MOVING BACKWARDS:

CANADA'S STATE OF TRANSPORTATION ACCESSIBILITY IN AN INTERNATIONAL CONTEXT

FINAL REPORT TO THE COUNCIL OF CANADIANS WITH DISABILITIES

Researcher: DAVID BAKER

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EXECUTIVE SUMMARY

Background

Without the assertiveness of the disabled community worldwide, the current high level of recognition globally that accessibility is a basic human right would never have occurred. CCD, as Canada's national cross-disability organization, has displayed leadership during key initiatives concerning transportation accessibility at key junctures ever since it was founded in the late 1970's, including:

- Expert testimony in the *Clariss Kelly v. VIA Rail* case, decided by the Canadian Transportation Commission in 1979;
- Expert testimony on accessibility to the Parliamentary Committee on the Status of Disabled and Handicapped Persons leading to important recommendations concerning transportation accessibility in the groundbreaking *Obstacles Report*;
- Closely consulted by the Liberal Transport Minister during establishment of *National Policy on Accessible Transportation*, and accessibility tariffs during the late 1970's and early 1980's;
- Closely consulted by Conservative government during general deregulation of national transportation modes, which led to strengthening accessibility requirements for persons with disabilities in the *National (now Canada) Transportation Act* of 1987;
- Closely consulted by the National (now Canadian) Transportation Agency during the enactment of accessibility regulations in the late 1980's and the early 1990's.

Over this period of time [1979-1993] Canada came to be recognized internationally as a world leader in transportation accessibility. The federal government, in partnership with disability organizations including CCD, provided the leadership. Change occurred because it was mutually recognized and understood that voluntary measures would never remove the barriers excluding disabled travelers. Years of experience had demonstrated that mandatory government action was the only hope.

In the 1960's, studies were done on how persons in wheelchairs move through their environment. Using assumptions concerning wheelchair sizes that seem modest in light of the more recent development of tilt-recline and other features in sophisticated electric wheelchairs and the widespread use of scooters and cambered wheels, standard measures for door widths, turning radius, tie-downs and washroom designs were established. While they are sorely in need of review, in light of the increasing sizes of today's wheelchairs, these measures quickly were adopted internationally and formed the basis of international movements to legislate first building and then, subsequently, transportation accessibility. "Accessible" is therefore a term that has substantive content. It defines minimal level of access based on these internationality accepted "prescription standards" or measures".

By 1993, accessible technologies had become available for all transportation modes. Technological constraints ceased to be a limiting factor that would justify a failure to accommodate and include persons with disabilities. The sole issue was whether providers were prepared to utilize these technologies. The combination of government action and accessible technology held out the certain promise of full accessibility.

In 1993, the federal government changed. At the urging of industry, and without consulting persons with disabilities, the new Liberal government decided that there was no longer any need for accessibility regulations. It announced that voluntary codes of practice would suffice to continue progress towards full accessibility. Regulatory projects initiated by the National Transportation Agency (now known as the Canadian Transportation Agency or CTA) that were close to completion under the outgoing government were discontinued.

As voluntary codes were released, representatives of major transportation providers publicly affirmed their willingness to adhere to them. When criticized, the government and transportation providers maintained that the change would have no impact on the pace of change towards full accessibility. Persons with disabilities were handed a *fait accompli*. Their views didn't matter. Only time would tell whether the government and industry were telling the truth.

The change in policy meant that enforcement of accessibility was exclusively left to individual applications to the CTA, a body that had not addressed major transportation barriers through adjudication of individual cases, since its predecessor the Canadian Transportation Commission had gone out of existence.

Through its international networks, CCD was learning of sustained progress being made towards full accessibility in most other developing countries. Meanwhile Canada was experiencing regression in many areas. At least two of the most significant examples of regression involved violation of voluntary codes and broken promises by government and industry. One involved the VIA Rail purchase of inaccessible passenger rail cars that could only have been sold to countries without rail accessibility standards. Another involved the withdrawal of fare reductions for personal attendants providing in-flight services to persons with disabilities.

CCD was disturbed to learn that Canada was quickly regressing from a position of world leadership in accessibility to a position more consistent with the complete absence of regulation such as prevails in third world countries. It decided that a major review was required, so that changes occurring in Canada could be assessed in an international context.

The Study

Accessibility involves removing barriers that prevent people with disabilities from enjoying equal access to and benefit from transportation available to the general public. In relation to persons who use wheelchairs, "accessible" is a defined term. It is quickly assuming similar status in relation to other transportation barriers as well. Barriers can impede persons with a range of different disabilities. While CCD is aware of the importance of addressing this entire range of issues, limited resources meant a detailed international review of all accessibility issues was not possible. Consequently this study focuses on wheelchair access. Provider resistance is greatest to granting access to persons in wheelchairs because of the costs involved. Experience indicates that designs which

include people in wheelchairs are generally inclusive of those with less severe mobility disabilities and sensory disabilities as well. CCD is fully aware of the accessibility issues of all persons with disabilities and intends that this Report be used to encourage action to secure accessibility for all.

A legal consultant was retained who had done similar international regulatory comparisons for the federal and Ontario governments in the past. He was directed to conduct a comparative analysis of regulatory frameworks governing accessibility in the United States, the United Kingdom, the European Community and Australia. He was to examine progress towards an ideal of full inclusion, examine the effectiveness of enforcement and identify the potential for regression in the face of changing political and economic realities. He was also to attempt to gauge government resolve, industry opposition and consumer satisfaction with accessibility initiatives in each jurisdiction.

He was then to examine the Canadian situation, make international comparisons between Canada and these other jurisdictions and make recommendations for reform here in Canada, where appropriate.

Findings: 1. The United States

Through the 1970's and 80's the Americans engaged in pioneering, if piecemeal, legislation and relied heavily on litigation to define its accessibility requirements. One of the major accomplishments during this early period was the establishment of the world's leading source of expertise on regulatory standards of accessibility: the federal government's Architectural Barrier and Transportation Compliance ("Access") Board.

The full Report reviews the history of this legislation and litigation, which indicate that the experience of Canada's recent experience with "*ad hoc*ery" and voluntary measures has not been unique, nor should it have been unforeseen.

Twenty years of false starts and periodic regression ended with the passage of the *Americans with Disabilities Act (ADA)* in 1990 and a companion piece of legislation, the *Air Carriers Access Act of 1988.* The latter was passed under President Ronald Regan and the former, under George Bush.

The *ADA* was a big "P" political issue. According to polling done for Boydon Gray, Bush's general counsel, Bush's support for the *ADA* was the second most important factor in securing his election. No disability issue in history has achieved comparable prominence in a national election campaign.

Under the *ADA,* the Access Board was given broad authority to develop and interpret detailed accessibility regulations for all modes of public transportation. The Access Board gives transportation providers access to both detailed manuals and its expertise to ensure no confusion exists about how standards will be applied. Because the Access Board makes distinguishing compliance from non-compliance easy, the major issue in the U.S. is whether the enforcement mechanism creates an effective deterrent.

Depending on the mode of transportation, enforcement is primarily handled by either the Department of Transportation or the Department of Justice (i.e. public authorities), although individuals can enforce their rights privately if they wish. The public enforcement authorities can seek stiff fines and mandatory orders, in addition to seeking full compensation for travelers with disabilities. Strategic litigation by public authorities, combined with significant fines and serious compensatory awards, means that providers comply with the *ADA* in order to avoid litigation.

Since the regulations under the *ADA* came into effect there has been very little litigation. Effective interpretation and enforcement have worked. Air travel service standards (i.e. as opposed to accessible design of planes and airports) had been the only exception. Airlines felt the economic downturn they had experienced in the 1990's and again following the events of 9/11, together with a weak public enforcement mechanism, signaled a lack of government resolve. Sensing weakness they tried to take advantage. As public awareness

of air access litigation futility increased, the government had to decide whether accessibility was truly a priority. The Bush administration recently strengthened the enforcement mechanism and compliance is reported to be improving, with reliance on litigation decreasing. America is clearly committed to accessibility.

Compliance across all modes has been remarkable. Trains and major train stations are fully compliant. Reports indicate that the requirement that all stations [i.e. minor stations] be wheelchair accessible by 2010 will be met. Municipal transportation has been a remarkable success, to the point that the biggest issue for operators is luring paratransit riders back onto their fully accessible conventional systems. American airports and airplanes are world leaders in accessibility, and because of their influence on world markets, American standards of aircraft design are quickly becoming international standards. Even intercity bus has been a success, despite initial reservations expressed by the country's major provider: Greyhound.

Generally, accessible transportation in the United States has been an unqualified success. Providers have found the consistent application of clear regulatory standards means competitors can get no advantage by failing to comply. People with disabilities are pleased with the outcomes and grateful for the firm resolve demonstrated by public enforcement mechanisms. The example of consumer attitudes most often cited is the case of high profile transportation advocacy group ADAPT. Change has been so uniformly satisfactory that this group no longer advocates on the issue that was its *raison d'être.* ADAPT now lobbies on long term care issues. Even the election of an administration favouring a neo-conservative agenda, and the economic downturn in the airline industry have not decreased government determination to vigorously enforce compliance with mandatory access standards.

Findings 2 The United Kingdom

Like Europe generally, the UK was a slow convert to the American model of regulated accessibility standards and public enforcement of the standards. This does not mean that no attention was paid to the issue of accessibility prior to 1995. In these earlier years, governments used their heavy involvement in subsidizing or holding a major ownership stake in various transportation sectors to leverage accessibility. While progress was noted in many sectors, no long term goals were established that would eventually produce full accessibility. Progress was erratic. A system-wide and long-term strategy was required for full access to be achieved.

The Labour government of Prime Minister Tony Blair was the first in Europe to signal its interest in the American model with passage of the *Disability Discrimination Act of 1995 (DDA).* The Mobility and Inclusion Unit of the UK Department of Transport has been responsible for translating codes of "best practices" into regulations. Comparable to regulations in the United States, there are now regulations governing the design of buses that carry more than 22 passengers and trains. One powerful legal sanction that is applied is that new vehicles must receive a licence from the Inclusion Unit, certifying compliance with the *DDA*, before going into service. For example, the inaccessible trains recently purchased by VIA Rail were designed before the *DDA* was passed in 1995, and assembly began before the rail regulations were finalized in 1998. Nevertheless, when the manufacturer sought a licence to operate the trains on British rails, it was refused.

While major rail stations are now accessible, smaller stations (with their century old "walkover " design) have until 2024 to meet standards. In the meantime, there is an obligation on providers to make "reasonable adjustments to services" (comparable to the Canadian human rights concept of making "accommodation to the point of undue hardship"). While the British standards governing new vehicles are rigorous and the duty to retrofit is part of the obligation to make reasonable adjustments, old trains that are not fully accessible may continue to be operated until 2035. Progress with buses is more

advanced, with an estimated 90% of buses in the greater London area already compliant with accessibility standards.

The body charged with enforcing the law and the regulations (i.e. as opposed to developing regulations and issuing licences) is the recently established Disability Rights Commission, which commenced operations in 2000. The government demonstrated its determination to achieve full compliance with its legislation by appointing high profile disability activist Bert Massie as the Commission's first Chair. It has already achieved a widely heralded result in the courts with the successful prosecution of discount airline Ryanair for failure to make reasonable adjustments.

The UK accessibility initiative, based on the American model, was quickly emulated by Europe as a whole. European standards will generally supersede domestic standards. As will be seen, the European standards have been based on the UK model, and leadership in the European initiative came from the UK's Ann Frye, who heads its Mobility and Inclusion Unit.

Findings 3 European Community

The European Community has been tightening the integration of its member states in the interests of strengthening the economic union. Transportation, because of its economic and cross-border implications, is an area where standardization has been a priority. Also, there is an attempt being made to ensure that all goods manufactured in Europe do not encounter non-tariff barriers, and can be sold and used throughout all member states. Access standards that were emerging in member countries, including the UK, held the potential of becoming non-tariff barriers. Since the Community established a goal of increasing the rate of employment amongst persons with a disability by 70% by the year 2010, it had also been looking at the issue of how access standards would contribute to the achievement of this goal. All of these factors led the EU into establishing mandatory access standards with Community-wide application.

In 1985, the European Council of Ministers established an Accessibility and Inclusion Committee chaired by Ann Frye of the UK's Department of Transportation. Ms. Frye also headed a number of task forces studying best practices and technical standards for European produced transportation technologies as part of a process called COST that involved representatives from a number of European states.

Not surprisingly, the COST process produced recommendations that closely reflected the UK standards for intercity buses and rail cars. These recommendations in turn led to the adoption of European Directives that member states are required to adopt into their domestic laws and enforce. In the event a member states fails to follow the Community's Directive, the Community has the right to act unilaterally against that state. As a consequence, in these two areas of vehicle design there are now European standards in effect that are based on the UK standards, which in turn closely paralleled those in effect in the United States.

The airline industry had attempted to stave off further regulation of service standards by promising to self-regulate and adhere to a voluntary "Charter" of accessibility rights. The European Civil Aviation Authority has rejected this proposal, and the EU has now released draft air accessibility regulations. One noteworthy difference from North American air standards is the EU proposal that airports rather than airlines be responsible for boarding and airport accessibility service. Unlike the directives governing train and bus design, these regulations, once finalized, will immediately have the force of law and be enforceable by the European Court rather than by domestic [i.e. national] tribunals.

Regulation of accessibility has become a major priority for the EU. The European Disability Forum, a body with representation from national councils of persons with disability in all member states, is strongly supportive of the policy direction being taken by the Council of Ministers. This initiative also has widespread support amongst members of the European Parliament.

Findings 4 Australia

Following the passage of the country's *Disability Discrimination Act of 1992*, but before passage of mandatory access standards, there was a series of high profile cases that captured the public's imagination and demonstrated the determination of the country's human rights commission and courts to ensure meaningful accessibility. The most important of these cases involved the issuance of interim judicial orders that eventually led to settlements providing for enhanced accessibility. Purchases of new transportation vehicles were halted by court order, pending a ruling on whether their accessibility met legislative requirements. Before these cases actually went to trial (delay in these circumstances working in favour of accessibility rather than against it), the providers changed from the inaccessible vehicles originally proposed to accessible vehicles. Based on the outcome of these cases, it was providers, more so than persons with disabilities, who agitated for access standards as an alternative to litigation.

In an effort to introduce an element of predictability and planning into the process, the Australian Transportation Council of Ministers (with representation from the federal government and all the states) decided to support the introduction of accessibility regulations. Following a respected and inclusive consultation process coordinated by the country's human rights commission, the *Disability Standards for Accessible Public Transportation* became law in 2002. They differ from the "prescriptive" standards in effect in other jurisdictions by stating accessibility goals "functionally" and by covering all modes of transportation with a common standard. Functional standards describe the desired outcomes, rather than prescribing the means and measurements required to achieve those outcomes. The provider is given broad latitude to select the means of achieving these outcomes. It was explained that Australia wished maximum flexibility to purchase transportation technologies from the Asian as well as the European and North American markets. For this reason standards based on outcomes rather than precise measures were deemed preferable.

To date the state and federal governments have provided the funding necessary to allow state funded services such as ferry, rail and subsidized private operators of taxis (i.e. the major domestic means of public transportation) to meet all timetables imposed under the regulations. Some jurisdictions, such as New South Wales (which recently hosted the Olympic Games) are well ahead of schedule in many respects. Compliance means that the regulations have not yet been subjected to court challenges. A recent decision to reduce government funding of some key initiatives has not yet produced missed deadlines, but signals that use of the enforcement mechanism will soon begin. Missed deadlines will lead to litigation, including disputes about the precise meaning of the generally worded "functional" standards. Because the standards are vague, and enforcement is left to privately initiated cases going through the courts, it is difficult for an outside observer to be optimistic about the eventual outcome.

Leadership in the disabled community remains convinced that the Australian model of functional standards will be effective, however caution is urged due to the general nature of the standards and the reliance on litigation for enforcement. If public funding does not continue to finance the anticipated progress towards full accessibility, Australians will learn whether their courts are up to the challenge.

The Australian model appears to hold great appeal for its Asia Pacific trading partners, such as Japan, Malaysia, Singapore and New Zealand, which have all indicated an intention of adopting and following the Australian model. They are moving forward with reforms, without awaiting the outcome of early litigation under the Australian regulations.

Canadian Experience

While the regulatory mechanisms selected by the various jurisdictions being examined may vary, it is clear that all jurisdictions recognize that the most efficient and effective time to ensure accessibility is when major capital expenditures are being made. This is when accessibility can most cost-effectively be achieved. Regulations, with deadlines,

prescribed standards and licensing, are the primary mechanism for ensuring long-term progress towards full accessibility.

Recently Canada has gone in the opposite direction. Such federal regulatory standards as do exist concern training and service standards rather than vehicle and station design and tariffs. They are enforced by the Canadian Transportation Agency (the "Agency") through an efficient and effective process of written complaints and summary disposition of cases.

It is the issues of vehicle design and tariffs that have frustrated the Agency and caused regression to occur. The Agency decided a case in 1993 called *Buchholz v. Air Canada* concerning additional seats required by reason of a passenger's disability. The Agency decided Air Canada's policies constituted "undue obstacles to the mobility" of persons with disabilities. When the incoming Liberal government declined to enact the Agency's draft regulation, which reflected the outcome in *Buchholz*, and had been approved by the outgoing government, the airline industry interpreted this as a lack of resolve on the part of the government and openly defied the Agency. Even Air Canada refused to abide by the Agency's decision in *Buchholz*. The new Transport Minister publicly invited the industry to comply with the *Buchholz* order voluntarily, and stave off regulation. In 1996 the head of the Air Transportation Association of Canada (ATAC) flatly refused, promising ATAC's members would adhere to the *status quo* (i.e. half fares for additional seats required by reason of disability), but would not comply with either *Buchholz* or the Minister's proposal. This was accessibility's defining moment. The Minister backed down, the Agency's authority was undermined and the process of regression had begun. As of the time of writing, many ATAC members have disregarded the promise made on their behalf in 1996 and begun charging full fares for extra seats required by reason of disability. Charging these additional fares, re-erects a barrier for people with disabilities that has not existed in Canada since 1978.

The recent VIA Rail incident is convincing evidence that Canada has become a dumping ground for inaccessible transportation vehicles that cannot be brought into service in

other developed countries. VIA asserts that it got a great deal by buying inaccessible trains, saving taxpayers approximately $300 million in the process. The Minister of Transportation had promised people with disabilities in 2000 that the trains would meet the Agency's voluntary *Rail Code.* The Agency has ruled that the new cars fail to meet these standards in numerous respects and, further, that the cost of making modifications would be relatively modest. The federal government has taken no steps to make good on the Minister's promise. The inaccessible trains are still in operation.

VIA has appealed CCD's application concerning the trains to the Federal Court of Canada a total of three times, not including the motion it brought to have the Agency found in contempt of court. It currently has an appeal pending in the Federal Court of Appeal, with arguments scheduled for Toronto November 22 and 23. The grounds for VIA's appeal are that the Agency lacks the jurisdiction to address issues of rail car accessibility (i.e. "design"), and that the procedures followed by the Agency (which took almost three years, at enormous expense to CCD) were not fair to VIA. Clearly the federal government has not been willing to direct VIA to comply with the standards of accessibility promised by the previous Minister, nor has it provided VIA with the additional funds to make the changes required by the Agency's order. Meanwhile the litigation process grinds on, at a combined cost to the parties and the Agency that probably exceeds the costs of making the modifications necessary to bring the cars into compliance with the Agency's order.

If VIA is successful on its appeal, it will have established that the Agency is powerless to address accessibility issues. This would simply make explicit, what appears to have been the reality in Canada for some time: regulators lack the necessary authority to adequately deal with accessibility issues. Even if the appeal is ultimately lost, VIA has already proven that voluntary accessibility codes lay out maximum not minimum standards, and are therefore inadequate to move towards the goal of full accessibility. Providers are thereby encouraged to litigate all accessibility cases, in order to see how far the Agency will allow them to compromise accessibility.

Conclusions and Recommendations

It is no exaggeration to say that accessibility standards, at least for modes of transportation within federal government's jurisdiction, are a thing of the past. Canada is unique amongst the developed countries under review in that it is weakening rather than strengthening regulatory standards. It is also relying increasingly on litigation to determine issues that regulatory standards, had they existed, could have addressed more effectively.

The representatives of the federal government and industry have made promises to people with disabilities that they have not kept. Voluntary codes of practice have been proven to be ineffective. The federal government has relinquished its historic leadership position, and disability organizations have been placed in the position of attempting to enforce compliance, a role for which they are neither organizationally or financially equipped.

This Report's primary recommendation is that Canada abandon any illusion that its regulatory system is functioning and adopt the American model to the fullest extent possible. This would include the wholesale adoption of U.S. regulatory accessibility standards (for which no legislative change would be required) and utilization of their Access Board guidelines and expertise. It would also require that either the Department of Justice or Transport Canada be equipped, both legislatively and financially, to act in a prosecutorial role as part of an effective enforcement mechanism. This is basically the model selected in the recently introduced *Accessibility for Ontarians with Disabilities Act, 2004*, although, even after it is enacted, it will be many years before it is possible to begin to assess the effectiveness of this law on transportation modes in provincial jurisdiction.

The Minister's Advisory Committee on Accessible Transportation (ACAT) was for a long time stalemated by an artificially imposed requirement of consensus between representatives of providers and people with disabilities. While this requirement has changed, Transport Canada and in particular the Minister continue to attach a low priority

to ACAT's recommendations. ACAT does not address the big issues of the day. The former Minister's empty promise that the VIA trains would meet the *Rail Code* has undermined its credibility. It has done nothing to resolve the "One person one fare" issue. It is recommended that the government restore ACAT's credibility by ensuring that the Renaissance cars are brought up to *Rail Code* standards. In the absence of immediate action, consumers must decide whether ACAT continues to serve an effective purpose. The disabled community requires an effective means of advising the Minister. Industry clearly has many other lobbying mechanisms available to it. In light of progress being achieved elsewhere in the world and the regression occurring in Canada, ACAT members must consider whether they are part of the problem rather than part of the solution.

At this point it is difficult to predict how much damage has been done to the Agency's jurisdiction to respond to applications pursuant to s. 172 of the *Act.* Even if VIA's appeal is unsuccessful, it has been made clear that the Agency would benefit from having clearer authority to issue interim decisions that allow timely accessibility decisions to be made, and the ability to award stiff penalties and real compensatory awards that would prevent providers from controlling its processes by proceeding in defiance of the Agency. Such orders would also encourage prior consideration of the implications of non-compliance with Canadian accessibility standards and encourage providers to cooperate with the prompt resolution of applications. The options are clear. Inaction by the government would confirm that it is not committed to the goal of accessibility.

Action is urgently required lest Canada become a dumping ground for the inaccessible transportation vehicles from other jurisdictions, which are compelling compliance with rigorous access standards.

Canada is alone amongst the developed countries studied, in its reliance on voluntary standards. Clear evidence of regression is evident. Responsibility for action clearly lies with the federal government and with the representatives of persons with disabilities.

INTRODUCTION

As in all other areas, the advancement of rights for persons with disabilities depends first and foremost on them to assert their rights and demand others recognize the legitimacy of their claims.

CCD, as Canada's national cross-disability organization, has displayed leadership concerning transportation accessibility at key junctions ever since it was founded in the late 1970's, including:

- Expert testimony in the *Clariss Kelly v. VIA Rail* case, decided by the Canadian Transportation Commission in 1979;
- Expert testimony on transportation accessibility to the Special Parliamentary Committee on the Disabled and Handicapped leading to important recommendations concerning transportation accessibility in the groundbreaking *Obstacles Report***;**
- Closely consulted by the Liberal Transport Minister during establishment of *National Policy on Accessible Transportation*, and accessibility tariffs during the late 1970's and early 1980's;
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Over this period of time [1979-1993], Canada came to be recognized internationally as a world leader in transportation accessibility. The federal government, in partnership with disability organizations including CCD, provided the leadership. Over this period of time, it was fully recognized and understood that voluntary measures would never remove the obstacles excluding disabled travelers. Government action was the only hope.

In the 1960's, studies were done on how persons in wheelchairs move through their environment. Using assumptions concerning wheelchair sizes that seem modest in light of the more recent development of tilt-recline and other features and widespread use of scooters and cambered wheels, standard measures for door widths, turning radius, tie-downs and washroom designs were established. While they are sorely in need of review in light of the increasing sizes of today's wheelchairs, these measure quickly were adopted internationally and formed the basis of international movements to legislate first building, and subsequently transportation accessibility. This research led to legislation that ensured the word "accessible" had a clear and consistent meaning.

By 1993, accessible vehicles had become available for all transportation modes. Technological constraints ceased to be a limiting factor that would justify failure to accommodate and include persons with disabilities. The sole issue was whether providers were prepared to utilize these technologies. The combination of government action and accessible technology held the out the certain promise of full accessibility.

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systemically addressed major transportation barriers through adjudication of individual cases, since its predecessor the Canadian Transportation Commission had gone out of existence.

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CCD was disturbed that Canada was quickly regressing from a position of world leadership in accessibility to a position more consistent with the complete absence of regulation such as prevails in third world countries. It decided that a major review was required, so that changes occurring in Canada could be assessed in an international context. Before taking action, it wished to have a firm basis upon which to base its decision-making.

THE STUDY

Accessibility involves removing barriers that prevent people with disabilities from enjoying equal access to and benefit from transportation available to the general public. Barriers can impede persons with a range of different disabilities. While CCD was aware of the importance of addressing this entire range of issues, limited resources meant a detailed international review of all accessibility issues was not possible. Consequently this study focuses on wheelchair access. Provider resistance is greatest to granting access to persons in wheelchairs because of the costs involved. Experience indicates that designs which include people in wheelchairs generally are inclusive of those with less severe mobility disabilities and sensory disabilities as well. CCD is fully aware of the accessibility issues of all persons with disabilities and intends that this Report be used to encourage action to secure accessibility for all.

The Report focuses on urban transit, inter-urban bus, rail and air. Obviously other modes exist and could have been studied, but these modes were selected as priorities in order to keep the Report to manageable proportions.

A legal consultant was retained who had done similar international regulatory comparisons for the federal and Ontario governments in the past. He was directed to conduct a comparative analysis of regulatory frameworks governing accessibility in the United States, the United Kingdom, the European Community and Australia. He was to examine progress towards an ideal of full inclusion, examine the effectiveness of enforcement and identify the potential for regression in the face of changing political and economic realities. He was also to attempt to gauge government resolve, industry opposition and consumer satisfaction with accessibility initiatives in each jurisdiction.

He was then to examine the Canadian situation, make international comparisons between Canada and these other jurisdictions and make recommendations for reform here in Canada, where appropriate.

TRANSPORTATION: A PUBLIC GOOD IN CANADA

Some of the earliest examples of government regulation of private industry can be found in the transportation sector. Starting in pre-Elizabethan times, the common law courts of England compelled ferry and coach operators to provide transportation to all, without discrimination. Known as "common carriers", these modes of public transport operated royal or de facto monopolies. By favouring some and denying others, serious economic and social harm could be done. In order to ensure that everyone enjoyed an equal right to travel, the courts prohibited discrimination and required that equitable access be provided to all on equitable terms.

Thus even in an era when government intervention beyond the exercise of royal authority was virtually unknown, the uniquely "public" role of privately operated transportation was recognized.

Sometimes public transportation became so essential to the public interest that governments around the world became involved as operators. Thus urban transit services in virtually every city in every developed country operate as a public utility, or according to public licensing. It is recognized that competition amongst private operators will not provide the uniform level of service at an affordable cost that is deemed necessary. By granting monopolies on specified terms, or attaching terms to the provision of government subsidies, urban transportation was highly regulated from the outset.

Over the years, the common law role of the courts exercising its jurisdiction over common carriers was increasingly replaced by a more systematic and proactive form of government regulation. Provincial highway transport boards licensed and regulated inter-city bus operators. At the federal level the Canadian Transportation Commission regulated modes of transportation under federal jurisdiction, including air, rail, and ferries. These regulators were created by statute, and exercised broad discretionary powers to regulate competition through issuing licenses, fixing the terms of carriage and setting tariffs. Their discretion was to be exercised either to advance specific government

policies, or to "advance the public interest". Unlike courts, they had staffs with expertise in a variety of areas, and engaged in a broad range of specialized regulatory functions.

These regulatory agencies could operate proactively when reviewing licenses or setting tariffs, or they could respond to complaints filed by private citizens. It was when responding to the complaints of persons with disabilities that the regulatory agencies first came to consider the issue of accessibility. While the complaints were few and far between, presumably because precedents were few and people with disabilities lacked the financial means of accessing the legal process, the results generally confirmed that "the public interest" included the interests of people with disabilities, and the wider public interest would be best served if people with disabilities could have effective access to the particular mode of transportation in question.

Thus for example, in the 1979 case of wheelchair user Clariss Kelly, the Rail Transport Committee of the Canadian Transportation Commission held VIA Rail responsible for ensuring that she had access to its passenger trains in a number of stations across the country.[1]

1981 was proclaimed by the United Nations to be the International Year for Disabled Persons. To mark this year the Canadian government struck the Special Parliamentary Committee on the Disabled and the Handicapped, chaired by David Smith. In its Report called *Obstacles*, the Committee examined systemic barriers and called for government intervention to remove them. Several of the *Obstacles* recommendations related to transportation.

Recommendation 83 called for the development of a National Policy on Transportation for Disabled Persons. Following extensive consultation, the Minister of Transportation Lloyd Axworthy released a National Policy that provided:

[1] 1980 CTC Order No. R-30742 pursuant to s. 281 of the *Railway Act*, R.S.C. 1970

> The Policy, in keeping with the National Transportation Act, is to ensure the provision of safe, reasonable and equitable access to the transportation modes under federal jurisdiction and to remove the barriers to travel, both physical and attitudinal, experienced by disabled persons.

The Canadian Transportation Commission continued to rule on individual cases[2] and to move forward at the request of government on systemic issues such as that of "one person one fare".[3]

In 1987 a newly elected Progressive Conservative Government decided that it was time to deregulate transportation. After introducing a Bill in Parliament that would have removed the CTC's jurisdiction to remove obstacles experienced by persons with disabilities, the government amended the Bill to preserve and, arguably, to expand these powers. The researcher responsible for this Report, acting on behalf of several disability groups, was actively involved in developing the final language in sections 170-172, along with a Transport Canada Director General who was consulting Ministry legal counsel and the Minister's office. The new federal regulatory body that replaced the CTC, was to have the jurisdiction to initiate accessibility regulations and to adjudicate individual applications to review any obstacle that could have been removed by regulation. The statute reads as follows:

[2] *Ruth Adelia v. Air Canada* CTC Decision No. 10205 decided air travelers have the right to decide for themselves [i.e. the right of "self-determination"] whether or not they require the assistance of an attendant while flying.

[3] This issue was referred to the CTC by the Minister of Transportation in 1981. While preliminary rulings were released, suggesting both national policy and the *Charter of Rights and Freedoms* support the implementation of *Obstacles* Recommendation 88, the statute was repealed by a Progressive Conservative government and replaced by Bill C-131, the *National Transportation Act* before a final decision could be released.

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.

Incorporation by reference

(2) Regulations made under subsection (1) incorporating standards or enactments by reference may incorporate them as amended from time to time.

Exemption

(3) The Agency may, with the approval of the Governor in Council, make orders exempting specified persons, means of transportation, services or related facilities and premises from the application of regulations made under subsection (1).

S.C. 1996, c. 10, s. 170, in force July 1, 1996 (SI/96-53).

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.

S.C. 1996, c. 10, s. 171, in force July 1, 1996 (SI/96-53).

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.

S.C. 1996, c. 10, s. 172, in force July 1, 1996 (SI/96-53).

Between 1987 and 1993 the National Transportation Agency (NTA) enacted few regulations and proceeded as if the airline obligations contained in what had formerly been the mandatory terms of their tariffs remained in effect. Cases over this period basically involved enforcement of the status quo, with remedies involving staff training rather than systemic decisions that reflected shifts in policy one way or the other.

Industry defies the NTA and resists attempts at regulation

The one attempt the Agency made to adjust the status quo became the turning point in Canadian regulation generally.

In 1992 the NTA conducted consultations with groups representing persons with disabilities and the airline industry respecting fares for attendants of persons with disabilities. At that time the *status quo* of 50% fare reductions had been maintained by the industry, even though their tariffs were no longer mandatory and subject to review as they had been under the CTC. Representatives of persons with disabilities such as the Council of Canadians with Disabilities (CCD) continued as they had throughout the 1980's to press for enactment of *Obstacles* Recommendation 88, which recommended what had come to be known as "one person one fare". Industry opposed regulation.

In August 1993 the NTA released a decision[4] which represented a compromise between the positions of industry and CCD. It held that it had been an undue obstacle for the airline to charge any fare for additional seats required due to disability (e.g. where the passenger must lie on a stretcher) which are occupied by the passenger with a disability or to charge more than 25% of the applicable air fare for a seat occupied by an attendant due to a person's disability. The decision was not appealed by Air Canada. It might have been assumed that the issue had therefore been resolved, at least in so far as Air Canada was concerned. Remarkably Air Canada disregarded the *Buchholz* decision and carried on as if it had never happened, continuing to charge passengers with disabilities fares that it knew to represent undue obstacles to their mobility.

Later that year the NTA with the knowledge and approval of the Conservative government released draft amendments to the *Air Transportation Regulations* that partially addressed the fare for attendant issue. Accompanying the draft *Regulations* was a Regulatory Impact Analysis Statement that demonstrated that the real cost of reducing attendant fares would be minimal. The regulation confined itself to the attendant fare issue, and following its own conclusions in *Buchholz* would have required a 75% fare reduction. The regulation did not address the fares to be charged persons who occupied more than one seat due to disability, nor did it apply to fares for attendants on aircraft with fewer than 30 seats.

Voluntary Guidelines Replace Regulations

In 1994, the new Liberal government amended the *Air Transportation Regulations,* however the provisions in the draft concerning "one-person one-fare" had been removed. At the same time as the *Regulations* were gazetted, the government released a "regulatory proposal" together with draft regulations that provided for a 75% fare reduction for a disabled passenger's attendant. The Minister invited comment on his proposal.

[4] *Buchholz v. Air Canada* NTA Decision No. 1993-A-252

A year and a half later in June of 1995, the Minister of Transportation sent a letter to the Air Transportation Association of Canada (ATAC) inviting it to voluntarily adopt a "one-person one-fare" policy as an alternative to the government issuing a regulation. The Minister invited ATAC to develop a plan for accommodating affected passengers, as an alternative to the proposal to regulate a 75% discount for the attendant's fare.

In October of this year, two things happened that symbolized how the future would unfold. CCD appeared before the Parliamentary Standing Committee on Transportation, which was holding hearings on Bill C-101, the proposed new *Canada Transportation Act.* CCD proposed that more extensive use be made of regulations to remove barriers to the mobility of persons with disabilities. At virtually the same time, ATAC was responding to the Minister's letter. ATAC stated that its "voluntary" 50% reduction in the fares charged attendants should be accepted as sufficient. It refused to go any further, but promised its members would maintain the status quo.

By this time it had become clear that ATAC lobbying had prevailed with the Minister. It was understood that the government was no longer willing to issue accessibility regulations. In November 1995, the NTA for the first time mused about using "industry guidelines" as an alternative to regulations. Guidelines, it explained, would be minimum standards that air carriers would be encouraged to meet or exceed. In March 1996, the NTA released a "Draft Code of Practice". While the Code's provisions were to be voluntary, air carriers are advised that they are to meet or exceed them "wherever possible". Notable by its absence from the Code was any reference to the "one-person one-fare" issue.

Following enactment of the 1994 *Air Transportation Regulation*, which essentially did nothing more than codify the provisions of mandatory tariffs in effect since the early 1980's, no further regulations were enacted. Regulations had clearly been contemplated by Parliament as the primary mechanism for establishing access standards for persons with disabilities. Both transportation legislation and the *Canadian Human Rights Act* provide mechanisms for enacting regulations. The existence of these mechanisms led

CCD to conclude that existing legislation could be made to work without new initiatives such as the introduction of a *Canadians with Disabilities Act.*[5]

In October 1997 the Minister of Transportation wrote to ATAC. The Minister indicated that the issue of attendant fares remained outstanding and requested the current industry position. ATAC briefed the Minister's Advisory Committee on Accessible Transportation (ACAT) the following month. It opposed regulation, saying its members were firm in their commitment to a 50% fare reduction in attendant fares. It refused to budge on the amount of the fare.

In May 1998 ACAT struck a Subcommittee on Attendant Air Fares, comprised of two representatives from both industry and disability organizations. The Subcommittee was to have a consensus report indicating how the attendant airfare issue was to be resolved in the hands of the Minister by October 2, 1998. No recommendation ever emerged from this Subcommittee.

When the issue next arose before the Canadian Transportation Agency (which replaced the NTA with the proclamation of the *Canada Transportation Act*), it found a way to avoid the issue, holding additional fares paid on behalf of a person with a disability was not an undue obstacle because an insurer had absorbed the costs.[6] Subsequent applications concerning the issue were all adjourned indefinitely.

While this was occurring, discount fliers such as West Jet and even Air Canada's subsidiary Jazz broke ATAC's promise and did away with attendant fare reductions altogether. Unable to allow the regression to continue unchallenged, CCD together with Eric Norman and Joanne Neubauer have raised the issue before the CTA with a systemic application that challenges airline tariffs, along with airport charges and air security taxes that are imposed on a per seat basis. This application was filed November 19, 2002, and

[5] See Lana Kerzner and David Baker, *A Canadians with Disabilities Act?* May 14, 1999 and *Taking the Lead: Council of Canadians with Disabilities Proposals for Amending the Canadian Human Rights Act,* October 1999.
[6] *Smith v. Air Canada* CTA Decision No. 290-AT-A-2000

joined with several other applications dating back to April 1, 2001. All of these applications were placed on hold due to Air Canada going under bankruptcy protection. In October 2004 Air Canada emerged from bankruptcy protection and the case is being resumed.

Does voluntary work?

Air travel was not the only transportation mode affected by the federal government's refusal to sanction accessibility regulations. The CTA has issued the following voluntary Codes: *Ferry Accessibility for People with Disabilities, Passenger Rail Car Accessibility and Conditions of Carriage by Rail for Persons with Disabilities (the "Rail Code")* and *Aircraft Accessibility for Persons with Disabilities.* In addition the federal government has issued an *Intercity Bus Code of Practice.*

In order to answer the question of whether voluntary codes work it is necessary to measure actual results against the codes themselves. VIA's first major purchase of passenger rail coaches in a generation offers an opportunity to evaluate the success or failure of the government's decision to stop regulating and provide guidance to transport providers on the conduct expected of them.

Prior to the finalization of the Rail Code, VIA Rail had voluntarily agreed to bind itself by accessibility standards that were based on the *CSA Barrier Free Design Standards.* Since these are the same standards upon which the Rail Code was based, it would be fair to say that the Rail Code did little to change the standards to which VIA had voluntarily committed itself. The Rail Code was developed following what the Agency described as a "consensus process". When they were made public in a ceremony at Union Station in 1998, VIA's President and CEO committed VIA to abide by them.

Persons with disabilities find passenger rail to be a highly desirable mode of transportation. There are no technical issues that prevent new trains and stations from

being made fully accessible. Fully accessible systems are in operation in other jurisdictions, including the United States.

Despite the desirability and feasibility of making passenger rail accessible, people with disabilities in Canada accepted that until new rolling stock was purchased it would be necessary to live with the limitations of VIA's existing rail cars. VIA's existing rolling stock had been purchased before there were even building codes, let alone access rail codes. While efforts were made to retrofit VIA's coach cars, structural limitations involving the cars' external shells were said to exist, meaning entry doors were never going to be wide enough to meet Rail Code standards. Moreover VIA had no accessible sleeper accommodation at all. For those able to access the VIA 1 LRC coach cars [i.e. those with narrow chairs or scooters], the facilities inside the coaches are generally regarded as acceptable. Facilities include a suitable tie-down area and a washroom that is small but well designed.

In the fall of 2000 VIA Rail announced it was considering the purchase of Nightstock [hereafter called Renaissance] passenger rail cars manufactured by Alstom in the United Kingdom. Originally designed for use between London and Paris, the trains were approximately 500mm. narrower than North American rolling stock so they could go through the "Chunnel" under the English Channel. Their accessibility was quite limited, essentially restricted to a segregated sleeper compartment on the lounge car. Referred to as an "accessible suite", its doorways were narrower than the Code required, there was no tie down area and, despite its size the washroom fell far below Rail Code standards.

Persons with disabilities who viewed the trains were uniformly critical. Because the Minister of Transportation had promised members of his ACAT that the trains would meet Canadian accessibility standards, it was initially assumed that these trains would never be purchased. The Minister actually wrote a public letter to VIA's President recommending that it seek the expert advice of the Agency on any potential cars' compliance with the Rail Code. No application was ever made by VIA to have the CTA review the Renaissance cars compliance with Canadian accessibility requirements. CCD

and others such as ACAT Chair Eric Boyd wrote seeking assurances that VIA did not intend to purchase the Renaissance cars. When VIA and the Minister did not respond to these requests, and the Agency confirmed that it had not received an application from VIA concerning the cars accessibility, CCD filed an application with the CTA, asking that they be assessed against the provisions of its voluntary *Rail Code* and the "undue obstacle" standard in s. 172 of the Act. CCD hope the CTA would rule on its application prior to a decision was made about purchasing them. VIA responded that the purchase had already been completed prior to the viewing afforded persons with disabilities. It asked that CCD's application be dismissed on this basis alone.

The CTA refused to dismiss CCD's application, but it also declined CCD's request for an interim injunction preventing further work being done on the cars pending its decision. By refusing the injunction, VIA was able to continue with modifications to the cars, making them more difficult to return. It also meant that delay in the Agency's process worked in favour of allowing inaccessible cars to be brought into service prior to a CTA decision on whether they met Canadian accessibility standards. By delaying the CTA process through a variety of means, VIA seemed intent on presenting the CTA and disabled Canadians with a fait accompli.

VIA, however, was not content with having the CTA ever review the design of the Renaissance cars. It applied to the Federal Court of Appeal for leave to appeal the CTA's decision that it had jurisdiction over the issue. When the Federal Court ruled in CCD's favour, VIA turned around and appealed to the Federal Court that the time period allocated for CTA decisions had expired, depriving the CTA of jurisdiction. Presumably influenced by the fact that the passage of time was a direct result of VIA's earlier appeal, the Court again ruled against VIA. A contempt proceeding launched by VIA against the CTA was also resolved by this decision. VIA presumably assumed that its high cost litigation strategy would force CCD to withdraw. If this was VIA's plan, it did not succeed. The CCD Board decided it must see the application through whatever the cost.

There followed a series of "views" (or examinations) of the trains, interrogatories intended to elicit information from VIA and an oral hearing held at VIA's request. CCD provided a number of reports from expert witnesses that confirmed the Renaissance trains were not accessible or useable by most persons with disabilities, and that the trains could be retrofitted to make them more accessible.

VIA chose to submit no expert reports. Its strategy appeared to be to deprive the CTA of information it believed was essential to the CTA's ability to rule against it. In the end it took the CTA more than two and a half years to issue a final decision. The CTA decision did not strictly apply the provisions of its *Rail Code*. Whereas the Code provided every new sleeper car was to have an accessible suite, not one of the Renaissance sleepers was accessible. The "accessible suite" in the lounge car was not going to have an accessible washroom. Only some of the coach cars were going to have an accessible tie down and washroom. The CTA was still seeking further information from VIA with which to fashion a remedy when VIA launched yet another appeal to the Federal Court of Appeal.

The CTA enforcement process was put on hold by a "stay" that allowed VIA to exercise its right of appeal before having to make any changes. Its appeal is based on an argument that CCD's application raised systemic issues and was premature. VIA is arguing that Parliament never intended that the CTA should have authority over the accessibility of its rail cars. Should VIA's appeal succeed then the CTA would be finished as an accessibility regulator. In the meantime VIA has been able to continue to operate inaccessible trains for an estimated additional two to three years, simply as a result of having exercised its appeal rights. Even when the Federal Court has reached a decision, there could still be a further appeal to the Supreme Court of Canada.

While it is still to early to say whether the CTA's decision will be upheld by the courts, it is not too early to begin reaching conclusions about voluntary codes of practice.

It must firstly be noted that the *Rail Code* is not self-enforcing. Someone, in this case it was CCD, had to step forward and take the initiative of filing an application before the

CTA can begin exploring the question of whether or not the Renaissance cars met Canadian accessibility standards. While CTA staff participated in the viewing of the Renaissance cars, no evaluation was offered and no certification was required before they were purchased or brought into service. Failing an application by VIA, the *Act*'s application process requires that a volunteer such as CCD retain legal counsel, and that entails considerable expense. While the *Act* provides that hearings are to be conducted swiftly, the case demonstrates that a determined respondent can delay proceedings for months if not years beyond the legislated time limits. If CCD had not met deadlines imposed on it, the CTA could simply have dismissed its application. In contrast, the CTA appeared helpless to compel VIA's compliance with its orders.

When the CTA did issue a decision it did not treat the *Rail Code* standards as binding on VIA. It would not be unfair to say that they actually represent maximum standards rather than the minimum expectation they were described as being, when they were presented to the public.

It is too early to predict whether the appeal process will end up confirming or removing the authority of the CTA. Whichever it turns out to be, there can be no doubt that voluntary standards have not prevented inaccessible trains from being purchased and brought into service in Canada in a manner that could never have occurred in countries with mandatory standards.

If any proof is required one need look no further than the Renaissance cars themselves. Once they were no longer required for use in the Chunnel, an application was made to use them domestically within the UK. Prior to bringing them into service a license was required certifying the cars complied with the *Rail Vehicle Accessibility Regulations 1998*,[7] issued pursuant to the *Disability Discrimination Act 1995.* Ann Frye refused to issue the license and the trains were promptly put up for sale. If Canada had comparable regulatory standards in effect, the trains would never have been purchased by VIA. VIA now presents itself as having saved $300 million and secured a great deal for its ridership

[7] Statutory Instruments 1998 No. 2456

because of its astute management. The fact is that it essentially had no competition from developed countries for the cars, all of which expect rail cars to be accessible to persons with disabilities. The "bargain" was secured at the expense of persons with disabilities.

In addition to being inaccessible to persons with disabilities, Transport Canada has ruled that the cars do not meet Canadian rail safety standards. VIA is now lamenting that if it has to make the trains accessible as well as safe its great bargain will not look so great. Perhaps the trains weren't such a great deal after all. Voluntary standards may not have worked so well for VIA either.

Municipal Transportation: Do Government Subsidies Assure Accessibility?

Unlike the Canadian Transportation Agency, neither human rights commissions nor the courts have engineers on staff, nor specialized staff trained in assessing accessibility for persons with disabilities. Instead when called upon to adjudicate on individual cases concerning accessibility of transportation vehicles or systems they are dependent on the evidence of *ad hoc* experts called by the parties appearing before them. They are not well equipped to engage in making complex systemic decisions that involve the evaluation of technical information, and required in long-term planning.

Provinces do not have regulatory bodies comparable to the CTA. Consequently urban transit issues, which fall under provincial jurisdiction, typically are not even subject to evaluation against voluntary access codes. Adjudicators [i.e. courts or human rights tribunals] are not even given the benefit of a code that came out of a policy review process, balancing the competing interests of stakeholders.

All urban transit systems in Canada enjoy varying degrees of public subsidization of the fare-box. This means that local, regional or provincial governments can attach conditions to their funding. Governments are capable of providing clear direction on accessibility, but funding decisions are typically made annually, meaning decisions that require long-term commitments, such as is required when making urban transit systems accessible,

tend to be compromised when government priorities change or tight budgets encourage short-term decision making.

Accessible urban transit is essential if people with disabilities are to be able to work, live and be educated in their communities. People with disabilities who cannot access urban transit are denied their human rights to be free of discrimination because of disability, and their equality rights pursuant to the *Charter of Rights and Freedoms.*

While any center across the country could be selected to illustrate how difficult it is to make an urban transit service accessible, the experience of Toronto[8] will be used because its history is easiest to document.

Before there were any applicable anti-discrimination laws, pioneering leaders within the disabled community allied with sympathetic and visionary politicians to introduce a parallel transit system called "Wheeltrans" that offered a "door to door" accessible van service to a limited number of eligible riders. Over time the service was taken back from the private contractor who started it, and it was operated as a direct service of the Toronto Transit Commission. Little thought was given to making the conventional system of diesel, gas and electric buses, streetcars and subways accessible. The backbone of the system: the subway had been constructed before building codes started making provision for accessible access. People with disabilities had not yet exhibited the confidence to demand that millions be spent to sink elevator shafts. More importantly, the leadership of the disabled community was not yet persuaded that the technology existed to make surface vehicles, particularly buses, accessible. In the United States and more temperate Canadian cities such as Vancouver, lifts were being installed on buses. The leadership of the disability movement[9] in Toronto feared the unreliability of the lifts in the harsher Ontario winter conditions and the delays inherent in deploying the lifts would doom lift

[8] The Municipality of Metropolitan Toronto became the City of Toronto. For purposes of simplicity the term Toronto will be used for both.
[9] Initially leadership came from Action Awareness. Overtime leadership shifted to the Transaction Coalition.

equipped buses to failure. For these reasons the disabled community initially focused its attention on Wheeltrans rather than the inaccessible conventional service.

As the demand for Wheeltrans service started to climb, the TTC began to install "easier access features" designed to enable ambulatory persons with mobility limitations to use the conventional services. Saving paratransit costs was clearly the primary motivating factor behind the introduction of reserved seating, kneeling buses and tactile cues for people with visual disabilities.

During the early and mid-1980's political demands on behalf of the disabled community and such human rights complaints as were filed were generally concerned with ensuring Wheeltrans riders enjoyed comparable levels of service to those riding on the conventional service. Thus cases intended to end the private operation of Wheeltrans, and to challenge differential fares, hours of service and service areas and restrictions on the purpose of rides were successfully launched. All of these cases were resolved according to a principle of comparability. People with disabilities should receive comparable levels of service to that provided to non-disabled persons, at comparable cost. Generally this was a period of exponential growth in demand for Wheeltrans service, and in its quality. Cost seemed not to be a major concern.

In the late 1980's, as the burgeoning Wheeltrans budget was starting to give cause for alarm and low floor bus technology was starting to be commercially available, the disabled community in Toronto began preparations for a major systemic legal challenge to the inaccessibility of the TTC's conventional transit system. The newly elected New Democratic Party provincial government decided to act pre-emptively. It summoned 4 parties to the bargaining table: itself, the City, the TTC and the Transaction Coalition, representing the disabled community. Largely as a result of the promised infusion of substantial additional capital funding from the province, an agreement was reached between all parties. Had it been implemented, it would have required the TTC to make "key" subway stations wheelchair accessible according to a specific timetable; all new buses were to have low floors and be wheelchair accessible as soon as possible, and the

low floor buses were to be deployed along key routes. By signing the agreement it was assumed that the disabled community had achieved its primary long-term goal of moving the conventional transit system towards full accessibility. Thoughts of "outside" strategies, such as litigation, shifted to "inside" strategies of working with the TTC on planning and implementation. Key political leaders within the disabled community volunteered to work on TTC advisory committees.

When provincial governments changed in 1995, with the coming to power of the Progressive Conservatives, the visionary plan that had given so much cause for optimism amongst persons with disabilities was figuratively torn up. The province downloaded financial responsibility for funding public transit onto the City, precipitating a funding crisis. While a nominal provincial policy requiring that all new transit bus purchases be low floor remained in effect, without provincial dollars to back it up, "exceptional" purchases of inaccessible buses became the rule. Needless to say the province had no intention of enforcing its policy and persons with disabilities had no enforceable right to have inaccessible buses replaced with buses that were accessible. Consequently, inaccessible buses that would remain in service for 20 to 30 years were once again being brought into service.

The subway retrofit plan fell far behind schedule. "As budgets permit" was the response to inquiries about the TTC's access implementation schedule.

It had been generally assumed that as the conventional system became accessible, many people with disabilities would find the convenience of riding without booking in advance sufficient incentive to leave Wheeltrans and start using the conventional system. Once it became clear that this was not going to occur in the foreseeable future, the TTC suddenly decided that the continuing growth in demand for Wheeltrans service was no longer sustainable. By selling the notion of unsustainability, it skilfully turned Wheeltrans users on each other. As a consequence it was able to enlist the support of many persons who used wheelchairs for a process of removing Wheeltrans eligibility from others who could not use the conventional system, but whose claims to service were deemed less worthy:

primarily ambulatory persons who were unable to walk the distance to a bus stop and persons with developmental or cognitive disabilities. An unsuccessful *Charter* challenge to the process and its results is notable only for the court's specious assertion that those who were denied Wheeltrans had not experienced discrimination because they were treated no differently than those who were not disabled i.e. they still had access to the inaccessible conventional transit system.[10] Clearly the court was persuaded that the growth in demand for Wheeltrans services was unsustainable, and the fact that significant numbers of persons with disabilities were left with no useable means of public transportation was not going to distract it from upholding the cuts.

The Ontario Human Rights Commission

While the Ontario Human Rights Commission had fallen into considerable disrepair by the mid-1990's, and had provided no leadership on disability transportation issues through its litigation initiative [all "successes" previously referred to had been negotiated settlements], by the late 1990's it started to provide leadership in a manner that had not been foreseen. When Catherine Frazee had been Chief Commissioner, one of her most significant accomplishments had been securing the Commission's approval for the *Accommodation Guidelines 1989*. After Keith Norton became Chief Commissioner it was announced that the *Guidelines* were to be reviewed. Since the *Guidelines* were regarded as a fragile vestige of a previous era and the government of the day was quite antagonistic towards human rights generally, it was feared that the review would result in the dilution of the barrier removing power of the accommodation principle. Fortunately, this turned out to be a groundless concern. The *Guidelines* were reviewed and if anything, strengthened through the insertion of updated case references and elaboration upon barrier removal principles.

Through this process it became clear that the Human Rights Commission Policy Branch could be relied upon to accurately convey and incorporate the vision of a barrier free and

[10] This process was unsuccessfully challenged in the Charter case *Canella v. Toronto Transit Commission* [1999] O.J. No. 2282 leave to appeal to the SCC refused [2000] S.C.C.A. No. 31

inclusive society that was being articulated by the disabled community. In 2001 the Branch issued a discussion paper[11], which was quickly followed by a "consultation report"[12], both of which shared a common vision of integration through accessibility of the conventional transit service, while not allowing the paratransit service levels to fall below those of conventional transit, for those who require it. While the report purported to reflect case law, and thus did not directly confront the conclusions reached in bad cases such as *Canella,* it did not shy away from reaching significant political conclusions. For example, it made explicit reference to the impact of provincial downloading of financial responsibility for transit onto municipalities for the inadequate funding of accessibility. Most notable was its conclusion that Ontario should enact legislation comparable to the *Americans with Disabilities Act* that would provide a mechanism through which minimum standards of ensuring basic levels of transit service for persons with disabilities could be enforced through regulation rather than litigation.

Since the Commission's mission was litigation, rather than regulation, it is apparent that the report represented an acknowledgement of failure as much as the announcement of a coherent vision. The only reason that the Policy Branch was able to sell this honest and visionary approach was that the government of the day was in the process of enacting new barrier removal legislation called the *Ontarians with Disabilities Act.* By overstating the *Act's* barrier removal potential, it was possible to point out the limitations of litigation for major systemic change and the ease by which the use of standards could be used to ensure systemic change occurs in an efficient and resolute manner. Even without that kind of ODA, the report provides a useful roadmap of the kind of change that is required: a roadmap that is available in the right case for a Tribunal to seize upon and follow when deciding complaints.

[11] OHRC, *A Discussion Paper on Accessible Transit Service in Ontario*
[12] OHRC, *Human Rights and Public Transit Services in Ontario, 2002.*

Ontarians with Disabilities Act[13]

Contrary to Commission assumptions, the ODA turned out to have no substantive effect on accessibility or any other issue. It was at best a gentle reminder that barriers should be removed, without providing any of the means necessary to remove them. What the ODA did require was that certain public entities, including the TTC, develop accessibility plans.

The TTC complied with its obligation to develop a plan, but made its provisions contingent since "the rate at which the conventional TTC services can be made accessible is highly dependent on the level of funding provided for accessibility initiatives".[14]

While no one is authorized to conduct an accounting to ensure the data concerning the current state of accessibility reported in the plan is accurate, the Plan does represent the only available source of such information. For example, the Plan acknowledges that only 25% of the current conventional bus fleet is accessible. Based on a useful life expectancy and reasonable assumptions about bus replacement, it could have been assumed that if the TTC had adhered to the provincial requirement that only accessible buses be purchased, 50-75% of the fleet would have been accessible. The Plan claims that the fleet will be 100% accessible by the end of 2012. This is no great achievement, since virtually every other bus purchasing nation in the developed world requires that accessible buses be purchased when making replacements. Put simply, Toronto has no option but to buy accessible buses, unless it takes advantage of another jurisdictions' accelerated move towards accessibility by purchasing used or re-conditioned inaccessible buses.

The TTC claims in the Plan to have budgeted for 40% accessibility of its subway stations by 2008. At the time the Plan was written 29% of the stations were accessible. It goes on to express the hope that it will receive the funding necessary to make the remainder accessible by 2020. The TTC is now many years behind schedule on its original

[13] ODA S.O. 2001, c. 32
[14] TTC 2003 Accessibility Plan p. E-1

commitment to have all "key stations" accessible by 2001. The revised plan, even if it were implemented, represents a reduced accessibility goal [40%] from that promised [70%] 10 years earlier. The Plan contains cost estimates for every accessibility item and concludes with an inspiring chapter entitled "Funding is the Key". Unless money is specifically designated for this purpose, additional funding will likely all be allocated to purposes unrelated to accessibility. Consider how the TTC has received a number of financial promises from the federal [$1 billion over 5 years] and provincial governments, but has not amended its Plan or announced any intention of accelerating or increasing targets.

Moreover the TTC is quite prepared to make major investments in the future in inaccessible transportation vehicles. Take for example its network of completely inaccessible streetcars. While accessible streetcar technology has been in operation in Europe for more than a generation, according to the TTC it is neither financially feasible nor safe to embark upon a streetcar accessibility program. Instead it brazenly states that it intends to recondition the current aging fleet of streetcars, equipping them for use for at least another generation.

Even the accessibility victories claimed by the TTC do not stand up to close scrutiny. Fortunately persons with disabilities can still look to an advocacy group called Transportation Action Now! (TAN) to do the scrutinizing. This group started out as the broadly based coalition called the Transaction Coalition. In the early 90's when it appeared that things were going well, interest waned and a core group carried on under the new name. Now the group is smaller still and the funding is gone, but some stalwarts carry on. In 2001 TAN submitted a brief in response to the OHRC's discussion paper.[15] In the brief TAN offers cogent criticism of the paratransit service offered riders by Wheeltrans, as well as the inaccessibility of its conventional services. One telling point TAN makes is that there are at least eight American cities with fully accessible streetcar services.

[15] TAN materials can be reviewed on their website at http*://www.icom.ca/tan*

More recently it has issued its "Report on Wheelchair Accessibility in Toronto's Subway Stations". TAN members visited most of the TTC's allegedly accessible subway stations. None of the stations had accessible washrooms. More than 25% of the elevators were out of service on the day they were inspected with no signage to warn riders who depended upon those elevators. TAN also noted that the TTC, having gone to the expense of installing costly elevator shafts had cheaped out and purchased elevators that were too small to accommodate many of the larger scooters and chairs that are increasingly being utilized. Another consequence of the undersized elevators was that lengthy line-ups occurred, even though the TTC had not yet begun "funnelling" disabled Wheeltrans riders through accessible stations; the demand will increase exponentially as the subway becomes more accessible. When contrasted with subway systems in the United States it is clear that the TTC has done as little as possible, as slowly as possible and what it has done was done without regard to obvious longer-term requirements.

On October 13, 2004, the year old Liberal government of Ontario introduced for first reading a new piece of legislation called the *Accessibility for Ontarians with Disabilities Act, 2004 (AODA).* If passed in its current form it will be nothing much more than a hollow shell, although it does hold some promise. Like the *ADA*, the Act provides for the establishment of accessibility regulations. The requirement for there to be consensus before standard development committees report instills little confidence since transportation providers will be strongly represented on these committees. While time limits on the enactment of these regulations can be fixed by regulation, the Act differs from its American counterpart by not fixing deadlines for completion in advance. The new Act is similar to the *ADA* in that it provides for quasi-criminal penalties and public enforcement. It differs from its American counterpart by depriving individuals from having any role in enforcement or any compensation in the event they suffer harm as a result of non-compliance. In short the law will be as good or as bad as the government enforcement mechanism makes it. Apart from the public enforcement mechanism and the reliance on penal rather than compensatory sanctions to be applied, there is little difference between the *CTA* provisions and those of the *AODA.* Time will tell whether the *AODA* proves to be any more effective.

Conclusion

The early 80's were heady days for transportation accessibility in Canada. The federal government was listening to consumers and there was a willingness to regulate and impose policies on both private and public transportation providers. The entire world, including the United States, looked to Canada for leadership and inspiration.

Unfortunately, the country's accessibility structure was built on foundations of sand. While many favourable policies were put in place, once the times of deregulation and neoconservative economic policies arrived in the mid-80's, the legal structures established to maintain progress towards accessibility proved themselves to be inadequate to the task of standing up to transport providers intent on gaining competitive advantage by shedding responsibility for travelers with disabilities.

By the mid-90's providers were openly defying regulators and governments, sensing their lack of resolution and inability to cope with long-term resistance to efforts to phase in accessibility. Then provider lobbying succeeded in persuading a willing Liberal government that voluntary compliance was the path of least resistance. Leadership within the disability movement perceived itself as too weak to put up meaningful opposition.

In Ontario, progress in accessibility continued into the mid-90's. Successive red Tory, Liberal and NDP governments made the necessary financial contributions to ensure the TTC not only provided a quality paratransit service to a rapidly growing ridership, but also made pioneering commitments to accessible conventional transit, unparalleled outside the United States. Immediately following the victory of a neoconservative Conservative government, the TTC put all accessibility plans on hold, rushed to slash Wheeltrans ridership and defied provincial policy on the purchase of accessible buses without so much as a whimper from the province.

THE UNITED STATES

Fully ten years before Canada began legislating equality and access rights for people with disabilities, the United States government had begun to pass laws that paved the way to the accessibility leadership position America now occupies. While disability leadership in many countries have over the years complained that the US is unnecessarily formal and legalistic: some even complained that the timeframes given providers to bring themselves into compliance were too generous, nobody seems to quarrel today with the conclusion that the American model has delivered the goods and all others pale by comparison.

Urban Transit[16]

In 1970, the US Congress passed an amendment[17] to the *Urban Mass Transportation Act of 1964[UMTA]*, the legislative mechanism through which the federal government funnelled significant amounts of money towards subsidization of urban transit. The amendment purported to state a national policy on the rights of the elderly and the handicapped. Without defining consequences for non-compliance, the law required that "special efforts" be undertaken in the planning and design of all facilities and services associated with the operation of mass transits systems. Special efforts were defined as including making mass transit "available" to the elderly and persons with disabilities and to enable "effective usage". The real muscle behind this early attempt at inclusive legislation was the funding mechanism, which was entrenched in the law. The secretary of the Department of Transportation (DOT) was authorized to earmark grants and loans for the express purpose of meeting the transportation needs of the target groups. The secretary could also make financial contributions to non-governmental organizations that were prepared to provide supplementary accessible transportation services when public providers had failed to meet needs. This law began the process of making public transit accessible by priming the pump. It rewarded those who were up to the challenge and

[16] I am indebted to my University of Toronto Faculty of Law student Mark Colborne for some of the research on the history of access legislation in the field of urban transit.
[17] 49 U.S.C. 1612

financed NGOs to deliver the service (and raise expectations) in cities where governments were unwilling to act.

Three years later Congress enacted the world's first human rights legislation for persons with disabilities: the *Rehabilitation Act of 1973*[18]. Section 504a of the *Act* stated:

> No otherwise qualified handicapped individual in the United States… shall, solely by reason of his handicap be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance….

Urban transit was heavily dependent on federal funding. However onerous the obligations under the *Act* turned out to be, no cities funded under *UMTA* were about to opt out of federal funding in order to escape these new obligations. Those opposed to implementing the law's requirements quickly noticed that the law contained a number of terms, such as "otherwise qualified" and "undue burden" that simply cried out for litigation. Consequently the impact of this new legislation was not felt until some time after regulations were enacted, spelling out how inclusion and equal benefit were to be implemented in practice.

Later the same year the *Federal-Aid Highway Act of 1973*[19] *[FAHA]* was passed. S.165(b) imposed on the Secretary of DOT the obligation of ensuring that all transportation projects funded under the *Act* were "planned, designed, constructed, and operated to allow effective utilization by elderly or handicapped persons". The new wrinkle was that the Secretary was prohibited from approving funding for any programs that did not comply with the *Act's* accessibility provisions. Thus the government's funding power was starting to be used as a stick and not just as a carrot. Moreover the mechanism required that plans be submitted and receive prior approval, rather than being

[18] 29 U.S.C. 794
[19] 23 U.S.C. 142

reviewed after the fact. This meant that the provider was not free to spend first and rationalize later.

The *Rehabilitation Act* proved to be quite ineffective without regulations. *UMTA* and *FAHA* likewise made provision for regulations to elaborate upon the "special efforts" providers were expected make. It was decided that all the applicable access regulations should be consolidated, resulting in the *Department of Transportation Regulations of 1976*. [20] The regulations required that the transportation needs of persons with disabilities be accommodated, but did not specify the specific manner in which this was to occur. Thus providers were able to make the conventional system accessible, use paratransit or any combination. Some providers opted for example to rely exclusively on purchases of the untested and ultimately ill-fated "transbus". This bus was equipped with notoriously unreliable wheelchair lifts that were so unreliable they gave the whole notion of making conventional systems accessible a bad name for years to come. Others relied exclusively on "dial-a-ride" services, arguing it was too expensive to ever make conventional services accessible. Because either option, or any combination, was deemed compliant it was ultimately impossible to impose standards, and many transit properties lagged far behind.

At about the same time as the DOT regulations were coming into effect, president Gerald Ford issued an Executive Order[21] directing the Department of Health Education and Welfare (HEW) to establish guidelines on how the anti-discrimination provisions of the *Rehabilitation Act* were to be interpreted. All federal agencies responsible for the disbursement of federal funds were to develop regulations that were consistent with the HEW guidelines. The HEW guidelines published in 1978 [22], contained a strong preference for integrated transportation as opposed to specialized services. They expressly contemplated making subways and conventional buses fully accessible. Paratransit services were only to be provided for those who could not achieve equal opportunity through a totally accessible conventional transportation system. The DOT

[20] 41 Fed. Reg. 18234 (1976)
[21] Exec. Order No. 11914, 41 Fed. Reg. 17871 (1976)
[22] 43 Fed. Reg. 2132

released new regulations in 1979[23] that implemented the inclusionary spirit of the HEW guidelines by, for example, requiring that all new bus purchases be wheelchair accessible. The regulations went further still. For the first time, legally imposed goals and timetables required that all buses be wheelchair accessible within 10 years and more onerous yet, required that all buses in operation during "peak periods" [i.e. rush hour]" be accessible within 3 years. Moving beyond compelling that new buses be accessible, the DOT was clearly mandating that a significant number of existing buses would either have to be retrofitted by equipping them with wheelchair ramps, or taken out of service prematurely.

The regulations contained a provision allowing providers to seek a waiver, exempting them from full compliance in making certain subway components accessible. It is noteworthy that no applications were made for a waiver. As is the case in Canada, under human rights legislation, and in other countries such as Australia, which grant exemptions, providers did not wish to subject their operations to the kind of scrutiny that would be involved in being granted such a waiver. They perceived, likely correctly, that the price they would pay for such a waiver would be stringent conditions during an interim period and a time limited waiver that would result in the legislation's objectives being delayed but not frustrated altogether.

The 1979 DOT regulations were visionary or draconian depending on one's point of view. When the DOT refused to budge on its interpretation of the regulation, transit providers brought a major court challenge to the legislation. Thus, while conventional wisdom has it that equality seekers are the ones who are trigger-happy and litigate without restraint, it was the providers that brought the first major challenge to the DOT regulations. The suit was brought by the American Public Transit Association [APTA], the lobby organization representing a majority of the country's public transportation providers. The Court of Appeals for the District of Columbia[24] overruled a trial decision and held s. 504 of the *Rehabilitation Act* could not support regulations that compelled providers to engage in "affirmative action", but only to refrain from discrimination. In

[23] 44 Fed. Reg. 31442 (1979)
[24] *American Public Transit Association v. Andrew L. Lewis, Secretary, United States Department of Transportation*, 665 F.2nd 1275 (1981)

doing so the Court drew upon a decision of the United States Supreme Court called *Southeastern Community College v. Davis*[25], which held that a hospital did not need to substantially modify its training program in order to accommodate a deaf nursing student.

The *APTA* decision held the 1979 DOT regulations required modifications that were too expensive and too substantial to be supported by the *Act* [i.e. the same argument VIA is now seeking to advance in its appeal of the recent CTA decisions to the Federal Court of Appeal] . While some modifications might be reasonable, only "modest" changes were mandated by the legislation. The Court held that the regulations were based exclusively on the *Rehabilitation Act* and *the HEW Guidelines.* It refused to even consider whether the regulations could be upheld under the authority of either *UMTA* or *FAHA*, and remanded the regulation to the DOT to justify under other legislation or make modifications. The DOT responded by not seeking to justify the regulations and issuing interim regulations similar to those it had issued back in 1976.

The *APTA* decision and the limp legislative response that followed could aptly be described as the low point in the American fight for accessible transportation. Instead of coming out fighting, the DOT followed with the *Surface Transportation Act of 1982[STAA]*[26]. The *Act* authorized the DOT to establish minimum standards for public transportation services for persons with disabilities, but did not rebut the *APTA* holding that full accessibility or comparable levels of parallel service were not required. It took the DOT four years to finally release its *STAA* regulations[27]. They required that providers make their systems fully accessible, provide comparable levels of service through a parallel system or use some combination of the two. The regulations addressed the problem of assessing the adequacy of the accommodations by prescribing the standards paratransit services would be required to meet. Firstly, and in contrast to the *Canella* decision, the regulations required that eligibility criteria be non-discriminatory: meaning that those who were unable to access the conventional system would be eligible for paratransit. The regulations went on to provide maximum response time limits,

[25] 442 U.S. 397
[26] 49 U.S.C. 1601, 1612
[27] 51 Fed. Reg. 18994 (1986)

comparability of service areas relative to equivalent fixed route systems and comparability of periods of service and fares.

The regulations, had they gone no further, would not have been particularly inspiring. They surrendered to the providers' demand that they be permitted to meet service requirements through paratransit, which they perceived to be cheaper. They contained no clarion call to full accessibility, but would merely have required providers to provide fixed route access when they perceived it to be in their financial interests to do so. Unfortunately neo-conservatism was at its zenith under Ronald Regan at this time, and the regulations went further. Submitting to the courts' criticism that the 1979 DOT regulations required excessive modifications by transit providers, the 1986 regulations prescribed that no transit provider would be in contravention of the regulations if it had expended at least 3% of its total operating budget on initiatives for the benefit of persons with disabilities. Thus everything in the regulation, including the minimum service levels were made expressly subject to an absurdly low "cap" on expenditures.

This time it was the disabled community's turn to go to court. Americans Disabled for Accessible Public Transportation [ADAPT] is a disability organization best known for their high profile acts of civil disobedience, such as chaining themselves to inaccessible buses. Following a strategy similar to that followed by APTA when it went to court, ADAPT brought a direct challenge to DOT regulations only this time it was the watered down 1986 regulations that were said to not accord with the *Rehabilitation Act* and *UMTA.* ADAPT's primary argument was that the *Act* mandated mainstream access, and that allowance of a paratransit alternative to full access contravened these statutes. The U.S. Third Circuit Court of Appeals [28] rejected ADAPT's primary argument, affirming the authority of the DOT to allow for local decisions to be made about whether paratransit or full accessibility would be most appropriate. Despite this finding, the Court accepted ADAPT's fall back position, and ruled that the 3% "cap" on spending contravened the law. Holding that many transportation providers would not meet

[28] *Americans Disabled for Accessible Public Transportation v. Samuel K. Skinner, Secretary, DOT* 881 F.2nd 1184 (1989)

minimum acceptable levels of service for persons with disabilities, the Court struck down the cap as "arbitrary and capricious".

While ADAPT did not win the full access issue through the courts, it was only one year later that it, and all other disability groups won the issue big time, when Congress enacted the *Americans with Disabilities Act of 1990[ADA]*. The *ADA* required that the vast majority of people with disabilities be accommodated through the provision of fully accessible public transit.

The *ADA,* like the *Rehabilitation Act* that it complements, is human rights or anti-discrimination legislation. Some of the requirements of *Title II: Public Transportation* under the *Act* are subject to the "undue financial and administrative burdens" defence. In those situations [primarily paratransit], the required modifications or services are to be implemented unless doing so would fundamentally alter the nature of the service being provided. The key to allowing some flexibility to providers, without allowing the exception to become the rule is that providers are required to apply for exemptions in advance. If providers are allowed to raise the defence after the fact, it will be raised in every case, making litigation prohibitively expensive. If providers must apply in advance the onus remains where it belongs: on them, to provide the relevant information to justify their claim. Most importantly, if they must receive approval before making expenditures, providers cannot create prohibitive financial burdens through their unilateral actions, as VIA was able to do through its purchase and retrofitting of the Renaissance train cars. While there were initially a number of applications made for the "undue burden" exemption, it was never granted. Obviously the DOT set such stringent conditions on granting it that providers quickly learned this was not the loophole they could drive one of their inaccessible buses through. Because of the public source of funding, providers now rarely attempt to use this defence, although it should be noted that similar defences are available under other titles of the *ADA* [e.g. those covering intercity passenger rail and over the road buses] with more success, on an *ex post facto* basis. While it is only conjecture, it would appear providers fear the scrutiny their operations would be subjected to by regulators and the courts, and the temporary nature of the reprieve that

would be granted, since in the US the assumption is that compliance would be the norm. At least in the area of public urban transportation, the existence of the "undue burden" defence has not undermined progress towards full accessibility and comparability. The key is the legislation's insistence on prior application for exemption rather than *ex post facto* litigation.

Another potential loophole in the *ADA* regulatory framework is the "equivalent mechanism" exemption under s. 508. International criticism of the *ADA* centers on a general lack of flexibility, through the use of prescriptive rather than performance-based standards. Critics point to what is perceived to be an obsessive belief that "one size will fit all." *ADA* proponents counter this argument by pointing to the existence of this exemption. In practice, the key to the exemption is once again that prior applications are required. DOT provides a set of performance criteria alternative technologies must meet, if exceptions are to be made to the specific solutions prescribed in the *Act.* Again, there appears to be a hesitancy to make applications in advance that would definitely not be the case if the defence were available *ex post facto* in litigation.

Commentators sum up the general feeling about both the "undue burden" and the "equivalent mechanism" exemptions with the comment, "Flexibility is great until you try to use it". The DOT's approach to granting exemptions has been remarkable for its principled adherence to the accessibility goals of the *ADA.* It cannot be assumed that this could have been achieved without the clear legislative guidance provided by the *Act* and regulations.

Regulations passed pursuant to the *ADA* govern the purchase of new or used vehicles and the reconditioning of old ones. All new vehicles are to be fully accessible. When used vehicles are to be purchased or vehicles are leased, there must be a well-documented effort made to purchase vehicles that are accessible, and those efforts can be challenged. If repairs are made to existing vehicles that would extend the vehicle's useful life by more than five years, the vehicle must be made readily accessible. In practice, this generally means that it must be lift equipped. Only vehicles of a historical character are

exempted and even then only if modifications would alter that character in a significant way.

In addition to the very detailed regulations[29], there are legally mandated Manuals on Transportation Design produced by the Architectural and Transportation Barriers Compliance Board ["Access Board"] that provide minute details of what is required of an accessible vehicle. The Board has established enormous credibility over the years, primarily due to the talent and energy of people such as Dennis Cannon and David Capozzi. These two gentlemen are people with disabilities, with backgrounds in the consumer movement, and the capacity for enormous detail relevant to accessible design. Both providers and consumers have come to respect and rely on the Board's work. A measure of the its authoritative character is that no one seems willing to attempt to challenge their interpretations through the courts.

The *Act* also addresses the accessibility of all transit facilities, including subway stations and bus terminals. New facilities are required to be fully accessible. When major renovations are made to existing facilities, they likewise are to be brought fully up to standard. Accessibility includes not only detailed provisions concerning wheelchair access to transportations services, but also factors generally referred to as comprising "usability" such as bathroom facilities, telephones and drinking fountains. "Key stations" were to be brought up to standard within three years after the regulations came into effect. All stations are to be made accessible, unless it can be demonstrated that the system has been found to be fully accessible to persons with disabilities.

Escaping the "either-or" trap created by earlier regulations, the *ADA* requires that both paratransit and a fully accessible conventional service be provided. Eligibility criteria for paratransit are required not to discriminate on the basis of either physical or mental disability. Thus the scope of paratransit is extended beyond the previous assumption that it was only for people with physical disabilities.

[29] 36 CFR Part 1191 [Transportation Facilities] and Part 1192 [Transportation Vehicles], September 6, 1991

When considering paratransit, the hot button issue is comparability: ensuring those who depend on paratransit get comparable levels of service in all relevant ways to that received by passengers on the conventional system. Providers who wish to appear to be complying, but who want to reduce expenditures will allow service standards to fall. Proving comparability has been lost is a challenging prospect. Nevertheless detailed prescriptive regulations specify what is meant by comparability, and appear to go as far as is possible to prevent discriminatory inferior service without requiring constant litigation.

On the conventional side, the indicator of unwillingness to comply in an effort to cut costs is failure to keep accessibility features in proper working order. As TAN observed with the TTC, you can make a provider install elevators and escalators in subway stations or lifts on buses, however that does not guarantee that they will spend what is necessary to keep them in good working order. When providers are forced to provide accessibility, they are not willingly going to make accessibility repairs. Recognizing this, the drafters of the *ADA* include repair standards that specify how long an accessibility device such as an elevator can be under repair.

Enforcement of the *ADA* varies from title to title. The Public Transportation sections of Title II are enforceable either through private lawsuits in a Federal court, or by registering a complaint with the Office of Civil Rights in the Federal Transit Administration of the Department of Transportation. Unlike in Canada, where bureaucrats responsible for accessible transportation are either caring but disempowered or unconcerned careerists, the legal enforcement of the foregoing statutes has been led by Robert Ashby, a powerful lawyer who has dedicated his career to the issue, and has faithfully upheld the policy direction identified by the Access Board. The major challenge facing those charged with *ADA* enforcement at the moment concerns whether Title II will be found by the United States Supreme Court to be entirely unconstitutional. States' rights are in the ascendancy with successive neo-conservative governments making most of the appointments to the Court. It should be remembered that behind the

ADA, there has grown up a comparable network of state human rights legislation that in some measure would carry on, regardless of the eventual decision of the Court.

Privately operated transportation [e.g. trains and intercity buses] is covered under Title III. Complaints of Title III violations may be filed with the Department of Justice, Civil Rights Division, which has for many years been headed by another lawyer, John Wodatch, who has dedicated his career to accessibility issues. The Department is authorized to bring a lawsuit where there is a pattern or practice of discrimination, or where there is an act of discrimination that raises an issue of general public importance. Thus, when cases require additional resources in order to be effectively pursued, the Department has the discretion to pursue them. Individual cases can also be pursued by private lawsuit. It is no longer necessary to secure a "right to sue" letter from the Department before proceeding privately. This had been a mechanism used by the Department.

Private actions are virtually a non-issue. This reflects well on the ability of counsel with the DOT and DOJ to represent the interests of people with disabilities effectively. Obviously, if public lawyers were not representing the interests of people with disabilities they would have made more of an effort to assemble the resources necessary to commence private actions. Other relevant factors influencing the low rate of private litigation in this area include the high expert costs involved and the small financial recovery involved for any individual. Class proceedings have not benefited people with disabilities because it is assumed that each individual's need for accessibility is different, even if the barriers faced are of common concern. As one commentator noted, "When it comes to transportation, the *ADA* hasn't been good to lawyers".

The easiest way to summarize the *ADA*'s impact would be to point out that within a matter of a few short years, ADAPT, a group established and totally dedicated to making transportation accessible, was out of the transportation business and working on attendant care issues.

Another measure of *ADA's* success would be the widespread acceptance of mainstream accessibility amongst the leadership of UMTA, including its President Bill Miller. Instead of initiating court challenges, today's UMTA leadership is regarded as generally supportive of the *ADA* Regulations, if occasionally concerned about the declining level of federal funding support. Threats are not issued and deadlines have consistently been met across the country. According to those with whom I consulted, providers' major concern at this point is on enhancing service quality on fixed route services, so as to lure paratransit riders onto conventional service as much as possible. In order to accomplish this, they are exceeding *ADA* standards by introducing transit training for persons with developmental disabilities, providing free fares on conventional transit for those with paratransit eligibility, allowing persons with disabilities to make stop requests between regular bus stops and using paratransit to feed into mainstream systems. In this way they hope to minimize the demand for paratransit without denying that some passengers require paratransit eligibility to make transit accessible some of the time.

To the extent there are criticisms of the *ADA* from a consumer standpoint, they are derived from an accurate perception that accessible transit entitlements are based on principles of equity to transit service levels available to non-disabled persons.[30] This is a narrow framework from which to operate, particularly in a country that does not rely heavily on public transportation. America is a country of government budget cuts, where the private automobile reigns supreme. Thus services outside conventional transit boundaries are underdeveloped, even though persons with disabilities may not have access to private cars. Likewise, conventional transit riders may have other alternatives when funding for all transit is cut, but persons with disabilities can end up homebound or institutionalized.

These criticisms aside, it is impossible not to acknowledge the world leadership the *ADA* has given Americans with disabilities who require urban transit. Before examining how

[30] See for example Michael Lewyn, "Thou Shalt Not Put a Stumbling Block Before the Blind: The Americans with Disabilities Act and Transit for the Disabled", *52 Hastings L.J. 1062;* and Paul Stephen Dempsey, "The Civil Rights of the Handicapped in Transportation: The Americans with Disabilities Act and Related Legislation", *19 Transp. L.J. 315 (1991)*

the rest of the developed world, with the notable exception of Canada, has belatedly attempted to emulate this success, I will turn to briefly review how comparable success has been achieved with other transportation modes.

Air Travel

The *Air Carrier Access Act (ACAA)* was passed in 1988 before President Ronald Regan departed the White House. It prohibits discrimination against qualified individuals with physical or mental impairments in air transportation by domestic and foreign air carriers operating under US jurisdiction. It applies only to air carriers that provide regularly scheduled services for hire to the public. Requirements cover a broad range of accessibility features in newly built aircraft and new or altered airport facilities. Examples of mandatory aircraft features include removable armrests, accessible washrooms, on-board wheelchairs, level or lift boarding and open captioning of safety videos. Because the damages payable in such cases tend to be low, the legislation was recently amended to allow the FAA to sue for the imposition of substantial civil penalties that represent the extent to which the violation compromise the public interest. The DOT, which receives the fines, is then authorized to give the money back provided the airline agrees to abide by systemic conditions that meet the needs of future passengers with disabilities.

As in Canada the accessibility of planes with 30 seats or less has remained largely unregulated. American regulators confessed they were as perplexed about what could be done to make the Beech 19 aircraft accessible as Canadians have been. Getting proper lifts to work with the narrow doors and the tight angles into passenger seats have been the source of much of the problem. A recent crash in North Carolina, still under investigation, but suspected to involve improper balancing of the weight of a wheelchair, is felt to be holding back progress in this area.

Perhaps because they pre-date the *ADA* regulations, those under the *ACAA* are generally considered more general, and therefore generate more litigation. People may enforce

their rights by filing a complaint with the Aviation Consumer Protection Division of the DOT, or by filing a complaint in the Federal Court. The National Council of the Disabled (NCD) conducted a comprehensive study of enforcement in this area and concluded that it was not being conducted effectively and lagged behind that in other *ADA* transportation sectors. Many complaints were going uninvestigated, leaving complainants with no remedy other than bringing a private lawsuit. Enforcement was so poor that many people with disabilities were prepared to enter appeasement [i.e. low ball] settlements with airlines rather than seek to enforce their rights. Lack of resources and the higher rate of litigation were cited as underlying factors leading to this enforcement crisis. Federal Aviation Authority (FAA) General Counsel Nancy McFadden used this report to justify a major increase in funding, notwithstanding the political orientation of the Bush administration and the financial position of airlines. According to my informants, her office went from being the worst to the best resourced federal civil rights enforcement agency. Consumer representatives are satisfied that the additional resources, combined with the new power to impose civil penalties have resulted in an effective enforcement mechanism.

Railways

As CCD is aware from the VIA Rail litigation, the *ADA* regulations provide for strong clear mandatory accessibility requirements that are far superior to the inadequate voluntary standards introduced by the CTA. While the regulations and manuals have been developed by the Access Board, enforcement rests with the Department of Justice rather than DOT. The industry, dominated by national carrier AMTRAK, has chosen to pursue government subsidies rather than attempt to defy regulatory requirements, seek exemptions or provoke litigation with passengers with disabilities. This has continued despite the fact that it had all its government operating subsidies cut effective 2002, and only receives modest capital subsidies.

AMTRAK met the deadlines for having an accessible coach and sleeper car on every train and for making key stations accessible. According to the Access Board and Rosalyn Simon, the former head of its Business Diversity Office, AMTRAK will have no problem meeting the 2010 deadline for having all stations *ADA* accessible.

Every new railcar must meet *ADA* accessibility requirements [i.e. not limited to one car per train]. New rolling stock, notably the Canadian manufactured Acela train, not only meets regulatory standards, but is said to exceed them in many respects. They anticipate the future introduction of larger wheelchairs by exceeding door, turning and washroom requirements. Both folding and removable seats are used to allow space to be increased when required.

AMTRAK customers with disabilities expressed only two reservations. There was a feeling that the retrofit of some of the older cars, while ADA compliant had not been handled as well as it could have been. Problems are said to include too wide a gap between station platform and train, tight turns and poorly configured bathrooms. Others cite overconfidence. Apparently after the respected Rosalyn Simon left AMTRAK, the railway felt it was so far ahead of schedule, it no longer required a Business Diversity Office or an employee with her expertise in accessibility.

THE UNITED KINGDOM

Like Europe generally, the UK was a slow convert to the American model of regulated accessibility standards and public enforcement of the standards. This does not mean that no attention was paid to the issue of accessibility prior to 1995. In these earlier years governments used their heavy involvement in subsidizing or holding a major ownership stake in various transportation sectors to leverage accessibility. While progress was noted in many sectors, no long term goals were established that would eventually produce full accessibility. Progress was erratic. A system-wide and long-term strategy was required for full access to be achieved.

The Labour government of Prime Minister Tony Blair was the first to signal its interest in the American model with the passage of the *Disability Discrimination Act of 1995 (DDA).*

The legislation's original author is Ann Frye, who is the Director of the Mobility and Inclusion Unit of the UK Department of Transport. She has a number of persons with disabilities on her staff including Andy Kirby, who is Secretary of the Disabled Persons Transport Advisory Committee (DPTAC), a body composed of persons with disabilities and other access experts, which issues reports that enumerate best practices for various modes of transportation. These documents have the effect of providing guidance about the spirit of the legislation as opposed to its letter.

Their reports can be the final word, as they have been to this point in time for ferries, or they can form the basis for regulations under the *DDA.* The first set of regulations came into effect in 1998. The Act's requirement of "reasonable adjustments to services" came into effect in 1999. Transportation infrastructure is required to have removed barriers by October 2004. Trains currently in operation must be made fully accessible by 2035. This date was selected based on the projected book life of the rolling stock in operation at the time the Act came into effect. There is also a provision that will accelerate accessibility for existing trains, so that when refurbishments occur, design features related to

accessibility are to be fully incorporated. All new rail vehicles must meet the *Rail Vehicle Accessibility Regulations (RVAR)* and need to be licensed as meeting mandatory *RVAR* code before they can be brought into service. For example, the inaccessible trains recently purchased by VIA Rail were designed before the *DDA* was passed in 1995 and assembly began before the rail regulations were finalized in 1998. Nevertheless, when the manufacturer sought a licence to operate the trains on British rails, it was refused.

The Mobility and Inclusion Unit of the UK Department of Transport has been responsible for translating codes of "best practices" into regulations. Comparable to regulations in the United States, there are now regulations governing the design of buses that carry more than 22 passengers and trains. The powerful legal sanction that is applied is that new buses must receive a licence from the Inclusion Unit certifying compliance with the *DDA* before going into service.

While major rail stations are now accessible, smaller stations (with their century old "walkover " design) have until 2024 to meet standards. In the meantime, there is an obligation on providers to make "reasonable adjustments to services" (comparable to the Canadian human rights concept of making "accommodation to the point of undue hardship").

The Act grants the Department, on advice of DPTAC, the power to grant exemptions. While this may appear to allow loopholes big enough to drive trains through, it has been essential to winning and holding public support for the legislation. Because the discretion granted is quite broad, the integrity of the legislation requires good judgment on the part of the Department. An example of one of the few cases where an exemption was granted is the Welsh Heritage Railway. This Railway could not have maintained its historic appearance (its reason for continuing to exist) if the Act had been strictly applied to it. Ann Frye indicated that the exemption section has successfully been used to forestall attempts to reduce minimum requirements to insignificance. After responding to a deluge of initial applications for exemptions, the Department's strict approach appears to have resulted in the surge slowing to a trickle.

British manufacturers are publicly of two minds about prescriptive v. performance-based standards. They want flexibility, but since licensing is a prerequisite to going into service, they seem to prefer certainty so long as fair notice is given about standards. The Department's preference for prescriptive rather than functional regulations was as much at their request as that of people with disabilities.

Taxi regulation resulted in 100% compliance with regulations by January 1, 2000, with no exemptions having been granted. Cab drivers who refuse to take the extra time to pick up a passenger with a disability are in real jeopardy of losing their licence. It may be of historical interest to learn that British cabs have long been required to have flat floors and be of sufficient interior height to accommodate a man in a top hat. Building on their most accessible transportation mode, Britain like Australia utilizes taxi subsidies in most communities as an alternative to providing paratransit or "dial-a-ride". The London tube is very deep and inaccessible, so taxis are required to get around many parts of London, as the tube is gradually being made accessible. 90% of London area buses are accessible. There are the *Public Service Vehicles Accessibility Regulations, 2000* [as amended in 2002] concerning the conduct of persons involved in providing service. They apply to buses in scheduled or local service that carry more than 22 passengers. There are DPTAC guidelines for the smaller buses. The regulations apply to new buses while older buses are grandfathered for what is assumed to be the remainder of their economic life [between 2015-2020].

Each municipality is required under the *DDA* to submit a Ten Year Transport Plan with maturity and full access to be achieved by 2010. Anybody spending public funds on transportation is required to submit for the DOT's approval a Ten Year Transport Plan outlining steps it proposes taking to enhance accessibility. Thus the UK is not entirely dependent on legal standards, although they form the core of what is expected. The planning process is intended to ensure cross-modal compatibility and attention to detail. Ann Frye conducted research showing that if access is reliable [i.e. selected routes are accessible throughout], the ridership on public transport will increase by 18%. Scrutiny of

the planning process is therefore quite intense, with phase-in planning being subjected to careful examination to ensure interim access occurs rather than a general phase-in without regard to the needs of disabled travellers.

The Department is currently working on standards in the areas of pedestrian access, hire cars [i.e. rental] and "break down and recovery," which will ensure disabled motorists receive priority for roadside repairs and an accessible cab home if necessary.

While the British standards governing new vehicles are rigorous, and the duty to retrofit is part of the obligation to make reasonable adjustments, old trains that are not fully accessible may continue to be operated until 2035. Progress with buses is more advanced, with an estimated 90% of buses in the greater London area already compliant with accessibility standards.

The body charged with enforcing the law and the regulations (i.e. as opposed to developing regulations and issuing licences) is the recently established Disability Rights Commission. The government demonstrated its determination to achieve full compliance with its legislation by appointing high profile disability activist Bert Massie as the Commission's first Chair.

Created by legislation (*Disability Rights Commission Act, 1999*), the Commission became effective and commenced operations in 2000. Its existence as a separate entity from the generic human rights commission poses the classic dilemma faced by all specialized agencies: merging it into the generic agency is now under review. There is concern within the DRC that disability has not yet been firmly established, as have other more traditional forms of anti-discrimination.

The DRC has said as a matter of policy that voluntary standards don't work and has forcefully called for regulations in all areas. Their mandate is to advocate and promote, and to advise government but they also have the enforcement mandate for individual cases. Under the draft *Disability Discriminations Act, 2003* they will assume authority

for establishing a new Transport Code. Unlike education and employment cases, which go to administrative tribunals, transport cases go to the courts where it is considered more difficult to argue cases and win. The DRC has a legal committee that screens cases and is responsible for a litigation strategy. The DRC hosts the Transport Consumer Forum.

The DRC has already achieved a widely heralded result in the courts with the successful prosecution of discount airline Ryanair[31] for failure to make reasonable adjustments. Judge Crawford Lyndsay QC required that Ryanair make the "reasonable adjustment" and allow Ross to travel for the same fare. Both sides have indicated that the matter is far from over. The Disability Rights Commission announced that it was considering a class action against the airline based on its initial decision. Rather than appeal, the airline countered by building a fee into each ticket, highlighting an imputed and disputed cost to every passenger, which it says is attributable to disability costs. Noteworthy in the decision is the judge's finding that it was the airline not the airport that was responsible from check-in counter to plane for the safe and dignified boarding of passengers with disabilities. It is hard not to conclude that the EU's decision to transfer responsibility from airlines to airport authorities under its proposed regulations (discussed below) is a direct result of observing that "fly by night" discount carriers such as Ryanair cannot be trusted to provide adequate levels of service, since its obvious intention is to discourage disabled passengers from flying with them at all.

The UK is very strong on process and the involvement of disability organizations. The government grants resources to persons with disabilities, many of who have professional qualifications in the area, in order to ensure their skills and experience are fully utilized in research and consultation concerning standard setting.

The UK accessibility initiative, based on the American model, was quickly emulated by Europe as a whole. European standards will generally supersede domestic standards. As will be seen, the European standards have been based on the UK model, and leadership in

[31] *Robert Ross v. Ryanair Ltd. And Stanstead Airport Ltd*. Central London County Court Jan 29 04

the European initiative came from the UK's Ann Frye, who heads its Mobility and Inclusion Unit.

Ann Frye is fearful of the impact the new European standards will have on domestic UK standards, particularly in the area of sensory accommodation [e.g. vision, hearing] where she considers that UK standards exceed those developed by the EU. If her concerns are borne out, the effect will be a levelling down, since the European directives prevail in the event of a conflict.

THE EUROPEAN COMMUNITY

The European Community has been tightening the integration of its member states in the interests of strengthening the economic union. Transportation, because of its economic and cross-border implications, is an area where standardization has been a priority. Also, there is an attempt being made to ensure that all goods manufactured in Europe do not encounter non-tariff barriers, and can be sold and used throughout all member states. Access standards that were emerging in member countries, including the UK, held the potential of becoming non-tariff barriers. Since the Community established a goal of increasing the rate of employment amongst persons with a disability by 70% by the year 2010, it had also been looking at the issue of how access standards would contribute to the achievement of this goal. All of these factors led the EU into establishing mandatory access standards with Community-wide application.

In 1985 the European Council of Ministers established an Accessibility and Inclusion Committee chaired by Ann Frye of the UK's Department of Transportation. Ms. Frye also headed a number of task forces studying best practices and technical standards for European produced transportation technologies, as part of a process called COST that involved representatives from a number of European states.

Not surprisingly, the COST process produced recommendations that closely reflected the UK standards for intercity buses and rail cars. These recommendations in turn led to the adoption of European Directives that member states are required to adopt into their domestic laws and enforce. In the event a member state fails to follow the Community's Directive, the Community has the right to act unilaterally against that state. As a consequence, in these two areas of vehicle design there are now European standards in effect that are based on the UK standards, which in turn closely parallel those in effect in the United States.

Europe has two mechanisms for imposing Community-wide regulation: directives and regulations. The former are imposed on a EU wide basis, but require that individual states

adopt the standards into their domestic laws within a specified time frame. The laws based on directives are enforced by domestic courts and tribunals. Alternatively regulations are legislative instruments of the EU collectively. They must be enforced by national courts, but if they fail to do so they can be enforced by the European Court.

While for most countries, particularly those in the south of Europe which lack a history of funding or regulation of access, the European standards represented a step up from what existed previously, there was a levelling down in some areas for some countries. For example, Ireland and England were the only countries with traditions of level station access to trains, and this was lost in the process. This standard was lost in the European directive governing train design. Likewise the UK was unsuccessful in securing incorporation of its higher standards for the visually disabled and for the ambulatory mobility handicapped into the directive for trains.

While the UK was a leader in adopting human rights legislation and accessibility standards within Europe, in actual accessibility it was starting from far behind a number of other EU member countries, which had long traditions of government commitment to accessibility dating back to the seventies; examples are Germany, Sweden and the Netherlands. With the exception of the groundbreaking *Act on Facilities for the Disabled on Public Transport (1979)* in Sweden, almost all of the explanation for these countries' leadership can be attributed to a combination of government funding being used to lever industry's cooperation, together with a desire to develop innovative technologies which would place their respective manufacturing sectors at the cutting edge. This commitment to technical innovation was harnessed in order to generalize the attempts being made in these individual countries in EU wide regulations and directives.

While the will to act seems to be clear, the European government is moving slowly to develop structures to bring together these various initiatives. The process they follow is called COST under the auspices of the European Council of Transport Ministers. The ECTM established an Access and Inclusion Committee in 1985, which has been chaired by Ann Frye of the UK. COST is a voluntary process whereby individual states are given

the option of participating in (and funding) a process of research, leading to the writing of a technical report that includes "best practices" proposed standards and an economic justification for the imposition of Europe-wide standards as regulations of directives. The process has been highly successful, because it acknowledges the difficulties faced by states (widely acknowledged to be the "southern states") which have moved more slowly towards making their transportation systems accessible, while strongly making the economic case for standards that reflect existing standards (primarily those in the UK) and practices in the "northern states" that have taken the lead in providing their citizens with accessibility.

The first Directive issued by the EU concerned regional and urban buses. It was based on the COST 322 study on Low Floor Buses and was adopted on February 13, 2002. It gave member states until August 13, 2003 to adopt the Directive into each nation's domestic laws. The Directive, requires the mandatory installation of ramps or lifts on all urban buses, priority seating for persons with reduced mobility, a designated area for wheelchairs and for a guide dog, as well as colour contrasting for persons with visual impairments.

The COST 349 study looks at the construction of interurban and international buses. This study will be completed in 2005 and is expected to lead to the issuance of a directive soon thereafter.

In contrast to buses, the two EU directives on trains both relate to international trains only, one to high-speed rail and the other to conventional rail. They provide very detailed technical specifications for interoperability (TSI) intended to ensure compatibility between trains and their infrastructure [i.e. stations and platforms] throughout Europe. The standards in this directive are based on the research reported in the COST 335 Report.

Unlike in the areas of bus and train where the UK had introduced legislated standards, there were no legislated standards in place concerning air travel. The EC initially took the

stance that voluntary measures would suffice. As mentioned above, the industry had difficulty establishing meaningful standards, and then individual Transport ministers showed varying degrees of commitment to ensuring that the standards were actually applied. As with the case of trains, the single European market meant travelers could not be assured of consistency when crossing boundaries. The EU conducted a number of consultations over a three year period that led to the emergence of a consensus that refusal of carriage should be prohibited, subject to a reviewable exception in cases of a threat to passenger safety. There was also a consensus that passengers with reduced mobility should not be charged additional amounts for the disability-related assistance they require. The issue of aircraft design was not included in the consultation, because the market for aircraft is global rather than continental as is the case for most other transportation vehicles. The staff working paper suggests these issues should be regulated internationally.

Air travel provides the classic example of the failure of voluntary standards resulting in the failed effort by Europe's airlines and airports, operating under their umbrella organization called the European Civil Aviation Conference (ECAC), to stave off the imposition of mandatory standards. In 2001, it issued its Air Passenger Service Commitment and its Airport Voluntary Commitment on Air Passenger Service. The ECAC members had a great deal of difficulty agreeing on any substantive commitments. The one commitment they were all able to agree upon [i.e. that persons with disabilities should not be required to pay a premium in order to gain equal access], Ryanair promptly broke. As a consequence the European Parliament reached the conclusion, in 2003, that *Proposed Regulations establishing Common Rules on Compensation and Assistance to Air Passengers* should be enacted. Pursuant to this resolution, a Staff Working paper entitled *Rights of Persons with Reduced Mobility When Travelling by Air* has been issued and regulations are considered imminent. One noteworthy difference from North American air standards is the EU proposal that airports rather than airlines be responsible for boarding and airport accessibility service. This proposal is opposed by airlines which fear higher landing charges, but the Ryanair case probably ensured they will be disregarded. Unlike the directives governing train and bus design, these regulations, once

finalized, will immediately have the force of law and be enforceable by the European Court rather than by domestic [i.e. national] tribunals.

The European Civil Aviation Authority has standards which are said to be comparable to the American standards, but there is no intention of giving passengers individual rights comparable to that under American legislation at this time. The major debate emerging from the consultation seemed to center on whether airlines or airports should be responsible for services in terminals and boarding planes. The proposed policy imposes the responsibility on airports, because service requirements begin before the passenger reaches the check-in counter. The need for seamless service as passengers transfer between airlines and because airlines may also be based on perceived financial incentives (linked to what are called increasing "competitive pressures") to actively discourage passengers with disabilities from choosing to travel with them and therefore prove more resistant to regulation. Anticipating continuing changes in the marketplace, the Commission came down in support of imposing duties on airports, in the expectation that it could impose equitable charges on both discount and full-fare carriers. Airports may build charges into their general landing charge, but if they impose differentiated charges based on usage they must prorate charges based on a carriers' total passengers and not on the number of passengers with disabilities they carry. This change will create some challenges for those traveling into or out of Europe, and may necessitate a coincident obligation on carriers (i.e. as well as airports, to ensure European airports provide services) with whom a passenger has privacy of contract as well as domestic remedies through national courts or tribunals (e.g. the CTA in Canada). The European standards appear to require a high degree of coordination and communication between airports and airlines. The standards of accommodation while in-flight to which a passenger with a disability is entitled without charge will be very low, presumably because attendants will be required to provide in-flight services. No special provision is made in the standards for attendants. There was a high degree of confidence expressed on all sides that the proposed regulation will be in place within 15 to 24 months.

Other examples of transportation provider effort to derail a regulation proposal were the efforts of the AEIF, which is the European association of rail inter-operability, which called for further study of cost-benefits before regulation, and the Commission of European Rail (CER), which is in the process of drafting a "Charter" that proposes self-regulation. To date, they have only been successful to the extent of frustrating the EDF's goal of having standards made regulations, rather than directives.

Regulation of accessibility has become a major priority for the EU. The European Disability Forum (EDF), a body with representation from national councils of persons with disabilities in all member states, is strongly supportive of the policy direction being taken by the Council of Ministers. This initiative also has widespread support amongst members of the European Parliament.

The EDF was established in 1996 in order to ensure the Community's 37 million persons with disabilities have a strong voice in the development of EU policy. It is composed in equal measure of representatives of the Community's national councils of disabled people, along with representatives of more than 70 NGOs representing disabled people and parents of persons with disabilities who are presumed to be unable to represent themselves.

Pursuant to Article 13 of the Treaty establishing the European Community (which mandates a strong anti-discrimination role for the Community), the EDF's mission is to promote equal opportunities and non-discrimination by active involvement in policy development. The EDF's mandate would be familiar and consistent with those of most North American disability advocacy organizations. Members of the EDF issued the Madrid Declaration in 2003, which was the European Year of Persons With Disabilities, calling for recognition of access and inclusion as human rights issues.

The EDF has conclusively rejected voluntary standards. In its considered opinion, industry will not move unless it has the clarity and consistency that comes from mandatory standards. A notable development in Europe is the rising influence of AGE, a

Europe –wide seniors group that is having an increasing degree of influence on transportation policy. Europe has a larger seniors population than North America. Its emergence as a political force is significant because AGE will be acting on behalf of people with disabilities who are ambulatory, and pressing claims in areas such as pedestrian travel.

The case for accessibility in the EU boils down to a desire to open the European market to transportation vehicles manufactured anywhere within the EU and to allow passengers to travel freely throughout the EU without encountering variable accessibility standards that would discourage continental travel amongst a significant percentage of the market. In the case of the rail standards, it was deemed logical to attach the issue of accessibility to a general initiative requiring a significant amount of restructuring, in any event, to combat the widely divergent rail standards (e.g. railway track gauges) as part of a process of developing inter-operability standards across borders for which there were very strong economic arguments that had been generally acknowledged.

At the present time a variety of departments take the initiative from time to time, each seeming to depend on the goodwill and resources of others in order to fulfill its mandate. It is not clear who within the bureaucracy of the EU has responsibility for moving forward with the European Action Plan on Disability, which came into effect in December 2003. Notwithstanding this bureaucratic confusion, there seems to be no shortage of departments willing to take on the challenge of accessibility. This no doubt reflects the perception of Europe's entrepreneurial bureaucrats that disability access is a hot issue to which to attach one's career ambitions.

AUSTRALIA

Australia came to the issue of accessible transportation relatively recently and has a long way to go, as is readily acknowledged. In 1992, the *Disability Discrimination Act of Australia* (*DDAA)* was passed by the Commonwealth. Most states already had their own anti-discrimination legislation, but the federal legislation takes precedence to the extent of any incompatibility.

An early innovation, predating the *DDAA,* was the provision of accessible taxis for people with disabilities based on strict eligibility criteria. Those eligible may take an unlimited number of trips for up to $30 (Aus) at half fare. Budget considerations appear to be met through the eligibility criteria used. In some states this is functional (i.e. the criteria reflect the needs of those who cannot travel on the conventional transit system), but in many others it is much more tightly restricted, along the lines of limits placed on Wheeltrans in Toronto when it sought to cut costs. For example, in the state of Victoria there are three times as many people eligible for the taxi subsidy as are eligible in New South Wales, which has a much larger population. In Victoria people who can't walk to the bus stop and some blind persons are eligible, but not in New South Wales.

Accessible cabs have been brought on stream through a combination of government incentives, including interest free loans of $30,000 (Aus) for up to 10 years, extending the period they can run accessible vehicles (10 years instead of the usual 6-8 years for conventional vehicles) and the issuance of licenses free of charge (these can be worth up to $250,000 (Aus). In exchange for using these licenses the taxi operator is expected to give priority to calls for accessible cabs and to provide any additional service required (e.g. attach tie-downs) without charge. These issues are built into the taxi license and are policed through the Department of Transportation.

The heavy reliance on taxis in Australia explains the lack of pressure to develop a door-to-door or paratrans system, and also absorbs much of the pressure to make school buses accessible. Under the *DDAA* regulations one of the most contentious issues is waiting

times (i.e. the time between the ordering of an accessible cab and the arrival of the cab). There are no standards prescribing the number or percentage of cabs that are to be accessible. By December 2007, the wait time for accessible cabs is to be the same as for conventional cabs. This can be achieved because throughout the country. While licenses are issued to individual operators, most cabs operate through booking services and the *DDA* obligations are imposed on these services. It is noteworthy that the number of accessible cabs per person in rural areas of New South Wales is more than double that in an urban area such as Sydney. According to state transit authorities, the 2007 target will be reached by 2005 in many regions of the country. There seems to be a high degree of confidence that taxis will be meeting targets, and that they address many concerns about inaccessible urban transit.

The consumer movement is aware that taxi fares (even at half fares) can be prohibitively expensive, particularly when compared with municipal transit fares. Notwithstanding this there does not appear to be a major push to replace taxi subsidies with paratrans. The feeling is that a more elaborate system of subsidies is emerging (e.g. health and social programs providing a complementary subsidy) so that taxis along with a fully accessible conventional transit system can achieve the goal of equal access without the need for paratrans.

Following the passage of the country's *DDA*, but before passage of mandatory access standards, there was a series of high profile cases that captured the public's imagination and demonstrated the determination of the country's human rights commission and courts to ensure meaningful accessibility. The most important of these cases involved the issuance of interim judicial orders that eventually led to settlements providing for enhanced accessibility. Purchases of new transportation vehicles (generally buses) were halted by court order pending a ruling on whether their accessibility met legislative requirements. Before these cases actually went to trial (delay in these circumstances working in favour of accessibility rather than against it), the providers changed from the inaccessible vehicles originally proposed to accessible vehicles. The power to make interim orders is essential to the making of systemic decisions in the area of accessibility

because it is usually “too late” after large amounts of money have been spent and inaccessible vehicles purchased.

Based on the outcome of these interim order cases it was providers more so than persons with disabilities who agitated for access standards as an alternative to litigation. In an effort to introduce an element of predictability and planning into the process, the Australian Transportation Council of Ministers (with representation from the federal government and all the states) decided to support the introduction of accessibility regulations. Following a respected and inclusive consultation process coordinated by the country’s Human Rights and Equal Opportunity Commission (HREOC), the *Disability Standards for Accessible Public Transportation (DSAPT)* became law in 2002. They differ from the prescriptive standards in effect in other jurisdictions by stating accessibility goals “functionally”, and by covering all modes of transportation with a common standard. Functional standards describe the desired outcomes, rather than prescribing the means and measurements required to achieve those outcomes. The provider is given broad latitude to select the means of achieving these outcomes. It was explained that Australia wished maximum flexibility to purchase transportation technologies from the Asian as well as the European and North American markets. For this reason standards based on outcomes rather than precise measures were deemed preferable.

The rail system in Australia is primarily designed for what in Canada would be called regional travel. Most travel between states takes place by air or personal automobile. As a consequence there are a high number of old stations which pose major accessibility problems. While there are a large variety of rail gauges from state to state (like Europe), this is of no great significance since passengers do not have to change trains since no transfers and boundaries are crossed.

Largely as a result of the Olympics, Sydney has been able to achieve its DSAPT five year train accessibility target early. Politicians interpreted this as such a success that they cut funding for accessibility by almost 50%, virtually assuring that future targets will not be

met. They appear not to recognize (or more likely choose not to acknowledge) that due to the lead time required to achieve accessibility, the five-year targets they boast of having met were actually met through action that was accomplished over an eleven-year period.

This demonstrates how essential interim targets and annual progress reports are to the eventual implementation of accessibility programs such as the Australian program for train accessibility, which is to occur over a 30 year period (station accessibility is to reach 100% within another fifteen years). Presumably these reports will quickly indicate how short-sighted these cuts have been and will result in having the amounts that have been cut restored in time to permit steady progress to be resumed, and goals met. In the absence of a long-term plan, politicians are not capable of setting interim goals (e.g. by priorizing key stations). Having interim targets set in advance is the only way the thirty-year period would not end with little or no progress having been made.

To date the state and federal governments have provided the funding necessary to allow state funded services such as ferry, rail and subsidized private operators of taxi (the major domestic means of public transportation) to meet all timetables imposed under the DSAPT. Some jurisdictions, such as New South Wales (which recently hosted the Olympic Games) are well ahead of schedule in many respects. Compliance means that the regulations have not yet been subjected to court challenges. The recent decision to reduce funding of some key initiatives has not yet produced missed deadlines, but signals that use of the enforcement mechanism will soon begin. Missed deadlines will lead to litigation, including disputes about the precise meaning of the generally worded "functional" standards. Because the standards are vague and enforcement is left to privately initiated cases going through the courts, it is difficult for an outside observer to be optimistic about the eventual outcome.

Leadership in the disabled community remains convinced that the Australian model of functional standards will be effective, however caution is urged due to the general nature of the standards and the reliance on litigation for enforcement. If public funding does not

continue to finance the hoped for progress towards full accessibility, Australians with disabilities will quickly learn whether their courts are up to the challenge.

The Australian model appears to hold great appeal for its Asia Pacific trading partners, such as Japan, Malaysia, Singapore and New Zealand, which have all indicated an intention of adopting and following the Australian model. They are moving forward with reforms, without awaiting the outcome of early litigation under the regulations.

SUMMARY OF RECOMMENDATIONS

Mandatory Regulations

1. CCD should reject the continued use of voluntary guidelines as an effective method of advancing accessibility for persons with disabilities in any mode of transportation. The VIA Rail experience demonstrates that voluntary guidelines become maximum standards rather than minimum standards, and even then they will be disregarded whenever it is convenient. International experience demonstrates that all jurisdictions in Europe and the United States have arrived at the conclusion that mandatory regulations, based on the American model, are the only way to resolutely, equitably and efficiently introduce full accessibility over a reasonable period of time. The goal of full accessibility, interim goals and timetables for developing regulations that will achieve the goal should be prescribed in legislation in a manner that will allow the agenda to survive regime change.

Consensus Building

2. CCD requires the cooperation and support of other disability organizations in order to avoid government efforts to divide and conquer. It should circulate this paper or a summary of its policy positions and request that disability organizations endorse and agree to join in a concerted strategy for change.

Action Required

3. The strategy should include a statement that there is no need for study, regulatory impact analysis, consultation with stakeholders or dialogue with the provinces. Regulatory initiatives in other jurisdictions are far ahead of Canada. The actions of all other countries speak for themselves. The experience in Canada and in other jurisdictions has been that these processes divert rather than clarify.

Cooperation is Cooptation

4. The Minister's Advisory Committee on Accessible Transportation (ACAT) has proven itself incapable of initiating regulatory standards. CCD, in conjunction with other consumer groups, should communicate that unless the new Minister rejects the previous government's antipathy to regulation, it will resign from ACAT, and engage in consultation boycotts and other acts of civil disapproval. Justification for this position can be found in the country's poor and declining levels of accessibility at a time when the rest of the world is moving forward.

Consult About Details Not Goals

5. Consultation with stakeholders, if it is to occur, should occur within the context of advising government on how to draft regulations that will most effectively meet the goal of full accessibility. Unless the goal is made non-negotiable, providers will use the consultation process to frustrate the achievement of that goal.

No Time for Nationalism

6. Regulations should be prescriptive, along the lines of the ADA regulations, rather than functional, in order to minimize litigation and avoidance. Prescriptive standards should be based on those in effect in the United States. Canada is so far behind the rest of the world at this stage that it cannot afford the luxury of the illusion that it has anything either innovative or constructive to add. Timetables provided in other countries should be abbreviated here to reflect the financial advantage gained by providers who have enjoyed an exclusion holiday at the expense of Canadians with disabilities. By basing standards on those in effect in the United States, Canada can be assured that (1) providers have not duped regulators yet again, (2) requisite technology exists sufficient to meet the demand of the American market, (3) the Fraser Institute cannot argue American competitors will gain a competitive advantage due to over regulation and (4) CCD can retain the services of knowledgeable American consumer experts to advise it, at modest cost, so as not to be bested in the regulatory process by high paid

provider experts. The Americans have proven regulation is not a dirty word, even as airlines go bankrupt on a daily basis. Cost is no excuse.

Bureaucratic Failure

7. Transport Canada should be told that the bureaucrats it has entrusted with the accessibility file lack the authority, expertise and commitment to effectively manage their portfolio. CCD should demand that the Canadian government appeal to the American government to second to it access experts such as Dennis Cannon, David Capozzi and Robert Ashby. They should be given the mandate of recruiting and training qualified technical and legal staff, so that Transport Canada will finally have staff capable of carrying forward the regulatory process.

Before Not After

8. Transport Canada must hold the authority to grant "undue hardship" or "comparable measure" exemptions, but only based on prior application and approval. No *ex post facto* attempts to use costs occasioned by disregarding regulatory provisions as a defence for failure to comply should be tolerated. Standards must be established explaining the purpose being served by granting exemptions, the circumstances in which they will be available and the conditions and time limits that will attach to them. This will ensure that the goals of the legislation are served through the administrative process. Decisions should be public and groups such as CCD should be allowed to comment on applications. CCD would have to hold Transport Canada politically accountable for the way it administers exemptions.

Agency Needs to Control Its Process

9. The CTA decision in the VIA Rail case was a bare 2 to 1 majority. Apart from its bare majority decision in this case, its jurisprudence cannot be said to justify believing it is capable of making systemic decisions or decisions that will alter provider behaviour, when providers believe it is in the economic interests to defy the Agency. The *Canada Transportation Act* must be amended to ensure due

consideration is given when deciding whether to issue an interim injunction to the impact on the regulatory process by allowing providers to delay and defy the regulatory process. The CTA is designed to work quickly and informally. This will not work if providers perceive they can frustrate the Agency by defying it. An injunction on bringing vehicles or terminals into service will force providers to cooperate and work to expedite the process.

The Prosecutorial Dilemma

10. Perhaps the greatest challenge for Canada is to find a body in which to vest prosecutorial responsibility for enforcing the proposed access regulations. In the current model under the *Canada Transportation Act*, the Agency cannot act on its own to enforce regulations. It must await an "application" before it can investigate and report on its findings. While it could do more, to date it has been totally passive. The applicant must carry the entire prosecutorial function. As CCD has learned, this is a challenging role to have to fulfill when a provider feels it is in its financial interests to attempt to exhaust the resources of the applicant. As noted above, it has its hands full adjudicating cases without assuming responsibility for monitoring and prosecuting them as well. The Australian analogy would be to entrust some [but definitely not all] of this function to the Canadian Human Rights Commission. This is another agency that in the Canadian context seems to be overwhelmed managing its current responsibilities. Its Australian counterpart has earned credibility from its role in a small number of systemic transportation cases and the leading role it played in the development of the *Commonwealth Disability Standards for Accessible Public Transportation 2002*. While consumers in Australia are hopeful that the Human Rights and Equal Opportunities Commission (HREOC) will live up to its responsibilities, it is early and their system still depends on complaints, indeed is even more adversarial than our human rights process. Additionally, there have been judicial pronouncements suggesting the regulation-making prosecutors of human rights commissions are inconsistent with their adjudicative functions, although they assume a prosecutorial function once their initial screening function is complete. Of

greatest concern is the perceived independence of such agencies, meaning they cannot be held accountable when they fail to uphold their mandate. The Canadian equivalent would be either Transport Canada or the Department of Justice. The former is increasingly perceived as the captive of the providers it was established to regulate. The latter has independence, but a disability enforcement office would be an orphan, unless it were attached to the exclusively policy [i.e. as opposed to litigation] Human Rights Branch. Ontario is going thorough a comparable process of needing a public prosecution under the recent *AODA*.

Funding Public Interest Litigation

11. The CTA must change its approach of denying public interest costs to groups such as CCD in advance of litigating cases which have broad systemic implications. Courts are increasingly recognizing their public function, particularly in *Charter* cases and making these awards of damages. The Supreme Court of Canada recently made such an award in the Okanagan Indian Band case. This was done by the CRTC in the old telephone rate cases, allowing groups such as NAPO to become involved, with representation from the PIAC. It may not always be appropriate to impose responsibility for these costs on a particular provider, but this should be the norm. At least until the prosecutorial dilemma is resolved, the CTA should be given authority to award public interest applicants, public funding to proceed with systemic cases. The Court Challenges Program is an example of public funds being used to support public interest litigation. Currently CCD is fulfilling this role on behalf of Canadians with disabilities, at great risk and considerable cost to its other functions. If the CTA will not accept its responsibility to act in this area, public funding could be provided to the Court Challenges Program, if it were willing to accept this responsibility.

Deter Non-compliance

12. Litigation is a signal that the regulatory system is not functioning as it should. Damages under the CTA are intentionally kept low, if not trivial. It seems providers perceive individual cases more as a nuisance than as a caution.

Following the *Air Carrier Access Act* example from the US, the CTA should be given the power to award heavy fines, in addition to making the rather trivial damage awards to individual applicants. The fines should be payable to Transport Canada, which should have the option of restoring the money to the provider on condition it enters into a compliance agreement addressing areas of systemic concern. Agreements should be public, and CCD should be able to push the prosecutorial authority to enforce them. In addition full compensatory damages, perhaps even double or triple damages as is done in the U.S., would encourage meaningful individual applications and give the CTA the opportunity to oversee the elimination of undue obstacles based on real world fact situations.

POSTSCRIPT

Much has happened since the original version of this report, entitled "Only in Canada You Say?...Pity: The International State of Transportation Accessibility" was published in November 1, 2004. The first thing was that the Report's title was changed by unanimous public demand.

An advanced copy of the Executive Summary was presented to Canada's new Transport Minister, the Honourable Jean Lapierre on September 8, 2004. CCD wished to ensure he was given every possible opportunity to familiarize himself with its content before he was asked to respond. Its major findings concerning the regressing state of transportation accessibility should not have come as a surprise, since prior to becoming Prime Minister the Rt. Honourable Paul Martin had requested a briefing on them from the researcher who wrote this Report. Nevertheless, Minister Lapierre requested time to consider the Report's implications.

When nothing more was heard from the Minister, his office was advised that the Report would be discussed at the November 18th ACAT meeting. The Report was presented by its author, with CCD's President and National Coordinator in attendance. It was well received by all ACAT members, with the exception of VIA's representative.

After receiving prior notice, the Minister was further advised at the ACAT meeting that if he could not commit to:

a) move forward from voluntary codes of compliance to regulations,
b) increase support to the Department's Accessible Transportation unit, and
c) agree to work on a new policy on transportation access for Canadians with disabilities

by the end of November, CCD would withdraw from its participation in his ACAT.

The Minister's response to CCD's announcement of its intentions was not promising. He accused CCD of engaging in "blackmail" and declined "to be held responsible for [his] predecessor's decisions".

On November 22nd and 23rd the VIA Rail case was argued in the Federal Court of Appeal. The submissions of VIA's counsel were noteworthy, because he for the first time revealed that the former Transport Minister David Collenette was fully aware of the inaccessibility of the Renaissance cars when VIA purchased them. The clear implication of this statement, if true, would be that the Minister knowingly lied to his ACAT when he promised the trains would meet Rail Code standards.

Also noteworthy is the fact that a new Member of Parliament has been directly and personally affected by several of the new barriers to accessibility that are described in the Report. It remains to be seen whether his Party will take up the cause, and allow him to speak out on behalf of Canadians with disabilities.

By the end of November, nothing further had been heard from the Minister.

On January 6, 2005, Marie White, CCD's President wrote to the Minister confirming CCD's withdrawal from ACAT. She explained:

> We are withdrawing from participation in ACAT because at the present time we do not see it as a vehicle that is advancing the full inclusion of persons with disabilities.

Ms. White rejected the notion that the current Minister could not reverse his predecessor's decision. She pointed out to the Minister:

> We are not moving forward; we are moving backward, and CCD finds its time and energy has to be spent challenging these actions through complaints and in the courts.

Understandably, CCD believes Canadians with disabilities are entitled to more than a "no comment" from the Minister responsible for Canada's Transportation system at a time when a serious erosion of their rights is occurring.

It is a decisive moment in the history of the disability movement in Canada. Much hangs in the balance.

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