Legal Analysis of Bill C-81,

An Act to ensure a barrier-free Canada

DRAFT REPORT FOR COMMENT

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INTRODUCTION

In 2016, the Government of Canada announced its intention to develop and introduce federal accessibility legislation. On June 20, 2018 the *Accessible Canada Act* (ACA) was introduced in the House of Commons and passed first reading. The *Accessible Canada Act*, also known by its full title as *An Act to ensure a barrier-free Canada*, is presently a bill. It must work its way through the legislative process before becoming law in Canada. [1]

Building upon earlier work[2] in relation to federal disability legislation, the Council of Canadians with Disabilities (CCD) asked ARCH Disability Law Centre to coordinate a group of disability rights lawyers from across Canada to develop a legal analysis of the bill.

This report is the first draft of the legal analysis. A revised draft of this report will be produced following feedback and comments from the CCD, disability organizations and persons with disabilities.

ABOUT THIS REPORT

The purpose of this report is to provide the CCD, disability organizations and persons with disabilities with a legal analysis to assist the community in developing an advocacy response to the bill. In addition to this report, the Federal Accessibility Legislation Alliance (FALA) is producing a legal analysis of the ACA, and the Accessibility for Ontarians with Disabilities Act Alliance is producing a brief to Parliament on the ACA. ARCH and the CCD are both partners of FALA. These reports should complement one another and provide a rich set of analyses, issues and recommendations for the community to consider.

Nothing in this draft report is intended to contradict the legal analyses and recommendations contained in the reports produced by FALA, the AODA Alliance or other disability organizations.

A very short timeline was available for producing this report. The report highlights the following:

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[1] A copy of the draft bill (Bill C-81) is available online: <http://www.parl.ca/DocumentViewer/en/42-1/bill/C-81/first-reading#enH3962>.

[2] In 2006, ARCH Disability Law Centre (ARCH) produced a paper entitled “A Federal Disability Act: Opportunities and Challenges,” which was commissioned by the Council of Canadians with Disabilities (CCD) and the Canadian Association for Community Living (CACL). Available online: CCD <http://www.ccdonline.ca/en/socialpolicy/fda/1006>.

- elements of the ACA which achieve the goals articulated by the community during the pre-bill consultations;
- significant gaps which the bill does not address;
- how the implementation and enforcement mechanisms established by the bill will interact with existing administrative bodies that deal with human rights and accessibility issues; and
- elements of the bill which require strengthening.

Disability rights lawyers from across Canada contributed to research, analysis, writing and revising this first draft of the report. Our team included:

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- Jessica De Marinis, Staff Lawyer, ARCH Disability Law Centre
- Dr. Ruby Dhand, Associate Professor of Law, Thompson Rivers University
- Kerri Joffe, Staff Lawyer, ARCH Disability Law Centre
- Laura Johnston, Lawyer, Community Legal Assistance Society
- Robert Lattanzio, Executive Director, ARCH Disability Law Centre
- Dulcie McCallum, Expert Advisor on Canada's Delegation (UN*CRPD*) to the UN; former B.C. Ombudsman and N.S. Privacy Commissioner
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ABOUT ARCH

ARCH Disability Law Centre (ARCH) is a specialty legal clinic dedicated to defending and advancing the equality rights of persons with disabilities in Ontario. ARCH is primarily funded by Legal Aid Ontario. For over 35 years, ARCH has provided legal services to help Ontarians with disabilities live with dignity and participate fully in our communities. ARCH provides summary legal advice and referrals to Ontarians with disabilities; represents persons with disabilities and disability organizations in test case litigation; conducts law reform and policy work; provides public legal education to disability communities and continuing legal education to the legal community; and

supports community development initiatives. More information about our work is available on our website: www.archdisabilitylaw.ca

SUMMARY OF KEY ISSUES

No Dates and Timelines: The ACA does not include dates or timelines for achieving its purpose of a Canada without barriers, nor does it includes dates or timelines for implementing requirements such as making accessibility standards and other regulations. This report describes key sections which would be strengthened by adding dates or timelines.

Use of permissive language: Many sections of the ACA which set out powers to make and enforce accessibility requirements use the language may. The legal effect is to give power to make and enforce accessibility requirements, but not actually require this power to be used. If the language may remains, accessibility standards may never be made into binding law. This report describes key sections which could be changed from may to shall, in order to ensure that accessibility requirements are made and enforced.

Areas to trigger accessibility requirements are general: The ACA describes general areas in which barriers must be identified, removed and prevented. These areas do not capture all of the issues identified by persons with disabilities during the pre-bill consultations. This report outlines specific areas which may need their own accessibility standards.

Multiple accessibility requirements in each area: The ACA gives powers to more than one agency to create accessibility requirements in most areas. As a result, it is likely that most areas will have more than one accessibility standard or set of requirements. The report describes the advantages and disadvantages of this approach.

Diffuse approach to oversight of accessibility standards and adjudication of accessibility complaints: The ACA does not designate one central agency to oversee compliance accessibility requirements and adjudicate accessibility complaints. Instead, enforcement of accessibility standards will be done by multiple agencies, including the Accessibility Commissioner, CRTC, CTA, and grievance adjudicators of the Federal Public Sector Labour Relations and Employment Board. The report describes the advantages and disadvantages to this diffuse approach to enforcement.

Failure to sufficiently address intersectionality and poverty: The report describes how the ACA can be strengthened by recognizing and addressing the multiple and

intersectional barriers experienced by persons with disabilities in relation to their identities and their experiences of poverty.

Failure to address unique barriers experienced by Indigenous persons with disabilities and the interaction of the ACA with areas that fall within the jurisdiction of First Nations governments: The report outlines some related preliminary issues.

PREAMBLE AND PURPOSE

Preambles and purpose sections are important components of legislation. A preamble sets out important facts or considerations that led to the enactment of the legislation. It may also set out goals the legislation aspires to achieve and principles the legislation is meant to implement. A purpose provision sets out the governing principles or policies of the law or the objectives it is meant to achieve.[3]

Although different, a preamble and a purpose are both authoritative sources of information regarding the way a law is to be implemented, interpreted and applied. Both are relied upon to understand the legislative intent and values behind a law. They may also be relied on to resolve any ambiguity in the law, determine the scope of the law or generally understand the meaning and effect of legislative language.[4]

The ACA contains a strong preamble. The preamble states that the bill adopts a proactive and systemic approach for identifying, removing and preventing barriers to accessibility. It articulates the relationship between the bill and the *Canadian Human Rights Act*[5], stating that this proactive approach complements the rights of persons with disabilities under the *Canadian Human Rights Act*. The use of the word complement is important for signalling that the bill is not intended to override or replace existing rights to be free from discrimination under the *Charter*[6] and the *Canadian Human Rights Act*.

The preamble connects the ACA's barrier removal approach with the *Charter*'s section 15 equality guarantee and the *Canadian Human Rights Act*'s preamble, stating that all people should have equal opportunities and have their needs accommodated without discrimination. The preamble also connects barrier removal with achieving full and equal participation in society for persons with disabilities.

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[3] Ruth Sullivan, *Sullivan on the Construction of Statutes,* 6th ed (Markham: LexisNexis, 2014) at 454.
[4] *Ibid* at 270-271, 384-386; compare also *Legislation Act*, SO 2006, c 21 Sch F, s 69; *Interpretation Act*, RSC 1985, c I-21, s 13.
[5] RSC, 1985, c H-6.
[6] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

The preamble recognizes Canada's international human rights obligations under the *Convention on the Rights of Persons with Disabilities* (*CRPD*) to take appropriate steps regarding accessibility. This is important because it demonstrates Parliament's intention that the ACA serves to implement *CRPD* requirements in relation to accessibility.

Overall, the preamble contains strong statements connecting the ACA with domestic and international human rights laws. After the bill becomes law, these statements will be helpful if there are disputes about what the ACA means, what it requires organizations to do, or how the law should be interpreted. Courts and administrative tribunals will look to the preamble to guide their interpretation and application of provisions of the ACA. Sections of the ACA must be interpreted and applied in a way that achieves the goals of complementing the right not to be discriminated against under the *Canadian Human Rights Act*, implementing Canada's accessibility obligations under the *CRPD*, and achieving full and equal participation of persons with disabilities in Canadian society.

The effect of the preamble and purpose sections can be further strengthened by adding sections to the ACA to clarify that nothing in the ACA lessens existing human rights obligations of federally regulated entities under the *Canadian Human Rights Act*, and that where a conflict arises between the ACA and another law, the law that provides the greatest accessibility for persons with disabilities will apply.

The preamble may be further strengthened by incorporating language from the preamble to the CRPD.

SECTION 5: PURPOSE

Dates and Timelines

Section 5 states that its purpose is the progressive realization of a Canada without barriers, within areas that fall to federal jurisdiction. Notably, section 5 does not include a timeline for achieving this purpose. This is a significant omission. Without a timeline for achieving the bill's purpose, there is no assurance that the ACA will have an impact on the lives of persons with disabilities. It is critical to include a timeline for achieving the ACA's purpose.

In addition, the absence of a timeline is not in keeping with the concept of progressive realization. Progressive realization is a robust international law concept which requires effective steps to be taken in order to meet accessibility targets. Progressive realization means taking well-planned steps, over time, to fully realize a legal obligation or purpose. Progressive realization requires that accessibility targets or benchmarks are set, timelines for meeting those benchmarks are established, demonstrable steps are taken

to achieve those benchmarks, and progress is regularly measured and assessed. More detailed information about progressive realization is included in Appendix A of this report.

Including a timeline in section 5 is consistent with the concept of progressive realization because it is essential for assessing how well Canada is progressing in achieving the purpose of the bill. The timeline in section 5 should be a specific year or period of time by which the purpose of a Canada without barriers will be achieved.

Areas in which Accessibility Standards will be Developed

Section 5 states that the purpose of the ACA is to be achieved by the identification, removal and prevention of barriers in employment, the built environment, information and communication technologies, the procurement of goods and services, the delivery of programs and services, transportation, and other areas designated in regulations.

Consultation reports and expert interviews done by the Canadian Access and Inclusion Project, the Alliance for an Inclusive and Accessible Canada, the Canadian Association of the Deaf, the Canadian Hard of Hearing Association, and Communication Disabilities Access Canada asked persons with disabilities to identify which issues the ACA should address. In addition to the areas already listed in section 5, a number of consultations reported that the law should address:

- inclusive and accessible political participation: elections, candidates debates, running for office
- language rights: designating ASL and lsq as official languages
- non-discriminatory immigration policy
- anti-poverty measures, including accessible affordable housing and anti-poverty measures for people who cannot work
- attitudinal barriers and stigma through education and awareness-raising
- social and cultural inclusion and participation
- representation of persons with disabilities in media

In addition to all the issues listed above, in an earlier paper[7], ARCH recommended that in order to further *CRPD* implementation, the ACA should also address:

- access to justice: ensuring that federal courts and tribunals are fully accessible;
- accessibility of Canada's existing federal income support programs, social security programs, and disability-related tax credits and exemptions: removing any barriers to accessing these programs, and requiring the Government of Canada to develop a national action plan that addresses poverty reduction for persons with disabilities. This plan should address access to adequate food, clothing and clean water; access to appropriate and affordable disability services, assistive devices and other disability-related needs; and access to affordable, accessible housing; and
- Canada's international cooperation and development programs: ensuring they are inclusive of and accessible to persons with disabilities.

People with disabilities have further stated that the ACA should address:

- supported decision-making
- accessibility in federal prisons and community-based alternatives to incarceration;
- a national strategy for inclusive education; and
- a national strategy for deinstitutionalization.

The issues listed above are not explicitly addressed in the ACA. However, the areas included in section 5 are broad enough to capture many of these additional issues. For example, the delivery of programs and services in section 5 could cover elections, some aspects of social and cultural participation, accessibility in courts and tribunals, accessibility of Canada's existing federal income support programs, and accessibility within federal prisons. This is because all of those issues fall within the scope of the delivery of programs and services, which is covered by section 5 of the bill.

[7] ARCH Disability Law Centre, "Discussion Paper: Proposed Federal Accessibility Legislation and the Convention on the Rights of Persons with Disabilities" (8 February 2017) at 5, online: <http://www.archdisabilitylaw.ca/Discussion_Paper_FedAccessibilityLegislation_*CRPD*>.

Even though the accessibility standards that are ultimately developed under the ACA may address many of the specific issues raised in the consultations, it is also possible that many of the issues will not be addressed. It would be helpful for the bill to require the development of accessibility standards on certain specific issues. Issues that raise particular disability-related barriers in a particular sector or are of particular concern to disability communities should have their own accessibility standards, so that the particular barriers in these important areas will be addressed. For example, specific accessibility standards could be developed for inclusive and accessible political participation, access to justice, accessibility in federal prisons and community-based alternatives to incarceration, access to federal income support programs, and accessibility in some of the other areas identified in the list above. The community may wish to determine which areas of particular concern we should advocate for having specific accessibility standards.

If the community determines that certain particular areas should have their own accessibility standards, it will be necessary to amend the ACA to ensure that these standards will be developed, rather than leaving it to government's discretion. Section 117(1) would need to identify those specific areas. Section 117(1) would need to specify that for the purposes of section 5(g), accessibility regulations must be developed in specific areas, including but not limited to those identified.

Section 5 states that one of the areas in which accessibility standards will be developed is the delivery of services and programs. The foreseeable problem in focusing on delivery only is that the substantive objectives or parameters of a program may be put in place before thinking about disability, accessibility and inclusion. To avoid this problem, the section could use language of design and delivery of programs and services.

SECTION 6: PRINCIPLES

Like the preamble and purpose sections, the principles outlined in section 6 of the ACA will guide the implementation and interpretation of the Act and its regulations.

In addition to the principles already included in section 6, the following additional principles could be added to strengthen the ACA, in particular to ensure that barrier identification, removal and prevention is done in a way that recognizes diversity among persons with disabilities and the impact of poverty:

- Persons with disabilities disproportionately live in conditions of poverty.

- Women and girls with disabilities experience unique and intersecting barriers to accessibility, which must be recognized and addressed.

- Persons with disabilities are diverse and experience multiple and intersecting barriers to accessibility, as a result of discrimination on the basis of race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, martial status, family status, genetic characteristics, and/or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered. Multiple and intersectional barriers must be recognized and addressed.

- Indigenous persons with disabilities experience unique and intersecting barriers to accessibility, as a result of colonialism, racism and systemic discrimination. These barriers must be recognized and addressed.

- Barrier identification, removal and prevention must be done in accordance with principles of inclusive design and universal design.

SECTION 2: DEFINITIONS

Section 2 defines disability as a physical, mental, intellectual, learning, communication or sensory impairment – or a functional limitation – whether permanent, temporary or episodic in nature that, in interaction with a barrier, hinders a person's full and equal participation in society.

It is important that the definition of disability be as broad and inclusive as possible to ensure that the law will apply to all persons with disabilities, to new disabilities which may arise and to our evolving understanding of disability. The definition would be made broader and more inclusive by adding 'disability includes but is not limited to' at the beginning of the definition.

Similarly, the definition would be broadened by adding 'whether the disability is evident or not'. This would help to ensure that accessibility requirements take barrier removal into account regardless of whether or not the disability is evident.

Section 2 defines barrier as barriers that are physical, architectural, technological, attitudinal, based on information or communications, or the result of a policy or practice that hinders full and equal participation in society of persons with physical, mental, intellectual, learning, communication or sensory impairments or functional limitations.

Missing from this definition are barriers created by law. The ACA's reach could be extended by adding the word law to section 2, so that barriers created as a result of laws would also be subject to accessibility requirements.

Section 15(1) of the *Charter* guarantees that everyone is equal before and under the law and has the right to equal benefit and protection of the law without discrimination. Generally, when governments create new laws, they analyze whether the law respects the *Charter*'s section 15 equality guarantee. Despite this check, governments can still enact laws or programs which discriminate if they can be justified in a free and democratic society (the *Charter*'s section 1 test) or if they are ameliorative (section 15(2) of the *Charter*). Adding the word law to section 2 would complement the *Charter*'s section 15 equality guarantee.

The definition of barrier could also be broadened to recognize how the intersection of disability and Indigeneity, race, culture, ethnicity, gender, sex and other social factors create systemic barriers for people with disabilities.

PART 1: MINISTER'S POWERS, DUTIES AND FUNCTIONS (sections 4, 11-16)

Section 4 provides that the Governor in Council may designate a Minister responsible for the ACA. The word may is permissive; it provides the Governor in Council with legal power to designate a minister, but does not require the Governor to do so.[8]

During consultations on the bill, one of the key concerns of persons with disabilities was that the ACA should have strong oversight, enforcement and accountability mechanisms. Key to ensuring that the ACA achieves its purpose is having a minister responsible for the law. Therefore, the word may should be changed to shall. This would require the Governor in Council to appoint a Minister.

Like the purpose of the ACA, the mandate of the Minister is the progressive realization of a Canada without barriers (section 11(1)). It is very important to include a date or timeline in section 11(1) for the same reasons that it is important to include a date in section 5 (purpose). The dates in these sections should be the same.

Sections 11(2) – 16 set out various powers, duties and functions which will enable the Minister to fulfil the mandate. Missing from these sections are duties in relation to

[8] *Supra* note 3 at 81 and 91. Section 11 of the federal *Interpretation Act* states that the "expression 'shall' is to be construed as imperative and the expression 'may' as permissive" (RSC 1985, c I-21). The legal effect of a statutory provision that uses "may"—as in the context of the ACA—is to confer power on an official to do something. In the absence of express or implied limitation, the conferred power is discretionary, and the official may decide whether or not to exercise their power. In contrast, the effect of "shall" is to both confer a power to do something and also oblige it to be done. A person who "shall" do something has no discretion to decline.

fulfilling the progressive realization component of the Minister's mandate. As outlined on pages 8-9 of this report, progressive realization requires that accessibility targets or benchmarks are set, demonstrable steps are taken to achieve those benchmarks, and progress is regularly measured and assessed. The following duties could be added to the ACA to ensure that the Minister implements the progressive realization requirement:

- a requirement that the Minister will establish benchmarks for progressively realizing a Canada without barriers by the date that should be specified in the ACA;

- a requirement to establish progressive timelines for meeting these benchmarks;

- a requirement that progress towards meeting these benchmarks is regularly assessed. In this respect section 15 could be changed to: Subject to the Statistics Act, the Minister shall collect, analyse, interpret, publish and distribute information in relation to matters relating to accessibility. An additional subsection could be added to the bill requiring the Minister to collect, analyse, interpret, publish and distribute information regarding progress being made towards meeting established benchmarks within the time specified in the Act.

There is a dearth of information on the rates of disability among persons from ethno-racial communities and the unique barriers they face. Section 15 could require the Minister to collect and analyze such data in order to better understand the accessibility needs of these groups.

Section 16 provides that the Minister may coordinate accessibility efforts with the provinces and territories. The coordination and consistency of accessibility requirements across the country was highlighted as an important consideration in several of the pre-bill consultations. The word may in section 16 should be changed to shall to ensure that the federal Minister will coordinate accessibility efforts with the provinces and territories. In addition, consultation with First Nations communities is essential, especially where self-government models are in place.

Consideration should be given to include an additional responsibility for the Minister in the bill, namely the provision of clear language information setting out which organizations have accessibility requirements that apply to them, and what those requirements are. (For more information see page 36 of this report).

PART 2: CANADIAN ACCESSIBILITY STANDARDS DEVELOPMENT ORGANIZATION (sections 17-36)

Part 2 of the bill establishes the Canadian Accessibility Standards Development Organization (CASDO). Among other things, CASDO has responsibility for developing and revising accessibility standards (section 18(a)). CASDO then recommends the accessibility standards to the Minister (section 18(b)). These standards may become law if the Governor in Council enacts them into regulations (section 117(1)(c)). Regardless of whether the standards become law, CASDO must make the standards public (sections 18(c), (e), 19(e), 20, 34). It is likely that the accessibility standards which CASDO develops will be made public before they are enacted into law. This will provide organizations with an opportunity to voluntarily adopt or follow accessibility standards, even before they are legally obligated to do so.

The bill establishes CASDO as an agent of the government (section 17(2)). Section 21(1) further provides that the Minister may issue general directions to CASDO regarding how it carries out its mandate. Under Part 2, the Minister will have close control over CASDO and the Board of Directors will be appointed by government (section 23(1)). CASDO must submit an annual report on its activities to the Minister (section 36(1)), and the Minister must table this report in Parliament (section 36(2)).

It is important that CASDO be independent from government to allow it to carry out its mandate for developing and revising accessibility standards unencumbered by the political and policy priorities of the government of the day. To achieve this, section 17(2) could be amended to say that CASDO is an organization independent or at arms-length from government, and section 21(1) could be removed from the bill. CASDO's independence could also be attained through fixed term appointments of directors, with removal based on a good behaviour or competence standard. Rather than reporting to the Minister, CASDO should report to Parliament directly.

There is no requirement that persons with disabilities be represented among the Board of Directors of CASDO. Instead, section 23(2) states that as far as possible, the majority of the directors should be persons with disabilities. There is no provision in the bill which requires CASDO staff to be persons with disabilities. The current language is not strong enough to ensure sufficient representation of persons with disabilities on CASDO.

Section 18 provides that CASDO must develop and revise accessibility standards, but does not set any timelines for doing so. Section 18 could be strengthened by including timelines for developing accessibility standards. A timeline should also be included for reviewing accessibility standards (for example, CASDO will review each accessibility standard five years from the day on which it was created).

PART 3: ACCESSIBILITY COMMISSIONER (sections 37-41)

The bill creates an Accessibility Commissioner that has responsibilities for enforcing the law and accessibility standards; receiving and addressing complaints that organizations have not complied with the accessibility standards (section 94 and on); and monitoring and reporting on the enforcement of the law. Part 3 deals with the Accessibility Commissioner's monitoring functions, which include providing information and advice to the Minister about the enforcement of the law (section 37), complaints that are filed under the law (section 39(2)(a)(v)) and emerging systemic accessibility issues (section 39(2)(b)). Part 6 deals with the Accessibility Commissioner's enforcement responsibilities and responsibilities to receive and address complaints.

The Accessibility Commissioner is a member of the Canadian Human Rights Commission (section 2). As such, the Accessibility Commissioner is not wholly independent from government, but does enjoy a significant degree of independence.[9] The community will need to consider whether the Accessibility Commissioner should be a fully independent body.

Each year, the Accessibility Commissioner must report to the Minister responsible for the ACA and the Minister of Justice on its enforcement activities, including inspections of compliance with accessibility standards, orders requiring organizations to comply with accessibility standards, notices of violation of accessibility standards, and accessibility complaints (section 39(2)). The Minister must table this annual report in Parliament (section 39(3)), and it will therefore be publicly available. This section could be strengthened by requiring the Accessibility Commissioner to report to Parliament instead of the Minister. This would provide the Accessibility Commissioner with a greater degree of independence.

Section 39(2)(v) states that the Accessibility Commissioner must include in the annual report information about the complaints filed. This section could be strengthened to also include information on how complaints were resolved or addressed.

[9] The Canadian Human Rights Commission by its conduct and custom seeks to remain independent but is not guaranteed that independence by law. Commissioners of the Canadian Human Rights Commission are independent in the sense that they report to Parliament through the Speaker, rather than to the Minister of Justice, who is otherwise responsible for the *Canadian Human Rights Act*. Commissioners enjoy relatively high security of tenure. Commissioners are appointed for terms not exceeding seven years if full time or 3 years if part time, and may be removed prior to expiry of their term only on breach of good behaviour and by a joint address to the House and Senate. This is a protection typically reserved for judges. On the other hand, Commissioners are appointed by government, and in this sense are not fully independent. See: *Canadian Human Rights Act, supra* note 5 at ss. 61, 26.

In addition, the Accessibility Commissioner may provide the Minister with special reports in relation to its enforcement and complaint responsibilities (section 38(1)). The Commissioner has discretion to decide whether to make special reports public (section 38(2)). Section 38(2) could be strengthened to say that special reports must be made public.

PART 4: DUTIES OF REGULATED ENTITIES (sections 42-72)

The ACA requires organizations and service providers to prepare and publish accessibility plans, feedback processes and progress reports. Depending on the type of accessibility plan, these documents are regulated and overseen by the Minister responsible for the ACA, the Accessibility Commissioner, the Canadian Radio-television and Telecommunications Commission (CRTC), and/or the Canadian Transportation Agency (CTA). More detailed information on this is provided below, on pages 18-21.

Although accessibility plans are regulated and overseen by various agencies, there are common requirements that all regulated organizations and service providers must fulfill.

All organizations must consult with persons with disabilities when preparing their accessibility plans and their progress reports (sections 42(4), 47(4), 51(4), 56(4), 60(4), 65(4), 69(4) and sections 44(3), 49(3), 53(3), 58(3), 62(3), 67(3), 71(3)).

They must make these documents available to people who request them (sections 42(7), 44(6), 47(7), 49(6), 51(7), 53(6), 56(7), 58(6), 60(7), 62(6), 65(7), 67(6), 69(7), 71(3), 71(6)).

These requests must be in the format and manner specified by regulations (sections 42(7), 47(7), 44(6), 49(6), 51(7), 53(6), 56(7), 58(6), 60(7), 62(6), 65(7), 67(6), 69(7), 71(6)).

In their feedback processes, all organizations must explain how they will receive and deal with feedback about the way they are implementing their accessibility plans and the barriers encountered by persons who deal with their organizations (sections 43, 48, 52, 57, 61, 66, 70).

In their progress reports, all organizations must explain how they are implementing their accessibility plans (sections 44(1), 49(1), 53(1), 58(1), 62(1), 67(1), 71(1)). They must also include information about any feedback they received and how they dealt with that feedback (sections 44(5), 49(5), 53(5), 58(5), 62(5), 67(5), 71(5)).

Broadcasting Organizations

The ACA requires broadcasting organizations to prepare and publish two sets of accessibility plans, feedback processes and progress reports. The CRTC oversees one set, and the Accessibility Commissioner oversees the other set.

The accessibility plans overseen by the CRTC must address:

- the organization's policies, programs, practices and services for identifying, removing and preventing barriers in information and communications, the procurement of goods and services, and the delivery of programs and services. Organizations that are not already subject to employment equity laws must include employment equity in their accessibility plans. (section 42(1)(a)); and

- conditions of the organization's license, any order under the *Broadcasting Act*[10] and any regulations under the *Broadcasting Act* that relate to barrier identification, removal and prevention (sections 42(1)(b), (c) and (d)).

These plans must be updated every 3 years or on a date set by regulations made by the Canadian Radio-television and Telecommunications Commission (CRTC) (section 42(2), 46(1)).

The ACA empowers the CRTC to make regulations regarding timelines for developing these plans, the form the plans must take, the manner in which the plans are published, and the form and manner of the feedback processes and progress reports (section 45). The CRTC is also empowered to exempt any broadcasting organization or group of broadcasting organizations from developing these accessibility plans, feedback processes or progress reports (section 46(1)).

The accessibility plans overseen by the Accessibility Commissioner must address:

- the organization's policies, programs, practices and services regarding barrier identification, removal and prevention in employment, the built environment, transportation and any requirements contained in accessibility regulations made under the ACA (section 47(1)(a) and (b)).

These plans must be updated every 3 years or on a date set by regulations made under the ACA (section 47(2), 117(1)).

The ACA empowers the Minister to make an order exempting any broadcasting organization or class of organizations from developing these accessibility plans, feedback processes or progress reports (section 50(1)).

[10] SC 1991, c 11.

Canadian Carriers and Telecommunications Service Providers

The ACA requires Canadian carriers and telecommunications providers to prepare and publish two sets of accessibility plans, feedback processes and progress reports. The CRTC oversees one set, and the Accessibility Commissioner oversees the other set.

The accessibility plans overseen by the CRTC must address:

- the provider's policies, programs, practices and services for identifying, removing and preventing barriers in information and communications, the procurement of goods and services, and the delivery of programs and services (section 51(1)(a)); and

- conditions that relate to barrier identification, removal and prevention which are imposed under the *Telecommunications Act*[11] or regulations under that law (section 51(1)(b)(c)).

For these accessibility plans, providers must prepare and publish an updated plan every 3 years or on a date set by regulations made by the CRTC (section 51, 92, 54(1)).

The ACA empowers the CRTC to make regulations regarding timelines for developing the plan, the form the plan must take, the manner in which the plan is published, the form and manner of the feedback process and progress reports (section 54). The CRTC is also empowered to exempt any Canadian carrier or telecommunications provider or group of providers from developing these accessibility plans, feedback processes or progress reports (section 55(1)).

The accessibility plans overseen by the Accessibility Commissioner must address:

- the provider's policies, programs, practices and services regarding barrier identification, removal and prevention in employment, the built environment, transportation and any other requirements contained in accessibility regulations made under the ACA (section 56(1)(a) and (b)).

For these accessibility plans, organizations must prepare and publish an updated plan every 3 years or on a date set by regulations made under the ACA (sections 56(2), 117(1)).

[11] SC 1993, c 38.

The ACA empowers the Minister to make an order exempting any Canadian carrier or telecommunications provider or group of providers from developing these accessibility plans, feedback processes or progress reports (section 59(1)).

Transportation Carriers

The ACA requires transportation carriers to prepare and publish two sets of accessibility plans, feedback processes and progress reports. The CTA oversees one set, and the Accessibility Commissioner oversees the other set.

The accessibility plans overseen by the CTA must address:

- the carrier's policies, programs, practices and services for identifying, removing and preventing barriers in information and communications, the procurement of goods and services, the delivery of programs and services, transportation, and certain aspects of the built environment, including passenger aircraft, trains, buses, vessels, aerodome terminals, and railway, bus or marine stations (section 60(1)(a)); and

- requirements contained in regulations under section 170(1) the *Canada Transportation Act*[12] (section 60(1)(b)).

For these accessibility plans, carriers must prepare and publish an updated plan every 3 years or on a date set by regulations made by the CTA (section 60(2), 63(1)).

The ACA empowers the CTA to make regulations regarding timelines for developing these accessibility plans, the form the plan must take, the manner in which the plan is published, the form and manner of the feedback process and progress reports (section 63). The CTA must have the recommendation of the Minister of Transport and the approval of the Governor in Council to make these regulations. The CTA is also empowered to exempt any transportation carrier or group of carriers from developing these accessibility plans, feedback processes or progress reports (section 64(1)).

The accessibility plans overseen by the Accessibility Commissioner must address:

- the carrier's policies, programs, practices and services regarding barrier identification, removal and prevention in employment, any requirements contained in accessibility regulations made under the ACA, and the built environment other than passenger aircrafts, trains, buses, vessels, aerodome terminals, and railway, bus, or marine stations (section 65(1)(a)); and

[12] SC 1996, c 10.

- requirements contained in accessibility regulations made under the ACA (section 65(1)(b)).

For these accessibility plan, carriers must prepare and publish an updated plan every 3 years or on a date set by regulations made under the ACA (section 65(2), 117(1)).

The ACA empowers the Minister to make an order exempting any transportation carrier or group of carriers from developing these accessibility plans, feedback processes or progress reports (section 68(1)).

All Other Regulated Entities

All other regulated entities includes certain entities named under the *Financial Administration Act*,[13] the federal public administration, the Canadian Forces, any person, partnership or unincorporated organization or person acting on their behalf that operates within federal jurisdiction, and certain Parliamentary entities (section 7).

These organizations must prepare and publish accessibility plans, feedback processes and progress reports, which are overseen by the Accessibility Commissioner.

The accessibility plans must address:

- the organization's policies, programs, practices and services for identifying, removing and preventing barriers in information and communications, the procurement of goods and services, and the delivery of programs and services, employment, the built environment, transportation (section 69(1)(a)); and

- any requirements contained in accessibility regulations made under the ACA (section 69(1)(b)).

Plans must be prepared, published and updated every 3 years or on a date prescribed by regulations made under the ACA (section 69(2)).

The ACA empowers the Minister to make an order exempting any regulated entity or group of entities from developing the accessibility plans, feedback processes or progress reports (section 72(1)).

[13] RSC 1985, c F-11.

Elements of Part 4 that Require Strengthening

No Requirement to Prepare Accessibility Plans until Regulations Created

Sections 42(1), 47(1), 51(1), 56(1), 60(1), 65(1), and 69(1) require different organizations to prepare and publish accessibility plans within one year after a day determined by regulations made by the Minister, CRTC or CTA. The ACA allows but does not require the Minister, CRTC or CTA to make these regulations. This is because the sections in the bill that establish powers for the CRTC, CTA and Minister to create regulations all use the permissive language may (sections 45, 54, 63, 117). If the regulations are not made, then the one year timeline for preparing and publishing accessibility plans will not begin to run, and the obligation to prepare plans will not be triggered.

There are two ways to address this:

First, the permissive language (may) in sections 45, 54, 63 and 117(e) (f) (g) and (h), could be changed to directive language (shall). This would require the CRTC, CTA and Minister to make regulations, rather than permit them to do so at their discretion. The relevant sections of the bill would also need to include a timeline by which the regulations would be enacted, to ensure that the regulations are enacted relatively quickly, which would then trigger the requirement for organizations to prepare and publish their accessibility plans.

Second, sections 42(1), 47(1), 51(1), 56(1), 60(1), 65(1), and 69(1) could be amended to include a timeline for preparing and publishing accessibility plans regardless of whether the relevant regulations have been made. One advantage of this approach is that organizations would likely prepare and publish their accessibility plans more quickly than if they were required to wait for regulations to be made. One disadvantage is that accessibility plans may need to be changed later on, to meet the regulatory requirements once the regulations have been made.

No Requirement to Publish Feedback Process Until Regulations Created

The bill requires regulated entities in all sectors to establish and publish feedback processes. However, publishing must be done in accordance with the relevant regulations (sections 43(2), 48(2), 52(2), 57(2), 61(2), 66(2)). Again, these regulations are not required to be made, because the bill uses the language may. If regulations are not made, feedback processes will not be published.

This issue could be addressed by requiring the relevant regulations to be made within a specific timeframe.

Broad Powers to Exempt Organizations in all Sectors from Preparing Accessibility Plans

The bill empowers the Minister, CRTC or CTA to exempt any organization or group of organizations from the requirement to prepare and publish accessibility plans, create feedback processes and develop progress reports (sections 46(1), 55(1), 64(1), 68(1)).

It is not clear why it may be necessary to exempt some organizations from complying with these requirements. Any exemption would weaken the overall purpose of the ACA. Further explanation on this point should be sought from government. If there are legitimate reasons for exemptions, then significant checks and safeguards should be included in the ACA. For example, exemptions should happen only in the narrowest circumstances, after the Minister, CRTC or CTA has provided reasons or rationale for the exemption, these reasons have been made pubic, and the public has had an opportunity to provide feedback. Any exemptions that are created should be subject to review to ensure that they are still needed.

Accessibility Plans and Progress Reports Made Available Only if Conditions Met

The bill requires organizations to make their accessibility plans available to people who request them. However, individuals must make this request in the format and manner specified by regulations. If the correct format and manner are not used, the organization need not provide the accessibility plan. The same is true for progress reports (sections 42(7), 47(7), 44(6), 49(6), 51(7), 53(6), 56(7), 58(6), 60(7), 62(6), 65(7), 67(6), 69(7), 71(6)).

In addition, the regulations specifying the format and manner for requesting accessibility plans and progress reports are not required to be made, since the relevant provisions use the language may.

This issue could be addressed if the bill was amended and simplified so that accessibility plans and progress reports must be made available upon request. There is no need to specify the format and manner of these requests.

Provisions to Strengthen Accessibility Plans

Part 4 requires regulated entities to prepare and publish accessibility plans that address barrier identification, removal and prevention in various areas. To maximize their effectiveness, accessibility plans should be prepared with a goal or purpose in mind. The goal or purpose will determine much of the scope and detail of the plan.

The ACA’s purpose is to progressively realize a Canada without barriers. The ACA could make it clear that accessibility plans must relate to the purpose of the law. Plans should address how they will contribute to achieving a Canada without barriers by the date which should be included in the ACA, and how they will implement progressive realization. Accessibility plans could not only identify barriers, they could set

benchmarks for becoming barrier free, set timelines for meeting benchmarks, specify the steps that will be taken to meet the benchmarks, and outline the ways in which progress will be measured and assessed. Updated accessibility plans could assess whether organizations have met their accessibility benchmarks, identify any remaining barriers, set benchmarks and timelines for becoming barrier free, and specify the steps to be taken to meet those benchmarks.

In addition, Part 4 could require organizations to ensure that their accessibility plans and progress reports are prepared and implemented in accordance with the principles in section 6 of the ACA. Assuming these principles were amended as described on pages 11-12 of this report, accessibility plans and progress reports would need to consider and address the unique barriers faced by ethno-racial persons with disabilities, Indigenous persons with disabilities, and women and girls with disabilities.

Provisions to Strengthen Consultation Processes

Organizations are required to consult with people with disabilities on their accessibility plans and progress reports. Sections in the ACA that address consultation could be strengthened by requiring appropriate consultation with persons with disabilities living in poverty or on low incomes, ethno-racial persons with disabilities, and women and girls with disabilities.

PART 5: ADMINISTRATION AND ENFORCEMENT (sections 73-93)

Part 5 of the ACA establishes the Accessibility Commissioner's inspection and enforcement powers.

The Accessibility Commissioner is empowered to verify whether entities are complying with their requirements in relation to producing and publishing accessibility plans, establishing feedback processes, creating progress reports, and complying with any accessibility standards (regulations) made under the ACA. In addition the Accessibility Commissioner is empowered to prevent non-compliance with these requirements (section 73(1)). To carry out these functions, the Commissioner may enter premises, conduct inspections and require people and organizations to produce documents.

It is important to note that the Accessibility Commissioner is only empowered to enforce the accessibility plans, feedback processes and progress reports that it oversees, and any accessibility standards made under the ACA (section 73(1)). Other agencies, including the CTA and CRTC, have their own inspection and enforcement powers for certain aspects of the ACA. The CRTC has similar powers to inspect and enforce

accessibility plans, feedback processes, and progress reports that are regulated under the *Broadcasting Act* and *Telecommunications Act* (section 164). The CTA has similar powers to inspect and enforce accessibility plans, feedback processes, and progress reports that are regulated under the *Canada Transportation Act* (sections 174 and following).

If the Accessibility Commissioner has reasonable grounds to believe that an organization is contravening or has contravened requirements in relation to accessibility plans, feedback processes, progress reports or accessibility standards, the Commissioner can make a compliance order (section 75(1)). The order can require the organization to stop the contravention or take any step to ensure that it does not continue or reoccur. The language any step is broad and provides wide scope for the Commissioner to determine what an organization should take to comply with its accessibility requirements.

Section 75(1) uses the permissive language may make a compliance order. As a result the bill does not require the Commissioner to do so. There is no reason why the Commissioner should not make a compliance order if there are reasonable grounds to believe that an organization is not complying. Therefore, section 75(1) should be changed to say the Commissioner shall make a compliance order.

Under section 76(1) the regulated entity can ask the Accessibility Commissioner to review a compliance order. Section 117(1)(k) provides that the government can make regulations determining whether such reviews will be done orally or in writing.

Under Part 5, entities have committed a violation if they contravene any requirements in relation to accessibility plans, feedback processes, progress reports or accessibility standards regulated by the ACA, or if they do not comply with the Commissioner's order to produce documents or with a compliance order. Committing a violation can lead to a warning or a monetary penalty (section 77(1)).

The maximum amount for a monetary penalty is $250,000 (section 91(2)). The ACA allows the Governor in Council to make regulations fixing penalties for violations, based on whether they are minor, serious or very serious (section 91(1)(a)(b)). $250,000 is not a high ceiling for fines, and by itself will probably not create a significant incentive to comply with the ACA. However, in addition to penalties, section 93 allows the Accessibility Commissioner to publicize the name of the entity or person who violated accessibility requirements, as well as the nature of the violation and the amount of the penalty imposed. The language in section 93 could be changed from may to shall to require the Accessibility Commissioner to publicize information about violations. Publicity together with a modest penalty would create a stronger enforcement mechanism.

Instead of paying a monetary penalty, regulated entities can request to enter into a compliance agreement with the Accessibility Commissioner (section 81(2)). If a person or entity does not fulfill a compliance agreement, the Accessibility Commission can issue a notice of default, which may double the original monetary penalty or require the entity to forfeit any previous security deposit to the government (section 82(4)).

Regulated entities can request a review of a compliance order, in which case the Accessibility Commissioner must determine, on a balance of probabilities, whether a violation was committed (section 80(1), 81(2)(b), 84(1)).

A regulated entity cannot defend itself by arguing that it exercised due diligence to prevent the violation or reasonably and honestly believed in the existence of facts that would exonerate it (section 85(1)). However, regulated entities can use common law rules and principles to defend themselves, as long as these defences are not inconsistent with the ACA.

The ACA sets out a limitation period: proceedings in relation to violations may only be brought within two years of the day on which the subject matter related to the violation arose (section 90).

Part 5 does not contain any sections to ensure that the ACA is enforced appropriately within ethno-racial communities. For example, inspections and enforcement procedures should address language interpretation issues and cultural differences. Inspections and enforcement procedures must not perpetuate racism and systemic discrimination.

PART 6: REMEDIES (COMPLAINTS TO THE ACCESSIBILITY COMMISSIONER) (sections 94-110)

Part 6 provides that individual complaints can be made to the Accessibility Commissioner in certain circumstances.

Any person who has experienced physical or psychological harm, property damage, or economic loss as a result of a regulated entity contravening an accessibility standard that has been made into a regulation (or another regulation under the ACA that imposes obligations in relation to barrier removal and prevention) may file a complaint (section 94(1). A complaint may also be filed by a person who has been adversely affected by a contravention. Section 94(1) is broadly worded, and will allow complaints from persons with disabilities and anyone else who is negatively affected by an organization not fulfilling its requirements under an accessibility standard.

There are exceptions to this: employees and RCMP members who can file individual grievances under the *Federal Public Sector Labour Relations Act*[14] or the *Royal Canadian Mounted Police Act*[15] cannot file a complaint to the Accessibility Commissioner. Neither can persons who are entitled to file complaints under the *Public Service Employment Act*[16] (section 94(2)-(5)).

The Accessibility Commissioner can only hear complaints about contravention of an accessibility standard that has been made into a regulation. There are no complaints for standards that have been created and published by CASDO but have not been passed into law.

In addition, the Accessibility Commissioner can only hear complaints about contravention of an accessibility standard that has been made into a regulation under the ACA or another regulation under the ACA that imposes obligations in relation to barrier removal and prevention. Generally, the Accessibility Commissioner cannot hear complaints about accessibility plans, feedback processes and progress reports that organizations are required to produce. It also cannot hear complaints about accessibility plans, feedback processes, progress reports and accessibility requirements that are mandated under the *Canada Transportation Act*, the *Broadcasting Act*, the *Telecommunications Act*, or regulations under any of those laws.

Section 95 provides that the Accessibility Commissioner can investigate complaints. However the Accessibility Commissioner will not investigate a complaint if:

- there are grievance or other complaint mechanisms available which have not yet been used (section 95(a));

- if there is another process that would deal with the complaint more appropriately (section 95(b));

- the complaint is not within the jurisdiction of the Accessibility Commissioner (section 95(c)). This means that the complaint must be about contravention of an accessibility standard that has been made into a regulation under the ACA or about contravention of another regulation that imposes obligations in relation to barrier removal and prevention under the ACA in order for the Accessibility Commissioner to hear it;

- the complaint is frivolous, vexatious or made in bad faith (section 95(d)).

[14] SC 2003, c 22, s 2.
[15] RSC 1985, c R-10.
[16] SC 2003, c 22, ss 12, 13.

- the complaint is based on something that was or was not done more than one year ago (section 95(e)). This creates a one year limitation period to file a complaint. However, the Accessibility Commissioner can allow for a longer period of time that is appropriate in the circumstances (section 95(e)).

Section 95 effectively restricts the Accessibility Commissioner to accepting complaints only if they are about accessibility standards that have been made into regulations under the ACA, for which there is no other legal process, and which have been filed within a year. If all of these elements are met, then the Accessibility Commissioner may investigate the complaint.

The use of the permissive language may in section 95 means that there is no requirement for the Accessibility Commissioner to investigate. May should be changed to shall in order to require the Accessibility Commissioner to investigate complaints that fall within its purview. There is no justification for the Accessibility Commissioner to decline to investigate if all the elements are met, since there would be no other legal mechanism available in which to pursue the complaint.

The limitation period in section 95(e) is one year from an act or omission upon which the complaint is based, or longer if the Accessibility Commissioner considers it appropriate. This section may be interpreted in a way that would prevent a lot of complaints from being made. An entity may have violated an accessibility standard in a regulation under the ACA many years ago by failing to take steps to identify, remove or prevent a particular barrier. However, if a person with a disability suffers a loss because of this omission today, they cannot file a complaint because the omission occurred more than one year ago. To prevent section 95(e) from being interpreted in a way that could prevent people from filing accessibility complaints, the section should create a one year limitation period from the time the complainant became aware of the act or omission which caused him/her to suffer a loss.

If the Accessibility Commissioner decides not to investigate a complaint, s/he must write to the parties and indicate how the parties can ask for a review of this decision (section 96).

If the complaint proceeds, then the Accessibility Commissioner investigates the complaint (section 98). Attempts to resolve the complaint using dispute resolution (section 99) may be made, including mediation, conciliation or other mechanisms.

The Accessibility Commissioner can stop investigating the complaint if there is not enough evidence or if the complainant and the regulated entity have resolved the complaint (section 100(1)).

At the end of the investigation, the Commissioner must dismiss the complaint if s/he finds that the complaint is not substantiated, meaning that there is not enough evidence to show that the entity violated an accessibility requirement in an ACA regulation (section 100(1)).

If the complaint is substantiated, then the Commissioner can order the entity to do one or more of the following:

- take appropriate corrective steps (section 102(1)(a));
- give the complainant access to the rights, privileges or opportunities that were denied because the entity did not fulfill its accessibility requirements (section 102(1)(b));
- pay compensation for any loss of wages and any expenses incurred due to the violation (section 102(1)(c));
- pay compensation for any money the complainant had to spend to get alternative goods, services, facilities or accommodation (section 102(1)(d));
- pay compensation up to $20,000 for any pain and suffering (section 102(1)(e), 102(2)); and
- pay compensation up to $20,000 if the entity was wilful or reckless in contravening their accessibility requirements (section 102(1)(f), 102(2)).

These are broad remedial powers. The Commissioner has the power to order organizations to take steps to correct the violation in relation to the individual complainant (ie: by removing barriers to enable the complainant to have access to the service, good, facility or accommodation in question, paying the complainant for any wages or other costs lost as a result of the contravention, and paying the complainant for pain and suffering). The Commissioner also has the power to order organizations to take steps to prevent the violation from happening again in the future (i.e. by taking appropriate corrective steps and paying up to $20,000 if the contravention was wilful or reckless). The broad remedial powers available to the Accessibility Commissioner are very similar to the remedial powers available to the Canadian Human Rights Tribunal. In other words, the Accessibility Commissioner can order similar remedies for violations of the accessibility standards under the ACA, as the remedies that the Canadian Human Rights Tribunal can order for discrimination complaints under the *Canadian Human Rights Act*.

The ACA allows for reviews and appeals to be requested if complainants or organizations do not agree with the decisions made by the Accessibility Commissioner.

If a complainant or an organization does not agree with the Accessibility Commissioner's decision not to investigate a complaint or to discontinue an investigation, they may ask the Accessibility Commissioner to review the decision (section 103). This provision would be strengthened by requiring that the person who reviews the decision is not the same person who made the original decision. Such a requirement is especially necessary since there is no further appeal or review available (section 103(3)).

If a complainant or organization does not agree with the Accessibility Commissioner's decision to dismiss a complaint or substantiate a complaint and make orders for compliance, an appeal to the Canadian Human Rights Tribunal is available (section 104(1)).

Part 6 does not require the Accessibility Commissioner to hold a hearing if s/he decides to stop an investigation or decide that a complaint is not substantiated. This is consistent with the relatively fast, non-legalistic, investigatory approach to accessibility complaints (explained below on page 31). However, the ACA does allow complainants to request reviews of these decisions. It is at this review stage that persons with disabilities will have an opportunity to provide input and explain why they disagree with the decision to dismiss their accessibility complaint. Presently, the bill does not guarantee the opportunity to provide such input at the review stage. The ACA would be strengthened by explicitly stating that complainants who request a review of the Accessibility Commissioner's decisions will have an opportunity to provide submissions in a manner and form that is accessible to them.

Part 6 does not contain any sections to ensure that the accessibility complaint process will be accessible for ethno-racial persons with disabilities or Indigenous persons with disabilities. Ethno-racial persons with disabilities may require language interpreters or other supports to participate in the complaint process. Indigenous persons with disabilities may require accommodations and supports. The Accessibility Commissioner should be able to retain cultural consultants and consider cultural evidence or information if it is relevant to the determination of the complaint. The Accessibility Commissioner should receive anti-racism, anti-oppression and cultural competency training to ensure that the complaint process does not perpetuate systemic discrimination experienced by ethno-racial persons with disabilities or Indigenous persons with disabilities.

Measures should be taken to ensure that the accessibility complaint process addresses barriers experienced by persons with disabilities who live in poverty or are on low incomes.

Accessibility Complaint Process and its Interaction with Human Rights Complaints

It is not yet known exactly what the process for complaints to the Accessibility Commissioner will look like. Part 6 provides some detail about how the Accessibility Commissioner will deal with complaints that an accessibility standard which is a regulation has been violated. However some of this detail is left to be set out in regulations (section 108). Section 109 states that the Accessibility Commissioner must deal with complaints informally and expeditiously while maintaining fairness and natural justice. Natural justice includes basic legal principles of fairness such as the requirement that a decision-maker provides reasons for a decision, the opportunity for parties to present their arguments, the requirement that a decision be made based on an assessment of the evidence and in an unbiased manner.[17] Procedural protections such as disability-related accommodations are essential to natural justice since they ensure that a party with a disability can participate in the legal process on an equal basis as others.

The direction to deal with complaints informally and expeditiously, as well as the process of investigation and decision making specified in the bill, signal the government's intention to create a process for accessibility complaints that is relatively fast, non-legalistic, and investigatory in nature. The Accessibility Commissioner must determine whether a complaint is substantiated based on the information gleaned from their investigation. This is an assessment of liability based on what the particular accessibility standard requires, whether the organization has fulfilled that requirement, and whether the failure to fulfill that requirement led to the loss that the complainant alleges. This approach has the potential to allow for relatively quick resolution of accessibility complaints and relatively quick access to remedies, as compared with the Canadian Human Rights Commission and Tribunal processes. In addition, it appears that accessibility complaints will involve a lower evidentiary burden on persons with disabilities to prove their accessibility complaints, as compared with the evidentiary burden to prove a *prima facie* case of discrimination at the Canadian Human Rights Commission and Tribunal.

[17] See generally Louis LeBel, "Notes for an Address: Reflections on Natural Justice and Procedural Fairness in Canadian Administrative Law" (2013) 26:1 Can J Admin L & Prac 51.

It is clear from section 95 that the Accessibility Commissioner cannot hear discrimination complaints (ie: complaints that an organization has discriminated against a person based on disability, thereby violating the *Canadian Human Rights Act*).

Based on the above, it is reasonable to presume that the process for accessibility complaints will be different than the existing Canadian Human Rights Commission and Tribunal process for discrimination complaints. Accessibility complaints and discrimination complaints will both be made to the Canadian Human Rights Commission, but it is likely that the Canadian Human Rights Commission will establish a new process (separate from its existing process for discrimination complaints) to deal specifically with accessibility complaints under the ACA.

It is appropriate that there be separate processes for accessibility complaints under the ACA and discrimination complaints under the *Canadian Human Rights Act* to reflect the distinct purposes of these two laws. The ACA's purpose is to realize a Canada without barriers by identifying, removing and preventing barriers in certain areas. It is a proactive and systemic approach to accessibility (preamble). The purpose of the *Canadian Human Rights Act* is broader, namely to give effect to the principle that everyone should have an equal opportunity to make for themselves the lives that they are able and wish to have without being prevented from doing so because of discrimination.[18] The ACA and the *Canadian Human Rights Act* complement one another and must work together closely, but one should not lessen the effect of the other. (See page 8 of this report for related comments on strengthening the bill by adding sections that clarify that nothing in the ACA lessens the existing human rights obligations that federally regulated entities have under the *Canadian Human Rights Act*, and that where a conflict arises between the ACA and another law, the law that provides the greatest accessibility for persons with disabilities will apply).

PART 7: CHIEF ACCESSIBILITY OFFICER (sections 111-116)

The bill allows, but does not require, the Governor in Council to appoint a special advisor to the Minister. This advisor is to be called the Chief Accessibility Officer (section 111(1)). The role of the Officer is to advise the Minister regarding systemic or emerging accessibility issues (section 113).

Consideration should be given to changing the language in section 111(1) to shall in order to require the government to appoint a Chief Accessibility Officer. Whether to advocate for this change will depend on how important and useful the community anticipates the Chief Accessibility Officer's position will be.

[18] *Supra* note 5, s 2.

PART 8: REGULATIONS (sections 117-133)

Regulations Creating Accessibility Standards

Section 117 states that regulations may be made, however there is no requirement to do so. This is problematic because the bill leaves much of the detail about what regulated entities will actually have to do to identify, remove and prevent barriers to the regulations. The ACA is designed so that CASDO creates and recommends non-binding accessibility standards, and the government then decides whether to enact these standards into binding regulations. The strength of the ACA, and ultimately how successful it will be in achieving its purpose of a Canada without barriers will largely be determined by the specific accessibility requirements set out in accessibility standards which have been made into binding regulations. Without a requirement to make accessibility standards into regulations, there is no assurance that the government will do so and therefore no assurance that regulated entities will be required to comply.

Among other things, section 117 states that the Governor in Council may make the following regulations:

- designating additional areas for barrier identification, removal and prevention beyond those already listed (which include employment, the built environment, information and communication technologies, the procurement of goods and services, the delivery of programs and services, and transportation) (section 117(1)(b));

- establishing standards to remove barriers and improve accessibility in employment, the built environment, information and communication technologies, the procurement of goods and services, the delivery of programs and services, and transportation (section 117 (1)(c)); and

- imposing obligations or prohibitions on regulated entities regarding barrier identification, removal and prevention (section 117(1)(d)).

Section 117 should be amended to shall in order to require the Governor in Council to make the above regulations. This is necessary to strengthen the ACA.

Including in section 117 a timeline for making the above regulations would also significantly strengthen the ACA.

Section 117 should include a requirement that regulations advance the purpose (section 5) and recognize and respect the principles (section 6) of the ACA.

Section 117 should state that nothing in the standards can reduce or minimize the right to be free from discrimination under the *Canadian Human Rights Act* and the *Charter*.

Section 117(1)(l) provides that the government can make regulations exempting regulated entities, a built environment, an object, a work, an undertaking or business, an activity conducted by a regulated entity or a location from requirements to produce and publish accessibility plans, feedback processes and progress reports. Section 121 states that organizations can apply to the Minister for an order exempting them from any accessibility requirements creating in regulations.

This is concerning because unlike acts, regulations and Ministerial orders are not typically subject to the same level of public scrutiny and comment.[19] Regulations may be made without any opportunity for the disability community to provide input. Further, it is not clear why it is necessary to exempt organizations from accessibility requirements. Any exemptions would weaken the overall purpose of the ACA. Clarification on this should be sought from government. If there are legitimate reasons for exempting some entities or places from complying with accessibility requirements, the ACA should include checks and balances. If exemptions are to be made, they should happen only in the narrowest of circumstances, only after reasons or rationale for the exemption have been made public and the public has had an opportunity to provide feedback. The exemption should be subject to future review to ensure that it is still needed.

Section 117(2) provides that regulations may distinguish among different classes of regulated entities. In practice, this may mean that the government enacts accessibility standards which require only some classes, or groups, of entities to identify, remove and prevent certain barriers. For example, in Ontario, under the AODA, organizations with a larger number of employees are subject to more accessibility requirements than organizations with fewer employees.[20] To guard against the dilution of accessibility requirements under the ACA, section 117(2) could be changed to require the government to provide reasons for proposing the creation of classes of entities, provide information on whether the class will be exempted from any accessibility requirements, make this information public, provide an opportunity for feedback, and consider this feedback before creating the class. If certain classes of organizations are exempt from accessibility requirements, this exemption should be subject to future review to ensure that it is still needed.

[19] David J Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at 137-138.
[20] Consult, for example, *Accessibility Standards for Customer Service,* O Reg 429/07, ss 3(5) and 4(7).

Limited Application of Regulations

Sections 118-120 state that accessibility standards and accessibility requirements which are made into regulations under section 117 do not apply to all regulated entities. Only some accessibility standards and accessibility requirements made under section 117 apply to some regulated entities, and this limited application of accessibility standards largely mirrors the different kinds of accessibility plans which different entities are required to create under Part 4 (see pages 18-21 of this report).

For example, section 119 states that the only accessibility standards created under the ACA that apply to Canadian carriers or telecommunications service providers are those that relate to barrier identification, prevention and removal in employment, the built environment, and transportation. Section 119 mirrors section 56(1)(a) which tells Canadian carriers and telecommunications service providers that they must have accessibility plans to address barrier identification, removal and prevention in employment, the built environment and transportation, and that these plans must comply with regulations under the ACA. For barrier identification, removal and prevention in the other areas (including information and communication technologies, procurement of goods and services, delivery of programs and services), Canadian carriers and telecommunications providers must create accessibility plans in accordance with regulations under the *Telecommunications Act*. They are not required to comply with accessibility standards created under the ACA in relation to information and communication technologies, procurement of goods and services, and delivery of programs and services.

Similarly, broadcasting organizations and transportation carriers are exempt from certain accessibility regulations under the ACA, but are required to identify, remove and prevent barriers in these areas in accordance with regulations under the *Broadcasting Act* and *Canada Transportation Act* respectively.

In effect, Parts 4 and 8 together carve out areas of subject matter expertise. These parts create a scheme in which organizations are required to comply with accessibility standards and requirements made under the ACA when these standards relate to areas that are outside the subject matter expertise of other legislation they are subject to. When there is already legislation that applies to an organization and provides for accessibility requirements in a particular subject area, the organization is not required to comply with the accessibility standards created under the ACA.

In addition, Part 10 of the ACA provides powers to the CTA and CRTC to create regulations regarding barrier identification, removal and prevention in areas that fall within their respective subject matter expertise. For example, the CTA is empowered to create regulations for identifying, removing or preventing barriers in the federal

transportation network, particularly barriers in the built environment, information and communication technologies and the delivery of programs and services (section 170).

The effect of Parts 4, 8 and 10 is that there may be more than one accessibility standard created in some areas. For example, CASDO may create an accessibility standard for transportation which applies to broadcasting organizations, telecommunications providers and other regulated entities, but does not apply to transportation carriers. Instead, transportation carriers will have to follow regulations which the CTA may create. The same may be true for broadcasting organizations and telecommunications providers with respect to accessibility standards in relation to information and communication technologies.

Advantages and Disadvantages to Multiple Accessibility Regulations in a Given Area

There are advantages and disadvantages to this approach. The scheme is legally complex. Having more than one set of accessibility requirements in a given area will make it difficult for persons who are not legally trained to determine which accessibility requirement applies to which organization and whether an organization is complying with its requirements. It is possible to try to address this confusion by requiring the Minister to publish clear language information setting out the organizations that have requirements under the ACA, which ACA accessibility standards those organizations must follow, and which other accessibility standards those organizations must follow. This information must be made available in accessible formats, and must be regularly updated.

On the other hand, this approach allows agencies with subject matter expertise (the CTA and CRTC) to create accessibility regulations in those areas. There is an opportunity for these agencies to create accessibility regulations that are specific, technical and targeted to the particular subject matter. This could yield regulations that set a higher standard for accessibility than regulations which would otherwise be developed by CASDO or the government, who lack the same subject matter expertise.

In preparing this report, ARCH heard from persons with disabilities and disability rights lawyers who shared their concerns that in practice, regulations made by the CTA and CRTC may not be stronger than those developed by CASDO. Members of the CTA and CRTC are appointed for their technical expertise and are often from within the industry. As a result, it was felt that these agencies may have subject matter expertise but they do not have expertise in disability, accessibility and human rights, which is required to develop strong accessibility standards. As a result, if these agencies retain regulation

making powers under the ACA, accessibility standards in these areas may be weaker than if the same standards were developed by CASDO.

Given the advantages and disadvantages outlined above, the disability community must consider whether to advocate that the ACA be changed to provide for centralized accessibility regulation-making powers at CASDO.

Reviews of the *Accessible Canada Act*

The bill provides for a number of reviews of the *Accessible Canada Act*. Five years after the day on which the first regulation is made, a committee of the Senate, House of Commons or both will conduct a review of the provisions and operation of the ACA (section 131(1)). Within six months, the committee must submit a report which includes recommended changes (section 131(2)). Five years after the submission of this report, the Minister must arrange for an independent review of the provisions and operation of the Act. The independent report must be tabled in Parliament (section 132(1)). The independent reviewer must consult with the public, persons with disabilities, organizations representing persons with disabilities, regulated entities and organizations representing regulated entities (section 132(2)).

Section 131 could be strengthened by requiring that the committee conduct its first review five years after the date on which the ACA is proclaimed into law, rather than five years after the first regulation is made. This prevents the review from being delayed if regulations are not passed promptly.

PARTS 10 + 11: RELATED, CONSEQUENTIAL AND COORDINATING AMENDMENTS – Diffused Enforcement of Accessibility Standards (sections 147-206)

Broadly speaking, the purpose of many of the sections in Part 10 of the bill is to change existing laws to allow various existing agencies and adjudicators to participate in implementing and enforcing the ACA. To this end, the sections insert reference to the ACA into the laws and regulations that already exist for a given sector.

As an example, sections 161-165 make minimal modifications to the *Broadcasting Act* and *Telecommunication Act* by simply inserting reference to the ACA into the existing enforcement provisions. In other sectors, such as those governed by the *Federal Public Sector Labour Relations Act, Public Service Employment Act*, and *Parliamentary Employment and Staff Relations Act* the effect of the sections in Part 10 is to give those adjudicative bodies additional powers to deal with complaints that an entity has

contravened regulations made under the ACA. Adjudicative bodies are also given powers to make orders providing for the same kinds of remedies that the Accessibility Commissioner can order (sections 159, et al.). In some cases, the Accessibility Commissioner can participate in a grievance or other legal proceeding by making legal submissions about whether there was a contravention of a regulation under the ACA (sections 195(10), et al.).

Part 10 maintains existing administrative and adjudicative processes for certain federally-regulated sectors. This means that enforcement of the ACA will be done by the Accessibility Commissioner and also by a number of other bodies, including the CRTC, the CTA, and grievance adjudicators of the Federal Public Sector Labour Relations and Employment Board.

Changes to the *Canada Transportation Act*: Increased Oversight and Adjudication Powers for CTA

Sections 166-184 related to the *Canada Transportation Act* go further than simply giving the CTA powers to apply the ACA. These sections strengthen the CTA's powers and responsibilities for overseeing transportation carriers' compliance with the ACA and adjudicating accessibility complaints. There is an attempt to harmonize many of the processes and remedies available under the CTA with those available to the Accessibility Commissioner. For instance, the remedies available under the newly reformed CTA complaints process will be virtually identical to those available at the Accessibility Commissioner (sections 172.1(1)-(2), 172.2(1)-(4)), 102). Additionally, the changes to the penalties available at the CTA bring them largely in line with the penalties available under the ACA (compare sections 77 – 93 and sections174 -184).

Until now, the CTA and the Canadian Human Rights Commission have shared jurisdiction over complaints related to accessible transportation. For legal analysis and background on this point, see Appendix B of this report. However, the question of jurisdiction has been fraught with tension and has been the subject of several court decisions.

The ACA does not explicitly give jurisdiction over accessible transportation to either the CTA or the Accessibility Commissioner. However, the bill indicates Parliament's intention to make the CTA the primary forum for investigating, adjudicating and enforcing matters related to accessible transportation in the federally-regulated transportation network. This intention is evident from the following:

- Sections of the ACA import human rights language into the CTA. For example the CTA uses the term undue obstacle when referring to accessible

transportation issues. Sections of the ACA replace undue obstacle with undue barrier throughout the CTA.[21] Undue barrier is more reflective of the human rights language, undue hardship;

- The remedies that would be available under the CTA are more robust because of the changes made by the ACA.[22] These new remedies reflect the remedies available under the Canadian Human Rights Commission and Tribunal process[23] and the remedies available to a complainant filing a complaint with the Accessibility Commissioner[24];

- Section 120 limits the application of accessibility regulations under the ACA to transportation carriers; and

- Section 122(1) directs the Accessibility Commissioner, the CTA, the CRTC, the Canadian Human Rights Commission and the Federal Public Service Labour Relations Board to collaborate and coordinate in order to refer complaints to the appropriate authority.

Under current law, the CTA is limited in the remedies it can award for complaints brought before it. Section 172(3) of the *Canada Transportation Act* empowers the CTA to order a respondent to take corrective measures to remove an undue obstacle and/or repay the complainant any expense incurred because of the undue obstacle.

On the other hand, the Canadian Human Rights Tribunal can order much broader remedies for discrimination complaints before it. Section 53(2) of the *Canadian Human Rights Act* states that the Tribunal can order a respondent to pay compensation for any and all lost wages, all additional costs of obtaining alternative goods, services, facilities or accommodation, and damages for pain and suffering not exceeding $20,000. In addition, section 53(3) of the *Canadian Human Rights Act* enables the Tribunal to award special compensation up to $20,000 if the respondent engaged in wilful or reckless discriminatory practice.

The ACA would change this difference in remedies by giving the CTA very similar remedial powers as the Canadian Human Rights Tribunal and the Accessibility

[21] For example, it is clear that it was Parliament's intention to replace the word "obstacle" with the word "barrier" in section 172(1) of the CTA (see s 172(1) of the ACA). However, section 5(d) still speaks to undue obstacle, but section 5(d.1) speaks to undue barrier – we would recommend that this also be changed to "barrier" for consistency and to minimize any confusion with respect to when something is an undue "obstacle" as opposed to an undue "barrier".
[22] Consult, for example, section 172(3) of the ACA, amending 172(3) of the CTA.
[23] *Supra* note 5 at s 53(2)(e) and (3).
[24] *Supra* note 1 at s 102(1).

Commissioner. This will mean that regardless of where the complaint is filed, the complainant will have virtually the same remedies available to them.

Currently, the CTA and the Canadian Human Rights Tribunal apply different legal tests when adjudicating accessible transportation complaints. The Canadian Human Rights Tribunal applies the legal test for *prima facie* discrimination which has been developed by Supreme Court of Canada jurisprudence.[25] If discrimination is established the Tribunal then considers whether accommodating the complainant would have caused undue hardship to the respondent.[26] The legal test applied by the CTA is less straightforward and arguably weaker. For a more detailed analysis on this point, see Appendix C of this report.

The ACA does not clarify which legal test the CTA should apply when adjudicating complaints about accessible transportation. However, if as a result of the ACA, the CTA is to become the primary forum for adjudicating these complaints, then it is important that the ACA clarify that the CTA should be applying the same legal test for discrimination as the Canadian Human Rights Commission and Tribunal. Without such clarification, accessible transportation complaints may fail or not get the full benefit of a robust human rights legal analysis.

Another concern is in relation to sections 172 and 172.1 of the *Canada Transportation Act*. These sections state that if the CTA is satisfied that a transportation service provider has complied with regulations under the *Canada Transportation Act*, then the CTA must find that there is no undue obstacle to the mobility of persons with disabilities. This section suggests that compliance with regulations, no matter how retrogressive the regulations are, means that there is no undue obstacle and amounts to a full answer to any human rights concerns raised by a person with a disability. It essentially creates a defense that may short circuit some of the human rights analysis that would usually be required. A more fulsome human rights analysis would explore the impact a barrier had on an individual and why they could not access a particular service before making a determination as to whether there is an “undue barrier”. The ACA amends section 172 but the changes it makes do not address this concern.

The ACA could be strengthened by clarify that compliance with regulations under the *Canada Transportation Act* does not mean that an “undue barrier” or discriminatory barrier does not exist.

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[25] *Moore v British Columbia (Education)*, 2012 SCC 61, [2012] 3 SCR 360; *Stewart v Elk Valley Coal Corp*, 2017 SCC 30, [2017] 1 SCR 591.
[26] *Moore, ibid.; Renaud v. Central Okanagan School District No. 23*, [1992] 2 SCR 970, 95 DLR (4th) 577; *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees’ Union (B.C.G.S.E.U.)*, [1999] 3 SCR 3, 176 DLR (4th) 1.

Section 173 of the ACA states that the CTA may create a participant funding program. This raises the possibility that persons with disabilities will be able to more meaningfully participate in CTA proceedings. Section 173 could be strengthened by making it mandatory for the CTA to establish the fund. Section 173 could also clarify that the fund can be used to provide for procedural accommodations that persons with disabilities may need in order to participate effectively in CTA proceedings, or to pay for legal counsel.

Consideration should be given to seeking an amendment to the ACA which would see the establishment of such participant funds for CASDO and all the bodies and agencies involved in the adjudication of complaints under the ACA.

Changes to the CRTC

The CRTC currently oversees broadcasting and telecommunications under the *Canadian Radio-television and Telecommunications Commission Act,*[27] the *Broadcasting Act*[28] and the *Telecommunications Act*.[29] The CRTC has different powers under the *Broadcasting Act* and the *Telecommunications Act*. For broadcasting, the CRTC oversees accessibility features such as closed-captioning, described video and audio description of television programming, as well as the accessibility of equipment such as remote controls and set-top boxes. For telecommunications, the CRTC oversees accessibility features such as telephone relay services, and text-based 9-1-1, as well as customer service and the accessibility of equipment such as cell phones.

The legal and regulatory framework in this area is difficult to navigate. It is inaccessible to many people with disabilities due to its complexity. During the pre-bill consultations, the disability community called on the federal government to simplify the regulatory framework for accessibility requirements in this area.[30]

Rather than being included in a single set of regulations, existing accessibility requirements are contained in various CRTC policies, decisions, bulletins, orders and conditions of license and service. For example, the requirements for closed-captioning are laid out in more than five different documents.[31] The same is true for telephone relay

[27] *Canadian Radio-television and Telecommunications Commission Act*, RSC 1985, c C-22.
[28] *Supra* note 10.
[29] *Supra* note 11.
[30] For example, see: Melanie Benard, Promoting Accessibility Through Legislative Reform (Council of Canadians with Disabilities: June 2017), at pp 31-34: http://alliance-canada.org/wp-content/uploads/Promoting-Accessibility-Through-Legislative-Reform.pdf
[31] Broadcasting Public Notice CRTC 2007-54; Broadcasting and Telecom Regulatory Policy CRTC 2009-430; Broadcasting Regulatory Policy CRTC 2012-362; Broadcasting Regulatory Policy CRTC 2015-104;

service requirements.[32] Within these documents, the CRTC issues three levels of instructions for broadcasters and telecommunications providers: encouragements, expectations and requirements. The nuances between these levels are not always clear.[33] People with disabilities must make their way through this bureaucratic maze to find out what their rights and remedies are.

Instead of simplifying matters, the ACA adds additional layers of complexity by adding a new oversight body (the Accessibility Commissioner). The Accessibility Commissioner will share enforcement functions with the CRTC.

Limited Powers of the CRTC

The ACA does not significantly expand the powers of the CRTC under the *Broadcasting Act* or the *Telecommunications Act*.

The *Broadcasting Act* currently gives the CRTC the power to issue regulations, guidelines, statements, decisions and orders.[34] The CRTC can also issue and renew broadcasters' licenses for up to seven years at a time.[35] It can suspend or revoke licenses or subject them to certain conditions.[36] Many accessibility requirements are contained in conditions of broadcasters' licenses.[37] Consumers, including people with disabilities, can intervene at license renewal hearings.[38] They can apply to have their interim and final costs covered by the Broadcasting Participation Fund.[39]

The CRTC can also inquire into contraventions of the *Broadcasting Act,* regulations, licenses, decisions or orders.[40] The CRTC can order broadcasters to comply with their obligations under these instruments.[41] However, the CRTC does not currently have the power to ensure broadcasters' compliance through inspections or by issuing administrative penalties.

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and the CRTC decision regarding the renewal of the broadcaster's license (ex. Broadcasting Decision CRTC 2018-270).

[32] Telecom Decision CRTC 1997-8; Telecom Order CRTC 1998-1; Telecom Decision CRTC 2005-28; CRTC 2009-430 and Telecom Regulatory Policy CRTC 2014-187.

[33] For example, consult the CRTC's overview of described video requirements in Broadcasting Regulatory Policy CRTC 2015-104, paras 28-30.

[34] *Broadcasting Act*, ss.6, 10, 11, 12(2) and 17.

[35] *Broadcasting Act*, s.9(1)(b) and (d).

[36] *Broadcasting Act*, s.9(1)(b), (c) and (e).

[37] For example, consult: CRTC 2018-270.

[38] *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, SOR/2010-277, s 26.

[39] Broadcasting Decision CRTC 2011-163; Broadcasting Regulatory Policy CRTC 2012-181 at para.17. For more information on the Broadcasting Participation Fund, go to: www.bpf-fpr.ca.

[40] *Supra* note 10, s 12(1).

[41] *Ibid.*, s 12(2).

The ACA gives the CRTC the additional power to oversee broadcasters' accessibility plans, feedback processes and progress reports (sections 51-53, 161). However, it does not grant the CRTC the power to inspect, issue penalties or fines to ensure that broadcasters' are complying.

The *Telecommunications Act* gives the CRTC the power to issue regulations, guidelines, statements and orders.[42] It also allows the CRTC to impose conditions of service on telecommunications providers.[43] The CRTC ensures that companies do not charge unreasonable rates or unjustly discriminate.[44] It can award interim and final costs to encourage the participation of people and groups representing subscriber interests in telecommunications proceedings.[45]

Unlike with broadcasting, the CRTC can appoint inspectors to ensure compliance with the *Telecommunications Act*.[46] It can also impose administrative penalties of up to $15,000,000 for violations of that law.[47] However, according to the CRTC, it has never imposed an administrative penalty for a violation of an accessibility requirement.[48]

The ACA gives the CRTC the additional power to oversee telecommunications providers' accessibility plans, feedback processes and progress reports (sections 42-44, 162 and following).

The CRTC currently has the power to investigate complaints against broadcasters and telecommunications providers, including complaints about accessibility.[49] There is very little caselaw in this area. The CRTC shares its jurisdiction over complaints with the Canadian Human Rights Commission.[50] The Canadian Human Rights Commission generally refers accessibility complaints to the CRTC.[51] This has been a source of contention within the disability community and the Canadian Human Rights Commission.[52] Unlike the Canadian Human Rights Commission, the CRTC does not

[42] *Supra* note 11, ss 51 and 57-58.
[43] *Ibid*, s 24.
[44] *Ibid*, ss 25(1) and 27.
[45] *Ibid*, s 56; CRTC *Rules*, *supra* note 38, ss 60-70; Telecom Regulatory Policy CRTC 2010-963 [CRTC 2010-963].
[46] *Ibid*, ss 48(1) and 71(1).
[47] *Ibid*, s 72.001
[48] This information was provided by an anonymous source at the CRTC.
[49] CRTC *Rules*, *supra* note 38, s 45.
[50] *Supra,* note 5, s 41(1)(b).
[51] *Ibid.*, s 44(2)(b). For a discussion of the issue of concurrent jurisdiction over broadcasting matters and the referral of complaints to the CRTC, go to: *Eadie v MTS Inc*, 2015 FCA 173 (CanLII) – Application for leave to the Supreme Court of Canada dismissed (Case No. 36641 - April 7, 2016.
[52] For example, consult: Speech by Ian Fine at the Alliance for the Equality of Blind Canadians 2016 National Conference, online: www.chrc-ccdp.gc.ca/eng/node/2075.

have the power to award damages to complainants. Instead the CRTC helps parties find mutually-agreeable solutions. [53]

Advantages and Disadvantages to Diffused Oversight and Enforcement

If the ACA becomes law, oversight of accessibility standards and adjudication of accessibility complaints will not be done by one central agency, such as the Accessibility Commissioner. Instead, enforcement of accessibility standards will be done by multiple agencies, including the Accessibility Commissioner, CRTC, CTA, and grievance adjudicators of the Federal Public Sector Labour Relations and Employment Board. There are potential advantages and disadvantages to this diffuse approach to enforcement.

On the one hand, giving enforcement powers to existing bodies may make for weak enforcement, since to date some agencies have not given a great deal of attention to disability-related requirements. For example, for decades, the CTA has had the power to adopt regulations regarding air and train transportation, but it has instead chosen to rely on voluntary codes, which have proven to be ineffective.

The diffuse approach to enforcement may also result in uneven enforcement of the ACA if different bodies adopt different approaches to implementing the ACA. This is a real possibility, given that the sections in Part 10 do not standardize the different complaint or enforcement processes that exist across the CTA, CRTC and grievance adjudicators. For example, the CRTC has a very different type of complaints process than the Accessibility Commissioner, but the ACA does little to reconcile the two (sections 161-165).

Another disadvantage to this diffuse approach is that it is likely to cause confusion for persons with disabilities when trying to determine where they should file their complaint. The experiences of disability rights lawyers in Ontario and British Columbia is that persons with disabilities often experience unnecessary and convoluted legal barriers as a result of split and overlapping jurisdictions among multiple federal forums. Diffuse enforcement may result in people with disabilities falling through jurisdictional cracks between multiple forums.

The above concerns would not occur if accessibility complaints were adjudicated by one central body such as the Accessibility Commissioner.

Two sections in the ACA attempt to address these concerns. Section 123 requires all of the agencies involved in the implementation and enforcement of the ACA to collaborate

[53] This information was provided by an anonymous source at the CRTC

and coordinate to develop complimentary policies and practices in relation to accessibility-related matters. In addition, section 122(1) requires all of the agencies involved to work together to efficiently and expeditiously refer accessibility complaints to the appropriate authority. The language used in these provisions is broad enough to allow the various agencies to develop similar approaches to accessibility complaints, but it does not guarantee that they will do so.

In addition, section 122(3) states that the time between initiating a complaint and having that complaint referred to a more appropriate authority is not to be counted toward a limitation period. This means that if a person files their accessibility complaint at the wrong enforcement body, they do not have to worry that their time limit for filing their complaint to the correct enforcement body will run out. Section 122(3) is a helpful provision in the bill.

One advantage of the diffuse approach to enforcement is for people whose accessibility complaints arise as part of a larger complaint. For example, workers governed by the *Federal Public Sector Labour Relations Act, Public Service Employment Act*, and *Parliamentary Employment and Staff Relations Act* may have a workplace complaint, part of which is related to an accessibility complaint. Rather than filing an accessibility complaint and a separate grievance, these workers can have both complaints adjudicated by the grievance adjudicator.

Another advantage is that agencies are able to apply their subject matter expertise and adjudicate accessibility complaints within that particular context. For example, the CRTC can apply its technical knowledge of broadcasting and telecommunications to adjudicate complaints regarding barriers to accessible information and communication technologies, and the CTA can apply its technical knowledge of transportation to adjudicate complaints regarding barriers to transportation.

However, in preparing this report, ARCH heard from persons with disabilities and disability rights lawyers who shared their concerns that in practice, the CTA and CRTC will not adjudicate accessibility complaints in a manner that advances the preamble, purpose and principles of the ACA. In particular, it was pointed out that members of the CTA and CRTC are appointed for their technical expertise and are often from within industry. As a result, it was felt that these agencies may have subject matter expertise but they do not have expertise in disability, accessibility and human rights. Without such expertise, they will not be able to apply human rights principles and analysis to issues of accessibility and inclusion. They may be more likely to treat human rights and accessibility as secondary to technical concerns.

A review of relevant CTA cases released in 2018 demonstrates this concern is real in the CTA context, in the sense that the CTA often does not apply a human rights

analysis when adjudicating complaints that raise accessibility issues (See Appendix C of this report for a more detailed analysis of the CTA cases).

The ACA also calls for substantial duplication in reporting requirements. It requires organizations to submit two sets of accessibility plans, feedback processes and progress reports to different agencies. This siloed approach to reporting could cause confusion for regulated entities and the public, and could impede the adoption of a holistic approach to accessibility issues. It would also be unnecessarily taxing on resources in terms of the time required by industry to prepare multiple documents, and by the CRTC, CTA and Accessibility Commissioner's staff to review them.

Given the advantages and disadvantages outlined above, the disability community must consider whether to advocate that the ACA be changed to provide for centralized enforcement and adjudication of accessibility complaints by the Accessibility Commissioner. If, on the other hand, the diffuse approach to enforcement remains, then the ACA will require, at minimum, amendments to ensure that:

- persons with disabilities have very clear information about which regulations apply to which sectors, and where to file accessibility complaints;
- procedural safeguards are in place to prevent accessibility complaints from getting caught up in procedural barriers or disputes between various agencies;
- the CTA and CRTC are explicitly required to apply human rights principles when adjudicating accessibility issues;
- the CRTC has additional powers to order the same remedies as the Accessibility Commissioner. This includes the power to order compensation for complainants regarding violations of accessibility requirements;
- decisions made by the CRTC and CTA in relation to accessibility complaints are subject to additional reviews or appeals; and
- the right to file discrimination complaints to the Canadian Human Rights Commission is preserved.

SIGNIFICANT OMISSION: Barriers for Indigenous Persons with Disabilities

A significant omission is the bill`s failure to address the unique barriers experienced by Indigenous persons with disabilities, and the interaction of the ACA with areas that fall within the jurisdiction of First Nations governments. The ACA does not address how the

federal government will support First Nations in achieving accessibility while recognizing their jurisdiction.

During the pre-bill consultation period, the British Columbia Aboriginal Network on Disability Society (BCANDS), the Assembly of First Nations (AFN), and the Native Women's Association of Canada (NWAC) led consultations with Indigenous communities regarding the ACA. These organizations are reviewing the bill and preparing their responses to it.

Based on our review of the ACA and the consultation reports produced by BCANDS, AFN and NWAC, we have identified a number of preliminary issues:

- The preamble and purpose sections of the ACA does not recognize Indigenous rights, the specific circumstances of Indigenous peoples in Canada, the unique relationship between the Government of Canada and First Nations, or the fiduciary responsibilities owed by the Government of Canada to First Nations;

- The definition of disability in the ACA does not recognize the intersection of disability with indigeneity, and the principles in the ACA do not recognize the impact of intergenerational trauma, colonialism, and systemic racism;

- The ACA does not provide for the collection of data or statistics on the rates of disability among Indigenous persons.[54] This information is important to collect in order to identify barriers to the delivery of programs and services within First Nations communities;

- The ACA does not require the creation of accessibility standards that address barriers faced by persons with disabilities who reside within First Nations communities, including disparities in disability and health services, social and economic inclusion, accessible communities, housing, transportation,[55] education, emergency planning, and access to non-insured health benefits;[56]

- The sections of the ACA dealing with CASDO do not explicitly require CASDO to include Indigenous persons on its Board of Directors or committees;

[54] There appear to be no statistics on the rate of serious mental health disabilities among Indigenous persons in Canada. See Constance MacIntosh, "Indigenous Peoples and Mental Health: The Role of Law and Policy" in Jennifer Chandler and Colleen Flood, eds, *Law and Mind: Mental Health Law and Policy in Canada* (Toronto: Lexis Nexis, 2016) 419 at 420.
[55] BC Aboriginal Network on Disability Society, "National Indigenous Federal Accessibility Legislation Consultation" (March 2017) at 2, online: <http://www.bcands.bc.ca/wp-content/uploads/BCANDS-January-March-2017-Accessibility-Consultation-Report.pdf>.
[56] Assembly of First Nations, "Federal Accessibility Legislation: Potential Implications for First Nations and People with Disabilities" (2017), online: <https://www.afn.ca/wp-content/uploads/2017/09/17-02-06-AFN-FNs-Federal-Access.-Legis-Doc-7-2.pdf>.

- The ACA does not address whether the Accessibility Commissioner will have the same inspection and enforcement powers within First Nations communities;
- The ACA does not address funding for First Nations to ensure adequate compliance with legislative and regulatory accessibility requirements;
- The ACA does not address any interaction it may have with section 35 of the *Constitution Act 1982*, nor ensure that it will be implemented in a manner that protects Indigenous treaty rights; and
- The ACA does not address how the complaint mechanisms it creates will be culturally appropriate: will these mechanisms include cultural consultants? Will cultural evidence and information be taken into consideration when adjudicating an accessibility complaint?

Disability organizations will need to determine how to coordinate their advocacy response to the bill with the response of Indigenous organizations. To this end, ARCH has connected with lawyers and representatives of BCANDS, AFN and NWAC to begin to share perspectives on the bill.

APPENDIX A: Progressive Realization

A state party's obligations in relation to economic, social, and cultural rights are subject to progressive realization. In interpreting the meaning of progressive realization in relation to state action, the United Nations Committee on Economic, Social, and Cultural Rights has clarified that "while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect…while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant."[57]

Economic, social, and cultural rights are subject to progressive—instead of immediate—realization in recognition of the practical challenges and difficulties involved in ensuring full realization of economic, social, and cultural rights in a short period of time. However, state parties remain obliged to move as expeditiously and effectively as possible toward full realization. Accordingly, state parties are obligated to submit periodic reports on their implementation efforts to the Committee on Economic, Social, and Cultural Rights who, in turn, assess the adequacy of a state's progress toward full realization of these rights.[58]

Article 4 of the *CRPD* affirms "with regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources…with a view to achieving progressively the full realization of these rights."[59]

Accordingly, state parties to the *CRPD* (including Canada) are obligated to "take measures"—requiring affirmative action to maintain and augment existing human rights—to the "maximum of its available resources."

To effectively monitor progressive realization of rights, meaningful indicators and benchmarks will need to be developed and used.

Indicators and Benchmarks

[57] Committee on Economic, Social and Cultural Rights, *Report on the Fifth Session (26 November 14-December 1990), Supplement No. 3, Annex III General Comment No 3: The Nature of States Parties Obligations*, UN Doc E/1991/23 at 83–87.
[58] John H Currie et al, *International Law: Doctrine, Practice, and Theory*, 2nd ed (Toronto: Irwin Law, 2000) at 615-16.
[59] Consult also Charles O'Mahony & Gerard Quinn, eds, *Disability Law and Policy: An Analysis of the UN Convention* (Dublin: Clarus Press, 2017) at 297.

Use of statistical indicators and benchmarks has been frequently recommended as one of the most effective means of measuring progressive achievement of human rights, subject to progressive realization.[60]

An indicator can be defined as a fact that indicates the state or level of something. In relation to accessibility, one indicator could be an estimate of the proportion of public buildings that have been made accessible in the last four years and the type of building.

The Office of the High Commissioner on Human Rights has recommended three broad categories of human rights progress indicators: (1) structure; (2) process; and (3) outcome. Structural indicators are those that concern "the ratification and adoption of legal instruments and [the] existence of basic institutional mechanisms deemed necessary for facilitating realization of a human right." Process indicators concern the efforts that a state is making to carry out its human rights commitments. Outcome indicators "capture attainments…that reflect the status of realization of human rights in a given context."[61] Disability rights indicators may also be divided into three analogous types: (1) those evidencing rights in law; (2) those evidencing the extent of barriers; (3) and those evidencing participation outcomes for disabled people in key domains of everyday life.[62]

Benchmarks are targets set by each state party in relation to key indicators, and vary necessarily according to the current level of enjoyment or absence of human rights in the subject state. Once benchmarks are developed, progress can be monitored in reference to the benchmarks and assessed by the state and independent parties.[63]

Implementing Progressive Realization

States commonly misinterpret their obligations in relation to progressive realization of economic, social, and cultural rights, perceiving implementation to not be an immediate concern.[64] Governments may invoke the concept of progressive realization to cloak their non-compliance and explain why they have not made sufficient progress toward full realization of rights. The variable nature of the obligations subject to progressive realization also complicates monitoring efforts.

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[60] Eitan Felner, "Closing the Escape Hatch': A Toolkit to Monitor the Progressive Realization of Economic, Social, and Cultural Rights" (2009) 1:3 JHR Pr at 409.
[61] OHCR, *Report on indicators for promoting and monitoring the implementation of human rights* (HRI/MC/2008/3) 20th meeting of chairpersons of the human rights treaty bodies (Geneva: UN) qtd in Marcia H Rioux et al, eds, *Disability Rights, Monitoring, and Social Change* (Toronto: Canadian Scholars' Press) at 33.
[62] *Ibid*.
[63] *Supra* note 60 at 410.
[64] *Supra* note 59 at 295.

Appropriate and locally adapted tools to measure the progressive achievement of human rights—including indicators and benchmarks—is essential for demonstrating the level of state compliance (or non-compliance) with human rights requirements.[65]

[65] *Supra* note 60 at 404, 408.

APPENDIX B: Jurisdiction over Accessible Transportation Complaints

In CTA Decision No. 435-AT-A-2005, Mr. Morten, a person with a disability, brought a CTA complaint against Air Canada for failing to remove an undue obstacle. The undue obstacle was a policy applied by Air Canada in a blanket manner that barred Mr. Morten from flying without an attendant. Mr. Morten did not need an attendant, but Air Canada refused to allow him to fly without conducting an individualized assessment. The CTA agreed with Mr. Morten that Air Canada's policy was indeed an obstacle, but determined that it was not undue because of the safety risks associated with Mr. Morten fly alone. Consequently, no remedy was ordered.[66]

Dissatisfied with the CTA's decision, Mr. Morten filed a discrimination complaint against Air Canada at the Canadian Human Rights Commission.[67] The Commission referred the matter to the Canadian Human Rights Tribunal. The Tribunal found that the CTA had not dealt with Mr. Morten's human rights claim properly and the human rights analysis it applied fell "far short" of what was required.[68] The Tribunal applied a human rights analysis and found that Mr. Morten had established *prima facie* discrimination[69] and that Air Canada had failed to establish that there was a *bona fide* justification for applying the policy to Mr. Morten.[70]

The CTA filed a judicial review application against the Canadian Human Rights Tribunal challenging the Tribunal's jurisdiction. Before the Federal Court, the CTA argued that it had *exclusive* jurisdiction to hear and decide questions of accessibility within the federal transportation system.[71] In the alternative, the CTA submitted that if the Court found that the Tribunal and the CTA had concurrent jurisdiction, then the CTA is the *preferred*

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[66] It is worth noting that one of the CTA members, Mary-Jane Bennett, provided a dissenting opinion at paras. [40]-[47] that diverged significantly from the other CTA panel members. Member Bennett applied an extremely restrictive analysis that completely negated a human rights analysis and as a result not only found that the obstacle was not undue, but that Mr. Morten did not experience any obstacle *at all*. The relevance of the dissenting opinion, however, lies in the fact that Member Bennett relied on a *regulation* (the *Canadian Aviation Regulation*) that stipulated the duties of flight attendants during emergency evacuations to support her position. Member Bennett further stated that Air Canada had applied its policy in a fair and non-arbitrary manner, demonstrating disregard for the well-established legal test to be applied in discrimination cases..

[67] Compare *supra* note 5 at s 5: "It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public: (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or (b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination."

[68] *Morten v Air Canada*, 2009 CHRT 3, 71 CHRR D/221at paras 27 and 28; the Agency's decision, however, predated Abella J.'s majority decision in *VIA Rail Canada Inc v Canadian Transportation Agency*, 2007 SCC 15, [2007] 1 SCR 650.

[69] *Morten, ibid.,* at para 56.

[70] *Ibid* at paras 61-65.

[71] *Morten* v Air Canada, 2010 FC 1008 at para 32, 194 ACWS (3d) 936.

place to resolve questions of accessibility in the federally-regulated transportation system.[72]

In his decision, O'Keefe J. referred to both the *Canada Transportation Act* and the Supreme Court of Canada's decision in *VIA Rail Canada Inc. v. Canadian Transportation Agency.*[73] While not explicitly stated by O'Keefe J., the Federal Court's decision effectively bestowed upon the CTA exclusive jurisdiction to deal with human rights complaints related to (in)accessible transportation.[74]

The Canadian Human Rights Commission appealed the Federal Court's decision[75] and argued that the Judge had erred in law by concluding that the CTA had exclusive jurisdiction to adjudicate over human rights complaints related to federal transportation.[76]

Dawson J. at the Federal Court of Appeal clarified that the question the Court had to consider was not whether the Canadian Human Rights Commission and Tribunal had jurisdiction, but whether they had properly exercised their discretion in hearing a matter that had already been heard by another Tribunal. In re-phrasing the question before it, the Federal Court of Appeal found that the Commission and Tribunal did in fact have concurrent jurisdiction with the CTA to hear the matter, but that the Tribunal had improperly acted as an appeal forum, and to have done so was unreasonable.[77]

Since the Federal Court of Appeal's decision in *Morten*, there have been no new decisions from the Canadian Human Rights Tribunal with respect to accessible transportation. It is uncertain whether this is directly related to the Federal Court of Appeal's finding that although there is shared jurisdiction between the Tribunal and the CTA, the CTA is equipped to handle human rights complaint.

It is telling that while there are no new (reported) Canadian Human Rights Tribunal decisions since *Morten*, the CTA is reporting a spike in accessibility complaints. For 2016-2017, the CTA reported that it resolved 69 accessibility complaints; for 2015-2016, it resolved 46 accessibility complaints.[78]

The CTA reported that its Chair and CEO met with the Chief Commissioner of the Canadian Human Rights Commission to "discuss steps that the organizations can take to strengthen collaboration and coordination, foster complementary policies and

[72] *Ibid* at para 36.
[73] *Supra* note 68.
[74] *Supra* note 71 at para 69.
[75] *Morten v Air Canada,* 2011 FCA 332, 210 ACWS (3d) 215.
[76] *Ibid* at para 11.
[77] *Ibid.*
[78] Canadian Transportation Agency, *Annual Report 2016-2017* (May 2017) at 17, online: <https://otc-cta.gc.ca/eng/publication/annual-report-2016-2017>.

practices, and avoid jurisdictional issues."[79] The CTA's Report also stated that an updated Memorandum of Agreement was being produced by both Canadian Human Rights Commission and the CTA which would speak to their cooperation and efficient service. This Memorandum was expected to take effect in mid-2017, but a search for it yielded no results.

[79] *Ibid* at 19.

APPENDIX C: CTA`s Legal Approach to Accessible Transportation Complaints

At the CTA, all applications relating to accessibility complaints are filed under section 172 of the *Canada Transportation Act*.

The CTA has established a three-part test that it applies to all applications relating to accessibility complaints experienced by a person with a disability on a federally-regulated transportation network:

a) Whether the applicant is a person with a disability;
b) Whether the applicant encountered an obstacle;
c) Is the obstacle undue?

Within this three-part test are "sub-tests". The applicant must establish that they have an impairment; they experience an activity limitation that is significant enough to result in an inherent difficulty in executing a task or action; and they experience a participation restriction in the context of the federal transportation network. In determining the second part of the test, the CTA has made it clear that an 'obstacle' can be a rule, policy, physical barrier, etc., which is either direct, i.e. applies to a person with a disability; or indirect, i.e. while the same for everyone, has the result of withholding a benefit from a person with a disability; and denies a person with a disability an equal access to services that are available to others such that accommodation is required from the service provider.

Interestingly, in more recent decisions, the CTA has started using the phrase "undue hardship" when applying the third part of the test.[80] The human rights term "undue hardship" does not often appear in CTA decisions and the interpretation of the term by the CTA is sparse. The term "undue obstacle" however has been defined by the CTA as follows:

An obstacle is "undue" if the transportation service provider did not justify the existence of the obstacle by proving that:

a) It is rationally connected to the provision of the transportation service;
b) It was adopted based on an honest and good faith belief that it was necessary in order to provide the transportation service; and
c) There are constraints that make the removal of the obstacle unreasonable, impractical or impossible ("undue hardship").[81]

[80] For example, consult Decision No. 111-AT-A-2017 at para. 11
[81] Decision No. 354-AT-A-2015 at para. 4

The CTA has referred to this test as the "justification test."[82] On its face, it is apparent that the third part of the test is a much lower threshold for respondents to meet, than the human rights analysis that is applied in other forums including the Canadian Human Rights Commission/Tribunal.

There can be two decisions for a single complaint. This is because the CTA sometimes bifurcates its determination of the issues into two parts: the first decision deals with parts (a) and (b) of the test. If the applicant is successful in establishing that they are a person with a disability and that they encountered an obstacle, then the CTA goes on to consider part (c) of the test. However, the CTA is not consistent with respect to this bifurcated process and sometimes considers all three parts of the test in the same decision.[83]

Is the CTA applying a Human Rights Analysis when it Adjudicates Accessibility Complaints?

In *VIA Rail*[84], the Supreme Court found that the legal test in relation to undue obstacle under the *Canada Transportation Act* was the same as the legal test for "reasonable accommodation" or "undue hardship" used in human rights cases.

Despite the *Via Rail* decision, there is some concern that the test for undue hardship which the CTA applies is a considerably lower standard that the test applied by the Canadian Human Rights Commission and Tribunal.[85]

For example, in the *Morten* decision the CTA found that Mr. Morten had experienced an obstacle, but the obstacle was not undue because Air Canada argued that there were safety risks associated with having Mr. Morten fly without an attendant.[86] In contrast, the Canadian Human Rights Tribunal found that Air Canada had failed to accommodate Mr. Morten to the point of undue hardship. This was based on Air Canada's admission that it was not impossible to individually assess Mr. Morten to see if he could communicate without an attendant.[87]

[82] Decision No. 324-AT-A-2015 at para. 43
[83] Go to Decision No. 29-AT-R-2017 for an example of when the CTA decided all three parts of the test in one decision.
[84] *Supra* note 68.
[85] In the *Morten* case, the Canadian Human Rights Tribunal questioned whether changes made to the *Canada Transportation Act* after the *Via Rail* decision meant that accommodation to the point of undue hardship was no longer the human rights standard in the transportation context. Go to *Morten v Air Canada*, 2009 CHRT 3, 71 CHRR D/22 at para 203.
[86] Note that the CTA made its decision in *Morten* before the Supreme Court of Canada released its decision in *VIA Rail*.
[87] *Supra* note 68 at para 63.

Another example is a case called *Sarah Cheung v. WestJet.*[88] In that case Ms. Cheung applied to the CTA for an order that WestJet accommodate her disability on international flights. Ms. Cheung has spinal muscular atrophy and requires that she be permitted to use an orthotic positioning device and be given one extra seat for one attendant to travel with. The CTA found that WestJet had *prima facie* discriminated against Ms. Cheung in denying her accommodation. However, contrary to core human rights principles, the Agency declined to consider whether providing the accommodation rose to the level of undue hardship, and dismissed Ms. Cheung's complaint without fully adjudicating it. Essentially, it concluded that the issues raised by Ms. Cheung's application were too complex to be decided within the context of an individual complaint.

A review of relevant CTA cases released in 2018 demonstrates that the CTA often does not apply a human rights analysis when adjudicating complaints that raise accessibility issues.[89]

In 2018 the CTA reported 9 decisions related to accessibility.[90] Five of those decisions relate to inaccessibility experienced by persons with disabilities on flights[91], one decision is in regards to an obstacle to mobility at a Canadian airport[92], and two are discrimination complaints against flight carriers on a ground other than disability.[93]

In *Korchinski v West Jet*[94], the applicant identified as a person with a disability and requested the use of a wheelchair upon arriving at his destination via a WestJet flight. Upon his arrival, a WestJet attendant greeted Mr. Korchinski with the requested wheelchair. Mr. Korchinski placed his carry-on luggage on the wheelchair and advised the attendant that he was ready to go. The attendant advised Mr. Korchinski that this was an inappropriate use of a mobility device and that it was meant to push people, not luggage. After a brief period, the attendant escorted Mr. Korchinski and his luggage on the wheelchair to his intended destination within the airport. WestJet, however, imposed a one-year travel ban on Mr. Korchinski not only for the inappropriate use of the mobility device but for his continued aggressive and threatening behavior which he had exhibited on two previous trips.

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[88] Agency Decision No. 324-AT-A-2015, online: Canadian Transportation Agency <https://otc-cta.gc.ca/eng/ruling/324-at-a-2015>.
[89] This review is based on decisions that the CTA makes public. Note that not all CTA decisions and determinations are posted or published.
[90] These results are from a keyword search for "disability". Search results available online: <https://otc-cta.gc.ca/eng/decisions/%22disability%22?f%5B0%5D=field_ruling_date%3A2018>.
[91] Consult in particular: Decision No. 17-AT-C-A-2018, Decision No. 30-AT-C-A-2018, Decision No. 20-AT-C-A-2018, Decision No. 19-AT-A-2018, and Decision No. 13-AT-A-2018
[92] Consult Letter Decision No. LET-AT-A-11-2018
[93] Consult in particular: Decision No. 34-C-A-2018, Decision No. 1-C-A-2018; this is an interim decision having to do with an order that the respondent conduct consultations – no summary is provided because the issues raised are not relevant for the purposes of this memo.
[94] Decision No. 17-AT-C-A-2018

The CTA applied the three part legal test[95] and found that Mr. Korchinski was a person with a disability. Of note is the fact that the respondent in this matter questioned whether the complainant had a disability at all.[96] In making a finding of disability, the CTA emphasized that it uses "a low threshold when assessing impairment, especially when there is evidence from a doctor with a diagnosis of one or more condition(s).[97] This seems to reconcile with a human-rights analysis that is applied in human rights forums.

In determining whether Mr. Korchinski experienced an undue obstacle, the CTA noted that "…human rights law … indicates that persons with disabilities are entitled to an accommodation that meets their disability-related needs"[98], without citing any case law or identifying where this principle is pulled from. This is important because based on this principle, the CTA made a finding that Mr. Korchinski had not established how the use of the mobility device was connected to his disability. The CTA found that the complainant needed luggage assistance and not a wheelchair and as such, he did not experience an obstacle that was undue.[99]

Mr. Korchinski claimed that the imposition of a travel ban (in accordance with a tariff), was discriminatory as it was related to his disability.[100] WestJet submitted that the ban was set in place because of several factors one of which was the misuse of a mobility device by Mr. Korchinski.[101] In making a finding that the ban was not discriminatory, the CTA did not apply a human rights analysis. Rather, the CTA focused on the factual scenario and the *proper application of the Tariff* and did not consider whether the application of the tariff was appropriate from a human rights perspective.

In *Saghbini v Air Canada*,[102] Mr. Saghbini requested wheelchair assistance from Air Canada on a flight from Ottawa to Lyon via Montreal. The fact that Mr. Saghbini had made this request was indicated on his boarding pass. The problem arose when Mr. Saghbini's flight in Ottawa was delayed, causing him to miss his connection in Montreal. Because he missed his connecting flight, Air Canada placed Mr. Saghbini on the next available flight. His boarding pass, however, did not indicate that he required wheelchair assistance. According to Mr. Saghbini, this omission meant that Air Canada personnel did not know they had to accommodate him and it caused him to encounter multiple undue obstacles.[103] In addition to needing wheelchair assistance, Mr. Saghbini also

[95] Decision No. 17-AT-C-A-2018 at paras. 11 to 14
[96] *Ibid*., at paras. 23-24
[97] *Ibid*., at para. 29
[98] *Ibid* para. 39
[99] *Ibid* at para. 41
[100] *Ibid* at para. 42
[101] *Supra*, note 94 at para. 43
[102] Decision No. 30-AT-C-A-2018
[103] *Ibid*. at paras 29-32

needed assistance from flight attendants in retrieving medication from his luggage which was stowed in the overhead compartments, as well as being provided with water and food with which to take his medication.

The parties disagreed on whether Mr. Saghbini had requested wheelchair *and* medical assistance (according to the applicant) or just wheelchair assistance (according to Air Canada). The CTA found that the applicant had not provided sufficient information or evidence with respect to his allegations, but nevertheless Air Canada should have provided him with a wheelchair at all times and that if he had made a request for water to take his medication, Air Canada should have provided him with water.[104] As such, it was found that Mr. Saghbini experienced an undue obstacle.[105]

In *Shelton et al v. Air Canada*[106], an application was brought by Gayle Shriner on behalf of the applicants, Shelton and Berghoff who are persons with disabilities. Their application alleged that Air Canada failed to provide them with wheelchair assistance on multiple occasions during a round-trip flight.[107] The CTA applied its three-part test[108] and found that the applicants were persons with disabilities who did encounter an undue obstacle. However, according to the CTA, because Air Canada had apologized and refunded the applicants' travel costs, no further action was necessary.[109] This decision is completely devoid of any human rights analysis and resembles more of a customer service dispute resolution. Both applicants were elderly and left without any assistance in the middle of the night in the middle of an American airport without any assistance.[110] This goes to the heart of so many human rights issues including respect for a person's dignity.

In *Kathiravelu v. Air Canada*[111], the applicant brought along with him his own pack of medical oxygen ("Medipak"). The applicant had arranged and paid to have this available to him on his Air Canada flight from Sri Lanka to Toronto. The CTA found that the applicant was a person with a disability and that he had encountered an obstacle when Air Canada failed to provide him with his Medipak upon his request. According to Air Canada, in-flight personnel were actually unaware of Mr. Kathiravelu's need for his Medipak because:

[104] *Ibid*. at para. 46
[105] *Ibid* at para. 47
[106] Decision No. 20-AT-C-A-2018
[107] Namely, subsection110(4) of the *Air Transportation Regulations*, SOR/88-58, as amended
[108] *Supra*, note 106 at para. 10
[109] *Ibid*. at para 41
[110] *Ibid* at para. 25
[111] Decision No. 19-AT-A-2018

- A Notice of Medical Oxygen Onboard was not posted at the entrance of the aircraft and as such it was likely that cleaning staff had removed the Medipak prior to the flight (this is a matter of practice);
- There was no notification in the Passenger Information List of Mr. Kathravelu's need for a Medipak; and
- A Medipak had not been placed at Mr. Kathiravelu's seat by ground staff.[112]

The CTA dubbed the aforementioned as "mistakes" made by the airline and found that Mr. Kathiravelu's experienced an obstacle to his mobility.[113]

The CTA provided a purely factual analysis of Mr. Kathiravelu's situation and applied no human rights analysis to the matter. It found that there was no evidence to demonstrate that the "difficulties" encountered by the applicant were demonstrative of a broader issue with Air Canada's policies and procedures and that, rather, they were mistakes that created an obstacle that are preventable.[114] In order to remedy these preventable mistakes, the CTA ordered Air Canada to distribute a written reminder to cleaning staff that Medipaks should not be removed and a written reminder to ground staff relating to placing Medipaks at the passenger's seat prior to the flight.[115]

[112] *Ibid* at para. 7
[113] *Ibid* at para. 8
[114] *Ibid.* at para. 17
[115] *Ibid*. at para. 22