ALL ABOARD AT LONG LAST

- THE HISTORY TO AND SIGNIFICANCE OF - *THE COUNCIL OF CANADIANS WITH DISABILITIES V. VIA RAIL CANADA INC.* -

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On March 23, 2007, following a seven year battle against Canada's national passenger rail provider which nearly bankrupted a non-profit organization representing persons with disabilities across the nation, the Supreme Court of Canada ruled that "members of the public who are physically disabled *are* members of the public".[1] The fundamental rights of persons with disabilities are not to be sacrificed for amenities, facilities and services provided at a "better bargain".[2] There is no exception granted from those rights for Canada's national transportation providers. Canada's train, plane and bus service providers are subject to the same human rights standards as those outside the transportation context.

The Supreme Court's decision in the *Council of Canadians with Disabilities v. VIA Rail Canada*, will have important ramifications for persons with disabilities applying to the Canadian Transportation Agency ("the Agency") as well as to broader human rights jurisprudence. Acknowledging the significant historical context to the legislation, the Supreme Court has affirmed the Agency's own position that Part V of the *Canadian Transportation Act*[3] (the *CTA*) is human rights legislation and the Agency is mandated and obligated to ensure that our nation's human rights principles are respected by service providers within the federal transportation network. In so doing, the Court raised the bar for those seeking to perpetuate existing barriers to full inclusiveness and came down squarely against the creation of new barriers. The Court has articulated the once elusive threshold of "undueness" respondents must meet and reiterated the factors which are and are not relevant to that analysis. It has also clarified courts' involvement in reviewing administrative tribunal decisions with human rights implications.

The decision will undoubtedly have a significant impact on a number of cases working their way through the legal system including *The Council of Canadians with Disabilities v. Air Canada* and *West Jet, et al.* (a case, otherwise known as "one person - one fare", awaiting

[1] *The Council of Canadian with Disabilities v. VIA Rail Canada Inc.* 2007 SCC 15 at para. 221.
[2] *CCD v. VIA*.2007 SCC 15 at para. 164.
[3] *Canadian Transportation Act,* S.C. 1996, c. 10

decision from the Agency)[4] and *Brown v. The National Capital Commission* (a positive Canadian Human Rights Tribunal decision currently awaiting a judicial review date before the Federal Court).[5]

1. BACKGROUND TO RAIL ACCESSIBILITY WITHIN CANADA

(a) Legislative History

A generation ago no standards existed for wheelchair access within Canada and there were no legal obligations to accommodate persons with disabilities. People in wheelchairs were routinely excluded from buildings and transportation systems. Exclusion meant wheelchair users were unable to travel, get jobs or live independently in the community.

Human rights jurisprudence in the mid-1980s (outside the transportation context) was just beginning to address adverse effects discrimination and the duty to accommodate.[6] It was not until 1999 that the Supreme Court decided, in the case of *British Columbia (Public Service Employee Relations Commission) and British Columbia Government and Service Employees' Union (B.C.G.S.E.U.)* ("Meiorin"), that the duty to accommodate imposes a primary obligation to systemically address the sources of discrimination, rather than just compensating for the effects of accommodation.[7] In the companion case of *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* ("Grismer"), the Court held that discriminatory barriers to equality were to be modified and made as "as inclusive as possible", so that systemic discrimination is not perpetuated.[8]

The earliest systemic discrimination cases upholding the human rights of persons with disabilities were decided by the Canadian Transportation Commission (the Agency's predecessor). The landmark case of *Clariss Kelly v. VIA Rail Canada Inc.* resulted in the removal of a variety of barriers to persons in wheelchairs traveling safety and in dignity.[9] In a subsequent decision, it was decided the Commission had to adhere to *Charter* equality values when

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[4] Canadian Transportation Agency File No. U3570-14/04-1, Re: Applications involving additional fares and charges for persons with disabilities who require additional seating due to their disabilities (AFC applications).
[5] *Brown v. The National Capital Commission* (6 June 2006), 2006 CHRT 26, online: CHRT <http://www.chrt-tcdp.gc.ca/search/files/t760_1003ed06jun06.pdf>.
[6] *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536 at paras. 18 and 23.
[7] *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.),* [1999] 3 S.C.R. 3.
[8] *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights),* [1999] 3 S.C.R. 868.
[9] *Kelly v. VIA Rail Canada Inc.* (1980), 1 C.H.R.R. D/97 (C.T.C.).

exercising its jurisdiction over airfares for persons with disabilities.[10]

Consequently, in 1986, when the government announced its intention to draft a new national transportation act to "deregulate" the transportation sector, the disabled community was intent on ensuring the legislation would provide the protection offered under human rights legislation and more.

The initial 1986 Bill contained only an unenforceable statement that persons, including persons with disabilities, were not to face undue obstacles. The disability community successfully urged Parliament to ensure that the National Transportation Commission would have the authority to remove undue obstacles to the mobility of persons with disabilities.[11] The concept of undueness was specifically related to those protections contained in the *Charter*, particularly the concept of equal benefit contained in section 15(1). The term "obstacle" was introduced to ensure that the legislation would include not only policies but also structures (e.g. trains). The disabled community and Members of Parliament sought to ensure that human rights issues concerning the accessibility of transportation services would be expeditiously adjudicated by a specialized tribunal that was equipped to address systemic obstacles to the participation of persons with disabilities.[12]

In 1987, the *National Transportation Act, 1987* ("*NTA, 1987*", the predecessor to the *Canada Transportation Act*) was passed. It removed most of the former Commission's regulatory jurisdiction, but explicitly ensured the continuation of its authority over accessibility for persons with disabilities.[13] The Honourable John Crosbie (then Mister of Transport) explained the decision to use transport rather than human rights legislation:

> The Government is also ensuring that disabled persons have access to the transportation system. That commitment is reflected in the policy statement contained in Clause 3 of the Bill. A year ago the Government announced its intention to fulfill this commitment through human rights legislation. Transport officials and the Advisory Committee on Transportation of Disabled Persons have been drafting accessibility standards to be adopted as regulations. Representations were made to me and to the standing committee arguing that transportation

[10] *Report of the Special Panel of the Air Transport Committee of the Canadian Transport Commission on the Subject of a Special Air Fare Policy for the Attendants of Disabled Passengers and for Additional Seats for Disabled and Other Passengers* (Ottawa: 1986).
[11] House of Commons, Submissions of the representatives of ARCH, BOOST and March of Dimes before the Standing Committee on Transport, 2d session of the 223d Parliament at 22:52 to 22:60 (23 March 1987).
[12] *House of Commons Debates*, (2 February 1987) at 2983 (Mr. Carlo Rossi); *House of Commons Debates*, (3 February 1987) at 3040 to 3041 (Mr. Neil Young); Bill C-18, *An Act respecting National Transportation*, 2d Sess., 33d. Parl., 1986 (First Reading, s. 3, 4 November 1986).
[13] *National Transportation Act, 1987*, R.S.C. 1985, c. 34, ss. 3, 35(1), (5)-(7) (assented to 28 August 1987).

> legislation rather than human rights legislation should be used to enforce these accessibility standards, and I have agreed.
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> … the disabled will not lose any rights they now have for access to the transportation system. The Bill has been amended to remove any uncertainty on this point.[14]

Despite Minister Crosbie's statements, this initial *Act* fell short of the access requirements of persons with disabilities and it was fundamentally amended the very next year.[15] On June 17, 1988, preceding the passage of the amendment to the *NTA, 1987*, the Minister of Transport told the House of Commons:

> It is truly a pleasure to rise in the House today and introduce for second reading a Bill which provides the means for ensuring that Canadians with disabilities are provided fair and dignified access to our national transportation system ... Accessible transportation is key to providing persons with disabilities the opportunity for full integration into the mainstream of Canadian life ... The laws of a country are a reflection of the values of its people. I invite Hon. Members today to join with the Government in this co-operative effort so that this legislation can be placed alongside the other laws of Canada that reflect its tradition <u>for protecting human rights and values in Canada</u>. [Emphasis added][16]

In 1996, the National Transportation Policy was strengthened in the new *Canada Transportation Act* ("*CTA*") to refer to the importance of "effective transportation services accessible to persons with disabilities" in its introductory paragraph as well as sub clauses.[17] Regrettably, the Agency's power to conduct inquiries on its own motion was removed, meaning the Agency could only act on application.[18]

The specialized human rights legislative provisions governing the accessibility of all transportation under federal jurisdiction are now contained in section 5 and Part V of the *CTA*:[19]

> **NATIONAL TRANSPORTATION POLICY**
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> *Declaration*
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> 5. It is hereby declared that a safe, economic, efficient and adequate <u>network of viable and effective transportation services accessible to persons with disabilities</u> and that makes the best use of all available modes of transportation at the lowest

[14] *House of Commons Debates*, (17 June 1987) at 7272 to 7273 (Hon. John C. Crosbie).
[15] *An Act to Amend the National Transportation Act, 1987*, S.C. 1988 (4th Supp.), c. 19, amending R.S.C. 1985, c. 34.
[16] Canadian Transportation Agency Decision No. 175-AT-R-2003 (March 2003) at 15.
[17] *Canada Transportation Act*, S.C. 1996 c. 10, s. 5.
[18] *Canada Transportation Act*, S.C. 1996 c. 10, s. 172.
[19] *Canada Transportation Act*, S.C. 1996 c. 10, ss. 5, 170-172.

total cost is essential to serve the transportation needs of shippers and travellers, including persons with disabilities, and to maintain the economic well-being and growth of Canada and its regions and that those objectives are most likely to be achieved when all carriers are able to compete, both within and among the various modes of transportation, under conditions ensuring that, having due regard to national policy, to the advantages of harmonized federal and provincial regulatory approaches and to legal and constitutional requirements,

(a) the national transportation system meets the highest practicable safety standards,
(b) competition and market forces are, whenever possible, the prime agents in providing viable and effective transportation services,
(c) economic regulation of carriers and modes of transportation occurs only in respect of those services and regions where regulation is necessary to serve the transportation needs of shippers and travellers and that such regulation will not unfairly limit the ability of any carrier or mode of transportation to compete freely with any other carrier or mode of transportation,
(d) transportation is recognized as a key to regional economic development and that commercial viability of transportation links is balanced with regional economic development objectives so that the potential economic strengths of each region may be realized,
(e) each carrier or mode of transportation, as far as is practicable, bears a fair proportion of the real costs of the resources, facilities and services provided to that carrier or mode of transportation at public expense,
(f) each carrier or mode of transportation, as far as is practicable, receives fair and reasonable compensation for the resources, facilities and services that it is required to provide as an imposed public duty,
(g) each carrier or mode of transportation, as far as is practicable, carries traffic to or from any point in Canada under fares, rates and conditions that do not constitute,
(i) an unfair disadvantage in respect of any such traffic beyond the disadvantage inherent in the location or volume of the traffic, the scale of operation connected with the traffic or the type of traffic or service involved,
(ii) an undue obstacle to the mobility of persons, including persons with disabilities,
(iii) an undue obstacle to the interchange of commodities between points in Canada, or
(iv) an unreasonable discouragement to the development of primary or secondary industries, to export trade in or from any region of Canada or to the movement of commodities through Canadian ports, and
(h) each mode of transportation is economically viable,
and this Act is enacted in accordance with and for the attainment of those objectives to the extent that they fall within the purview of subject-matters under the legislative authority of Parliament relating to transportation.

PART V
TRANSPORTATION OF PERSONS WITH DISABILITIES

Regulations

170. (1) The Agency may make regulations for the purpose of eliminating undue obstacles in the transportation network under the legislative authority of Parliament to the mobility of persons with disabilities, including regulations respecting

(a) the design, construction or modification of, and the posting of signs on, in or around, means of transportation and related facilities and premises, including equipment used in them;
(b) the training of personnel employed at or in those facilities or premises or by carriers;
(c) tariffs, rates, fares, charges and terms and conditions of carriage applicable in respect of the transportation of persons with disabilities or incidental services; and
(d) the communication of information to persons with disabilities.

Coordination

171. The Agency and the Canadian Human Rights Commission shall coordinate their activities in relation to the transportation of persons with disabilities in order to foster complementary policies and practices and to avoid jurisdictional conflicts.

Inquiry re obstacles to persons with disabilities

172. (1) The Agency may, on application, inquire into a matter in relation to which a regulation could be made under subsection 170(1), regardless of whether such a regulation has been made, in order to determine whether there is an undue obstacle to the mobility of persons with disabilities.

Compliance with regulations

(2) Where the Agency is satisfied that regulations made under subsection 170(1) that are applicable in relation to a matter have been complied with or have not been contravened, the Agency shall determine that there is no undue obstacle to the mobility of persons with disabilities.

Remedies

(3) On determining that there is an undue obstacle to the mobility of persons with disabilities, the Agency may require the taking of appropriate corrective measures or direct that compensation be paid for any expense incurred by a person with a disability arising out of the undue obstacle, or both.

(b) The Rail Code

The Agency has the authority, under section 170 of the *CTA*, to make regulations to eliminate undue obstacles in the transportation network. Those regulations may address design

and construction issues, the training of personnel, tariffs,[20] fares and conditions of carriage as well as the communication of information to passengers with disabilities.[21] The Agency has only initiated two regulations governing accessibility issues, neither of which relate to the design of trains.[22] The federal government instituted a policy of pursuing "voluntary approaches thoroughly before proposing regulations".[23]

Accordingly, in the mid-1990s, as an alternative to regulations, the Agency coordinated a "consensus" process involving passenger rail providers (including VIA) and representatives of persons with disabilities (such as CCD). The process resulted in the issuance of standards in the form of the "*Code of Practice: Passenger Rail Car Accessibility and Terms and Conditions of Carriage by Rail of Persons with Disabilities*" (the "Rail Code").[24] The Rail Code defines accessibility by incorporating the Canadian Standards Association Standard CAN/CSA-B651-95 *Barrier-Free Design*, ("CSA Standards").[25] The CSA Standards describe the space required by people in their personal wheelchairs to move, turn around, and transfer to use washrooms, etc. They prescribe a standard wheelchair size ("footprint") as well as corresponding door and aisle widths, turning diameters and washrooms. The Rail Code intended that persons using standard sized wheelchairs or smaller could remain in their personal wheelchairs.[26] Coach and sleeper cars that permitted this were deemed "wheelchair accessible".

Remaining in one's personal wheelchair is a matter of dignity and safety. Some wheelchair users are unable to travel if required to transfer out of their personal chairs. According to the Agency:[27]

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[20] Under section 55 of the *Canada Transportation Act*, S.C. 1996 c. 10, a tariff "means a schedule of fares, rates, charges and terms and conditions of carriage applicable to the provision of an air service and other incidental services".
[21] *Canada Transportation Act*, S.C. 1996 c. 10, s. 170.
[22] See e.g. *Personnel Training for the Assistance of Persons with Disabilities Regulations*, S.O.R./94-42; *Air Transportation Regulations*, S.O.R./88-58, ss. 107(n)(i), 122(c)(i), Part VII.
[23] CTA Decision No. 175-AT-R-2003 (March 2003) at 2, 29.
[24] Canadian Transportation Agency, *Code of Practice: Passenger Rail Car Accessibility and Terms and Conditions of Carriage by Rail of Persons with Disabilities* (Ottawa: Minister of Public Works and Government Services Canada, 1998) [*Rail Code*]; CTA Decision No. 175-AT-R-2003 (March 2003).
[25] CTA Decision No. 175-AT-R-2003 (March 2003) at 23-24; *Rail Code* at 5; According to the its website, "The Canadian Standards Association is a not-for-profit membership-based association serving business, industry, government and consumers in Canada and the global marketplace. As a solutions-oriented organization, we work in Canada and around the world to develop standards that address real needs, such as enhancing public safety and health." online: CSA <http://www.csa.ca/Default.asp?language=English>
[26] CTA Decision No. 175-AT-R-2003 (March 2003) at 25-27.
[27] CTA Decision No. 175-AT-R-2003 (March 2003) at 19.

> The implications of not having independent access are significant in that persons with disabilities will have to be dependent on others to assist them in their travel, whether it be transportation industry workers or, in some cases, their own attendants. In addition, there are a variety of problems that can be associated with assisted access, including human error, inconvenience, delays, affronts to human dignity and pride, cost, uncertainty, and no sense of confidence or security in one's ability to move through the network.
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> The Agency is of the opinion that one important aspect of the principle of independence is the recognition of the importance of a person's own mobility aid to his or her independence, dignity, safety and comfort. For example, in the context of this application, rail cars have provided an important opportunity within the transportation network for a person to be able to choose to remain in his/her own wheelchair and the Agency is of the opinion that it is important to preserve this aspect of rail travel wherever possible.

The standards established in the Rail Code are comparable to the mandatory standards in other industrialized countries such as the United States, the European Union (based on earlier standards developed in the United Kingdom) and Australia.[28] The Rail Code standards are not regulations but are considered to be advisory. The President and CEO of VIA publicly committed VIA to complying with the Rail Code when it came into effect in 1998.[29]

VIA had previously retrofitted their aging fleet of coach cars. The retrofitted VIA coaches had accessible washrooms, tie-downs and turning areas, but had narrow external doors that fell below Rail Code standards for new rail cars. Across VIA's entire "network" of "existing" rail cars, there was not a single "wheelchair accessible coach car" or "wheelchair accessible sleeping car".[30] Currently, due to the inaccessibility of VIA's existing trains, persons with disabilities (and in particular persons using wheelchairs) are significantly underrepresented amongst VIA's ridership.[31]

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[28] *CCD v. VIA* 2007 SCC 15 at paras. 157-150; See e.g. *Americans with Disabilities Act*, 36 CFR Part 1193, "Accessibility Guidelines for Transportation Vehicles" (6 September 1991); European Union, "Directive of the interoperability of trans-European high-speed rail system" 1996/48/EC (23 July 1996); Statutory Instrument 1998 No. 2456, "The Rail Vehicle Accessibility Regulations 1998"; Australia "Disability Standards for Accessible Public Transport Guidelines 2002"

[29] CTA Decision No. 175-AT-R-2003 (March 2003) at 20-21, 45.

[30] CTA Decision No. 175-AT-R-2003 (March 2003) at 38-39, 45.

[31] CTA Decision No. 175-AT-R-2003 (March 2003) at 32, 39-40: the actual usage of passengers with disabilities of VIA is less than 0.1% of its 3.95 million passengers; According to Statistics Canada, in 2001, 3.6 million (12.4%) Canadians reported having activity limitations. Statistics Canada, "Prevalence of Disability in Canada", online: <http://www.statcan.ca/english/freepub/89-577-XIE/canada.htm>; Statistics Canada, "Participation and Activity Limitation Survey: A profile of disability in Canada" *The Daily* (3 December 2002), online: http://www.statcan.ca/Daily/English/021203/d021203a.htm.

Recognizing that the costs of retrofitting old trains would be prohibitive, in a 1998 decision the Agency declined to exercise its jurisdiction under Part V of the *CTA*, when asked by persons with disabilities to review their inaccessibility.[32] The Agency pointed out that it was issuing accessibility guidelines, the "*Rail Code*", which it expected would ensure that the next generation of trains would be accessible. Until the year 2000, there had been no major purchases of trains in Canada since accessibility codes for buildings, and modes of transportation started to be introduced. Thousands of Canadians with disabilities awaited (for decades) the purchase of new trains which would be accessible and permit their participation and use of a key, national transportation service.

(c) Renaissance Rail Cars

Finally, in April 2000 Minister of Transportation David Collenette informed representatives of Canadians with disabilities present at a meeting of his Advisory Committee on Accessible Transportation ("ACAT") that the government of Canada was providing VIA with $400 million of capital funding with which to purchase its next generation of passenger rail cars.[33] Mr. Collenette assured ACAT that the new trains would be fully accessible to persons with disabilities.

VIA decided to purchase the "Renaissance" cars - 139 rail cars, still in various stages of assembly, that had been rejected for use in the United Kingdom, and for which there was a limited market because they were not "wheelchair accessible".[34] VIA considered the cars to be a "bargain" since to purchase comparable cars would have cost it an additional $250 million.

In November, 2000, persons with disabilities who were permitted to see the Renaissance cars raised concerns that neither the coach cars nor the sleeper cars were accessible to passengers in personal wheelchairs.[35] Both had entrances that were too narrow to admit a person using a personal wheelchair. Neither had a place where a wheelchair could be turned, a usable

[32] *Marcella Arsenault v. VIA Rail Canada Inc.* (December 29, 1998), Decision No. 641-AT-R-1998 (Canadian Transportation Agency) at 6.
[33] Affidavit of Laurie Beachell, sworn August 3, 2004 at para. 8 submitted for use in proceedings before the Federal Court of Appeal [*VIA Rail Canada Inc. v. National Transportation Agency*, [2005] 4 F.C.R. 473].
[34] Andrew McIntosh, "VIA Revival Hit by $110 M Overrun", *National Post* (7 October, 2003); *CCD v. VIA* 2007 SCC 15 at paras. 9-10; Affidavit of Laurie Beachell, sworn August 3, 2004 at para. 23 submitted for use in proceedings before the Federal Court of Appeal [*VIA Rail Canada Inc. v. National Transportation Agency*, [2005] 4 F.C.R. 473].
[35] Letter from Eric Boyd to Marc LaFrançois (November 25, 2000); Email from Barry McMahon to Bob Brown (November 17, 2000); CTA Decision No. 175-AT-R-2003 (March 2003) at 4-5.

wheelchair tie-down nor an accessible washroom. The only compartment meant to be accessible was not: it had doors too narrow to admit a person in a personal wheelchair, the washroom was inaccessible and a person could not retain their wheelchair in the sleeping compartment. In addition the entry stairs and coach seat armrests presented an obstacle for ambulatory persons with a mobility disability, and there was no place to seat a person accompanied by a service animal.

VIA refused any renovations which would have permitted these passengers with disabilities to independently meet their own needs. Rather, it proposed, for instance, to transfer passengers into on-board wheelchairs, deliver their meals and assist with washroom facilities.[36] VIA took the position that the Rail Code may be deviated from since "compromises are expected and reasonable under the Rail Code because it is voluntary".[37]

2. CCD'S APPLICATION TO THE AGENCY

(a) The application and "investigation"

When it learned that VIA, contrary to the Minister's assurances, planned to purchase inaccessible trains, CCD was determined to take action. In December 2000, it brought an application to the Agency under section 172 of the *Act*, seeking to prevent VIA from purchasing the trains which would pose "undue obstacles" to the mobility of persons with disabilities.[38] In response, VIA indicated that it had already purchased the trains in September, 2000, despite its undertaking to consult with members of the disability community in October, 2000 about purchasing the trains. CCD nonetheless continued with its application, asserting that various features of the new trains posed undue obstacles to the mobility of persons with disabilities.[39] VIA responded by bringing two successive applications for leave to appeal to the Federal Court of Appeal (FCA) disputing the Agency's decision that it had jurisdiction to consider and decide CCD's application. The FCA dismissed both applications.[40] CCD, as an organization (i.e. not an individual), was entitled to pursue the application. Moreover, the Agency was not required to

[36] *CCD v. VIA* [2007] SCC 15 at para. 11.
[37] *CCD v. VIA* [2007] SCC 15 at para. 145; CTA Decision No. 175-AT-R-2003 (March 2003); Letter from John Campion, counsel to VIA, to the Agency (21 August 2003).
[38] CCD's application to the Agency (December 4, 2000); *CCD v. VIA* [2007] SCC 15 at para. 18
[39] *CCD v. VIA* [2007] SCC 15 at para. 19.
[40] *VIA Rail Canada Inc. v. The Canadian Transportation Agency et al.* (1 May 2001) 01-A-13 (FCA); *Rail Canada Inc. v. The Canadian Transportation Agency et al.* (8 June 2001) 01-A-16 (FCA); *CCD v. VIA* [2007] SCC 15 at paras. 30, 32; CTA Decision No. 175-AT-R-2003 (March 2003).

wait until an individual had actually experienced the inaccessibility first hand, while attempting to ride the trains, in order to adjudicate; the Agency clearly had the jurisdiction to investigate inaccessible designs

The Agency conducted a two year written hearing, concluded at VIA's request with written and oral closing submissions by the parties. Both parties were free to submit any and all evidence that was relevant to their case. No evidence tendered was excluded by the Agency. CCD supplied detailed evidence of the obstacles the new train cars represented for persons with disabilities. Its evidence included: independent expert reports from three professional engineers (two of whom with extensive experience in the rail industry); two accessible design experts; the president of a wheelchair manufacturing company; an economist and an expert on American law. In addition, four persons with disabilities who had the opportunity to view the trains provided detailed reports outlining why they would be unwilling or unable to use them. On the advice of a professional engineer specializing in rail car design, CCD provided a specific proposal for making the Renaissance cars accessible. Throughout the process, VIA continually refused to respond to Agency requests and orders for information.[41]

VIA based its defense on a "network argument". According to VIA, its existing rail network provided sufficient accommodation for persons with disabilities and therefore the obstacles in the Renaissance cars could not be considered "undue".[42] Rather than indicate any accommodation that would redress obstacles actually found in the Renaissance cars, VIA "simply listed the range of options that it made generally available to accommodate persons with disabilities". It proposed no accommodation whatsoever beyond continuing to make its existing railcars available.[43]

In terms of the issue of the costs of making the Renaissance trains accessible, VIA made the strategic decision not to volunteer the information despite numerous requests for the information and specific directions from the Agency.[44]

(b) The Agency's Preliminary Decision

[41] CTA Decision No. 175-AT-R-2003 (March 2003); CTA Decision No. 620-AT-R-2003 (October, 2003); *CCD v. VIA* [2007] SCC 15 at paras. 29, 43, 44, 57-66, 232, 235, 238.
[42] CTA Decision No. 175-AT-R-2003 (March 2003) at 36-37; *CCD v. VIA* [2007] SCC 15 at paras. 27, 167.
[43] CTA Decision No. 175-AT-R-2003 (March 2003) at 38; *VIA Rail Canada Inc. v. National Transportation Agency*, [2005] 4 F.C.R. 473 at paras. 112-113 (FCA), Sexton J., dissenting
[44] CTA Decision LET-AT-R-5-2002 (January 8, 2002); *CCD v. VIA* [2007] SCC 15 at para. 235.

The Agency issued a decision on March 27, 2003. The Agency reaffirmed its position that "Part V of the *CTA* is by its nature human rights legislation," and that "[t]he purpose of Part V of the *CTA* is to ensure that persons with disabilities, a recognized minority group, are not discriminated against within the Federal transportation network".[45] Its analysis followed the dictates of the FCA's decision in *VIA Rail Canada Inc. v. National Transportation Agency* ["*Lemonde*"], by considering the National Transportation Policy contained in section five of the *CTA*, when deciding whether the obstacles found were "undue".[46]

The Agency identified 25 obstacles to the mobility of persons with disabilities in the Renaissance cars, of which eight were found not to be undue. It found that 14 of the remainder were undue on a "preliminary" basis, and deferred consideration of the "undueness" of the remaining three pending a final determination of those found to be undue. Before making any final orders it decided to give VIA a further opportunity to submit evidence about the technical feasibility and cost of removing the obstacles. VIA was directed to provide verifiable evidence of its inability to afford the costs that would result from an order to remove the obstacles. The only specific design that it was directed to cost was that proposed by CCD. VIA was given an initial 60 days to assemble the requested evidence.[47] The Agency bent over backwards to give VIA every opportunity to provide the evidence required.

VIA responded to portions of the Agency's show cause order, indicating that removing three of the obstacles would not be possible, and that the total cost and lost revenue of completing the work identified in the show cause directions would be over $35 million. It acknowledged the estimates did not come from the sources identified by the Agency in its show cause direction, but insisted that the costs cited were reasonable in its experience".[48]

The Agency then became aware, through CCD, that Transport Canada had ruled in October 2002 that the Renaissance cars did not meet Canadian safety standards.[49] VIA had not informed the Agency. Within 60 days VIA had an engineering firm called Pro-Sphere design and cost four options to bring it into compliance, and submitted this information to Transport Canada.

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[45] CTA Decision No. 175-AT-R-2003 (March 2003) at 15-18, 31-36.
[46] *VIA Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25 at para. 39 (FCA).
[47] CTA Decision No. 175-AT-R-2003 (March 2003) at 3-5, 143-147.
[48] Letter from John Campion, counsel to VIA, to the Agency (26 May 2003); CTA Decision No. 620-AT-R-2003 (October, 2003); *CCD v. VIA* [2007] SCC 15 at para. 55.
[49] *CCD v. VIA* [2007] SCC 15 at para. 56.

Those design/options and costings were eventually produced and accepted as evidence by the Agency. Option Three involved making the coach car wheelchair accessible. The Agency recognized that this was the "solution CCD has specifically proposed to remedy a number of concerns in these particular cars." i.e. the option VIA had been directed to cost in the Agency's March 2003 Preliminary Decision.[50] The Agency gave VIA an additional 60 days to respond to its original show cause order and additionally requested that it show cause why it could not implement Option Three.[51]

VIA responded that neither the Agency nor VIA Rail has the expertise or resources to adequately complete this process in the time allotted or at all. VIA stated the entire design process could be completed in an adversarial atmosphere. It requires an iterative process, which only VIA Rail and its advisors could complete. The process was uniquely in the management control of VIA.[52] It submitted and adopted the expert costings of Option Three. VIA confirmed that making the coach car wheelchair accessible and complying with Transport Canada safety requirements would cost approximately twice as much as VIA's preferred Option One ($4.8 million versus $2.3 million).[53]

(c) The Agency's Final Decision - October 29, 2003

The Agency ordered VIA to: develop plans and a timetable to make the coach cars wheelchair-accessible based on VIA's Option Three design; make minor modifications to the sleeper compartment in the service car; remove obstacles for ambulatory people with mobility disabilities in the coach arm rests and closed stair risers; and to ensure a space is provided on the coach cars for persons who travel with service animals.[54]

> Based on the above findings, the Agency hereby directs VIA to make the necessary modifications to the Renaissance passenger rail cars:
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> 1. In the "accessible suite", to ensure that:

[50] CTA Decision No. 620-AT-R-2003 (October, 2003).
[51] CTA Decision No. Let-AT-R-128-2003 (May 30, 2003); CTA Decision No. LET-AT-R-130-2003 (June 9, 2003); CTA Decision No. 620-AT-R-2003 (October, 2003).
[52] *CCD v. VIA* [2007] SCC 15 at para. 264.
[53] Letter from John Campion, VIA counsel, to the Agency (14 July 2003).
[54] CTA Decision No. 620-AT-R-2003 (October, 2003) at 70-71.

(a) the door from the vestibule in the service car into the sleeper unit in the "accessible suite" is widened to at least 81 cm [31.89"]; and,

(b) there is a wheelchair tie-down in the sleeper unit to allow a person with a disability to retain a Personal Wheelchair.

2. In the economy coach cars, through the implementation of Option 3, with the appropriate modifications, to ensure that:

(a) there is a washroom that can accommodate persons using Personal Wheelchairs proximate to the wheelchair tie-down;

(b) there is sufficient clear floor space in the wheelchair tie-down area to accommodate a person in a Personal Wheelchair and a service animal; and the tie-down area, in conjunction with the area that is adjacent to it, provides adequate manoeuvring and turning space to allow a person using a Personal Wheelchair to manoeuver into and out of the tie-down area;

(c) there is a seat for an attendant, which faces the wheelchair tie-down; and,

(d) the width of the bulkhead door opening located behind the wheelchair tie-down and the width of the aisle between the "future valet/storage" are at least 81 cm [31.89"].

3. In every economy coach car, to ensure that there is one row of double seats that is lowered to floor level and that provides sufficient space for persons who travel with service animals;

4. In every coach car, to ensure that, in addition to the four moveable aisle armrests that are presently in the cars, there are at least two additional movable aisle armrests on the double-seat side;

5. With respect to the exterior stairs to the cars, to ensure that the stair risers on the Phase 1 Renaissance Cars are closed; and,

6. With respect to overnight train consists where a sleeper car service is offered, to ensure that a service car is marshalled in such a way that the "accessible suite" is adjacent to the wheelchair tie-down end of the economy coach car that contains the wheelchair-accessible washroom, and this suite is offered as a sleeping accommodation.

The Agency accepted VIA's statements regarding those obstacles VIA said it would not be feasible to remove. However, it did not accept that VIA could not have supplied the relevant costing and design information, particularly in light of the four design options VIA produced for

Transport Canada. It addressed VIA's cost estimate of $35 million in detail, finding the estimate to be "overstated". It found the net additional cost of implementing Option Three as opposed to Option One (presented to Transport Canada to remedy safety concerns) would be between $673, 400 and $1, 712,000, indicating that only 13 of the 47 coach cars need be modified – one per train "consist".[55]

In its preliminary and final decisions the Agency considered all of the following:

- the Renaissance cars "will be the only cars in operation on some of VIA's routes";
- VIA's existing fleet did not provide any wheelchair-accessible sleeper compartments
- none of VIA's existing coach cars were "wheelchair-accessible" (e.g. door widths were 12-21% too narrow to be accessible to a person in a personal wheelchair);
- VIA would "not provide any compensation to any travelers or persons who cannot be accommodated" (in response to a CCD interrogatory concerning those unable to use the Renaissance cars);
- the Renaissance cars would increase VIA's fleet by approximately one-third
- the Renaissance cars had some features designed to benefit persons with disabilities other than those who use wheelchairs; and
- persons with disabilities were a minority within society, and underrepresented amongst VIA's passengers.[56]

3. DECISIONS OF THE FEDERAL COURT OF APPEAL

VIA appealed the Agency's decisions and asked that it not be required to implement the Agency's final decision until the Appeal was decided. In support of its application for a stay, within 37 days of the Agency's Final Decision, VIA produced new costing information, from an engineer, for removing the "undue obstacles".[57] This was precisely the type of information the Agency requested in its show cause orders. Normally, new evidence is not admitted on appeal, particularly when it was: discoverable before the end of the hearing appealed from; not credible (for instance, the costing was based on retrofitting all cars versus the number actually ordered by

[55] CTA Decision No. 620-AT-R-2003 (October, 2003) at 2-4, 6-12, 20-24
[56] CTA Decision No. 175-AT-R-2003 (March 2003) at 36-40.
[57] *CCD v. VIA* [2007] SCC 15 at para. 239.

the Agency) and was not practically conclusive of an issue on the appeal.[58] CCD produced an affidavit from engineer demonstrating the inaccuracies in VIA's new evidence. Nonetheless, the FCA "in the interests of justice, permit[ed] fresh evidence to be presented on a question of fact so as not to leave the Court in any doubt as to the surrounding circumstances".[59] At least CCD and the Agency were awarded their costs of the motion.

On appeal, VIA argued that: (1) the Agency did not have jurisdiction to hear complaints about "hypothetical barriers" where no individual had actually experienced a problem; (2) the Agency should not have considered the Rail Code in its decision; (3) the process was unfair in that there was no oral hearing after the preliminary decision and thus VIA did not have a proper opportunity to submit required evidence; and (4) an "undue obstacle" must be related to the entire network (all of VIA's trains as well as other transportation avenues), and not just a section of it (i.e. the Renaissance trains). The FCA dismissed VIA's appeal with regards to the Agency's jurisdiction to hear CCD's complaint and reference the Rail Code, but otherwise granted the appeal. Of note, the entire panel found no fault with the Agency's conclusion that the Renaissance cars contained 14 obstacles to the mobility of persons with disabilities.

The majority of the FCA held that before considering whether a transportation obstacle was itself undue, the Agency must: (1) determine whether there is an obstacle to the mobility of persons with disabilities; (2) examine the whole network of the transportation service provider with a view to determining whether the network itself provides relief such that the obstacle cannot said to be undue; (3) if the network does not provide relief, consider the possible accommodations within the network (which might mean addressing the physical obstacle itself, but not necessarily) which could eliminate or alleviate the undue obstacle. Examples of possible "accommodations," proposed by the FCA included the occasional use of older cars on routes where the new trains would otherwise have been used exclusively, and compensation for those who could not ride the Renaissance cars for travel on another mode of transportation, such as bus or airplane.[60]

All three FCA justices held that after issuing its preliminary decision, the Agency was

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[58] *Frank Brunckhorst Co. et al. v. Gainers Inc. et al*., [1993] F.C.J. No. 874 at para. 2 (FCA); *Federal Courts Rules*, r. 351

[59] *VIA Rail Canada Inc. v. Canadian Transportation Agency and Council of Canadians with Disabilities* (13 July 2004), A-238-04 (FCA)

[60] *VIA Rail Canada Inc. v. National Transportation Agency*, [2005] 4 F.C.R. 4 at paras. 40, 62- 64 and 108-110 (FCA)

obliged as a matter of fairness to "invite" VIA to make further submissions on how its network could accommodate those for whom the Renaissance trains constituted an obstacle. A further hearing would then be held to decide whether the obstacles were undue in light of possible network accommodations.[61] Only after conducting the stage-two hearing and ruling that the network was unable to accommodate persons with disabilities would the Agency be entitled to "invite" submissions from VIA on the cost and feasibility of modifying the Renaissance rail cars as one potential option for addressing the undue obstacle. Before the Agency could reach any conclusions about whether the obstacles in the Renaissance cars were themselves undue, it therefore was required as a matter of fairness to conduct a trifurcated hearing.[62]

The FCA's decision essentially meant that fundamental human rights principles applied elsewhere did not apply to persons with disabilities in the national transportation network. For instance, the FCA's "network analysis" would have required that discriminatory barriers only be modified as a last resort, and after all other possible accommodations have been rejected, contrary to the principle of full inclusion. Obstacles would not necessarily ever have been eliminated, and new ones would be permitted to come into existence. Persons with disabilities would not have been afforded equal benefit to services offered to the general public (a principle which is widely accepted in the human rights field).[63]

Also, the FCA decision removed the onus from the respondent, holding that as a matter of procedural "fairness" there is no obligation upon a respondent to call evidence, unless and until the Agency expressly "invites" it to do so. Having to provide submissions, even by way of response, as to why there is an undue obstacle in Canada's entire network of transportation, and how Canada's entire network of transportation may be used to craft a remedy would have been awesomely cumbersome, and would have virtually eliminated the ability of individuals to seek remedies before the Agency.

If adopted into general human rights law, the FCA's decision would have made systemic discrimination cases unworkable for applicants, allowed respondents to withhold evidence they alone could produce, and placed tribunals in the "Catch 22" dilemma of identifying a remedy before they could decide on liability.

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[61] *VIA Rail Canada Inc. v. National Transportation Agency,* [2005] 4 F.C.R. 473 at paras. 58 and 108 (FCA).
[62] *VIA Rail Canada Inc. v. National Transportation Agency,* [2005] 4 F.C.R. 473 at paras. 73 and 125-128 (FCA).
[63] E.g. *Eldridge v. British Columbia (Attorney General),* [1997] 1 S.C.R. 241 at para. 78.

4. VICTORY AT THE SUPREMES – THE DECISION OF THE SUPREME COURT OF CANADA

In a bold move, only possible with the support of the now cancelled Court Challenges Program[64], CCD elected to seek leave from the Supreme Court of Canada to appeal the FCA's decision. Fortunately, it was one of the approximately 8.6 percent of cases to be granted leave in 2006.[65] It is, the authors believe, the first time the Supreme Court had heard a case addressing discrimination and mobility disabilities.

After 11 months of deliberation, in a scarily narrow five to four vote, the Supreme Court issued a landmark decision for persons with disabilities. The decision leaves no doubt but that Canada's equality rights provisions within human rights codes, the *Charter* and other human rights legislation ensure the full and equal citizenship of persons with disabilities. The Court affirmed:

a. The provisions of the *CTA* at issue must be interpreted consistently with long-standing human rights principles which include ensuring the full-inclusion of persons with disabilities, respecting their independence, comfort, dignity, safety and security;

b. There is a duty to prevent new barriers (the failure of a design/development process to take accommodation into account can result in a *per se* finding of discrimination);

c. Undueness is the Respondent's burden (i.e. failure to provide the requisite evidence will result in the respondent being found not to have discharged this burden);

d. Under the *CTA*, "undue obstacle" has the same meaning as "undue hardship" in other human rights law;

e. Costs relevant to the undueness analysis are "net" of costs that can be shifted, attributed to factors other than accommodation, other sources of funding, including tax credits and deductions and income that will be generated as a result of being more accessible; and

f. Undueness is reached only when all reasonable means of accommodation are exhausted

[64] The Court Challenges Program, "About: CCP", online: <http://www.ccppcj.ca/e/about/about.shtml> The Court Challenges Program is a national non-profit organization which was established by the federal government in 1994 to provide financial assistance for important court cases that advance language and equality rights guaranteed under Canada's Constitution; Treasury Board of Canada Secretariat, Medial Release "Backgrounder: Effective Spending" (25 September 2006), online: < http://www.tbs-sct.gc.ca/media/nr-cp/2006/0925_e.asp>. In September 2006 the Conservatives cancelled the program's $5.6 million dollar budget, citing 'value for money' objectives.

[65] Supreme Court of Canada, "Statistics 1996 to 2006", online: <http://www.scc-csc.gc.ca/information/statistics/HTML/cat2_e.asp>

and costs would threaten the survival or essential character of the enterprise.

(a) The *CTA* is Human Rights Legislation

Both the majority and minority of the Supreme Court unequivocally stated that Part V of the *CTA* constitutes human rights legislation and must be interpreted as such.[66] The Agency is required to adjudicate undue obstacles under Part V of the *CTA* in a manner that is consistent with the approach to identifying and remedying discrimination in human rights law (i.e. *Meiorin*). The well known, BFOR test from *Meiorin* applies in all human rights analysis (including physical barriers) and not just analysis of policies or statutory standards for individuals. This is particularly important given the hesitancy in some courts and Tribunals (including the Agency) to apply *Meiorin*.[67]

(i) Full Inclusion

Practically speaking, full inclusion is the ultimate accommodation goal. The Court reinforced its earlier decisions in *Grismer* and *Meioron* in this regard. In *Grismer,* the Honourable Justice McLachlin stated: [68]

> 19 …Employers and others governed by human rights legislation are now required in all cases to accommodate the characteristics of affected groups within their standards, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them….
>
> 22 …"Accommodation" refers to what is required in the circumstances to avoid discrimination. Standards must be as inclusive as possible.

Being as "as inclusive as possible" means respecting the independence, comfort, dignity and safety of persons with disabilities.[69] Consequently, the Court agreed with the Agency that use of the personal wheelchair, as set in the *CSA*, was most consistent with human rights principles. The use of the personal wheelchair was particularly appropriate in view of the widespread

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[66] *CCD v. VIA* 2007 SCC 15 at paras. 109, 112-118, 134, 136-139, 293, 296

[67] E.g. *Brown v. The National Capital Commission* (6 June 2006), 2006 CHRT 26 at para. 195, online: CHRT http://www.chrt-tcdp.gc.ca/search/files/t760_1003ed06jun06.pdf; *Hutchinson v. Canada (Minister of the Environment)*, [2003] 4 F.C. 580; *Forster v. Canada (Attorney General),* [2006] F.C.J. No. 1007; *Tremblay v. Canada (Attorney General,)* [2003] F.C.J. No. 627 at para. 25; *Watson v. Calgary Airport Authority*, [2002] F.C.J. No. 1763 at para. 17; *New Brunswick (Human Rights Commission) v. Potash Corp. of S*, [2006] N.B.J. No. 306 (C.A.).

[68] *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 at paras. 19, 22, cited by the Court in *VIA* at, e.g. para. 161

[69] *CCD v. VIA* 2007 SCC 15 at paras. 110, 161-162, 173-175, 180-182

domestic and international acceptance of personal wheelchair based accessibility standards, and VIA's own Rail Code commitments.[70]

> 162 The accommodation of personal wheelchairs enables persons with disabilities to access public services and facilities as independently and seamlessly as possible. Independent access to the same comfort, dignity, safety and security as those without physical limitations, is a fundamental human right for persons who use wheelchairs. This is the goal of the duty to accommodate: to render those services and facilities to which the public has access equally accessible to people with and without physical limitations.

While the current personal wheelchair within the CSA is smaller than the average chair used today (i.e requiring only five feet of turning space rather than the seven feet required for motorized wheelchairs and scooters), reference to the more frequently used wheelchair size is made in the appendix to the 2004 standards, and is considered advisory. Work on the 2009 standards has not yet begun.[71]

(b) Duty to Prevent New Barriers

In keeping with the principle of full inclusion, the Supreme Court in *VIA* was clear that the Agency can accept an application to review a "planned existence of an obstacle" (i.e. a design issue), without having to wait until the vehicle or station being planned is brought into existence.[72] According to the Court, "the ad hoc provision of services does not satisfy Parliament's continuing goal of ensuring accessible" transportation services". The Court therefore affirmed the importance of systemic remedies within human rights as a means of ensuring relief to the broadest number of persons and of avoiding forcing untold numbers of individuals to suffer discrimination.[73] CCD had argued that it made no sense to wait until the costs of making the Renaissance cars accessible would be much greater (i.e. after their manufacture and/or retrofit was complete), when the undue obstacles in their design were readily apparent. Early on in the proceeding the Agency tragically declined to grant an interim injunction stopping the manufacture of the rail cars pending its decision. That refusal may turn out to cost the taxpayers tens if not hundreds of millions of dollars. Nevertheless, it recognized the

[70] *CCD v. VIA* 2007 SCC 15 at paras. 151-165
[71] Author's May 14, 2007 conversation with Laurie Ringaert (BSc., BMR-OT, MSc.) Universal Design Consultant, Researcher and Educator and member of the B651 Accessible Design Committee and member responsible for research on the standard size of wheelchairs used.
[72] *CCD v. VIA* [2007] SCC 15 at paras. 93-94, 118
[73] *Canadian National Railway v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114 at para. 23-29, 39

unfairness of VIA being able to increase the cost of providing access, then relying on these self-imposed costs as proof of unduehardship.

One of the most significant problems with the FCA's decision was that it implicitly endorsed the creation of new barriers to persons with disabilities (as long as other "accessible" avenues still existed, new barriers would have been acceptable). The Supreme Court has clarified that the duty to accommodate, and the duty not to discriminate, include a duty not to create new barriers.[74] According to the Court, "while human rights principles include an acknowledgement that not every barrier can be eliminated, they also include a duty to prevent new ones, or at least, not knowingly to perpetuate old ones where preventable".[75] The majority is clear that accessibility is expected to increase and not to move backwards and that respondents must be think prospectively rather than retrospectively.

> 164…Neither the Rail Code, the *Canada Transportation Act*, nor any human rights principle recognizes that a unique opportunity to acquire inaccessible cars at a comparatively low purchase price may be a legitimate justification for sustained inaccessibility. In the expansion and upgrading of its fleet, VIA was not entitled to ignore its legal obligations and public commitments. The situation it now finds itself in was preventable in a myriad of ways.[76]

(c) Onus of Proof

There is a wealth of Supreme Court jurisprudence which tells us that it is the respondent in human rights cases who must demonstrate undue hardship/undue obstacle.[77] The FCA ignored this jurisprudence in placing the onus on the Agency to produce information and/or to "invite" VIA to produce the relevant information. In *VIA*, the Supreme Court once again confirms that it is the respondent, in all human rights matters, including under Part V of the *CTA*, who bears the onus of demonstrating that an obstacle is not "undue".[78] In particular, the respondent is typically in the best position to provide cost information. Failure to provide the requisite evidence will result in a respondent being found not to have discharged the burden upon it. In VIA's case, to

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[74] *CCD v. VIA* 2007 SCC 15 at paras. 164, 186.
[75] *CCD v. VIA* 2007 SCC 15 at para. 186.
[76] *CCD v. VIA* 2007 SCC 15 at para. 164.
[77] *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.),* [1999] 3 S.C.R. 3 at paras. 78-79; *Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* [1999] 3 S.C.R. 868 at paras. 20, 42; John Sopinka. *The Law of Evidence in Canada,* 2nd ed. (Canada: Butterworths, 1999) at 80-89.
Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497 at paras. 76-81.
[78] *CCD v. VIA* 2007 SCC 15 at paras. 142, 226.

the extent withholding evidence meant it failed to discharge the burden upon it, VIA was found to have been the authour of its own misfortune.[79] "Where VIA refuses to provide evidence in its sole possession in support of its undue hardship argument, it cannot be said that any reasonable basis exists for refusing to eliminate an undue obstacle."[80]

(d) The Determination of Undueness

(i) "Undue obstacle" equals "undue hardship"

At the FCA, VIA was successful in arguing that "undue obstacle" under Part V of the *CTA* meant something less than "undue hardship" used in human rights jurisprudence.[81] The Supreme Court has corrected this. Under the *CTA*, a discriminatory (obstacle) barrier must be removed unless there is a *bona fide* justification for its retention, which is demonstrated by establishing that accommodation poses undue hardship on the respondent.[82] "For the Agency to find that an obstacle denying access to transportation services is justified, therefore, no reasonable alternative to burdening persons with disabilities must exist".[83]

> 120 The same analysis applies in the case of physical barriers. A physical barrier denying access to goods, services, facilities or accommodation customarily available to the public can only be justified if it is "impossible to accommodate" the individual "without imposing undue hardship" on the person responsible for the barrier…
>
> 121 …The discriminatory barrier must be removed unless there is a *bona fide* justification for its retention, which is proven by establishing that accommodation imposes undue hardship on the service provider: *Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525 ("*Chambly*"), at p. 546.
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> 122 In *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 79, this Court noted that it is "a cornerstone of human rights jurisprudence that the duty to take positive action to ensure that members of disadvantaged groups benefit equally from services offered to the general public is subject to the principle of reasonable accommodation", which means "to the point of 'undue hardship'". Undue hardship implies that there may necessarily be some hardship in accommodating someone's disability, but unless that hardship imposes an undue or unreasonable burden, it yields to the need to accommodate.

[79] *CCD v. VIA* 2007 SCC 15 at paras. 142, 226-228.
[80] *CCD v. VIA* 2007 SCC 15 at para. 226.
[81] *VIA Rail Canada Inc. v. National Transportation Agency*, [2005] 4 F.C.R. 473 at paras. 36 to 49.
[82] *CCD v. VIA* 2007 SCC 15 at paras. 120-122, 129, 137-139.
[83] *CCD v. VIA* 2007 SCC 15 at para. 129.

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> 137 The qualifier, "as far as is practicable", is the statutory acknowledgment of the "undue hardship" standard in the transportation context. The fact that the language is different does not make it a higher or lower threshold than what was stipulated in *Meiorin*: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montreal (City)*, [2000] 1 S.C.R. 665, 2000 SCC 27, at para. 46. The same evaluative balancing is required in assessing how the duty to accommodate will be implemented….

While the *National Transportation Policy*, found at section five of the *CTA*, lists a number of considerations in addition to accessibility, the Court saw these as merely a statutory guide to factors that arise in every human rights accommodation case. The Supreme Court accepted CCD's arguments (and those of the interveners) that the factors listed in section five in no way diminish the level of undue hardship that a respondent must demonstrate in order to be relieved of its duty to accommodate.[84] Under the *CTA*, "undue obstacle" has the same meaning as undue hardship in other human rights law. [85]

> 139 **What is "practicable" within the meaning of s. 5(*g*)(ii) of the *Canada Transportation Act*** is based on the evidence as to whether the accommodation of the disability results in an unreasonable burden on the party responsible for the barrier. That **is the same analysis required to assess whether there is undue hardship under the *Canadian Human Rights Act* or whether, under the *Canada Transportation Act*, it would be unreasonable (or undue) to require that an obstacle be removed or rectified. No difference in approach is justified by the different context, particularly since Parliament directed the Agency in s. 171 to foster complementary policies and practices with those of the Canadian Human Rights Commission.** The "reasonable accommodation" analysis in the transportation context is unique only insofar as the policy objectives articulated in s. 5 of the *Canada Transportation Act* are factors which inform a determination of the possible grounds on which undue hardship may be established. These factors inform, not dilute, the duty to accommodate to the point of undue hardship.

(ii) Appropriate Cost considerations[86]

Cost is typically a key consideration in determining undue obstacle/hardship defences. Many of the factors listed in section 5(g)(ii) of the *CTA* (e.g. the economic viability of each mode of transportation) relate to the notion of "cost". The Supreme Court warned, in keeping with its

[84] *CCD v. VIA* 2007 SCC 15 at paras. 128, 137-139, 134.
[85] *CCD v. VIA* 2007 SCC 15 at para. 139.
[86] *CCD v. VIA* 2007 SCC 15 at paras. 109, 131-132, 221-222.

past jurisprudence, that "impressionistic evidence of increased expense will not generally suffice".[87]

In terms of calculating costs, the appropriate considerations are those "net" of costs that can be shifted, attributed to factors other than accommodation, other sources of funding, including tax credits and deductions and income that will be generated as a result of having been more accessible. "A service provider's capacity to shift and recover costs throughout its operation will lessen the likelihood that undue hardship will be established".[88] The majority of the Court expressly contemplated that the costs of accommodation could raise ticket prices, noting that accommodations for persons with disabilities should be no different than all other legitimate expenditures which contribute to ticket price such as wages and fuel.[89]

> 222 There is, moreover, no evidence in the record indicating that passenger fares are likely to increase as a result of the Agency's decision. But even if they do, VIA's passenger fares already fluctuate with the expense of operating the system. Wages, fuel, maintenance — these are among the variables…

The size of the enterprise and economic factors are to be considered. The larger and more economically successful the enterprise, the more likely it will be expected to shoulder a heavier accommodation cost

(iv) Voluntary codes to be considered in assessing undueness

Other factors, aside from cost, may also be considered, including self-imposed minimum standards. Accordingly, the Supreme Court held that the Agency appropriately considered the voluntary Rail Code VIA had endorsed.[90] Self-imposed minimum standards set by travel service providers are relevant to the Agency's consideration under Part V of the *CTA*. This aspect of the decision is incredibly important given concern over the government's reliance on unenforceable voluntary codes rather than regulation.[91] Although the acceptance of codes falls significantly short of having regulatory standards in place, it does add teeth to the Agency's adjudicative process. The Court's determination is consistent with, but puts a more promising spin on its recent decision in *McGill University Health Centre (Montreal General Hospital) and Syndicat*

[87] *CCD v. VIA* 2007 SCC 15 at para. 109.
[88] *CCD v. VIA* 2007 SCC 15 at paras. 131-132.
[89] *CCD v. VIA* 2007 SCC 15 at para. 222.
[90] *CCD v. VIA* 2007 SCC 15 at paras. 144-150.
[91] Brian Flemming, C.M., Q.C. et al, *Canada Transportation Act Review: Vision and Balance* (Minister of Public Works and Government Services Canada, June 2001) at 246-249; CTA Decision No. 175-AT-R-2003 (March 2003)

des employés de l'Hôpital général de Montréal wherein disability leave and termination clauses in a collective agreement were found not to be presumptively discriminatory.[92] While joint agreements or voluntary codes are not the sole determinant of whether or not a barrier is discriminatory, they are relevant to the analysis.

(v) Factors not to be included in the undueness analysis

A very common response from respondents in human rights claims is to assert their general philanthropy towards all persons with disabilities. In this case, while refusing to address the discriminatory barriers under review, VIA claimed that the Renaissance cars were of benefit to the wider population of persons with disabilities and that the claims made by persons using wheelchairs would only compromise the services/facilities provided to others. It sought thereby to avoid doing anything to accommodate any person with a disability.

The FCA accepted this argument. The FCA implied, without foundation, that meeting the needs of those who require wheelchairs would disadvantage those who have other disabilities. It inappropriately took judicial notice of the notion that ensuring all of VIA's trains are fully accessible for all forms of disability (as they are in jurisdictions with mandatory access codes) would involve costs so great "that the transportation service would be unlikely to survive. At the very least, its financial viability would be severely jeopardized."[93] Essentially, the FCA pitted groups of persons with disabilities against one another, leaving it up to VIA to decide which groups to "accommodate", and to what extent.

The Supreme Court explicitly rejected this analysis which pitted various persons with disabilities in competition with one another. It is an error to lump all costs of all potential accommodations for all persons with disabilities when considering whether the hardship would be undue:[94]

> 224 It has never been the case that all forms of disability are engaged when a particular one is said to raise an issue of discrimination. While there are undoubtedly related conceptual considerations involved, they may nonetheless call for completely different remedial considerations. A "reasonable accommodation", "undue hardship", or "undue obstacle" analysis is, necessarily,

[92] *McGill University Health Centre (Montreal General Hospital) and Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4
[93] *VIA Rail Canada Inc. v. National Transportation Agency*, [2005] 4 F.C.R. 473 at para. 42.
[94] *CCD v. VIA* 2007 SCC 15 at para. 224 a similar analysis was undertaken by the Court in *Eldridge v. British Columbia (Attorney General)*, [1997] 1 S.C.R. 241.

> defined by who the complainant is, what the application is, what environment is being complained about, what remedial options are required, and what remedial options are reasonably available. Given the nature of the application and the parties before it, the Agency would have acted unreasonably in seeking representations about all conceivable forms of disability. Ironically, the Court of Appeal questioned the breadth of CCD's application as it was.

Likewise, the Court rejected an undueness approach which would carve out persons with disabilities from membership in the public: [95]

> 220 The majority judgment of the Federal Court of Appeal was also critical of the Agency's failure to consider the interests of passengers who are not disabled. Noting the small percentage of passengers with disabilities who utilize VIA's services, the majority was of the opinion that a remedial order which could result in significantly increased fares would unfairly economically disadvantage other members of the public.
>
> 221 This carves out from membership in the public those who are disabled. **Members of the public who are physically disabled *are* members of the public**. This is not a fight between able-bodied and disabled persons to keep fares down by avoiding the expense of eliminating discrimination. Safety measures can be expensive too, but one would hardly expect to hear that their cost justifies dangerous conditions. In the long run, danger is more expensive than safety and discrimination is more expensive than inclusion.

(e) Threshold of Undueness

The Supreme Court has held, since *Eldridge v. British Columbia (Attorney General)*, that courts should be wary of putting to low a value on the access rights of persons with disabilities.[96]

> …one must be wary of putting too low a value on accommodating the disabled. It is all too easy to cite increased cost as a reason for refusing to accord the disabled equal treatment. This Court rejected cost-based arguments in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at paras. 87-94, a case where the cost of accommodation was shown to be modest. I do not assert that cost is always irrelevant to accommodation. I do assert, however, that impressionistic evidence of increased expense will not generally suffice. Government agencies perform many expensive services for the public that they serve.

However, prior to the decision, the Supreme Court had not set a definitive line as to the "undueness" threshold. Now, the Court has adopted the approach articulated in the Ontario Human Rights Commission's "Policy and Guidelines on Disability and the Duty to

[95] *CCD v. VIA* 2007 SCC 15 at paras. 220-221.
[96] *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights),* [1999] 3 S.C.R. 868 at para. 41.

Accommodate".[97] "The threshold of "undue hardship" is not mere efficiency".[98] Ultimately, the bottom line in relying upon costs is the demonstration of "substantial interference with a service provider's business enterprise".[99] A respondent relying on a cost defence will be expected to prove that, after all the considerations listed above are given due weight, the accommodation would "threaten its survival or alter its essential character".[100]

Clearly in *VIA* the Court was not deterred from ordering accommodation by a crown corporation dependent on government subsidy nor by the fact that VIA had no surplus or line item in the budget to cover accommodation costs.

(f) Implications on Standard of Review of Agency decisions

The Supreme Court's decision also has important standard of review implications. Historically, the Court has held that human rights decisions (except findings of fact), where the tribunal has no greater expertise than the court on the issue in question, would be readily, leaving all administrative tribunals open to a complete review of such decisions by higher courts.[101] The majority of the Court in *VIA*, however, explicitly linked human rights issues to their factual context to move away from the correctness standard of review on human rights issues and rejected the parceling of administrative tribunal decisions into several components.[102]

> 88 The Court of Appeal also concluded that the standard for reviewing the Agency's decision on the issue of whether an obstacle is undue, is patent unreasonableness. I agree. I do not, however, share the majority's view that VIA raised a preliminary, jurisdictional question falling outside the Agency's expertise that was, therefore, subject to a different standard of review. Applying such an approach has the capacity to unravel the essence of the decision and undermine the very characteristic of the Agency which entitles it to the highest level of deference from a court — its specialized expertise. It ignores Dickson J.'s caution in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, that courts "should not be alert to brand as

[97] Ontario Human Rights Commission, Policy and Guidelines on Disability and the Duty to Accommodate (23 November 2000), online: Ontario Human Rights Commission <http://ohrc.on.ca/english/publications/disability-policy.shtml>. An earlier version of the Guidelines was adopted in the case of *Quesnel v. London Educational Health Centre* (1995), 28 C.H.R.R. D/474 (Ont. Bd. Inq.) , which was cited by with approval by the Supreme Court in *CCD v. VIA* 2007 SCC 15 at para. 132.
[98] *CCD v. VIA* 2007 SCC 15 at para. 225.
[99] *CCD v. VIA* 2007 SCC 15 at para. 131.
[100] *CCD v. VIA* 2007 SCC 15 at para. 132.
[101] *CCD v. VIA* 2007 SCC 15 at paras. 281-286, Deschamps and Rothstein JJ., dissenting.
[102] *CCD v. VIA* 2007 SCC 15 at paras. 88, 97 and 100.

> jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so" (p. 233)
>
> ***
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> 97 I do not share the view that the issue before the Agency was, as a human rights matter, subject to review on a standard of correctness. This unduly narrows the characterization of what the Agency was called upon to decide and disregards how inextricably interwoven the human rights and transportation issues are. Parliament gave the Agency a specific mandate to determine how to render transportation systems more accessible for persons with disabilities. This undoubtedly has a human rights aspect. But that does not take the questions of how and when the Agency exercises its human rights expertise outside the mandate conferred on it by Parliament.
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> ***
>
> 100… The Agency made a decision with many component parts, each of which fell squarely and inextricably within its expertise and mandate. It was therefore entitled to a single, deferential standard of review.

The Court's decision shows deference to the Agency's extensive experience in transportation matters. Importantly, it limits the review powers of the Federal Court over the Agency's jurisdiction, leaving less incentive for respondents to haul applicants through expensive and time-consuming Federal Court proceedings which, in essence, conduct a complete re-examination of the issues involved.[103]

5. IMPACT ON OTHER CASES

The *VIA* decision will undoubtedly have a positive impact on other cases of interest to CCD, including *Brown v. The National Capital Commission* and the ongoing "one person-one fare" case.[104]

In his Canadian Human Rights case, Mr. Brown took the National Capital Commission (NCC) and Public Service to task for allowing the York Street Steps to be built without any accessibility provisions for persons in wheelchairs.[105] The NCC argues that an elevator, located over 130 metres away constitutes "reasonable accommodation". The Tribunal found for Mr.

[103] *CCD v. VIA* 2007 SCC 15 at paras. 243-244.
[104] Canadian Transportation Agency File No. U3570-14/04-1, Re: Applications involving additional fares and charges for persons with disabilities who require additional seating due to their disabilities (AFC applications).
[105] *Brown v. The National Capital Commission* (6 June 2006), 2006 CHRT 26, online: CHRT http://www.chrt-tcdp.gc.ca/search/files/t760_1003ed06jun06.pdf.

Brown, finding the NCC's decision to create a new barrier as constituting a prima facie violation of the *CHRA*.[106]

The NCC has sought a judicial review of the Tribunal's decision. The issues on judicial review include: impact of the creation of a "new barrier"; what is "reasonable accommodation" and whether "reasonable accommodation" is a relevant defence under the *CHRA*; appropriate factors to consider in assessing undueness (including issues of heritage and aesthetics as well as costs associated with fixing an inaccessible design); and the consequences for failing to produce sufficient and relevant cost information going to the undueness defence. Consequently, the Supreme Court's discussion of the importance of full-inclusion and how that must inform accommodation efforts, its now stated intolerance for the creation of "planned barriers", the reiteration of the onus on the respondent to produce significant and sufficient cost information demonstrating that the organization's viability would be threatened by the requested accommodations, will be of significance in the Federal Court proceedings.

The *VIA* decision will also have a significant impact on CCD's ongoing "one person-one fare" case before the Agency. That case involves an undue obstacle challenge by CCD and individual applicants to the airlines' charging fares to attendants (the airlines require certain persons with disabilities to have an attendant accompany them in order to fly) and for a second seat for obese individuals or other disabled individuals who require more than one seat to accommodate their disability. The essence of the case is "undueness", i.e. the impact on the airlines if they do not charge these additional fares as terms of carriage. CCD argued throughout that the undueness threshold was high and essentially amounted to determining whether the viability of the airlines' entire enterprise would be affected. The airlines produced evidence regarding potential loss of revenue (which was refuted by CCD's expert) but not much more by way of undueness. Unsurprisingly, the airlines also submitted two expert reports outlining the costs to the airlines of accommodating all "special needs" groups. Ultimately, the Supreme Court's decision has answered for the Agency the very questions before it in the "one person-one fare" case – the factors relevant to the Agency's undueness analysis and the point at which an obstacle can be said to be "undue". The additional fares charged will be undue if, across the entire West Jet and Air Canada enterprises, viability is not threatened.

[106] *Brown v. The National Capital Commission* (6 June 2006), 2006 CHRT 26 at para. 253, online: CHRT http://www.chrt-tcdp.gc.ca/search/files/t760_1003ed06jun06.pdf.

Tangentially, the case also involves the issue of new barriers. CCD pointed out to the Agency that both respondent airlines had purchased new aircraft in recent years (after becoming aware of CCD's case), with no indication that an assessment was done to see if such aircraft could have accommodated the population in question. CCD was being more than reasonable in not asking the airlines to modify the aircraft. The fact that CCD asked for a lesser accommodation than what the *VIA* decision justifies can only heighten the scrutiny of the undueness defence asserted.

6. WHERE DO WE GO FROM HERE?

As happy as human rights advocates, including persons with disabilities, should be with the Supreme Court's decision, there are many important issues which have arisen from CCD's still ongoing battle which are not addressed by the Supreme Court's decision. Significant access to justice issues arise from the duration of the process employed, the costs involved and the responsibility placed on individual litigants to bring such cases forward.

(a) Need for Interim Remedies

As was noted above, in beginning its application and as the application proceeded, CCD asked the Agency to grant an interim injunction preventing VIA from purchasing, and then continuing to assemble and substantially modify, the Renaissance Trains. The Agency refused, necessitating repeat requests for updated design information and significantly extending the time required to adjudicate the application. Where a respondent is actively engaged in the process of creating new barriers, as was VIA, human rights adjudicators, including the Agency, must be prepared to utilize their powers to grant interim injunctions to prevent the continuation of the process. The exercise of such powers would significantly expedite the decision-making process, and where the adjudicator monitors government-subsidized actors, potentially save the tax payer from needlessly undoing inaccessible work. In other jurisdictions, these powers have effectively been used to enhance respect for the human rights process.[107]

(b) Consultation

[107] David Baker, *Moving Backwards: Canada's State of Transportation Accessibility in an International Context. Final Report to the Council of Canadians with Disabilities* (February 2005) online: <http://www.ccdonline.ca/publications/movingback/movingback.htm>.

An important means of preventing new barriers is through consultation with those groups who will be affected by a new building, structure, facility, train, etc. Had VIA consulted with meaningfully with relevant disability groups prior to purchasing the Renaissance trains, their extreme inaccessibility would have been obvious.

Consultation is an element of the duty to accommodate. This procedural element, which requires that a respondent effectively investigate solutions, is important in ensuring the best accommodation is obtained by looking at all viable forms of accommodation.[108] Moreover, process is important in addressing attitudinal barriers and paternalism towards persons with disabilities, which are so often a component of discrimination. "Because disabled persons are the best judges of their own interests, they should have a larger voice in determining what services are provided in the disability services market".[109]

The *CHRA* specifically offers those proposing to implement a plan for adapting a service or facility the services of the Commission to facilitate a consultation process leading to Commission approval of the proposed accommodation.[110] VIA was entitled to approach the Commission or even to bring an application on its own to the Agency prior to purchasing the Renaissance trains to assess their accessibility. It chose not to do so. It is hoped that the effects of seven plus years of litigation will emphasize the importance and need for consultation.

(c) Process length

Applications before the Agency are supposed to be decided within 120 days of filing. CCD's application to the Agency, from start to finish before the Agency alone, took over two years and ten months. The time can be broken down as follows:

1. Requesting VIA's cooperation to provide information – five months (December 12, 2000 - March, 2001; June - August, 2001)
2. Two applications for leave to appeal to the Federal Court of Appeal – three months (March 9 - June 8, 2001)

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[108] *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256 at para. 131 (in dissent but not on this particular point); *Quesnel v. London Educational Health Centre* (1995), 28 C.H.R.R. D/474 (Ont. Bd. Inq.) at paras. 19; *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3 at paras. 42 and 66; *Brown v. The National Capital Commission* (6 June 2006), 2006 CHRT 26 at para. 253, online: CHRT http://www.chrt-tcdp.gc.ca/search/files/t760_1003ed06jun06.pdf.

[109] *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 at paras. 43-44; *Quesnel v. London Educational Health Centre* (1995), 28 C.H.R.R. D/474 (Ont. Bd. Inq.) at para. 27.

[110] *Canadian Human Rights Act*, R.S., 1985, C. H-6, s. 17.

3. Viewings of trains and interrogatories concerning VIA's final plan for modifications – four months (September 2001 – January 2002)
4. Final submissions and oral argument – three months (January 31, 2002 – April 8, 2002)
5. Agency review of evidence which, unbeknownst to it, VIA had changed – four months (April – August, 2002)
6. Reviewing of modified trains – four months (August 14, 2002 – December 10, 2002)
7. Agency review of evidence, further final submissions and issuance of Preliminary Decision – four months (December 12, 2002 – March 27, 2003)
8. Receipt of VIA's responses to two Agency directions to "show cause" – four months (March 27, 2003 – May 26, 2003; May – July 2003)
9. Agency review of additional evidence and issuance of Final Decision - three months (August – October 31, 2001)

The time noted above does not include arguments before the FCA or the Supreme Court, the pending process before the Agency as it reviews the design plans VIA is now to produce by May 22, 2007, nor VIA's actual implementation of those plans.

In response to VIA's claims that the process was not fair (VIA argued that it did not have sufficient opportunity to produce required information), the Supreme Court endorsed the process adopted by the Agency, which resulted in prolonged hearings and submissions and the absolute requirement to involve legal counsel.[111] Although there are understandably some circumstances which may prevent an application from being heard within the 120 day period set out in the *CTA*, the Agency must be more confident in dealing with parties to ensure a process which does not unnecessarily delay proceedings. In *VIA*, had the Agency made firm orders to produce information (rather than soft requests for the same), and been prepared to let VIA suffer the consequences of not producing the information in time (which is what happened in any event), years could have been trimmed from the process.

Not only did the process in place result in sustained inaccessibility for persons with disabilities, it significantly drove up legal and other costs. Hopefully, the Court's reiteration of onus requirements will be used by the Agency to take a stronger stance on respondent delay issues. It is also hoped that respondents (particularly those representing crown corporations) will be less prone to employ such sharp, procedural practices as a means of frustrating the goals of

[111] *CCD v. VIA* 2007 SCC 15 at paras. 108-109.

applicants to the Agency.[112]

(d) Costs

As a result of the 1996 legislative changes removing the Agency's jurisdiction to determine undue obstacle issues on its own initiative, the significant public interest issues in the *VIA* case had to be brought by an individual litigant. Thankfully, CCD was able to come forward. Unfortunately, it did so at great cost to the organization. It undertook a gigantic battle against a Crown Corporation which could not otherwise have been brought.

VIA, which was established in 1977, has been a Crown corporation since 1978 and is responsible for Canada's national passenger rail transportation. VIA was incorporated under the *Canadian Business Corporations Act*, R.S.C., 1985, c. C-44, with the Government of Canada as the corporation's sole shareholder and reports to the Government of Canada through the Minister of Transport. Throughout the litigation, VIA was represented by in-house senior counsel and a team of lawyers from a down-town Toronto law firm which included three partners of the firm.

By way of contrast, CCD is Canada's national disability rights advocacy organization. As a public interest organization, it depends on private donations and public funding to continue to exist. Its annual budget is just $1.3 million. CCD was forced to spend out of its operating budget to cover its legal bills associated with the *VIA* challenge. CCD accessed some public funding for this case, but the funding did not cover all appeal expenses or future proceedings before the Agency. Although CCD has extensive experience in litigating issues of importance to the disabled community, this is the first case in which the net cost to CCD has exceeded $10,000.

The costs to the organization were immense and far exceeded any other experience CCD had had regarding a complaint to a regulatory body. Were none of its legal costs recoverable, or worse, had the FCA's judgment stood and CCD been left paying for VIA's lawyers, the impact to the organization would have undoubtedly been catastrophic. CCD bore this responsibility without any possibility of recuperating the entirety of its legal costs. Although the Supreme Court did award CCD its costs throughout, both the Agency and the Court award costs based on tariffs, which provide for much lower fees than lawyers' typically charge, even those operating at Court Challenges Program rates. Moreover, the costs award does not cover future expenses. In order to

[112] Bill Rogers, "Ethical Hypothetical" *National* 16:3 (April, May 2007) 55; *CCD v. VIA* [2007] SCC 15 at paras. 227, 232-238, 368.

manage the unanticipated costs related to filing the complaint to the Agency, and the proceedings thus far, CCD had to lay off two full time staff.

In many ways, it was incredibly unjust that CCD bore the risk and responsibility it did in the *VIA* litigation, which had such incredible public interest ramifications. The case was not a commercial matter in which CCD stood to gain financially. The issues in the case were complex and time-consuming and well beyond the capabilities of most litigants to argue individually. Moreover, the issues transcended individual interests and reflected the interests of all Canadians, particularly those with disabilities. The appeal addressed: the meaning of human rights clauses within legislation which does not constitute a human rights code; the analytical approach to be adopted by the Agency, as the main overseer of national transportation disability issues, in "undue obstacle cases"; and, more particularly, the accessibility of Canada's next generation of passenger rail cars. On appeal, the Agency was without jurisdiction to provide submissions on the substance of the case, leaving CCD with the weight of defending the Agency's jurisdiction.[113]

The issue of costs is of even greater concern now that the government has closed the CCP program and that the Supreme Court has stepped back from its allocation of advanced costs awards (where the respondent pays, up front, for and applicant's future legal costs in a proceeding) for public interest litigants.[114] The Court has warned that public interest advance costs orders must be granted with caution, as a last resort, in circumstances where their necessity is clearly established. The standard is high. The Supreme Court's decision does not ensure that the system available for addressing discrimination experienced by persons with disabilities in the transportation system operates fairly and efficiently. Enormous legal costs associated with Supreme Court challenges pose a real barrier to public interest litigants wishing to pursue cases with sufficient merit.[115]

(e) The Agency requires the authority to initiate investigations on its own motion

The Supreme Court's decision confirmed that Part V of the *CTA* is to be interpreted as human rights legislation. However, access to the system which we now know can address systemic human rights issues may be marred by costs issues insurmountable by individual

[113] *VIA Rail Canada Inc. v. National Transportation Agency*, [2005] 4 F.C.R. 473 at paras. 92-94.
[114] *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2.
[115] *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371 at paras. 26-27, 30, 31; Chris Tollefson *et al.*, "Towards a Costs Jurisprudence in Public Interest Litigation" (2001) 83 Canadian Bar Rev. 473

litigants. Reinstating the Agency's jurisdiction to initiate investigations on its own would go a long way to improving access to the system and alleviating some of the cost concerns. The Canada Transportation Act Review Panel so advised in its 2001 report:

> The Panel is concerned that there is now a gap between the Agency's ability to make regulations and its jurisdiction to deal with individual complaints. The Panel believes this important tool should be restored with respect to accessibility issues, as it provides an effective means for the Agency to address these matters.[116]

According to the Panel, the restoration of such power would also alleviate the apprehension that issues may not be properly explored because of insufficient resources. The Agency could explore issues, including through appointing experts and hiring counsel. This is sometimes done now but is not guaranteed and, in any event, happens only after an individual litigant has incurred the financial risks of bringing an application forward. [117]

(f) Regulations are required

Although the Supreme Court ultimately accepted the Agency's reference to the voluntary Rail Code as a basis for finding an undue obstacle, the acceptance of such a Code does little to prevent the necessity of future litigation. Moreover, the Court's decision does not dispute the well-accepted premise that guidelines, codes etc. while clearly important to shaping an administrative body's decision, are not binding (lest a Tribunal fetter its discretion), but merely offer guidance.[118] The only benefit of the voluntary codes has been to transportation providers. Voluntary codes are not legislated and are not, on their own, enforceable.[119] Regulations, however, are enforceable and would require no greater effort on the part of the Agency. In 2001, the Canada Transportation Act Review Panel believed there was little evidence of problems or abuse with the use of codes over regulations and therefore, given "the general advantages of codes over regulatory processes," the Panel encouraged that approach wherever feasible.[120] However, the Panel did note that, in the event that problems arise the Agency could propose

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[116] Brian Flemming, C.M., Q.C. et al, *Canada Transportation Act Review: Vision and Balance* (Minister of Public Works and Government Services Canada, June 2001) at 248-249

[117] See e.g. *McKay Panos v. Air Canada*, CTA Decision No. 646-AT-A-2001(12 December 2001) online: <http://www.cta-otc.gc.ca/rulings-decisions/decisions/2001/A/AT/646-AT-A-2001_e.html>.

[118] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 72; *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2.

[119] Brian Flemming, C.M., Q.C. et al, *Canada Transportation Act Review: Vision and Balance* (Minister of Public Works and Government Services Canada, June 2001) at 246.

[120] Brian Flemming, C.M., Q.C. et al, *Canada Transportation Act Review: Vision and Balance* (Minister of Public Works and Government Services Canada, June 2001) at 248.

binding regulation. The costs associated with the VIA decision, and VIA's refusal to be bound by the Rail Code's, now evidence the problems associated with reliance on voluntary codes. Had clear regulations been in place, the entire litigation process might have been avoided. Regulations are required.

(g) The Canadian Human Rights Commission or the Canadian Transportation Agency?

Another major gap in the Agency's power and tools for determining "undue obstacle" applications, which is readily apparent post *VIA*, is the Agency's inability to award compensation for the pain and suffering associated with discrimination. Under the *CHRA*, individual damages are available (beyond merely compensating for "hard expenses").[121] However, the Agency is statutorily unable to order general damages, regardless of the severity of the harm caused. In some cases, therefore, there is little the Agency could order by way of appropriate remedy. In the "one person-one fare" case, the Agency can order a systemic change in airline policy and can order reimbursement of legal costs, but it cannot offer an amount to compensate for the frustration and discrimination experienced over the years of litigation to the three individual litigants involved in the case.[122]

The Canada Transportation Act Review Panel considered this very issue in its 2001 report to the Minister of Transportation, in part based on submissions from the CHRC.[123] The Panel believed that compensation for loss of dignity or hurt feelings arising from discrimination in the transportation system should be left exclusively to the CHRC, seemingly believing the CHRC alone had the requisite expertise. The same opinion was held by the FCA in *VIA Rail Canada Inc.* and *Canadian Transportation Agency*, (*Sikand*). In *Sikand*, the FCA found that the Agency's jurisdiction was limited to ensuring proper access to effective transportation services (moving people from point A to point B) and did not extend to customer service issues (including dignity issues) which otherwise arise during the transportation process.[124] The FCA determined that

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[121] *Canadian Human Rights Act*, R.S., 1985, c. H-6 at ss. 53(2)(e) and (3).
[122] *Canada Transportation Act*, S.C. 1996 c. 10, s. 24.1, 172(3); The "one person-one fare" case has two named individual applicants but the outcome of the case will also significantly impact on the intervener, Linda McKay Panos.
[123] Brian Flemming, C.M., Q.C. et al, *Canada Transportation Act Review: Vision and Balance* (Minister of Public Works and Government Services Canada, June 2001) at 246.
[124] *VIA Rail Canada Inc. v. Canadian Transportation Agency* 2006 FCA 45 (*Sikand*). – VIA Rail successfully appealed a decision an undue obstacle decision of the Agency. VIA's had only one wheelchair tie-down in economy and placed additional passengers using wheelchairs in first class. While such passengers were offered a free meal,

human rights issues do not fall within the mandate of the Agency. The Supreme Court of Canada denied leave to appeal from the FCA's decision, after it had granted leave in CCD's case, but before it had heard oral arguments. The refusal of leave should not be misunderstood as approval of the FCA decision in *Sikand.* On the contrary, the Supreme Court has addressed the FCA's incorrect reasoning by clearly stating that transportation and human rights issues are inextricably connected and within the mandate of the Agency, thereby defacto reversing the *Sikand* decision.[125]

Unfortunately, the Supreme Court's decision creates the anomaly that the Agency is now left regulating important human rights issues without appropriate remedial powers. As noted above, the Agency remains without the full panapoly of powers its colleague the Commission holds. As a result, persons with disabilities experiencing discrimination in the federal transportation network must either (a) opt for the CHRC, which arguably has less familiarity with transportation issues and which entails a much lengthier process or (b) endure a bifurcated process before two different administrative agencies. Either approach perverts basic access to justice principles. Moreover, unfortunately, access to the CHRC is not assured. Under section 41(1)(b) of the *CHRA* the Commission may defer a complaint to another forum in circumstances where the Commission is of the view that the "complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament" other than the *CHRA.* Historically, the Commission has referred complaints regarding national transportation matters to the Agency, regardless of its inability to award damages for the fact of discrimination or loss of dignity.[126] This is unlikely to stop; particularly now that the CHRC can be assured that the Agency will employ the appropriate human rights analysis.[127]

Now that the Agency's expertise has been pronounced, there is little logic left in forcing litigants into a duplicate process or else to forego compensation owed because of a lapse in the

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because they were served last (VIA's meal distribution started at the other end of the car), they had no choice of meal as did other passengers who could either choose where they sit in first class, or opt to buy a meal from economy.

[125] *CCD v. VIA* [2007] SCC 15 at para. 97

[126] Brian Flemming, C.M., Q.C. et al, *Canada Transportation Act Review: Vision and Balance* (Minister of Public Works and Government Services Canada, June 2001) at 246.

[127] In *Vlug v. Canadian Broadcasting Corp.* (2000), 38 C.H.R.R. D/404 (Can.Trib.) the Canadian Human Rights Tribunal elected to hear Mr. Vlug's complaint regarding the failure of a broadcaster to provide closed captioning despite the fact that the Canadian Radio-television and Telecommunications Commission (CRTC) had already pronounced upon the issue. According to the Tribunal, although the CRTC decisions are persuasive on technical issues, the CRTC applied a different legal test than the CHRT.

Agency's mandate. The Agency should be given the power to provide compensation for loss of dignity or hurt feelings from discrimination. The most effective way of doing so (with the broadest impact) would be to amend the *Canadian Human Rights Act*, to indicate that alternative human rights processes must provide for equivalent compensation mechanisms. Such an amendment would be in keeping with section 171 of the *CTA* which mandates the Agency and the Canadian Human Rights Commission to coordinate their activities, "in order to foster complementary policies and practices and to avoid jurisdictional conflicts".[128]

6. CONCLUSION

The Supreme Court's decision in *VIA* was the culmination of a hard fought, "David and Goliath" battle. It constitutes an incredibly important victory for persons with disabilities. The Court's decision addresses issues with the Agency significant in their own right given the importance of transportation issues to persons with disabilities. The decision also entrenches legal principles which extend beyond the purview of the Agency and the *CTA*, and which will affect broader human rights jurisprudence, with beneficial impact on cases yet to be decided.

Finally, the decision gives CCD the unassailable proof that has long been demanded of it by government that the current system is broken and badly in need of reform. In all other developed countries, disability groups do not have to risk their very existence in order to ensure that basic access requirements are part of the design process of trains and stations. Government standards and regulations ensure this occurs as a matter of course. Canadians with disabilities have now earned the right to demand of their government that it demonstrate the political will it has lacked for the last decade to enforce their basic human rights entitlements.

[128] *Canada Transportation Act*, S.C. 1996 c. 10, s. 171.