



**Council of Canadians
with Disabilities**

A VOICE OF OUR OWN

**Conseil des Canadiens
avec déficiences**

CETTE VOIX QUI EST LA NOTRE

SUBMISSIONS RESPECTING:

Transportation Modernization Act (Bill C-49)

Submissions to the Standing Senate Committee on Transport and Communications

By: Council of Canadians with Disabilities (CCD)

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BACKGROUND:

The Council of Canadians with Disabilities (CCD) has a long history of addressing accessibility for Canadians with disabilities to Canada's transportation systems. Indeed, Canadians with disabilities came together in the late 1970s to form what is now CCD as a result of very little transportation services that could meet the needs of Canadians with disabilities. Accessibility as referred to in this document is not simply access related to mobility impairment but rather related to the access needs of all persons with disabilities and grounded in the principles of Universal Design. We are seeking a cross-disability framework in the development of an accessible, federally regulated transportation system. These were the goals and objectives of CCD 40 years ago and they remain the goals and objectives for transportation today. A CCD member almost 40 years ago put it this way:

Transportation, or should I say the inaccessibility or lack of transportation, has been the greatest problem for the mobility handicapped for what seems an eternity. Neither basic medical visits, nor employment, and certainly not recreational activities could even be attempted, and then only with a great deal of difficulty and expense on the part of the disabled, who, like myself, could not get into a regular vehicle unaided. - Elizabeth Semkiw, Winnipeg (1981)

CCD works for an accessible and inclusive Canada. In 2014, CCD reminded the Canada Transportation Act Review that in March 2010, Canada ratified the *Convention on the Rights of Persons with Disabilities (CRPD)*. By ratifying the *CRPD*, Canada made a commitment to meet the standards set by this international law, which upholds accessibility for persons with disabilities. Articles 9 (Accessibility) and 21 (Freedom of Expression and Opinion and Access to Information) elaborate measures States Parties must undertake to ensure people with disabilities experience full enjoyment of their human rights when using transportation services. (See Appendix One for Article 9 and 21.)

Canada was once a world leader in accessible transportation. Canadian access levels have fallen. Other jurisdictions, such as Japan and the European Union, have inclusive and Universal Design in their transportation systems. CCD believes that international best practices of inclusive and Universal Design will assist Canada to become truly accessible.

BILL C-49: Generally

Parts of the *Transportation Modernization Act*, help Canada move forward, while other parts move backwards, reminding CCD of the hard struggle for Canadians with disabilities to become part of their Canadian communities as transportation became at least a little accessible. However, in Canada, Canadians with disabilities do not have true accessibility in our transportation system, as:

- One independent traveler with a disability informed CCD that when she arrived at the airport an Air Canada agent informed her that she would need to travel with an attendant.
- Some air carriers assign ground crew to accompany travelers, with disabilities, CCD have been told, that even when these travelers indicated that assistance was not required, the staff remained with them until they boarded.

- Air carriers are now charging travelers to check their luggage. This is a barrier for passengers with disabilities who may need to travel with various aids, devices and supplies.
- A variety of services in terminals are offered through inaccessible touch screen devices, such as self-check-in systems. These devices are a barrier to travelers with physical and sensory disabilities.
- Air carriers are reducing aircraft seat pitch and width. North American travelers are becoming larger. Small seat size is a barrier for passengers with an obesity disability.
- Options are limited for making reservations to various modes of transportation throughout Canada. Sometimes the only method available is a telephone. Internet-based applications are available but are not accessible to all, as they do not support adaptive technology software used by Canadians with some types of disabilities. Outdated methods of accommodations, like TTYs, are still being used rather than upgrading to text or messaging systems.
- In summer 2014, a wheelchair user wanted to travel by bus from Ontario to the City of St. John's. Once he arrived in North Sydney, Nova Scotia he planned to travel from North Sydney to Port aux Basque via a Marine Atlantic vessel. He had wanted to book a bus from Port aux Basque to the City of St. John's. Unfortunately, there was no form of accessible transportation from Port aux Basque to the City of St. John's.
- Public transportation systems across Canada are now refusing to transport scooters. Even parallel transportation systems are questioning scooters.

Each year, travelers with disabilities bring many complaints about barriers to the Canadian Transportation Agency (CTA). The same problems (for example, poorly trained staff, damage to equipment, barriers to mobility) keep re-occurring and travelers with disabilities continue to lodge complaints. Systemic barriers remain and discrimination is ongoing; systemic remedies are required.

Canada's system of consumer protection for the travelling public is based on formal complaints to the Canadian Transportation Agency. Dispute resolution options ranging from facilitation to mediation to adjudication are available. Decisions are made on a case-by-case basis and only apply to the service provider targeted in the complaint, not to the industry as a whole. Other jurisdictions, such as the U.S. and the European Union, have more prescriptive regulatory regimes based on pre-established consumer rights associated with specific issues.

The case-by-case approach and decisions only applying to the carrier targeted in a complaint, is a frustrating process for Canadians with disabilities seeking an accessible and inclusive transportation system. For example, CCD, in collaboration with Eric Norman and Joanne Neubauer, lodged a Canadian Transportation Agency (CTA) complaint against WestJet and Air Canada which resulted in a decision that established the one person/one fare policy for these carriers domestically. Unfortunately, the decision did not effect other carriers or international flights. For the realization of an accessible and inclusive transportation system, the CTA must have the power to order systemic solutions.

Unlike the CTA, the Canadian Human Rights Tribunal, has the power to order robust corrective measures. For example, a complainant can be awarded:

- up to a maximum of \$20,000 for pain and suffering and any losses caused by the discrimination, and
- up to a maximum of \$20,000 for reckless or willful discrimination.

Similar remedies must be available to the CTA in order to resolve undue obstacles to the mobility of persons with disabilities.

Part V Transportation of Persons with Disabilities – It is CCD's view that the *Canadian Transportation Act's* s. 170 -173, should not be changed, with the exception of s. 172 (3), which should be amended to give the Canadian Transportation Agency (CTA) the same range of remedies as the Canadian Human Rights Tribunal. The Canadian Human Rights Commission has been reluctant to accept cases from Canadians with disabilities concerning access barriers in the federally regulated transportation system.

In addition to empowering the CTA to award human rights remedies, CCD is calling for the CTA to use the power: to grant interim injunctions related to the purchase of inaccessible equipment by carriers, to issue a prospective order requiring carriers to pay the legal costs of persons with disabilities and to mandate the CTA to make systemic cost orders.

CCD is opposed to any amendment of the *Canadian Transportation Act* which would dilute the mandate of the CTA. The CTA's current mandate with regard to "undue obstacles" complies with human rights standards [VIA Rail] and the UN *Convention on the Rights of Persons with Disabilities*. CCD holds that the problem is not with the law but the enforcement of the law (lack of remedies and lack of advance cost awards for individuals) and the need for regulations.

What the Supreme Court of Canada said in the VIA case:

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

“176 Likewise the fact that there are accessible trains traveling along some routes does not justify inaccessible trains on others. It is the global network of rail services that should be accessible.”

“186 The twin goals of preventing and remedying discrimination in *Canadian National Railway Co. v. Canada (CHRC)* cannot be accomplished if the creation of new, exclusionary barriers can be defended on the basis that they are no more discriminating than what they are replacing. This is an approach that serves to perpetuate and exacerbate the historic disadvantage endured by persons with disabilities.”

“221 Members of the public who are physically disabled are members of the public. This is not a fight between able-bodied and disabled persons to keep fares down by avoiding the expense of eliminating discrimination. Safety

measures can be expensive too, but one would hardly expect to hear that their cost justifies dangerous conditions. In the long run, danger is more expensive than safety and discrimination is more expensive than inclusion.”

What is stated in the Via Rail case can also be said about air travel, bus travel and marine travel. But more importantly, this case encourages law makers to consider the characteristics of persons with disabilities: one can no more expect a person in a wheelchair to climb stairs, a person who is blind to read printed materials, or a person who is deaf to hear an announcement made over a public address system.

In paragraph 162 (reproduced above) the objective of access cannot be put any clearer - *Independent access to the same comfort, dignity, safety and security as those without physical limitations, is a fundamental human right.* Modernizing Canada’s Statutes respecting transportation, must remove discrimination and protect every Canadian’s right of access.

In paragraph 176 (reproduced above) is just as clear, making one train or one aircraft or one bus or ferry accessible does not make the system accessible. It is direction for the entire system to be accessible that will recognize and implement the protection of the right of independent access with dignity.

In paragraph 186 (reproduced above) it cannot be stated any clearer that to allow new barriers to be created through ill-advised amendments to the Canadian transportation Statutes *serves to perpetuate and exacerbate the historic disadvantage endured by persons with disabilities.* I will get directly into specific changes that Canadians with disabilities fought for, for nearly 4 decades. CCD must challenge such amendments as not to do so is to ignore the sacrifices made by Canadians with disabilities and that is something CCD will not do.

Paragraph 221 (reproduced above) brings out the point that Canadians with disabilities are just as much Canadians or members of the public and in Canada have the right to enjoy the same services provided to any other member of the public. Again, I cannot say it any better than it was stated by the Supreme Court, *In the long run, danger is more expensive than safety and discrimination is more expensive than inclusion.*

CCD appreciates that the "Discussion Paper: Canada Transportation Act Review", made the following commitment, *Ensuring the accessibility of the transportation network for persons with disabilities will continue to be an important objective in light of Canada's aging population.* (p. 21) This is essentially the same commitment made to Canadians with disabilities in every report respecting transportation starting with the first *Obstacles Report* written in 1981.

SPECIFIC OFFENDING C-49 SECTIONS:

1. **Section 86.11(1)(f)** – This section increases wait time on tarmac from 1.5 hours to 3 hours. For many mobility challenged Canadians with disabilities, who travel, doubling the wait time from what it currently is, will have critical negative repercussions. It is common practice for mobility challenged travelers to dehydrate themselves calculating the time anticipated that they would not have access to washroom facilities. For persons with disabilities that are not able to stand or move, this increase in sitting time means pain, spasticity, pressure sores and greater dehydration. CCD strongly urges this

Committee to strike this amendment and make the wait time on the tarmac 1.5 hours before the requirement to provide water, food and the opportunity to exit the aircraft. 90 minutes maintains Canada's consistency with international provisions like those governing European air travel.

2. **Section 67.3** and the amendment to subparagraph 86(1)(h)(iii) introduce a new restriction upon the Agency. If these pass, the Agency will only act on written complaints from an adversely affected traveler. This prevents public interest actions. This Committee cannot allow this to happen.

CCD fully supports Dr. Lukács 's submission, especially its comments concerning public interest organizations, including CCD, being able to bring a complaint to the Agency in the public interest.

On January 19, 2018 in the matter of *Delta Airlines Inc. v Gábor Lukács*, the Supreme Court decided it is unreasonable for the CTA to use a narrow criteria for determining which complaints can be heard. The Court held a narrow approach unreasonably prevents public interest groups, such as CCD, from bringing complaints forward. Bringing cases about obstacles to mobility in the transportation system is one way to remove accessibility barriers. (See Appendix 2 for more on *Delta Airlines Inc. v Gábor Lukács*.)

3. **Section 86.11(1)(c)** – This section must be broad enough to cover any losses of travelers with disabilities. The fact that the current wording does not include the word delay is a huge oversight for Canadians with disabilities. Statistics Canada refers to Canadians with disabilities as the poorest of the poor. CCD is of the opinion that a uniform liability regime, applicable to all travel by air within Canada, would be a most welcome change as long as it is based on full restitution principles. Canadians with disabilities have the devices they must rely upon routinely damaged and often with no compensation by air carriers.

CCD is of the view that mobility devices, such as wheelchairs and all other mobility aids, should be considered as an extension of the person and treated accordingly and not be treated as baggage.

4. **Regulations** – If the volunteer codes of practice taught Canadians with disabilities anything, it is that they do not ensure accessibility. The past 40 years has taught CCD that in order to reach an accessible transportation system, we require Regulations. Regulations must embrace Universal Design and inclusivity. It is time for Canada to adopt clear and enforceable access regulations to govern the modes of transportation in federal jurisdiction and that the Council of Canadians with Disabilities be actively involved in the development of those regulations.
5. **Enforcement** - The enforcement of accessibility needs to be strengthened by providing the CTA with: the power to award human rights remedies (for example, awards for pain and suffering) and by CTA using the power to grant interim injunctions related to the purchase of any new equipment that would create new barriers; the power to issue a

prospective order requiring carriers to pay the legal costs of persons with disabilities; and, the mandate to make systemic cost orders.

All of which is submitted to this Standing Senate Committee on Transport and Communications, to assist in deliberations respecting the *Transportation Modernization Act* (Bill C-49 and for no other or improper reason.

On behalf of CCD we appreciate this opportunity to bring to your attention weaknesses that may adversely affect Canadians with disabilities.

Bob Brown

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CCD Transportation Committee

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Co-Chairperson,

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Appendix One

Article 9 – Accessibility

1. To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia:

- a) Buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces;
- b) Information, communications and other services, including electronic services and emergency services.

2. States Parties shall also take appropriate measures:

- a) To develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public;
- b) To ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities;
- c) To provide training for stakeholders on accessibility issues facing persons with disabilities;
- d) To provide in buildings and other facilities open to the public signage in Braille and in easy to read and understand forms;
- e) To provide forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public;
- f) To promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information;
- g) To promote access for persons with disabilities to new information and communications technologies and systems, including the Internet;
- h) To promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost.

Article 21 – Freedom of expression and opinion, and access to information

States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice, as defined in article 2 of the present Convention, including by:

- a) Providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost;
- b) Accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions;
- c) Urging private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities;
- d) Encouraging the mass media, including providers of information through the Internet, to make their services accessible to persons with disabilities;
- e) Recognizing and promoting the use of sign languages.

Appendix Two

On January 19, 2018 in the matter of *Delta Airlines Inc. v Gábor Lukács*, the Supreme Court of Canada (“SCC”) decided it is unreasonable for the Canadian Transportation Agency (CTA) to use a narrow criteria for determining which complaints can be heard. The Supreme Court heard the case on October 4, 2017.

The Council of Canadians with Disabilities (CCD) intervened in *Delta Airlines Inc. v Gábor Lukács* at the SCC. Byron Williams and Joëlle Pastora Sala from the Public Interest Law Centre (“PILC”) appeared before the SCC, along with pro bono counsel Alyssa Mariani of Thompson Dorfman Sweatman (TDS) LLP (“TDS”), on behalf of CCD. Sacha Paul of TDS was also an integral part of the team who worked on this case.

CCD’s Transportation and Human Rights Committees guided the development of the intervention. Bob Brown chairs the Transportation Committee and Anne Levesque chairs the Human Rights Committee.

At issue in the proceeding was the appropriate criteria for deciding whether to hear complaints before administrative bodies such as the Canadian Transportation Agency (CTA). CCD took the position that individuals and groups bringing serious issues before administrative bodies, such as the CTA, should be heard. It also argued that the protection offered by the CTA and other administrative bodies should be no less than the protection offered by the *Canadian Human Rights Act*.

The CCD argued that the CTA's discretion in identifying which complaints can be heard must be consistent with the Act's power to remedy obstacles and reduce rather than perpetuate barriers to access to justice. The arguments presented are of particular importance to CCD and to persons with disabilities because it may affect their efforts to effect barrier removal in the transportation system in a timely and cost effective manner.

The CCD intervention made a significant difference in the dialogue before the Court. The human rights aspects of the case were not really pursued before the Court of Appeal. The CCD intervention directly dealt with the relationship between the *Canada Transportation Act* and the *Canadian Human Rights Act*. As a result there was a discussion of the role of human rights by the CTA in its factum.

The SCC held that a narrow approach unreasonably prevents public interest groups such as CCD from bringing complaints forward. Bringing cases about obstacles to mobility in the federally regulated transportation system is one way to remove barriers to travel for people with disabilities.

The SCC agreed with the CCD that “to refuse a complaint based solely on the identity of the group bringing it prevents the Agency from hearing potentially highly relevant complaints, and hinders its ability to fulfill the statutory scheme's objective.” The SCC found that the Agency's decision to deny Dr. Lukács' complaint based solely on his identity was unreasonable as it “did not maintain a flexible approach”.

Consistent with the CCD submission, the majority SCC decision held that a more appropriate criteria may be to consider whether the complaint raises a serious issue to be tried.

Noteworthy is the Court's recognition that the Agency's decision was flawed as it did not allow those with most at stake to be heard. The disability community's "Nothing About Us Without Us" principle is having an impact!

The SCC's decision in *Delta Airlines Inc. v Gábor Lukács* will be useful to us in the future because it helps to ensure that groups like CCD will be able to continue to intervene before administrative bodies, like the CTA, to make the case for barrier removal.

CCD expresses its sincere appreciation to Byron Williams, Joëlle Pastora Sala, Alyssa Mariani, Sacha Paul and the CCD Transportation and Human Rights Committee for their work on the intervention which resulted in this important decision.

For the full decision, see: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16958/index.do>