



**Submission of  
ARCH Disability Law Centre  
to the Canadian Transportation Agency**

**Phase II – Consultation on the *Accessible  
Transportation for Persons with Disabilities  
Regulations (ATPDR)***

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## Introduction

ARCH is pleased to provide this submission to the Canadian Transportation Agency (Agency) as part of its Phase II Consultation on the *Accessible Transportation for Persons with Disabilities Regulations* (ATPDR). Accessible transportation is essential for realizing full and equal participation of persons with disabilities in Canada. Without access to transportation, people with disabilities are prevented from getting to work, obtaining food, attending medical appointments, voting or participating politically, engaging in social and leisure activities in the community, and virtually all other aspects of life.

ARCH's submission draws upon our legal knowledge and experience with the *Canada Transportation Act* (CTA), the *Accessible Canada Act* (ACA), the *Canadian Human Rights Act*, dispute resolution processes and decisions of the Canadian Human Rights Commission and Tribunal, the Canadian Transportation Agency, and the federal courts that review decisions of those tribunals. In addition, our submission is informed by the experiences of persons with disabilities, the barriers they encounter when travelling, and our work with various disability communities and organizations across Canada who advocate for accessible transportation.

## About ARCH

ARCH Disability Law Centre is a specialty legal clinic that practices exclusively in disability rights law. Since incorporation in 1979, ARCH has been dedicated to defending and advancing the equality rights, entitlements, fundamental freedoms and inclusion of persons with disabilities. ARCH provides a range of legal services directly to persons with disabilities in Ontario. ARCH's work extends nationally as well. ARCH represents persons with disabilities and disability organizations in precedent setting cases at various provincial and federal tribunals, including the Human Rights Tribunal of Ontario, the Canadian Human Rights Commission, the Canadian Human Rights Tribunal, the Canadian Transportation Agency as well as appellate courts, including the Court of Appeal for Ontario, the Federal Court of Appeal and the Supreme Court of Canada. ARCH has an extensive law reform practice, working on a variety of initiatives to advance the rights of persons with disabilities. ARCH provides public legal education to disability communities, and conducts community development projects to support our law reform work.

## ATPDR Must Be Developed within a Human Rights Law Framework

The ATPDR are created under the legislative authority of the *CTA* and the *ACA*. Consequently, the ATPDR must implement and further the purpose and overall objectives of these two laws.

Both the *CTA* and the *ACA* have as their objectives the realization of accessible transportation as a human right for persons with disabilities.

The objectives of the *CTA* are set out in section 5, entitled National Transportation Policy, which describes:

a competitive, economic and efficient national transportation system that meets the highest practicable safety and security standards and contributes to a sustainable environment and makes the best use of all modes of transportation at the lowest total cost is essential to serve the needs of its users, advance the well-being of Canadians and enable competitiveness and economic growth in both urban and rural areas throughout Canada.

The *CTA* states that these objectives are most likely to be achieved when, among other things, the transportation system is accessible without barriers to persons with disabilities.<sup>1</sup> The Supreme Court of Canada has confirmed that accessible transportation matters must be adjudicated within a human rights law framework.<sup>2</sup>

Similarly, the purpose of the *ACA* is to realize a Canada without barriers by identifying, removing and preventing barriers in a number of areas, including transportation. The Preamble to the *ACA* recognizes that this purpose complements the rights of persons with disabilities to be free from discrimination under the *Charter* and the *CHRA*. The Preamble further recognizes that this legislation is intended to implement some of Canada's international human rights obligations under the *Convention on the Rights of Persons with Disabilities*.

The purpose and objectives of the *CTA* and the *ACA* are both authoritative sources of information regarding the way that Parliament intended these laws to be implemented, interpreted and applied.<sup>3</sup> Given their emphasis on accessible transportation as a human right, the ATPDR must be developed within a human rights law framework.

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<sup>1</sup> *Canada Transportation Act*, SC 1996, c 10, s 5 (d.1) [*CTA*]

<sup>2</sup> *Council of Canadians with Disabilities v VIA Rail Canada Inc*, 2007 SCC 15 at paras 112-117 [2007] 1 SCR 650

<sup>3</sup> Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) 403-412, 416-422

Essential to the human rights law framework is the requirement to accommodate disability-related needs unless doing so would cause undue hardship to the service provider. Part V of the *CTA* provides that all transportation providers are subject to the human rights law obligation to accommodate the disability-related needs of passengers up to the point of undue hardship.<sup>4</sup> ARCH submits that a number of the questions the Agency asks in this consultation must be answered with reference to this human rights law requirement. Below, we provide more details about how the human rights law applies to specific issues in this consultation.

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<sup>4</sup> *CTA*, *supra* note 1, s 172(1)

## Application of ATPDR to Small Transportation Providers

The Agency's Consultation Paper states that small transportation providers have unique operating realities and may not be able to meet all the requirements in the Phase I ATPDR. ARCH acknowledges that small transportation providers may experience contextual challenges in addressing barriers to accessibility.

However, ARCH submits that as a general matter, operational realities should not justify the creation of blanket regulatory exemptions to accessibility requirements in the ATPDR. Exemptions are rules that allow transportation providers to avoid taking steps to ensure accessibility in certain defined situations. For example the existing Phase I ATPDR exempt large transportation providers from transporting mobility aids in certain situations.<sup>5</sup>

Regulatory exemptions to accessibility requirements in the ATPDR may have the unintended consequence of removing incentives for transportation providers to overcome barriers to accessibility. If an exemption exists, transportation providers need not take steps to remove the barriers covered by the exemption since the regulations do not require them to do so. In this way, the creation of exemptions contravenes one of the ACA's governing principles, outlined in subsection 6(g), which states that "the making of regulations must be done with the objective of achieving the highest level of accessibility for persons with disabilities."<sup>6</sup> Exemptions to accessibility requirements also undermine subsection 5.2 of the ACA, which affirms that the ACA should not require or authorize "any delay in the removal of barriers or the implementation of measures to prevent new barriers as soon as is reasonably possible."

If, however, the Agency finds it necessary to create regulatory exemptions for small transportation providers, the provision of said exemptions must be supported by evidence and information that is direct, objective and quantifiable. As the Agency itself has stated, when transportation providers wish to establish that an accommodation would amount to undue hardship they must provide "evidence in respect of the constraints that is objective, direct and, where appropriate, quantifiable."<sup>7</sup> This is consistent with human rights law requirements that undue hardship cannot be established based on impressionistic assumptions, rather it is established only when there is actual evidence that providing the accommodation would cause a real, serious risk to health and safety or is impossibly costly.<sup>8</sup> The Agency should not create

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<sup>5</sup> *Accessible Transportation for Persons with Disabilities Regulations*, SOR/2019-244, ss 44-47

<sup>6</sup> *Accessible Canada Act*, SC 2019, c 10) [ACA]

<sup>7</sup> Canadian Transportation Agency, Interpretive Decision 33-AT-A-2019 at para 28

<sup>8</sup> *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 at paras 78-79; *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*,

regulatory exemptions based on speculation or impressionistic evidence that it may not be possible to comply with a particular accessibility requirement, or mere statements that a particular accessibility requirement is too complicated, not feasible or unrealistic.

For example, it may be assumed that the exemptions in Phase I of the ATPDR, which allow large transportation providers to refuse to transport a mobility aid in specified circumstances, should automatically apply to small transportation providers. However, it is possible that this exemption should not extend to small planes which often fly cargo to remote communities, since they may actually have larger cargo holds and doors that might accommodate larger mobility aids.<sup>9</sup> If the Agency finds it necessary to create exemptions, these must be supported by direct, objective, quantifiable information and evidence.

Even where there is sufficient evidence to create an exemption, these exemptions should be allowed to be relied upon by transportation providers sparingly.

In addition, the Agency should clearly state in the ATPDR that human rights principles, including undue hardship and a procedural duty to accommodate, continue to apply. Where a transportation provider relies on an exemption, it still must discharge its ongoing procedural duty to accommodate. The procedural duty to accommodate is an important human rights law concept which places an obligation on the transportation provider to take all necessary steps to investigate whether it is possible to provide an accommodation, or whether suitable alternative accommodations exist which meet the disability-related need. A particular accommodation may not be available at one time, but may become available in the future, as technology advances or circumstances change.

The procedural duty to accommodate should be taken up in the ATPDR in two ways. First, the regulation should include a provision reminding transportation providers that they are subject to an ongoing procedural duty to accommodate, even where the regulation creates an exemption to a particular accessibility requirement. This will help to address the concerns raised above that the creation of exemptions undermines the purpose of the *ACA* and its requirement against delaying the removal of barriers.

Second, the procedural duty to accommodate should be applied so as to connect the ATPDR with regulations setting out providers' planning and reporting obligations under the *ACA*. Once a transportation provider has availed itself of an exemption or otherwise

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[1999] 3 SCR 868 at para 31; *Soullière v Canada (Blood Services)*, 2017 FC 689 at para 98-99.

<sup>9</sup> ARCH does not have direct information about the size of cargo holds on planes used by smaller transportation providers in remote communities. However, this possibility has been suggested to ARCH and serves as an example that demonstrates the importance of obtaining actual evidence for any exemptions to accessibility requirements.

been made aware of an accessibility barrier, the provider should be required to account for the relevant barrier in its accessibility plan and progress report under the *ACA*. This will allow the provider to implement the procedural duty to accommodate by identifying the particular barrier in its accessibility plan, creating a plan to investigate how to remove the relevant barrier, tracking actions that have been taken to do so, and accounting for limitations and challenges that may constitute undue hardship. Consequently, ATPDR exemptions will be less likely to create accessibility lacunae which are viewed as the accepted and permanent status quo, a situation that is inconsistent with human rights law and the purposes of the *CTA* and the *ACA*.

Finally, if the Agency finds it necessary to create exemptions, these exemptions should be reviewed every five years to ensure that they remain supported by direct, objective, and quantifiable information.

## Summary of Recommendations

- As a general matter, operational realities should not justify the creation of blanket regulatory exemptions to accessibility requirements in the ATPDR.
- If the Agency finds it necessary to create regulatory exemptions for small transportation providers, they must be supported by evidence and information that is direct, objective and quantifiable, and must be reviewed every five years.
- The ATPDR should include a provision reminding transportation providers that they are subject to an ongoing procedural duty to accommodate, even where the regulation creates an exemption to a particular accessibility requirement.
- Once a transportation provider has availed itself of an exemption or otherwise been made aware of an accessibility barrier, the provider should be required to account for the relevant barrier in its accessibility plan and progress report under the *ACA*.

# One Person, One Fare for International Travel and Small Transportation Providers

## A. Pilot Project to Test Application of One Person, One Fare by Canadian Transportation Providers Operating Flights To and From Canada

One Person, One Fare recognizes that when travelling, a person who requires more than one seat for disability-related reasons should not be charged more for their fare than passengers who do not require more than one seat. One Person, One Fare is grounded in human rights law principles of equality and accommodation.

One Person, One Fare currently only applies to domestic flight routes operated by Canadian transportation providers and does not extend to international travel, even international routes operated by Canadian transportation providers. This means that persons with disabilities who travel outside Canada are subject to a discriminatory barrier of having to pay for an additional seat they require due to their disability. From a human rights law perspective, this distinction is problematic and steps must be taken to resolve it.

ARCH submits that the starting point should be equality for persons with disabilities. One Person, One Fare should be extended to all passengers with disabilities requiring a second seat as a disability-related accommodation, regardless of the flight route operated by Canadian transportation providers, unless doing so amounts to undue hardship.

Canadian transportation providers have raised concerns that applying One Person, One Fare would put them at an unfair economic disadvantage since the same requirement would not be placed upon other international carriers. However, it is not clear that there is direct, objective, quantifiable evidence that extending One Person, One Fare to Canadian providers who fly internationally will in fact have this detrimental economic impact. In addition the Agency has pointed to the need to consider a number of other factors, including, international instruments; agreements between carriers and agencies; the territoriality of jurisdiction; and, safety measures to determine whether One Person, One Fare can be extended to international travel.<sup>10</sup>

In order to objectively evaluate whether One Person, One Fare should apply more broadly, ARCH submits that a pilot project should be undertaken. This pilot project would require all Canadian airlines to extend their One Person, One Fare policies to all flight routes, regardless of whether they are flying domestically or internationally. The

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<sup>10</sup> Canadian Transportation Agency Decision No 324-AT-A-2015 at para 54

purpose of the pilot project would be to measure what economic and other impacts extending One Person, One Fare has on Canadian airlines, and whether it would amount to undue hardship to extend the requirement permanently. The project would need to operate for a period of time sufficient to collect objective, quantifiable information.

It is critical that all Canadian airlines that operate international routes participate in the pilot project. In the Agency's Decision No 324-AT-A-2015, the Applicant sought the extension of One Person, One Fare to international destinations. At that time, the only Respondent was WestJet and the Agency found, amongst other things, that to require only one Canadian transportation provider to implement One Person, One Fare would be unfair.<sup>11</sup> Accordingly, the pilot project would need to be undertaken by all Canadian airlines that currently apply One Person, One Fare to their domestic flight routes.

The constraints to be monitored and measured in this pilot project should mirror and reflect those measured in the Agency's Decision No 6-AT-A-2008. In that decision the Agency balanced the needs of persons with disabilities requiring a second seat with the operational and cost constraints upon air carriers to provide this accommodation. The Decision sets out parameters in relation to eligibility requirements to be fulfilled by passengers requesting accommodations, as well as the methodology utilized by the transportation providers to measure cost and effect on their profit margins. These parameters should apply similarly within this proposed pilot project.

## **B. Pilot Project to Test Application of One Person, One Fare by Small Transportation Providers**

Some small airlines already provide a version of One Person, One Fare. For example, Canadian North provides that an attendant who accompanies a passenger with a disability during the flight will not be charged any fare.<sup>12</sup> It is clear, however, that the policy only applies when a second seat is required for an accompanying attendant and does not apply to the need for a second seat for other disability-related accommodations.

Similar to the preceding section, ARCH submits that One Person, One Fare should apply to small transportation providers up to the point of undue hardship. Where transportation providers raise concerns related to financial impact that they would experience should they be obligated to apply One Person, One Fare, direct, objective and quantifiable evidence should be provided to demonstrate undue hardship.

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<sup>11</sup> *Ibid* at para 59

<sup>12</sup> Canadian North, "Special Travel Requirements", online: <https://canadiannorth.com/travel-info/special-travel-requirements/>

A pilot project similar to the one proposed above could be undertaken. Under the guidance of the Agency, all smaller Canadian airlines would participate in a pilot project whereby One Person, One Fare is adopted and applied to all flight routes operated by small transportation providers for a limited time. The aim of the pilot project would be to collect information to measure whether the adoption of this requirement does in fact amount to undue hardship for small transportation providers. As above, the constraints to be monitored and measured in this pilot project should mirror and reflect those in the Agency's Decision No. 6-AT-A-2008, including assessing operational and cost constraints.

For those small airlines, like Canadian North, that already offer a version of One Person, One Fare but only in very specific cases, ARCH recommends a broadened definition of disability. As recognized in the Agency's Decision No. 6-AT-A-2008, passengers with disabilities may require a second seat for various disability-related needs, only one of which may be an attendant. Accordingly, the eligibility criteria for One Person, One Fare of smaller Canadian airlines should be revised to reflect the eligibility criteria set out by the Agency in Decision No. 6-AT-A-2008.

### C. Strategies to Remove Barriers to International Travel

Most of the international airlines operating flights to and from Canada originate from countries that have signed and/or ratified the United Nations *Convention on the Rights of Disabilities* (CRPD). The CRPD's general principles include equality and non-discrimination, and Article 9 of the CRPD provides that States Parties are expected to take appropriate measures to ensure that persons with disabilities can access, on an equal basis with others, transportation services.<sup>13</sup> The CRPD framework must be at the forefront of any multi-lateral discussions about accessibility of international travel.

Policies similar to One Person, One Fare have been considered within jurisdictions outside Canada. For example, Article 4(1) of European Commission Regulation (EC) N° 1107/2006 considers instances in which an airline may require a person with a disability to travel with a support person.<sup>14</sup> The Regulation is silent as to whether the support person's seat should be free of charge, but the regulation's interpretive guidelines recommend that the seat be offered for free or at a significantly discounted rate.<sup>15</sup>

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<sup>13</sup> Article 9 speaks to Accessibility generally and includes access on an equal basis to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provide to the public, both in urban and in rural areas.

<sup>14</sup> Interpretative Guidelines on the application of Regulation (EC) N° 1107/2006 of the European Parliament and of the Council of 5 July 2006, online:

[https://ec.europa.eu/transport/sites/transport/files/themes/passengers/air/doc/prm/2012-06-11-swd-2012-171\\_en.pdf](https://ec.europa.eu/transport/sites/transport/files/themes/passengers/air/doc/prm/2012-06-11-swd-2012-171_en.pdf)

<sup>15</sup> *Ibid* at 8-9

The European Civil Aviation Conference (ECAC) Document Number 30 states that air carriers should be encouraged to offer discounts for the carriage of any accompanying person for persons with disabilities and in particular when the air carrier itself requires the presence of such a person.<sup>16</sup> A recent UK Aviation Strategy Consultation recommended the adoption of this same policy.<sup>17</sup>

Canada and the Agency already play key leadership roles within the UN's International Civil Aviation Organization (ICAO), an organization to which many of the international airlines that fly in and out of Canada are members. ARCH recommends that the Agency use its leadership role to advocate for greater removal of barriers in international travel. In particular, ARCH recommends that Canada and the Agency request that the ICAO adopt a new strategic objective focused on accessibility and inclusion. Currently, the ICAO has five strategic objectives: safety; capacity and efficiency; security and facilitation; economic development; and environmental protection. Adopting a sixth objective focused on accessibility could be an effective way to focus efforts on removing barriers in international travel. It may be a vehicle for developing policies similar to One Person, One Fare by engaging international airlines in discussions and negotiations to develop policies regarding accessible and inclusive travel that would apply to all air carriers.

Some of the existing agreements between Canada and other countries whose airlines fly in and out of Canada do not include any human rights law principles or address disability accommodation issues.<sup>18</sup> Canada and the Agency should ensure that any

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<sup>16</sup> European Civil Aviation Conference (ECAC), Document Number 30 in Section 5 on Facilitation of the Transport of Persons with Disabilities and Persons with Reduced Mobility, online: <https://www.ecac-ceac.org/documents/10189/51566/Doc+30+Part+I+12th-Dec+2018-Amdt1-final.pdf/7f35c0b7-9f18-48cb-ACA0-aaed0a84f2a2> at section 5.5.4.1.

<sup>17</sup> In 2018, the UK launched its Inclusive Transport Strategy with the objective to create a transportation system that is equally accessible for persons with disability by 2030. One of the areas of focus is the Aviation Strategy where the UK aimed to understand the current barriers experienced by persons with disabilities and working with the industry to remove said obstacles and held consultations. These consultations resulted in the development of a Passenger Charter that focuses on persons with disabilities and the removal of barrier they experience within the UK's travel network. United Kingdom, HM Government *Aviation 2050: The Future of UK Aviation, A consultation*, December 2018 at 120, online: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/769695/aviation-2050-web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/769695/aviation-2050-web.pdf)

<sup>18</sup> For example, one of the Agreements between Canada and other countries whose airlines fly in and out of Canada is the *Agreement on Air Transport between Canada and the European Community and its Member States* (the "Agreement"). Despite the fact that both Canada and multiple European Union countries have ratified the CRPD, the Agreement is silent on the application of any human rights principles when transporting passengers. Article 10 of the Agreement refers to Consumer Interests and states that signatories to the Agreement recognize that Parties may require airlines to take, on a non-discriminatory basis, reasonable and proportionate measures concerning several matters one of which is accessibility measures: Official Journal of the European Union, *Agreement on Air Transport between Canada and the European Community and its Member States*: online: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22010A0806\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22010A0806(01)&from=EN)

such agreements include clauses relating to accessibility and disability accommodation.

#### **D. Summary of Recommendations**

- In order to objectively evaluate whether One Person, One Fare should apply to domestic carriers operating internationally and to small transportation providers, the Agency should undertake pilot projects. These pilot projects would require all Canadian airlines to extend their One Person, One Fare policies to all flight routes for a limited time, regardless of whether they are flying domestically or internationally. Specific information on the economic and other impacts of these pilot projects should be collected and used to evaluate whether extending One Person, One Fare permanently would constitute undue hardship.
- Canada and the Agency should propose that the ICAO adopt a new strategic objective focused on accessibility and inclusion.
- Canada and the Agency should ensure that agreements regarding airlines between Canada and other countries include clauses relating to accessibility and disability accommodation.

## Emotional Support Animals and Service Animals Other than Dogs

As the Agency has outlined in its consultation paper, service animals can facilitate access to transportation by meeting a wide variety of disability-related needs, such as guiding persons who are Deaf, deafblind, blind or have vision disabilities, assisting with emotional regulation for persons with anxiety or other mental health disabilities, providing seizure response for persons with epilepsy, and others.

Consistent with human rights law, the definitions of disability and barrier in the *ACA* are broad and based on a social model understanding of disability. Service animals may be trained to meet new disability-related needs in the future. ARCH submits that the ATPDR should not limit the use of service animals to persons with certain kinds of disabilities or disability-related needs only. Further, it is not necessary to limit service animals to a particular species or set of criteria. Rather, in keeping with a human rights law approach, the ATPDR should require all transportation providers to permit a service animal to travel when the person has a disability-related need, the service animal is providing a service in relation to that need, and the service animal and handler have been trained. Training should address the particular service the animal is providing, health and safety issues such as elimination during travel, and safe interactions with other people and animals in the travel environment. It may be consistent with human rights law to permit an emotional support animal during travel, depending on the animal, the disability-related need, and the circumstances.

Transportation providers may be entitled to request documentation demonstrating that the service animal and handler have been trained, and that the animal is providing a service that addresses a disability-related need. However, such requests for documentation must be made according to existing human rights law principles. For example, transportation providers cannot demand documentation that discloses a person's diagnosis or the specific disability the person has. Requests for documentation must be limited to the nature of the person's disability related needs and the service the animal is providing in relation to those needs. Once a person with a disability provides this documentation, the transportation provider must accept it with good faith and should not question its validity or demand additional, unnecessary documentation.

Multiple different requests for different documentation by different transportation providers creates barriers for persons with disabilities. To meet these demands, persons with disabilities have to navigate multiple, varying processes, secure and provide several kinds of documents, and may have to visit multiple medical professionals with different qualifications to do so. The Agency can address this barrier by standardizing the documentation that transportation providers request and the process for doing so. For example, the Agency could develop a standard form that requests only the type of information allowable by human rights law, which all transportation providers would use.

## Summary of Recommendations

- The ATPDR should not limit the use of service animals to persons with certain kinds of disabilities or disability-related needs only. Further, it is not necessary to limit service animals to a particular species or set of criteria.
- The ATPDR should require all transportation providers to permit a service animal to travel when the person has a disability-related need, the service animal is providing a service in relation to that need, and the service animal and handler have been trained.
- The Agency should standardize the documentation that transportation providers request for service animals, and the process to reduce barriers and ensure compliance with human rights law.

# Planning and Reporting Obligations under the *Accessible Canada Act*

## A. Content of Accessibility Plans

Accessibility plans should provide concrete information in plain language regarding how transportation providers will identify, remove and prevent barriers. This includes a description of what steps will be taken, who is responsible for those steps, when those steps will be complete, and how progress will be measured. Plans should also have detailed information about consultations with persons with disabilities, how the transportation provider addressed the feedback received, and, if necessary, why it did not adopt any particular recommendations. Each plan should explain how it addresses the principles outlined in section 6 of the *ACA*, and should list all relevant regulatory requirements in an appendix.

First, ARCH agrees that an accessibility plan should include the following elements identified by the Agency in the body of its Consultation Paper, as well as in Annex C:

- Policies, programs, practices, and services in relation to the identification and removal of barriers, and the prevention of new barriers;
- Types of barriers that currently exist and where they are;
- What the organization will do in response to each barrier; and
- A reporting on consultations with persons with disabilities.

To implement the human rights objectives of the *ACA*, ARCH submits that accessibility plans must also include:

- Specific, concrete actions the organization will take to remove and prevent barriers;
- The person(s) responsible for ensuring that the entire plan and/or each of these actions is implemented;
- Timeframes within which specified actions will take place;
- Indicators for measuring whether existing barriers have been successfully removed;
- A description of how the transportation provider conducted consultations with persons with disabilities and what steps it took to promote accessibility during those consultations. For example, whether the organization advertised the consultation, where it was advertised, how far in advance it was advertised, and whether outreach was done in an accessible way (for example, by providing information in ASL/LSQ, plain language, accessible formats, etc);

- A description of the discussions, submissions and other information received during consultations and how the transportation provider took these into account;
- A description of any feedback from consultations that was not used, adopted or implemented and why;
- A description of how the plan addresses and takes into account each of the principles outlined in section 6 of the *ACA*; and
- With respect to updated accessibility plans: barriers in the previous plan that were not removed, setbacks or limitations that explain why, strategies that address these challenges, and timelines for implementation of these strategies.

Second, transportation providers should have one accessibility plan that meets all relevant regulatory requirements imposed by the Agency and ESDC. This will enable people who request accessibility plans to more readily understand the scope of the organization’s regulatory obligations. The Agency and ESDC can streamline documents and processes under the *ACA* by coordinating their regulatory efforts.

Third, ARCH agrees that transportation providers should list any relevant provisions of regulations under subsection 170(1) of the *Canada Transportation Act* in their plans. However, these provisions should be listed in an appendix at the conclusion of the accessibility plan. In this way, this information is available, while technical language does not undermine the plain language content and accessibility of the rest of the plan.

## **B. Content of Regulations and Guidance Documents**

It is very important that regulations, not guidance documents, specify all essential elements of accessibility plans, including: actions to be taken to remove barriers; the person responsible for these actions; timelines; performance indicators; the manner in which consultations were conducted; how consultation information was used to develop the plan; and how the section 6 principles informed the development and content of the accessibility plan. These essential elements must be required by mandatory regulations, rather than being left to voluntary guidance documents. This will achieve the purpose of the *ACA* by ensuring that transportation providers create robust accessibility plans and measure their implementation. Leaving essential elements to guidance documents will likely result in some transportation providers developing weak plans that do little to advance accessibility.

ARCH submits that the *ACA* provides ample scope and authority for developing regulations that specify all essential elements of accessibility plans. Subsection 63(1)(b) of the *ACA* states that the Agency may make regulations “specifying the form in which accessibility plans required by subsections 60(1) and (2) are to be prepared and the manner in which they are to be published”. As well, section 60(1) states that transportation providers must “prepare and publish [...] an accessibility plan respecting

(a) its policies, programs, practices and services in relation to the identification and removal of barriers, and the prevention of new barriers”. A plain reading of these two sections with particular attention to Parliament’s words, “policies, programs, practices and services”, necessarily implies that, in making regulations, the Agency should require that accessibility plans include actions being taken, who is taking them, deadlines, and performance indicators. Without this information, accessibility plans would not meaningfully communicate what persons with disabilities should know when they request a plan.

Second, principles of statutory interpretation explain that the scope of the Agency’s regulatory authority should be rationally related to the purpose of the ACA.<sup>19</sup> The ACA is human rights-related legislation, and as such it must be given a broad and purposive interpretation.<sup>20</sup> The ACA’s purpose is to institute a “proactive and systemic approach for identifying, removing and preventing barriers to accessibility without delay.”<sup>21</sup>

Parliament specifically connected this purpose to the accessibility plan provisions in subsection 60(9) of the ACA, which requires transportation providers to take into account the principles in section 6 in their accessibility plan. Since subsection 6(f) requires the involvement of persons with disabilities in “policies, programs, services and structures”, accessibility plans must communicate the information that persons with disabilities require to meaningfully participate. Similarly, subsection 6(g) refers to “achieving the highest level of accessibility”, which can only be achieved and evaluated if specific actions, responsible persons, timelines, and performance indicators are required by regulations, reported by transportation providers, and published. Furthermore, a requirement that transportation providers explain how the section 6 principles inform the accessibility plan will ensure that plans accord with the human rights objectives of the ACA.

Third, according to principles of statutory interpretation, precisely worded powers such as those found in subsections 60(1) and 63(1)(b) must imply any necessary elements to accomplish the purpose for which Parliament granted them.<sup>22</sup> In this context, the necessary elements include concrete actions meant to address barriers, who is responsible for these actions, timelines for completing these actions, and how the provider will measure its own performance. This information is necessary in order for transportation providers to effectively plan and act to remove barriers. Without this information, persons with disabilities would not be able to understand what transportation providers are doing with respect to accessibility, how they are doing this, and when. This information is crucial if a person with a disability wants to make a

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<sup>19</sup> Sullivan, *supra* note 3 at 291, 295-298

<sup>20</sup> *Ibid* at 599-600

<sup>21</sup> ACA, *supra* note 6, preamble

<sup>22</sup> Sullivan, *supra* note 3 at 298

complaint through the transportation provider's feedback process or participate in a consultation held by the provider. Consistent with the overall purpose of the ACA as well as the specific grant of regulatory authority to the Agency, this information should be required by regulation.

In contrast, guidance documents may be helpful in providing detailed and accessible templates and best practices. These documents should comprehensively address all regulatory requirements and recommendations. In this way, transportation providers can rely on this guidance to understand what they need to do and how best to do it without having to cross-reference multiple documents. This will promote better implementation of the ACA and its regulations.

In summary, it is important for the Agency to require certain essential information be included in accessibility plans by regulation, while leaving other recommendations and best practices to guidance documents. This approach is the most likely to facilitate ACA requirements for timely barrier removal as well as the meaningful participation of persons with disabilities in that process. Therefore, this is the correct interpretation of the Agency's powers to make regulations regarding accessibility plans in sections 60(1) and 63(1)(b) of the ACA.

### **C. Content of Progress Reports**

Progress reports should meaningfully analyze actions taken to remove and prevent barriers and to address feedback received from persons with disabilities.

Progress reports should measure whether the transportation provider has completed the relevant actions within the required timeframes, based on the performance indicators set out in the accessibility plan. Where the transportation provider has failed to meet its own performance measures, it should explain why. In doing so, it should discuss lessons learned and new approaches and strategies that may form part of its updated accessibility plans.

Transportation providers should also discuss any feedback received through feedback mechanisms or consultations with persons with disabilities. This feedback may show that certain performance indicators have not been met with respect to known barriers. In addition, feedback may identify previously unknown barriers for the transportation provider to address. Where the transportation provider is claiming that a barrier cannot be removed due to undue hardship, it should explain why, indicate what objective, quantifiable information exists to justify its claim, and continue to track this barrier in future accessibility plans and progress reports.

## **D. Timing of Accessibility Plans and Progress Reports**

The Agency should coordinate the timing of accessibility plans and progress reports. Transportation providers should publish a progress report a year before each update to the accessibility plan. Since accessibility plans should be updated at least every three years, the first progress report should be completed two years after the first accessibility plan is due, and one year before that plan is to be updated. The content of that progress report, including actions completed, challenges, feedback, and consultations with persons with disabilities, can inform the next update to the accessibility plan.

## **E. Publication of Accessibility Plans and Progress Reports**

A facilitated, in-person engagement process is preferable to a process conducted in writing or online. This shifts the focus to co-creation of the accessibility plan through in-person dialogue, rather than one-way consultation. Transportation providers should attempt to engage a diverse group of persons with disabilities, including organizations of and for persons with disabilities, unaffiliated disability advocates, and individual persons with disabilities. Consultation must be conducted in a respectful, accessible process that values the expertise of participants.

Organizations must take steps to ensure the accessibility of these in-person meetings. For example, they can have scribes and support persons available, ensure that meetings are held in accessibly designed spaces that can be reached easily by public transportation, and account for travel costs. Participants should receive accessible resources and background information to overcome informational barriers to participation. As well, if participants are asked to provide any written feedback, documents, or follow-up materials, timelines should take into account disability accommodations. For example, it can take a few weeks to translate a written consultation document into ASL/LSQ video.

Participants and facilitators should receive compensation for their time. This will assist in overcoming financial barriers to participation. It also shows respect for the dignity and expertise that persons with disabilities bring to the engagement process. ARCH recommends that the Agency communicate to transportation providers that they resource persons with disabilities and disability organizations such that they may participate meaningfully in consultations.

Transportation providers should carefully select and train facilitators and staff to participate in consultations and work on ACA reporting. Transportation providers should consider hiring persons with disabilities as facilitators. Facilitators should have experience working with disability communities so that they are knowledgeable in

addressing barriers to participation rather than unintentionally creating new barriers. Transportation providers should provide staff with training regarding disability accommodation and providing services to persons with disabilities before conducting consultations and developing an accessibility plan.

After the consultation concludes, transportation providers should develop an accessible summary explaining what they understood from the consultation, and how this information will be included in the accessibility plan. They should send this document to everyone who took part. This allows the participants to address gaps and engage in dialogue to collaborate with the transportation provider to find solutions. It also provides accountability by letting participants know how the information they provided will be used.

## **F. Consultations on Accessibility Plans and Progress Reports**

A facilitated, in-person engagement process is preferable to a process conducted in writing or online. This shifts the focus to co-creation of the accessibility plan through in-person dialogue. Transportation providers should attempt to engage a diverse group of persons with disabilities, including both organizations and unaffiliated disability advocates, and to conduct a respectful, accessible process that values their expertise.

ARCH has received significant feedback from disability organizations that emphasizes the importance of co-creation as opposed to consultation. This type of process engages persons with disabilities in a dialogue that allows for meaningful input, problem-solving and opportunities to participate in decision-making. For example, to implement this approach, transportation providers could hire persons with disabilities to work on accessibility initiatives and facilitate engagement with persons with disabilities. They could also strike and resource committees of persons with disabilities to assist with developing their accessibility plans or monitoring their progress in relation to their goals.

Organizations must take steps to ensure the accessibility. For example, they can have scribes and support persons available, ensure that meetings are held in accessibly designed spaces that can be reached easily by public transportation, and account for travel costs. Participants should receive accessible resources and background information to overcome informational barriers to participation. As well, if participants are asked to provide any written feedback, documents, or follow-up materials, timelines should take into account disability accommodations. For example, it can take a few weeks to translate a written consultation document into ASL/LSQ video.

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in overcoming financial barriers to participation. It also shows respect for the dignity and expertise that persons with disabilities bring to the engagement process. ARCH recommends that the Agency communicate to transportation providers that they resource persons with disabilities and disability organizations such that they may participate meaningfully in consultations.

Transportation providers should carefully select and train facilitators and staff to participate in consultations and work on ACA reporting. Facilitators should have experience working with disability communities so that they overcome barriers rather than creating more. Transportation providers should also consider providing staff training regarding anti-ableism, disability sensitivity and human rights training before conducting consultations and developing an accessibility plan.

After the consultation concludes, transportation providers should develop a summary explaining what they understood from the consultation. They should send this document to everyone who took part. This allows the participants to address gaps and engage in dialogue to collaborate with the transportation provider to find solutions.

## **G. Feedback Mechanisms**

Feedback mechanisms developed by transportation providers to comply with the ACA should be accessible and should include a response to the person who made the complaint. That response should communicate what actions the transportation provider will take to address the feedback and the relevant timeframes.

A meaningful feedback process should include:

- (1) Information about how to provide feedback; for example, whether and how feedback can be submitted in person, by telephone, in writing, by email, in ASL/LSQ video, in plain language, etc. Information should also be provided identifying the point person who will receive the feedback, and where to send it. The information must be provided in plain language and multiple accessible formats.
- (2) The identified point person should be trained to communicate and interact with persons with disabilities. They should also be knowledgeable about the transportation provider's accessibility plan, actions that are underway to improve accessibility, and the arrangement of accommodations.

- (3) The point person should communicate with the person who provided the feedback about steps the transportation provider will take in response and the relevant timelines. If the transportation provider decides not to take certain actions because they believe that doing so constitutes undue hardship, they should explain why.
- (4) The feedback process should also include information about how and to whom a person can escalate the issue if they feel that the initial response is not adequate.
- (5) The point person or other transportation provider staff should track feedback and responses to be included in future progress reports and updated accessibility plans.

In summary, a person with a disability should be able to easily access the feedback process and should be informed of the organization's response after making a complaint. While it is important for feedback to be incorporated into progress reports and accessibility plans, the person who brought the feedback forward should receive a clear answer with next steps and timelines so that they understand what actions the transportation provider will take to address the feedback or barrier.

## H. Summary of Recommendations

- The Agency should require by regulation that accessibility plans include: actions to be taken to remove barriers; the person responsible for these actions; timelines; performance indicators; the manner in which consultations were conducted; how consultation information was used to develop the plan; and how the section 6 principles informed the plan. Interpretation of the Agency's regulatory authority outlined in the *ACA* supports the inclusion of these essential elements in mandatory regulations rather than voluntary guidance documents.
- Progress reports should measure the transportation provider's actions to date, based on the timeframes and performance indicators in the accessibility plan as well as input from consultations and the feedback process.
- The Agency should coordinate the timing of accessibility plans and progress reports. Transportation providers should publish a progress report a year before each update to the accessibility plan.

- A facilitated, in-person engagement process is preferable to a process conducted in writing or online. This shifts the focus to co-creation of the accessibility plan through in-person dialogue.
- Feedback mechanisms developed by transportation providers to comply with the ACA should be accessible and should include a response to the person who made the complaint.