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# The Universality of the Human Condition: Theorizing Transportation Inequality Claims by Persons with Disabilities in Canada, 1976-2016

Laverne A. Jacobs

*University of Windsor, Faculty of Law*

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**The Universality of the Human Condition: Theorizing Transportation Inequality Claims  
by Persons with Disabilities in Canada, 1976-2016**

*Laverne Jacobs*\*

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## **Introduction**

Transportation is the lifeline that connects persons with disabilities with the community, facilitating greater opportunities for work, social inclusion and overall independence. Adequate

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\* Associate Professor, Faculty of Law, University of Windsor. Invitations to speak on this topic have provided me with invaluable opportunities to workshop this article. Earlier versions of this paper were presented at the Summer Speaker Series at the Center for the Study of Law and Society, University of California, Berkeley on July 31, 2014, at the University of British Columbia's Law Faculty Colloquium on September 24, 2014 at the symposium, *Exploring Law, Disability and the Challenge of Equality in Canada and the United States*, University of California, Berkeley, December 5, 2014 and at the Dean's Lunch and Learn, University of Windsor, Faculty of Law on January 19, 2015. I am grateful to the participants of these events for their helpful comments, and to Carrie Griffin-Basas and the journal's anonymous reviewers for their feedback. Thanks also to Alicia Maiuri, Stephanie Skinner, Mackenzie Falk, Chandima Karunanayaka, Seana Chin , Mattie-Marie Eansor Bornais, Horia Tabatabaei Soltani and Cameron Taylor for their excellent research assistance. This research was supported by grants from the Fulbright Foundation and the Social Sciences and Humanities Research Council of Canada.

accessible transportation has long been a concern of persons with disabilities.<sup>1</sup> Yet, there is a dearth of sustained research on the law and society implications of transportation inequality for persons with disabilities in Canada.<sup>2</sup> This paper aims to contribute to the research on transportation inequality by providing an empirical and theoretical analysis of the human rights tribunal decisions on transportation equality in Canada. In doing so, it examines the issues from the perspective of the voices of persons with disabilities by focusing on the substance of the legal claims made. Ultimately, I argue that narrow interpretations of prevailing applicable law and doctrine have resulted in missed opportunities for achieving transportation equality on the ground for persons with disabilities within the reactive regulatory statutory human rights context. These opportunities may be captured from insights drawn in part from standard-setting regulatory processes, such as the one established under the *Accessibility for Ontarians with Disabilities Act, 2005*<sup>3</sup>.

In Part I, I present a detailed analysis of the Canadian statutory human rights cases in which applicants have brought disability discrimination claims about transportation. The corpus of cases that I analyze in this section represents the human rights tribunal decisions decided across Canada between 1976 and 2016. This Part of the paper shows that transportation equality claims brought by persons with disabilities within the Canadian statutory human rights context can be broken down into three categories: a) cases seeking transportation restructuring, b) cases seeking access to transportation in support of a broader family dynamic and c) cases in which the complainant seeks to assert that their need for transportation as a person with a disability does not lead to a loss of efficiencies as perceived by some members of the mainstream population.

In Part II of this paper, I briefly set out the theories of equality relating to economic distribution and identity recognition and relate them to the social model of disability. I show that economic maldistribution and identity misrecognition are reflected in each of the three categories of transportation inequality cases. More importantly, however, I demonstrate that neither economic maldistribution, identity misrecognition, nor a combination of both, fully captures the true nature of what is sought by the claimants seeking equality of transportation in these cases. I argue that a different conceptual framework is required to give voice to persons with disabilities seeking equality in transportation, and possibly in broader equality struggles as well.

In Part III, I develop more fully this additional aspect of equality theory. I term this missing aspect the *universality of the human condition*. The universality of the human condition brings attention to common experiences that we all share throughout life and requires that they be acknowledged within legal analysis. In this way, the law is used as a tool to support each individual to live through these experiences reasonably. I suggest that the universality of the human condition is a conceptual framework that can assist not only in clarifying the contours of what is sought by persons with disabilities seeking transportation equality but that also provides

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<sup>1</sup> See generally, the Council of Canadians with Disabilities' ongoing work documenting various major issues of transportation for persons with disabilities at *Transportation*, Council of Canadians with Disabilities, <http://www.ccdonline.ca/en/transportation> (last updated Jan. 11, 2015).

<sup>2</sup> The socio-legal literature that exists includes: Ena Chadha, "Running on Empty: The "Not So Special Status" of Paratransit Services in Ontario" (2005) 20 WRLSI 1[Chadha], "Transportation Barriers " ch 5 in Ravi Malhotra and Morgan Rowe, *Exploring Disability Identity and Disability Rights through Narratives* (New York: Routledge, 2014) and Lisa Vanhala, *Making Rights a Reality?: Disability Rights Activists and Legal Mobilization* (New York: Cambridge, 2011).

<sup>3</sup> SO 2005 c 11.

a reason for respondents to be more responsive to these claims. In developing this framework, I draw on the cases as well as on interviews of persons with disabilities and organizations dedicated to disability issues (ODDIs) in Canada and the United States. These interviewees were interviewed about their experiences in government and multi-party stakeholder consultations regarding the development of laws affecting persons with disabilities, providing insight on what was helpful in moving discussions forward. Finally, I show how the universality of the human condition can be a useful tool within the statutory human rights discrimination analysis, not only for claims relating to disability discrimination in transportation but for disability discrimination claims generally. The universality of the human condition is a conceptual tool that can assist persons with disabilities gain a more powerful voice for change .

## **Part I: Disability Discrimination in Transportation-Canadian Statutory Human Rights Decisions**

Statutory human rights regimes (comprised of commissions and tribunals) are administrative bodies that work to resolve claims in which there are allegations of discrimination and harassment.<sup>4</sup> These administrative actors exist in every province and territory across Canada. At the federal level, the Canadian Human Rights Commission and Tribunal also exist to address discrimination and harassment claims for matters that fall within federal legislative competence.

The human rights regime of each province and territory has its own enabling statute; however, these statutes all revolve around a common mandate to prohibit discrimination on a variety of grounds. These grounds include race, ancestry, sex, sexual orientation, gender identity, gender expression, age, marital status, family status and disability.<sup>5</sup> Protection from discrimination is restricted to specific social areas such as the provision of goods and services, employment and rental accommodation.<sup>6</sup>

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<sup>4</sup> In two provinces, British Columbia and Ontario, legislative reform to provide direct access the human rights tribunal took place in the 2000s (see *Human Rights Code*, RSC 1996, c 210, s 21 and *Human Rights Code*, RSO 1990, c H.19, s 34). In all other Canadian jurisdictions, there is the traditional model in which matters are first brought to the human rights commission and the commission tries to reach a settlement through investigation and alternative dispute resolution techniques such as mediation. If the matter cannot be resolved by the commission, it is then taken to the human rights tribunal of the jurisdiction for an adjudicative resolution (see eg Commission des droits de la personne et des droits de la jeunesse (Quebec), “Complaints Process”, <http://www.cdpdj.qc.ca/en/droits-de-la-personne/defendre-vos-droits/Pages/plainte-traitement.aspx> (last accessed July 1,2017)). Also of note is that Saskatchewan disbanded its human rights tribunal in 2011, requiring human rights complaints that are not resolved by the Saskatchewan Human Rights Commission to be taken to the superior court. The Commission is responsible for referring such matters to the Superior Court and will represent the complainant free of charge before the court (see Saskatchewan Human Rights Commission, “How to File A Complaint”, <http://saskatchewanhumanrights.ca/learn/fact-sheets/how-to-file-a-complaint> (last accessed July 1,2017)).

<sup>5</sup> A typical provision is found at s 1 of the Ontario *Human Rights Code* *ibid*, which sets out the scope of the Code's prohibition on discrimination. The section reads: "Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability."

<sup>6</sup> See, for example, the Ontario *Human Rights Code* *ibid* at ss 1, 2 and 5.

There have been 82 reported human rights decisions across Canada addressing allegations of disability discrimination within transportation services between the years 1976 and 2016.<sup>7</sup> Cases were found using a methodology that included identifying all provincial and territorial human rights commission and human rights tribunal (including board of inquiry) decisions during the timeframe in question. Four distinct databases were used to ensure that all cases touching on disability discrimination in transportation were collected.<sup>8</sup> These cases were then culled manually to retain only those addressing an incident or incidents involving a person with a disability in the provision of transportation services. The manual culling process weeded out decisions that touched on disability discrimination in transportation contexts other than the provision of transportation services — for example, cases concerning the employment of a person with a disability by a transportation company.

1976 was chosen as the beginning of the time period examined because it marks the year in which "disability" was added to the New Brunswick *Human Rights Code* as a ground of discrimination.<sup>9</sup> The New Brunswick *Human Rights Code* is the first human rights statute in Canada to include "disability" among the grounds of discrimination,<sup>10</sup> although it is now found in all the human rights statutes across the country. Human rights legislation applies in both public and private contexts. The transportation entities that are reflected in these cases therefore represent a mixture of public transit authorities (responsible for both conventional and paratransit systems), bus and motor coach lines open to the public, taxi services, etc.<sup>11</sup>

A review of the decisions dealing with allegations of disability discrimination in the provision of transportation services reveals some interesting facts. First, 82 cases over a 40-year period is a relatively small number of cases. It translates to a little more than two cases of alleged disability discrimination in transportation services a year. The number of transportation claims over the 40 year period is thus a drop in the bucket in comparison to the number of claims received today in some of the larger jurisdictions in Canada. The Human Rights Tribunal of Ontario, for example, currently receives over 3000 discrimination applications a year.<sup>12</sup>

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<sup>7</sup> The resulting dataset of cases for the study has been publicly archived and is available through the dataverse global repository: <https://dataverse.scholarsportal.info/dataverse/ljacobs>.

<sup>8</sup> The four databases searched were CANLII, QuickLaw, Westlaw and the Canadian Human Rights Reporter (CHRR) for each of the provinces and territories.

<sup>9</sup> *Human Rights Act*, RSNB 1973, c. H-11, as am. by SNB 1976, c 31, s1.

<sup>10</sup> See the discussion in Dianne Pothier, "Tackling Disability Discrimination at Work: Toward a Systemic Approach" (21010) 4 McGill Journal of Law and Health 17 at 18-19.

<sup>11</sup> Disability discrimination cases are also handled by the Canadian Transportation Agency at the federal level under the authority of the *Canada Transportation Act* SC 1996 c 10, Part V. Matters before the Canadian Transportation Agency deal primarily with interprovincial travel through airlines and railways. While these cases are also numerous, I have chosen to focus this study on the human rights decisions within the provinces and territories of Canada as human rights tribunal decisions reflect more soundly the day-to-day interaction of persons with disabilities and the community, and relate to life's daily activities.

<sup>12</sup> In the 2015-16 fiscal year alone, 3,357 applications were filed at the Human Rights Tribunal of Ontario (HRTO), concerning all prohibited grounds of discrimination. See Social Justice Tribunals Ontario, 2015 – 2016 Annual Report, <http://www.sjto.gov.on.ca/documents/sjto/2015-16%20Annual%20Report.html#hrto7>

Second, there are few successful cases of discrimination within the sample. A successful finding of discrimination was the outcome in only 28% of all decisions relating to disability and transportation. The majority of the cases had unsuccessful outcomes for the applicant on the ground of disability discrimination or did not make it past preliminary stages. Third, almost half of all the transportation cases were brought by self-represented litigants<sup>13</sup> in some jurisdictions such as Ontario, approximately 65% of the cases were brought by self-represented litigants.

More substantively, an analysis of the collection of transportation decisions shows that the decisions can be broken down into at least three categories of cases, especially if the analysis is done with an ear attuned to what it is that the applicants are requesting. As many of the applications are made by self-represented litigants, what the litigant is seeking is frequently presented in lay terms, and often usefully reproduced in those terms within the decision, as opposed to being presented through the filter of a legal advocate's voice. As noted in the Introduction, I have organized the cases into the following three categories: a) cases in which claimants are seeking transportation restructuring, b) cases in which claimants are seeking access to transportation in support of a broader family dynamic, and c) cases in which the complaint is prompted by a conflict between the need for transportation by a person with a disability and a perceived loss of efficiencies by some members of the mainstream population. I will next examine each of these categories.

#### **A. Cases seeking transportation restructuring**

I have chosen the term "transportation restructuring" to refer to cases in which the applicant seeks modifications to a transportation system that go beyond accommodating the applicant's specific disability needs. For example, a claimant may seek the redesign of taxi services so that wheelchair accessible taxis are available on call, around the clock –that is to say, in the same way that taxis are made available to members of the general population. This type of request is usually prompted by the observation that the able-bodied population requires less effort to use the conventional transportation system as a tool to complete the regular activities of everyday life than a person with a disability would require to complete the same activities using either conventional transit or (if eligible) specialized transit<sup>14</sup>. The cases in this category represent issues brought forward by applicants who sought to remedy circumstances that they considered to be an unjust infringement of their equality rights.

Within the Canadian statutory human rights context, these decisions have been met by narrow legal interpretations of the breadth of the administrative agency's authority or of the applicable legal doctrine. *Browne v Niagara (Regional Municipality)*<sup>15</sup> and *Austin v London Transit*

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<sup>13</sup> The ratio of self-represented to represented litigants is 36:46 or 44%.

<sup>14</sup> A useful definition of conventional and specialized transportation services can be found in the Transportation Standards enacted under the *Accessibility for Ontarians with Disabilities Act*. There, "specialized transportation services" means public passenger transportation services that operate within the province, are provided by a designated public sector transportation organization, and are designed to transport persons with disabilities. By contrast, "conventional transportation services" refers to public passenger transportation services on transit buses, motor coaches or rail-based transportation that operate within the province, are provided by a designated public sector transportation organization, and which explicitly do not provide transportation services designed to transport persons with disabilities. See section 33 of Part IV *Transportation Standards* of the *Integrated Accessibility Standards* O. Reg 191/11.

<sup>15</sup> 2010 HRTO 2141[*Browne*].

*Commission*<sup>16</sup> are two illustrative examples. Together they present some of the most significant procedural and substantive challenges that are experienced by litigants advocating for infrastructure changes to transportation services through the statutory human rights system.

***i. Lost discourse and inquisitorial processes***

*Browne* introduces us to some of the narrow approaches to legal interpretation that are employed in many of the transportation equality cases. In May 2004, the Niagara Regional Council passed a bylaw permitting the Municipality of Niagara to fund and coordinate inter-municipal specialized transit for persons with disabilities. The Regional Municipality of Niagara is made up of twelve cities and towns in the Niagara Region. The program of inter-municipal specialized transit began in 2006 for medical appointments only and, by the end of June, 2007, had expanded to include certain trips related to education and employment. Angela Browne did not qualify for the inter-municipal specialized transit. The eligibility criteria stipulated that the service was for those physically unable to board a conventional transit vehicle or who could not walk a distance of 175 m. Moreover, to be eligible, the user must also have required the service for one of three purposes — namely, to attend medical appointments, to participate in paid employment at the same place of employment at least three times a week, or for educational instruction at a qualified institution such as a secondary school, college or university.

There was no dispute that Ms. Browne was a person with disabilities. Both parties agreed that Ms. Browne's medical conditions qualified as disabilities under the Ontario *Human Rights Code*<sup>17</sup> (The Code). However, Ms. Browne's medical conditions (which included chronic fatigue syndrome, arthritis, depression, central processing disorder and diabetes), did not meet the requirements of a physical disability for the inter-municipal specialized transit system. In addition, while Ms. Browne required the transportation to complete her work as a paralegal, her work involved traveling to different courthouses in different cities within the Niagara Region. She therefore did not go to the same place of employment three times a week, a fact that further rendered her ineligible to receive the special transit service

Unfortunately, Ms. Browne, a self-represented litigant, did not challenge the eligibility criteria and her exclusion from the inter-municipal specialized transit system as a result of possessing

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<sup>16</sup> *Austin v London Transit Commission* 2013 HRTO 1936 [*Austin*]; The key cases that have addressed transportation restructuring since 1976 are: *Browne, Austin, Shiell v London Transit Commission* 2014 HRTO 481[*Shiell*], *Daniel v Peel (Regional Municipality)*, 2016 HRTO 1159, *Puharich v Ontario (Health and Long Term Care)*, 2016 HRTO 574 and *Martyn v Laidlaw Transit Ltd* 2008 AHRC 2 [*Martyn*].

<sup>17</sup> *Browne* at para 26. RSO 1990 c H 19, as amended. The definition of "disability" is broad under the Ontario *Human Rights Code*. It reads:

"disability" means,

- (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,
- (b) a condition of mental impairment or a developmental disability,
- (c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
- (d) a mental disorder, or
- (e) an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*.

disabilities that were not on the list. Ms. Browne wanted to reduce travel time. What was available at the time of her application was a patchwork of conventional inter-municipal transit offered by some but not all of the municipalities in the Niagara Region. It took two hours for one to travel between St. Catherine's, Ontario and her destination in Welland, Ontario using the system of buses and other forms of public transportation that was in place. The long travel aggravated Ms. Browne's chronic fatigue syndrome causing her exhaustion and motion sickness. Ms. Browne reasoned that if regular inter-municipal transit were available (parallel to the specialized transit system) one could make the trip in 30 minutes. She therefore requested that the Regional Municipality of Niagara be forced to create a conventional inter-municipal transit system in addition to the specialized system that already existed. The Tribunal dismissed her application. The adjudicator reasoned that while the Code provides a right to equal treatment with respect to a service, it presupposes that that service already exists. The Code cannot be used to order the creation of a new service and by extension could not be used to order the municipality to create an inter-municipal transit system.<sup>18</sup>

With respect to the qualifying criteria that had been established for the specialized inter-municipal transit, the Tribunal noted that it was not clear whether Ms. Browne was interested in access to this specialized transit system.<sup>19</sup> It held further that it had neither a sufficient evidentiary record nor the detailed legal argument required to enter into an examination of the question of whether the specialized transit system's eligibility criteria were discriminatory.<sup>20</sup>

Certainly, there is little doubt that the analysis of the tribunal is technically correct and follows prevailing legal doctrines. Due to the doctrine of separation of powers, judicial and quasi-judicial decision-makers are wary to cross into the legislative realm. A quasi-judicial executive agency such as the human rights tribunal would likely be upheld on judicial review for refusing to direct a municipality to create a new transportation system.

Nevertheless, the answer to how a tribunal should procedurally address a fact situation like that of Ms. Browne (lack of clarity on the issues raised by the applicant, less than full evidentiary record and argumentation) is not as clear-cut as what occurred. As a general principle and under the common law, administrative tribunals are masters of their own procedure.<sup>21</sup> In recent years, in Canada and elsewhere, a variety of policy goals have influenced legislative amendments and internal development of administrative tribunal policy and procedure to take advantage of the flexibility possessed by administrative actors in determining matters.<sup>22</sup> These flexible processes have been termed inquisitorial processes generally and sometimes "active adjudication" within the Canadian context.<sup>23</sup> One key Canadian example of this type of legislative amendment is found in the Ontario *Human Rights Code* itself which provides that the Human Rights Tribunal for Ontario may use "alternatives to traditional adjudicative or adversarial procedures" and

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<sup>18</sup> *Browne, ibid* at paras 29-32.

<sup>19</sup> *Ibid* at para 35.

<sup>20</sup> *Ibid* at paras 35-36.

<sup>21</sup> This principle has been articulated by the Supreme Court of Canada in *Prasad v Canada (Minister of Employment and Immigration)*, [1989] 1 SCR 560 at 558-569.

<sup>22</sup> These policy goals include efficiency, access to justice and evening the playing field when there are self-represented litigants. See Laverne Jacobs and Sasha Baglay (eds), *The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives* (Surrey, UK: Ashgate, 2013) [Jacobs and Baglay].

<sup>23</sup> See Samantha Green and Lorne Sossin, "Administrative Justice and Innovation: Beyond the Adversarial/Inquisitorial Dichotomy" in Jacobs and Baglay, *ibid* at 71.

explicitly permits the tribunal to define and narrow the issues before it.<sup>24</sup> While this provision does not suggest that an adjudicator may create issues for a party in using these processes, it does imply that the adjudicator could have clarified the issues being brought forward by the parties and at least inquired as to whether Ms. Browne also wanted the eligibility criteria of the inter-municipal transit authority to be examined for their conformity with the Code. The use of these active adjudication techniques would not alter the applicant's obligation to create legal arguments and provide evidence.<sup>25</sup> Close to 50% of the cases on the issue of transportation equality for persons with disabilities are brought forward by self-represented litigants. Without the provision of sufficient legal aid or the use of active adjudication on the part of the tribunal, the opportunity may be lost, as in the case of Ms. Browne, to address all issues relevant for effecting change.<sup>26</sup> A tribunal's use of active adjudication for self-represented litigants may help keep the door open to addressing issues that are otherwise left untouched in the realm of disability and transportation equality.

## **ii. The reasonable accommodation doctrine**

Like *Browne*, *Austin* is a case that illuminates the problem of lost opportunities for dialogue in seeking transportation restructuring through adjudicative regulation. But *Austin* also demonstrates how the doctrine of reasonable accommodation, which is central to equality law when it deals with persons with disabilities, provides a very narrow platform for receiving transportation restructuring concerns.

Mr. Austin was a paratransit user who felt that the paratransit system was an ineffective alternative to conventional transit in London, Ontario. In Ontario, the paratransit system was created in the 1970s.<sup>27</sup> It expanded robustly through the 1970s and 1980s only to be markedly stripped of funding in the mid-1990s when the conservative party was elected to power.<sup>28</sup> Similar to paratransit services in other major Ontario cities<sup>29</sup>, the service in London was, at the time of the application, a first-come first-served, door-to-door system which required pre-booking to obtain a ride. After a few specific instances in which he found himself unable to obtain a ride even though he had called to book within the stipulated booking window, Mr. Austin made a complaint to the Human Rights Tribunal of Ontario about the challenges of using

<sup>24</sup> See *Human Rights Code* RSO 1990 c H 19, ss 43(3) of the Code which states:

"Without limiting the generality of subsection (1), the Tribunal rules may,

(a) provide for and require the use of hearings or of practices and procedures that are provided for under the *Statutory Powers Procedure Act* or that are alternatives to traditional adjudicative or adversarial procedures;

(b) authorize the Tribunal to,

(i) define or narrow the issues required to dispose of an application..." [emphasis added].

See also s. 41 of the Code and Rule 1.7 h) of the Human Rights Tribunal of Ontario, Rules of Procedure (2014), <http://www.sjto.gov.on.ca/documents/hrto/Practice%20Directions/HRT0%20Rules%20of%20Procedure.pdf?6b0bd8>.

<sup>25</sup> Michelle Flaherty, "Self-Represented Litigants: A Sea Change in Adjudication" in Peter Oliver and Graham Mayeda (eds) *Principles and Pragmatism: Essays in Honour of Louise Charron* (Toronto: LexisNexis Canada, 2014) 323.

<sup>26</sup> Robert Thomas, "From "Adversarial v Inquisitorial" to "Active, Enabling, and Investigative": Developments in UK Administrative Tribunals" in in Jacobs and Baglay, *supra* note 20 at 51.

<sup>27</sup> Chadha, *supra* note 2.

<sup>28</sup> *Ibid.*

<sup>29</sup> See, for example, information on Toronto's Wheel-Trans service, *Wheel-Trans*, Toronto Transit Commission, <https://www.ttc.ca/WheelTrans/index.jsp>.

paratransit for persons with disabilities. He framed part of his submission in the following words:

...it is frustrating, stressful and humiliating to have to compete with other paratransit users for limited services, and ... given the 3-day advance booking requirement, the [London Transit Commission] should be able to accommodate all requests for paratransit rides.<sup>30</sup>

Mr. Austin further reported that he had been made to feel that it was his fault that he could not secure a ride. He was told that should have called as soon as the booking window opened at 7 AM as opposed to calling in the afternoon in order to obtain a ride since "bookings fill up quickly".<sup>31</sup> Ultimately, Mr. Austin submitted that "as a person with a disability, [he was] denied equal access to an equivalent public transportation system available to other residents of London, Ontario"<sup>32</sup>. Mr. Austin elaborated on this argument. The adjudicator noted that Mr. Austin stated that:

able-bodied residents have access to a predictable and reliable service, which paratransit is not, and that able-bodied residents can plan and schedule medical and dental appointments months in advance. The applicant seeks to be able to plan his life the same way users of the conventional system are able to.<sup>33</sup>

The transit company, for its part, responded that users of its conventional service did not have guaranteed rides or door-to-door service. Indeed, the transit company went as far as to assert that there were, in fact, benefits to using the special transit: after several special transit users complained that they "spent too long on vehicles, because of other pick-ups and drop-offs",<sup>34</sup> the company had agreed not to keep paratransit users on a bus for more than an hour. Lastly, the transit company argued that it was being as efficient as possible with the funding that it had.

Ultimately, Mr. Austin was unsuccessful on the ground of discrimination. The adjudicator filtered the matter through the lens of a reasonable accommodation analysis. He held:

In my view, in asserting that the respondent's specialized transit does not provide an equal or a reasonable alternative to conventional transit, the applicant is essentially alleging that the respondent has failed to provide him with reasonable accommodation short of undue hardship in the provision of transit services.<sup>35</sup>

The Tribunal found that Mr. Austin had not made out a *prima facie* case of discrimination.<sup>36</sup> However, the Tribunal went on to assert that had a *prima facie* case of discrimination been

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<sup>30</sup> *Austin supra* note 15 at para 3.

<sup>31</sup> *Ibid* at para 3.

<sup>32</sup> *Ibid* at para 2.

<sup>33</sup> *Ibid* at para 48.

<sup>34</sup> *Ibid* at para 24.

<sup>35</sup> *Ibid* at para 49.

<sup>36</sup> Curiously, the Tribunal found first that Mr. Austin could have accessed and used the conventional transportation system but since it was a bit far away, he had been disadvantaged by geography as opposed to disability. See *ibid* at para 62.

established, the transit commission would nevertheless have met the test for reasonable accommodation as the transit commission's three-day booking policy was reasonably necessary for the goal of maximizing services to its paratransit customers and had been adopted in good faith. As it could not meet its demand for both conventional and specialized transit services at the time, it would have experienced undue hardship had it attempted to either extend the three-day booking window or guarantee rides.

Reasonable accommodation is a cornerstone of Canadian human rights law. The concept of reasonable accommodation deals with removing barriers to access to the extent that it can be done without the party tasked with removal facing undue hardship. The Supreme Court of Canada has defined reasonable accommodation as follows:

The concept of reasonable accommodation recognizes the right of persons with disabilities to the same access as those without disabilities, and imposes a duty on others to do whatever is reasonably possible to accommodate this right. The discriminatory barrier must be removed unless there is a *bona fide* justification for its retention, which is proven by establishing that accommodation imposes undue hardship on the service provider...<sup>37</sup>

But, the challenge of using a reasonable accommodation lens is that it is, by nature, a tool that allows the possibility for lesser substitutes to be provided so long as they seem "reasonable". As Day and Brodsky have argued:

The difficulty with this paradigm is that it does not challenge the imbalances of power, or the discourses of dominance, such as racism, able bodyism and sexism, which result in a society being designed well for some and not for others. It allows those who consider themselves "normal" to continue to construct institutions and relations in their image, as long as others, when they challenge this construction are "accommodated." [...] Accommodation does not go to the heart of the equality question, to the goal of transformation... [It] seems to mean that we make some concessions to those who are "different", rather than abandoning the idea of "normal" and working for genuine inclusiveness.<sup>38</sup>

When it comes to cases of transportation restructuring, the reasonable accommodation paradigm provides little possibility for reimagining an inclusive transportation system. What is lost from the assessment of Mr. Austin's claim for equality, for instance, is any reflection about what a more inclusive transit system might look like. Such a transportation system would allow people

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<sup>37</sup> See *Council of Canadians with Disabilities v VIA Rail Canada Inc* 2007 SCC 15 at 121. See also the discussion in Michael Lynk, "Disability and Work: The Transformation of the Legal Status of Employees with Disabilities in Canada" in R. Echlin & C. Paliare (eds) *Law Society of Upper Canada Special Lectures 2007: Employment Law* (Toronto: Irwin Law, 2007) at 189-257.

<sup>38</sup> Shelagh Day and Gwen Brodsky, "The Duty To Accommodate: Who Will Benefit?" (1996) 75 Can Bar Rev 433 at 462.

with disabilities to organize their daily lives in a manner similar to those who use the conventional system without, for example, 7AM pre-booking calls made several days in advance.

The Tribunal's analysis is also disappointing because the UN *Convention on the Rights of Persons with Disabilities*<sup>39</sup> (CRPD), which Canada ratified in 2010, guarantees equal access to transportation. Indeed, Mr. Austin's comment that he was being denied equal access to an equivalent public transportation system available to other residents of London, Ontario virtually echoes the language that one sees in the CRPD. Article 9 of the CRPD states that "States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to ... transportation, both in urban and in rural areas"<sup>40</sup> The goal of inclusion in the community is one that is highlighted in the CRPD.

In conclusion, when an adjudicator recasts equality claims in the realm of accessible transportation as claims about reasonable accommodation, confusion arises as to the possibilities that can be attained by persons with disabilities envisioning equal transportation. This leads to a lost opportunity for genuine discussion about inclusive transportation, and is particularly disappointing in the era of the CRPD.<sup>41</sup>

### **B. Cases seeking access to transportation in support of a broader family dynamic**

There are many situations in which persons with disabilities require transportation for reasons other than the basic need to travel from Point A to Point B. For example, parents with disabilities may require transportation for their children to go to school, to caregivers, or to extracurricular activities. In other words, they require transportation in order to assist them with child-rearing and family responsibilities. The issue of supporting parents with disabilities is attracting growing attention. The United Nations *Standard Rules on the Equalization of Opportunities for Persons with Disabilities* was one of the earlier international instruments to bring the importance of family support to light.<sup>42</sup> Rule 9 of the *Standard Rules* is dedicated to family life and personal integrity and maintains, generally, that States parties should promote the full participation of persons with disabilities in family life and refrain from discrimination and parenthood.<sup>43</sup> The CRPD builds on these ideas. Article 23 of the CRPD requires States parties to take measures to

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<sup>39</sup> December 13, 2006, 44910 UNTS 2515 (CRPD). Canada ratified the CRPD on March 11, 2010. Canada has not signed the optional protocol.

<sup>40</sup> CRPD *ibid* art 9(1) states in full:

#### **Article 9 - Accessibility**

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

<sup>41</sup> Additional cases dealing with the issue of transportation restructuring include: *Shiell*, *supra* note 14; *Wozenilek v Guelph (City)*, 2010 HRTO 1652; and *Martyn*, *supra* note 14.

<sup>42</sup> See the United Nations *Standard Rules on the Equalization of Opportunities for Persons with Disabilities* (December 20 1993), <http://www.un.org/esa/socdev/enable/dissre04.htm>. [ *Standard Rules*].

<sup>43</sup> See *ibid*, Rule 9.

eliminate discrimination against persons with disabilities during parenthood and to render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities.<sup>44</sup>

A valuable illustration of a human rights case in which an applicant sought transportation in order to support a broader family dynamic is found in *Contini v Rainbow District School Board*<sup>45</sup>. In *Contini*, a mother of elementary school-aged children who also had multiple sclerosis brought a disability discrimination claim before the Human Rights Tribunal of Ontario. She argued that the Rainbow District School Board discriminated against her by not providing bus transportation from home to school for her two children in grades 3 and 4. Ms. Contini lived close to the school, but because of her disability, was unable to take her children to school herself. At the same time, due to the school board's transportation policy the children were not entitled to bussing services because of the proximity of their house to the school and their ages. For several years, Ms. Contini had made a special request for bussing service and the school board had acceded to her request. But in 2009, they refused to continue to do so. There was a practical solution by chance-the applicant's husband happened to be a teacher at the school and would drive the children to school.

Ms. Contini was a self-represented litigant and her argument, which is in layperson's language, does not mesh entirely with prevailing human rights doctrines. Nevertheless, it is clear that Ms. Contini was looking for her contribution to her family to be supported through school bus transportation. The adjudicator reported: "The applicant submits that the respondent's policy on bussing is discriminatory.... She states that despite the physical proximity of her house to the school and her husband driving the children to school, she wants to get her children ready for school and watch them get on and off the bus so that she can meaningfully contribute to her family. ...She asks that the respondent's policies take into account people with mobility disabilities."<sup>46</sup> In her written submissions, Ms. Contini asserted further:

According to the school board: Since I have a husband, I am no longer an individual and do not require the rights as an individual. All I need to do is get my husband to remove, shift, or convey any blockages preventing me from progressing. Also, since the School Board's policy is based on the average person (no disabilities), their policy is fair in their opinion.<sup>47</sup>

From an assessment of these two excerpts, it is evident that Ms. Contini was concerned about two interrelated problems. First, she wanted assistance so that she could do her share of the

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<sup>44</sup> See United Nations CRPD art 23, December 13, 2006, 44910 UNTS 2515. This Article reads in relevant part:

**Article 23 - Respect for home and the family**

2. States Parties shall ensure the rights and responsibilities of persons with disabilities, with regard to guardianship, wardship, trusteeship, adoption of children or similar institutions [...]

States Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities.

<sup>45</sup> 2012 HRTO 295 [*Contini*].

<sup>46</sup> *Ibid* at para 9.

<sup>47</sup> *Ibid* at para 10.

housework, specifically getting her children to school. For this, she was requesting assistance to have her children driven. Second, Ms. Contini was concerned by the school board's response to her request as it implied that a person with a disability had an obligation to have another family member step in and replace them in completing family responsibilities if they were unable to complete an aspect of their family life.

The adjudicator considered whether the bussing policy, which appeared neutral on its face, could have a discriminatory impact on Ms. Contini, a disabled parent. In a preliminary decision, it had been determined that the bussing policy provided a service to parents as a result of the policy's wording.<sup>48</sup> The Tribunal focused, therefore, on whether certain core aspects of the discrimination analysis were present.<sup>49</sup> The adjudicator examined how the school bus policies disadvantaged or had an adverse impact on the applicant in the circumstances of this case and found that Ms. Contini suffered no disadvantage or adverse impact. If the ultimate goal was to have her children arrive at school safely, then this was accomplished by her husband completing the task, the Tribunal held. Moreover, the tribunal focused on Ms. Contini's written application in which she had stated that she wanted to prepare the children and "watch them get on and off the bus". Taking a very literal approach, the adjudicator reasoned that Ms. Contini was essentially interested only in the ability to get her children ready and see them out the door. In this way, it did not matter if once past the door, the children were driven to school by her husband or a bus or if they walked with a group of children for that matter.

Regardless of whether one is willing to accept the adjudicator's analysis, a larger question remains as to whether antidiscrimination legislation should intervene in matters relating to providing transportation in order to assist parents with disabilities. The Tribunal's decision is dissatisfying because it ignores the opportunity to engage with this question. What would have happened, for example, if the school board had a policy allowing for bussing three days a week and expected parents to make their own arrangements for children to get to the school on the other two days? Would Ms. Contini have been successful in obtaining extra bus service in that case or would the school board (still) have been allowed to argue that she suffered no disadvantage because she could rely on the other parent? The answer to this question comes down to whether Ms. Contini's claim of wanting to contribute meaningfully to her family should hold any weight in the analysis. Although the tribunal focused on the existence of an adverse impact, more attention could have been paid to the idea that discrimination serves to perpetuate prejudice and stereotypes, which is also a prevalent method of proving discrimination within the legal doctrine.<sup>50</sup> The idea that people with disabilities need to rely on other family members to contribute to family development is a stereotype within mainstream ideology fought against by persons with disabilities. Moreover, socio-legal literature has noted, with dismay, a tendency for society and social policy to relegate disability issues to the private sphere, in an attempt to identify them as obligations that should be kept within the family, instead of spreading them out

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<sup>48</sup> *Contini v Rainbow District School Board* 2011 HRTO 1340.

<sup>49</sup> See *Battlefords and District Co-operative Ltd v Gibbs*, [1996] 3 SCR 566, citing *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143.

<sup>50</sup> See eg *Ontario (Disability Support Program) v Tranchemontagne*, 2010 ONCA 593 at para 104.

within an interdependent society with support from the state.<sup>51</sup> The consequence of this approach is that the social inclusion of persons with disabilities becomes entirely a private responsibility.

In conclusion, in this case regarding a claim for transportation to support a broader family dynamic, one notes a certain amount of family management implicit in the Tribunal's decision. The decision implicitly suggests how tasks within the family of the person with the disabilities should be ordered and assigned. Nonetheless, this family management could be avoided in favour of family assistance as per the letter and spirit of the CRPD.<sup>52</sup> It was perfectly within the realm of the Tribunal to order the school board to continue its bussing policy by conceiving of the discriminatory disadvantage suffered by Ms. Contini in a different manner. Her adverse impact could have been understood as a loss of the dignity associated with being able to assist her family because of the school board's decision not to continue the transportation assistance that it had been giving to Ms. Contini's family for years, or as perpetuation of the stereotype that support for persons with disabilities should be a private responsibility relegated to immediate family members. Alternatively, the Tribunal could have drawn on the principles of the CRPD relating to assistance for parents with disabilities in child-rearing in order to find for Ms. Contini.

In light of Canada's ratification of the CRPD and the legal landscape for respecting many Convention rights that is already in place in Canada,<sup>53</sup> one could easily argue that a human rights tribunal should find ways to bring Convention articles such as those respecting family life into its adjudication of everyday disability discrimination claims. The greater question is how to do this analytically and I will address that issue in Part III of this article.

### **C. Cases prompted by conflict between transportation needs and a perceived loss of mainstream efficiencies**

Transportation conflict cases concern claims in which the complainant alleges disability discrimination as a result of an untoward incident (or incidents) that occurred to them in the process of using a transportation system. The vast number of disability transportation cases fall within this category.<sup>54</sup> At the same time, it is noteworthy that many transportation conflict incidents are never brought forward to human rights tribunals as can be seen from the number of incidents documented in news media across the country that are not in the jurisprudence.<sup>55</sup> An

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<sup>51</sup>Marcia H Rioux, & Fraser Valentine, "Does Theory Matter? Exploring the Nexus between Disability, Human Rights, and Public Policy" in Dianne Pothier & Richard Devlin, (eds) *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law* (Vancouver: UBC Press, 2006) 47. See also generally Michael J Prince, *Absent Citizens: Disability Politics and Policy in Canada* (Toronto: University of Toronto Press, 2009).

<sup>52</sup> In addition to Articles 23 and 6, Article 4 of the CRPD also requires States Parties generally to "take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes", December 13, 2006, 44910 UNTS 2515.

<sup>53</sup> See the Government of Canada's first report to the UN regarding the CRPD: *Convention on the Rights of Persons with Disabilities*, Government of Canada (2014), [http://publications.gc.ca/collections/collection\\_2014/pc-ch/CH37-4-19-2013-eng.pdf](http://publications.gc.ca/collections/collection_2014/pc-ch/CH37-4-19-2013-eng.pdf) which outlines the legal landscape that is in place in Canada as well as acknowledging some of the shortcomings.

<sup>54</sup> The ratio of transportation conflict cases to the overall number of cases dealing with transportation and disability discrimination in the 40 year period is: 49:82 or 59.7%.

<sup>55</sup> See eg, Laurie Monsebraaten and Tess Kalinowski, "Wild ride for Laurier University student in a wheelchair" Toronto Star (January 29, 2014), [https://www.thestar.com/news/gta/2014/01/29/wild\\_ride\\_for\\_laurier\\_university\\_student\\_in\\_a\\_wheelchair.html](https://www.thestar.com/news/gta/2014/01/29/wild_ride_for_laurier_university_student_in_a_wheelchair.html) ; Katie Derosa, "Disabled student complains about unsafe bus ride; B.C. Transit sorry",

even larger number of incidents still do not even get into the media.<sup>56</sup> The phenomena of narrow legal interpretations and less than full tribunal engagement with the concerns raised by persons with disabilities occur equally in this category, manifesting themselves in a multitude of ways. These cases are generally decided on the narrowest possible issue. Over half of the cases of transportation conflict reached only preliminary stages of determination.<sup>57</sup> Approximately a third of the cases of transportation conflict were dismissed at the preliminary stage,<sup>58</sup> and almost two-thirds of those dismissed were dismissed for being deemed to have no prospect of success.<sup>59</sup> There are therefore not many extensively reasoned or even completed cases to examine,<sup>60</sup> leaving unanswered questions about how the discrimination analysis will and should unfold. In brief, the Canadian jurisprudence is simply unclear as to whether human rights tribunals will respond adequately to transportation conflict fact scenarios involving allegations of disability discrimination. When these cases contain complex facts, such as when the applicant has claimed disability discrimination for multiple transportation incidents or for discrimination against different disabilities that they experienced in a single transportation incident, even less guidance is available.<sup>61</sup> In addition, we see that the person with disabilities' time often appears not valued in the same way as the time of members of the mainstream public in the cases. The respondents often consider mainstream efficiencies to be more important than the time it would take to ensure that the person with the disability has the transportation assistance that they need.<sup>62</sup> This is

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Times Colonist (February 7, 2014), <http://www.timescolonist.com/news/local/disabled-student-complains-about-unsafe-bus-ride-b-c-transit-sorry-1.856982>; Liny Lamberink, LTC Investigating Driver's Treatment of Passenger in Wheelchair, CHRWR Radio (August 7, 2015), <https://chrwradio.ca/content/ltc-investigating-drivers-treatment-passenger-wheelchair>; Hilary Beaumont, "Stranded by Halifax Transit", The Coast (September 18, 2014), <http://www.thecoast.ca/halifax/stranded-by-halifax-transit/Content?oid=4416201>; Steve Goetz, "Guide dog handler refused service by Toronto taxis, UberX", Metro (October 18, 2015), <http://www.metronews.ca/news/toronto/2015/10/18/guide-dog-handler-refused-service-by-toronto-taxis.html> ;

<sup>56</sup> Comment by Peter Best, Windsor Community Disability Advocate and panelist at the *Transportation & Disability Law Panel* University of Windsor, Faculty of Law, November 2, 2016.

<sup>57</sup> 53.5% of the cases dealing with transportation conflict were decisions at a preliminary stage of determination such as a decision on jurisdiction, timeliness, furtherance of the purpose of the Human Rights Code or prospect of success. In many of these cases, the central issue of discrimination did not make it to a determination by the tribunal.

<sup>58</sup> Exactly 30.6% of the conflict cases were dismissed at a preliminary stage.

<sup>59</sup> Overall, 60% of the transportation conflict cases that were dismissed at a preliminary stage were dismissed by a human rights tribunal for having 'no reasonable prospect of success'. See, for example, *Coughlin v Pacific Coach Lines Ltd.* 2011 BCHRT 271 and *Halabi v Coast Mountain Bus Co.* 2006 BCHRT 310 [*Halabi*] decided by the BC Human Rights Tribunal.

<sup>60</sup> But see the successful cases of *Lepofsky v Toronto Transit Commission*, 2005 HRTO 20 and *Lepofsky v TTC* 2007 HRTO 23 in which the Toronto Transit Commission was determined to have discriminated against persons with disabilities by not calling out the stops at subway stations and in bus and other ground transit vehicles and required to rectify its practice.

<sup>61</sup> *Ussner v West Vancouver Municipal Transit* 2009 BCHRT 101 [*Ussner*] is an example of a case in which multiple factual instances relating to different disabilities were at play. In *Ussner*, the applicant suffered from multiple disabilities including physical disabilities and posttraumatic stress disorder. She submitted a series of events that she alleged had occurred to her on the bus system between 2005 and 2008. These allegations included assaults by a fellow passenger that the bus driver allegedly witnessed but to which he did not respond; being caught in the doors; and not being assisted when she fell out of her seat. As the case seems to have settled, it is unclear how the tribunal would have addressed the case's complexity. See also *Baker v Coast Mountain Bus Company* 2008 BCHRT 248. More generally, the inadequacy of the law in addressing multiple and intersecting grounds of discrimination is an issue that has been raised without satisfactory answers. See, for example, Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13 Canadian Journal of Women and the Law 37.

<sup>62</sup> See also *Lepofsky v Toronto Transit Commission*, 2005 HRTO 20 and *Lepofsky v TTC* 2007 HRTO 23.

particularly disconcerting as the assistance needed usually relates to the safety and security of the disabled person.

*Halabi v Coast Mountain Bus Co.*<sup>63</sup> (*Halabi*) is an illustrative example of a case exhibiting many of the characteristics and shortcomings of a typical transportation conflict case in which disability discrimination has been alleged. The case was decided on the narrowest and clearest issue, leaving additional, complicated disability issues unaddressed. It was dismissed at the preliminary stage as it was deemed to have no reasonable prospect of success. It also raises questions about the degree to which the respondent appreciated the claimant's time. In his application, Mr. Halabi made two complaints to the British Columbia Human Rights Tribunal. His first complaint was that he had been repeatedly denied seating on the right side of the wheelchair area, opposite the bus driver. Mr. Halabi stated that bus drivers and supervisors had declined to ask able bodied passengers to leave the right side of the area, forcing him to sit on the left.<sup>64</sup> In support of his claim, Mr. Halabi submitted an affidavit in which he had sworn that he lived with a spinal cord injury that affected his left side to a greater degree than his right, making his left his physically weaker side. He stated that as a result he "prefer[red] the right side of the bus, in the handicapped wheelchair seating area, for stability, comfort and safety"<sup>65</sup>. Mr. Halabi's second complaint was that because he had made several direct complaints to the bus company, certain bus drivers had retaliated against him. He stated that the retaliation took various forms, including denying him access to the bus, being told to take another bus, loading other passengers ahead of his wheelchair so that he was left behind, and, on one occasion, unloading him in an unsafe manner, causing him to miss the wheelchair ramp and fall from his wheelchair.<sup>66</sup>

At a preliminary hearing, the Tribunal held that Mr. Halabi's case should be dismissed without proceeding to a hearing because it had no reasonable prospect of success.<sup>67</sup> The matter was decided primarily on the ground that Mr. Halabi, despite his affidavit, had not provided medical evidence that he was left side weak and thus required seating on his chosen side of the bus in order to ride more securely. There are four problematic aspects to this decision.

First, on a purely doctrinal level, the "no reasonable prospect of success" test does not involve a high threshold.<sup>68</sup> As the BC Tribunal itself has explained in its jurisprudence, the Tribunal's role

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<sup>63</sup> *Halabi*, *supra* note 53. See also *Johnson v AC Taxi and Williams (No 2)* 2008 BCHRT 242.

<sup>64</sup> *Halabi*, *ibid* at para 5.

<sup>65</sup> *Halabi*, *supra* note 53 at para 20.

<sup>66</sup> The Tribunal set out Mr. Halabi's complaint at 6 as follows:

"Mr. Halabi also alleges, in paragraph 10 of his complaint, that, as a result of his various complaints to the CMBC, that some bus drivers have subjected him to other "detrimental" conduct including: denial of access onto a bus and being told to take another bus; having other passengers loaded ahead of him and so being left behind; the driver stopping short to load other passengers ahead of him and leaving him behind; moving people into the wheelchair area upon seeing him; and, on one occasion, being let off at an unsafe location, causing him to miss the wheelchair ramp and fall from his wheelchair."

<sup>67</sup> *Halabi*, *supra* note 53 at paras 11-27.

<sup>68</sup> See ss 27(1)(c) of the British Columbia *Human Rights Code* RSBC 1996, c. 210 (as amended). *Halabi ibid* at para 13 and *Bell v Dr Sherk and others* 2003 BCHRT 63. It was held in *British Columbia (Workers' Compensation Appeal Tribunal) v. Hill*, 2011 BCCA 49 at para. 27 that the "complainant must only show the evidence takes the case out of the realm of conjecture".

is to assess whether there is a reasonable prospect the complaint will succeed based on all of the material before it.<sup>69</sup> At this early stage, the complainant does not have to establish a *prima facie* case of discrimination, a higher burden reserved for adjudication of cases that are not dismissed.<sup>70</sup> The tribunal's task is just to determine whether the complaint has any chance of succeeding at all.<sup>71</sup> Yet, despite this low threshold, the Tribunal discounted a sworn affidavit for lack of a different type of evidence that presumably could have been brought in later at the main hearing.<sup>72</sup>

Second, and even more troubling, was the Tribunal's acceptance of information about Mr. Halabi that had been collected by the bus company to argue that Mr. Halabi did not need the medical supports that he used. Their argument was that his aids, such as his wheelchair, were not consistently used, and that Mr. Halabi had sat on the left side of the bus before when his requests to change spots had not been granted. Mr. Halabi's request to sit on one side of the bus was therefore presented as merely a preference not deserving of human rights protection.<sup>73</sup> Regardless of the discretion endowed upon the Tribunal to designate information as evidence and to receive it as such, a significant problem exists when a human rights tribunal does not identify actions that may be stereotypical and possibly perpetuating of historical misperceptions of equality-seeking groups. The image of the person with a disability who actually turns out to be "faking" their impairment for personal gain is a stereotype that has deep roots within disability history.<sup>74</sup> It would seem that instead of relying on the information gathered to prevent the matter from advancing to a hearing, this is the very type of information that the Tribunal would at least want to explore in greater detail through a hearing. This critique relates to the underlying purposes and policy goals human rights tribunals in Canada. Human rights tribunals are administrative actors that have been established to promote and foster equality, respect and dignity within society.<sup>75</sup> If they are able to use their powers in a way that effectively avoids the

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<sup>69</sup> See *Wickham and Wickham v Mesa Contemporary Folk Art and others*, 2004 BCHRT 134 and *Bell v Dr Sherk* *ibid.*

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> The *BC Human Rights Tribunal Rules of Practice and Procedure* permit the Tribunal to provide the complainant with an opportunity to file further or clarifying information before the application is filed. However, the BCHRT Rules also allow the Tribunal to waive or vary its rules "as it considers appropriate in the circumstances" (Rule 2(2)). Moreover, as stated in its first provision, the purpose of the Rules is to "to facilitate the just and timely resolution of complaints" (Rule 1). All of these elements of the Rules of practice suggest that there exists sufficient discretion on the part of the tribunal to permit filing of evidence at a later stage. Finally, the question of whether there is medical evidence of the effect of Mr. Halabi's spinal cord injury could be seen as an issue of him and the credibility the statements and the Tribunal's jurisprudence has held that issues of credibility may be an indicator that pushes for a hearing as opposed to dismissal (see *Heilman v First Canada*, 2010 BCHRT 222 at 25 [*Heilman*]).

<sup>73</sup> *Halabi*, *supra* note 53 at para 21.

<sup>74</sup> See the historical examination of treatment of persons with disabilities and the concept of the "sham cripple" in Susan M. Schweik, *The Ugly Laws: Disability in Public* (New York: New York University Press, 2009) at 43 and at 108-137.

<sup>75</sup> A sampling of the human rights statutes in three geographically diverse locations across the country shows the same public policy goals. For example, the purposes of the British Columbia *Human Rights Code* as found at s. 3, include the following:

[...](b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;

(c) to prevent discrimination prohibited by this Code;

(d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code;[...]; Similar public policy goals are expressed in the Preamble of the Ontario *Human Rights Code*, RSO 1990, c H 19, and in the Nova Scotia *Human Rights Act 1989*, RSNS c 214, s 2.

essence of their purpose, then this is an element of social and administrative justice that definitely requires attention.<sup>76</sup>

Furthermore, by taking so many strikes to ensure Mr. Halabi's application was defeated on the ground of lack of medical evidence linking disability and seat location, it became unnecessary for the Tribunal to address any of the other issues in a meaningful way. For example, retaliation is a lived experience of many persons with disabilities who take public transportation. In Canada, there are several examples of individuals with disabilities who have made human rights complaints concerning transit retaliation.<sup>77</sup> However, the Tribunal dealt with this issue in a cursory way only as it had already determined that there was a lack of essential medical evidence. As a result, the factual and legal issues relating to retaliation were not fleshed out and an opportunity was missed to provide guidance on this common issue. Even more disturbing is that the *Halabi* case presents an example of a human rights disability issue being determined through a medical as opposed to a social lens.

Finally, the facts imply that Mr. Halabi's time was not valued in the same way as that of members of the mainstream public. Mr. Halabi submitted several applications regarding his concern for his safety. Yet, this very investment of his time was disregarded as a preference, first by the bus company and then by the Tribunal. Moreover, if his allegations about transportation retaliation are true –ie that he has been denied access to bus services in order to allow priority to non-disabled members of the public on more than one occasion – then we see a deeper, repeated, unchecked and discretionary form of disregard of the time needed by persons with disabilities to get to work and other activities in favour of the efficiency of the mainstream, majority public.

In sum, it is clear that adjudication of one's transportation conflict case by a human rights tribunal may be thwarted by a number of outcomes that are not necessarily predictable. The tribunal will likely focus on the narrowest issue, and because the narrowest issue may dispose of the matter, the tribunal may not provide guidance on additional more complex issues. An applicant may also face a rigorous weeding out of matters through preliminary channels for early dismissal, leading, for example, to a determination that the complaint has no reasonable prospect of success. As discussed above, some of the foundational policy goals that should be foremost in animating human rights decision-making may not be addressed and the time of persons with disabilities may not be well considered. In the next section, I will address how a different equality framework may serve to ameliorate the analysis of human rights adjudicators and possibly bridge the gap between what human rights claimants seek when they are persons with disabilities arguing over transportation inequality, and the outcomes that statutory human rights adjudication currently brings. Although the equality framework that I propose has direct

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<sup>76</sup> See also *Johnson* in which the respondent taxi company argued that it should not have to pay for any additional medication for the aggravation of Mr. Johnson's injuries as Mr. Johnson had not provided proof of aggravation and because he had indicated in his application that his disabilities included earlier problems with addiction. The taxi company and the driver were held to be jointly and severally liable for compensation for injury to Mr. Johnson's dignity, feelings and self-respect in the amount of \$2,500 for the derogatory comments that the driver had made to Mr. Johnson. The troubling submission of the respondent relating to addiction was not addressed. On the one hand, silence on the matter may indicate that it is not an issue to be vindicated. On the other hand, it would be useful to have a clear statement guiding future tribunals on how to address arguments of this nature.

<sup>77</sup> See eg *Heilman supra* note 66; *Basic v Yellow Cab Co.* 2007 BCHRT 408; *Johnson v AC Taxi Ltd*, 2006 BCHRT 623; *Wright v Coast Mountain Bus Company and others*, 2014 BCHRT 73; *Baker v. Coast Mountain Bus Co.*, 2008 BCHRT 248.

application to the Canadian context, it may also have broader application to transportation inequality claims brought by persons with disabilities in other jurisdictions, as well as to cases about other types of inequality experienced by persons with disabilities.

## Part II: Connecting Equality Theories and Transportation Inequality Claims

How might prevailing theories of equality correspond to the claims of the applicants in the three categories of transportation equality cases above? What are applicants seeking to obtain through their claims? I argue that the claims made within the three categories of cases are, first and foremost, inspired by the social model of disability. Moreover, the claims made in these categories align themselves to some degree with the goals of two major traditional Western theories of equality: economic distribution and status recognition. Nevertheless, one can see that the claimants seek something more that extends beyond these two traditional visions of equality. They seek a recognition of how commonplace a variety of life experiences are or may be, and how these life experiences may pose a particular challenge to achieve (if they are positive), or may have a disproportionate negative impact for individuals with disabilities. The analysis in the previous part of this article showed ways in which the current antidiscrimination legal framework leaves manifold opportunities for this aspect of the voice of persons with disabilities to remain unheard.

Although not without its critics, disability activists and scholars have largely embraced the social model of disability in moving forward with the quest for substantive equality. The social model of disability maintains that societal barriers constructed outside of the body are at the heart of disablement.<sup>78</sup> These barriers, which may be caused by architecture, the environment, and stigmatizing attitudes, to name just a few, constitute the source of the struggles for human rights recognition by persons with various impairments. As Anita Silvers observes:

the social model understands disability as a political problem calling for corrective action by citizen activists who alter other people's attitudes and reform the practices of the state.<sup>79</sup>

A key challenge of operationalizing the social model of disability by lawyers and activists who wish to promote legal change is to find a legal framework that allows the social model to be useful. In other words, it is important to link the social model of disability with the legal tools for pursuing equality in order to effectuate viable legal and social change.

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<sup>78</sup> On the social model of disability see, for example, Silvers (2010, p. 19-36). On the social model of disability and models of disability generally see: Carol Thomas, "Disability Theory: Key Ideas, Issues and Thinkers" in Colin Barnes, Len Barton and Mike Oliver (eds) *Disability Studies Today* (Malden, MA: Polity Press, 2002) at 38. Thomas (2002, p. 38-57); Paula E Berg, "Ill/Legal: Interrogating the Meaning and Function of the Category of Disability in Antidiscrimination Law" (1999) 18(1) *Yale Law & Policy Review* 1; Tom Shakespeare, *Disability Rights and Wrongs* (New York: Routledge, 2006) at 9-28.

<sup>79</sup> See Anita Silvers, "An Essay on Modeling: The Social Model of Disability" in Christopher D. Ralston, and Justin Ho (eds) *Philosophical Reflections on Disability* (New York: Springer, 2010) 19.

One tool that is often used to connect the social model of disability to equality is antidiscrimination legislation. In Canada and the United States, antidiscrimination laws have been understood to offer remedies that seek to provide both distributional and recognition-based justice. Indeed, distributional and recognition-based justice represent the two historical foundations on which the notion of inequality has developed. In her influential work on equality, political theorist Nancy Fraser defined these two forms of inequality. Distribution-based equality is a form of justice that is preoccupied with ensuring that socioeconomic resources, and access to them, are fairly distributed.<sup>80</sup> Rooted in the political-economic structure of society, examples of distribution inequality include having the fruits of one's labour exploited by another, economic marginalization from "being confined to undesirable or poorly paid work or being denied access to income-generating labour altogether", and being denied an adequate material standard of living.<sup>81</sup> Distributional equality therefore aims at redistributing socio-economic resources to enable access of individuals to resources.<sup>82</sup>

Recognition-based equality, by comparison, deals with ensuring the authentic recognition of another. Fraser asserts that misrecognition finds its source in social patterns of representation, interpretation and communication.<sup>83</sup> She provides the following examples of inequality due to misrecognition:

Examples include cultural domination (being subjected to patterns of interpretation and communication that are associated with another culture and are alien and/or hostile to one's own); nonrecognition (being rendered invisible via the authoritative representational, communicative, and interpretative practices of one's culture); and disrespect (being routinely maligned or disparaged in stereotypic public cultural representations and/or in everyday life interactions).<sup>84</sup>

Today, it is largely understood that these two ways of conceiving of the search for equality are supplied in the remedies of constitutional and other legal tools, such as antidiscrimination laws, designed to promote equality.<sup>85</sup> However, much less attention has been paid to the actual *claims* made by applicants seeking equality under decision-making regimes designed to provide it. The absence is even more acute in the Canadian statutory as opposed to constitutional human rights context.

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<sup>80</sup>Nancy Fraser, "From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age" (1995) I/212 *New Left Review* 68 [Fraser, 1995]. The most well recognized and influential work on this topic is Nancy Fraser and Axel Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange* (New York: Verso, 2003).

<sup>81</sup> Fraser, 1995, *ibid* at 71. Fraser draws from the works of Rawls, Dworkin and Sen in formulating her critique of distribution equality. Critics have argued, however, that her work does not represent the full depth and nuance of distribution egalitarianism. See, for example, Ingrid Robeyns "Is Nancy Fraser's Critique of Theories of Distributive Justice Justified?" (2003) 10(4) *Constellations* 538.

<sup>82</sup>Sandra Fredman, "Redistribution and Recognition: Reconciling Inequalities", (2007) 23 *South African Journal of Human Rights* 214 at 216.

<sup>83</sup> Fraser, 1995 *supra* note 74 at 71.

<sup>84</sup> *Ibid*.

<sup>85</sup> Sujit Choudhry, "Distribution vs. Recognition: The Case of Anti-Discrimination Laws" (2001) 9(1) *George Mason Law Review* 145; Sandra Fredman, *supra* note 76; Claire Mummé, "The Ontario *Human Rights Code's* Distributive and Recognition Functions in the Workplace" (2014) 18(1) *Canadian Labour and Employment Law Journal* 145.

In considering the cases presented through the three categories of transportation equality claims discussed above, it is clear that applicants seek both a redistribution of economic goods and status recognition. Cases about the restructuring of transportation systems plainly make an appeal for the redistribution of social and economic goods. At the same time, this category of transportation claim speaks to an implicit disparagement when it comes to the value that a person with disabilities should place on time spent to accomplish their daily activities. In cases where transportation is sought as part of respect for family life and parenthood, the goals of economic redistribution and appropriate status recognition are both present and strongly intertwined. Claims made about transportation conflict show concern over economic redistribution because the applicants have an interest in seeing the entities responsible for transportation invest the time that it takes to ensure their safe transport. Identity recognition plays a role in transportation conflict claims as well as manifested in the very fact that persons with disabilities ask for their individualized challenges in using transportation to be recognized and respected.

However, I argue that battles for transportation equality that take place on the ground represent more than the material distribution and identity recognition paradigms of equality theory which have been debated in the literature put forward by political and legal theorists since the 1990s. Indeed, although these two competing models of social justice are present, at least one additional critical element emerges from a review of the three categories of cases above. I have termed this critical element of equality the *universality of the human condition*. The idea behind the universality of human condition is to bring attention to experiences that we all may share through life as human beings – such as raising children, the need to feel safe, the need to get to medical appointments and organize one's time in an efficient manner – and to have acknowledged within legal analysis that the law should be used as a tool to support everyone to be able to live through these experiences reasonably.

### **Part III: The Universality of the Human Condition**

#### **A. The theory**

The universality of the human condition builds on the equality of well-being model put forward by thinkers such as Marcia Rioux.<sup>86</sup> Equality of well-being refers to devising means to ensure that all individuals have the support to exercise their fundamental rights.<sup>87</sup> But equality of well-being, at least as put forward by Rioux, consists of focusing the discussion on reasonable accommodation. The universality of the human condition proposes, by contrast, to move beyond the reasonable accommodation lens altogether to a more first-order level of equality. As a

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<sup>86</sup> Marcia H Rioux identifies the three classical models of equality. “The theoretical constructs of equality fit into three general categories, each justifying different claims about entitlements and the legitimating criteria for differentiating or distinguishing people. One is the formal theory of equality, that is, the equal-treatment model. The second is the liberal theory of equality, incorporating both the ideals of equality of opportunity and special treatment. The third is the equality of outcome or equality-of-well-being model.” See Marcia H Rioux “Towards a Concept of Equality of Well-Being: Overcoming the Social and Legal Construction of Inequality” (1994) 7(1) *Canadian Journal of Law and Jurisprudence* 127 at 128.

<sup>87</sup> See Rioux *ibid* at 143. The idea also comes across in Martha Nussbaum’s human capabilities approach. See Martha Nussbaum, *Frontiers of Justice Disability, Nationality, Species Membership* (Cambridge: Harvard University Press, 2007).

practical reality, this means ensuring that the additional challenge(s) to achieving a goal or the disproportionate negative impact of a common life experience for the person with the disability will be considered at a primary stage of the human rights antidiscrimination analysis – at a stage earlier than discussion of reasonable accommodation.

The universality of the human condition also differs from Martha Fineman's vulnerability theory. Fineman posits that we are all susceptible to vulnerabilities and that our universal acceptance of our vulnerabilities will require us to look to state institutions for support. The state institutions should, furthermore, be designed to be responsive: they should respond by ensuring that privileges and disadvantages are balanced in society.<sup>88</sup> Unlike Fineman, I suggest that equality in the antidiscrimination analysis does not have to emphasize vulnerability and the negative connotations associated with it.<sup>89</sup> Instead, it should affirm the independence and empowerment that accompanies the social model. The universality of the human condition therefore affirms life experiences that are both positive and negative but that are often shared and seen as commonplace by a wide range of people.

Finally, the universality of the human condition has manifested itself as a powerful adhesive that brings opposing views together on issues affecting persons with disabilities. This was seen also in a study conducted on the experiences of persons with disabilities who consulted with government on the development of laws affecting them. In semistructured interviews conducted with persons with disabilities and organizations dedicated to disability issues about the consultations they had had, the connecting power of universality emerged as a strong theme.<sup>90</sup> I have observed that diverging stakeholders can come together in contemplating the challenges that a person with a disability may face in navigating something that is straightforward for nondisabled persons and taken for granted by them.

For example, an interviewee who had been involved in the development of the Accessible Transportation Standards pursuant to the *Accessibility for Ontarians with Disabilities Act, 2005*<sup>91</sup> described a decisive moment for the committee, which overall had had a very tumultuous time in trying to reach agreement on a variety of transportation access issues. On an issue related to taxi service, my interviewee mentioned that the turning point came when someone asked those from the taxi industry if they would find it acceptable for their mother to ride under the terms they were proposing. The individual from the taxi industry changed course at that time.<sup>92</sup>

Similarly, another interviewee in the US talked about consulting with local government officials and representatives of an elevator company including several lawyers in order to prevent the

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<sup>88</sup> See Martha A Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition" (2008) 20(1) Yale Journal of Law and Feminism 1.

<sup>89</sup> I acknowledge that Fineman asserts that the term "vulnerability" can overcome its negative connotations and be embraced as a powerful tool (see *ibid* at 8). Yet, I think that the term vulnerability has a much more arduous history for persons with disabilities that may not be easily disassociated. See also Ani B Satz, "Disability, Vulnerability, and the Limits of Antidiscrimination" (2008) Washington Law Review 83(4) 513.

<sup>90</sup> The study is ongoing and involved interviews and observations in Canada and the United States. Participants were selected because they had participated in the AODA Transportation Standard Consultation in Ontario or another consultation related to the AODA. In the United States, the individuals and organizations dedicated to disability issues that participated were selected because they had in some way interacted with government to bring about legal change.

<sup>91</sup> SO 2005, c 11 [AODA].

<sup>92</sup> Notes from interviews, on file with author.

widespread installation of a new type of elevator which clearly was not accessible to people with visual impairments. The interviewee indicated that what brought the group closer together on how the elevator design needed to be changed was a recognition of their common human need to use elevators. As the interviewee put it:

...elevators are ubiquitous. The industry agrees we need a standard. People can't be just like trying to figure out how to use an elevator every time they come into a new building.<sup>93</sup>

An understanding of common experiences as universal can clearly be helpful in negotiating contentious issues between persons with disabilities and others who may not stand immediately to gain. In the next section, I explore how this theoretical framework, the universality of the human condition, can be incorporated into discrimination analyses in the pursuit of substantive equality.

## **B. Incorporating the universality of the human condition within the discrimination analysis**

In this final part of the paper, I use the Canadian context and the transportation case study to illustrate briefly how the universality of the human condition may be applied to disability discrimination claims concerning transportation. There are two places where the universality of the human condition may be incorporated as a useful tool.

First, the universality of the human condition may be a valuable tool in establishing a connection between the protected characteristic and the adverse impact on the complainant. The discrimination analysis under Canadian statutory human rights law is comprised of two stages. The first stage requires the applicant to establish a *prima facie* case of discrimination. To do this, the applicant must show that “they have a characteristic protected from discrimination under the Code; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact.”<sup>94</sup> Once a *prima facie* case has been established, the onus shifts to the respondents to demonstrate that they can establish a bona fide reasonable justification for their denial of service or that they attempted to accommodate the applicant to the point of undue hardship.<sup>95</sup>

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<sup>93</sup> Notes from interviews, on file with author.

<sup>94</sup> See *Moore v British Columbia (Education)* 2012 SCC 61 at para 33.

<sup>95</sup> In this regard, a respondent must show that it could not have done anything else reasonable or practical to avoid the negative impact on the individual. See: *Meiorin*, *ibid* at para 38, *Council of Canadians with Disabilities v VIA Rail Canada Inc*, [2007] 1 SCR 650 at para 130, and *Moore*, *ibid* at para. 49. The discrimination analysis, as set out by the Supreme Court of Canada in *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* [1999] 3 SCR 868, consists of the following approach:

1. That the requirement was adopted for a purpose or goal that was rationally connected to provision of this service;
2. That this requirement was adopted in an honest and good faith belief that it was necessary to the fulfillment of that purpose;
3. That this requirement is reasonably necessary to accomplish this purpose. To do so, the respondent must show that the applicant cannot be accommodated without undue hardship.

Generally, the first two parts of the *prima facie* test are relatively easy to fulfill, although much litigation and academic debate continue in an effort to establish the proper framework of analysis for the third part of the test. Indeed, the Supreme Court of Canada and lower courts have articulated at least three different versions of what it means for the protected characteristic to be “a factor in the adverse impact”.<sup>96</sup> The current law is unsettled as to whether stereotypes, arbitrariness and causation, among other factors, should be part of the determination of whether the protected characteristic is a factor in the respondent’s adverse action (including an adverse decision).<sup>97</sup>

The universality of the human condition may be a valuable tool in establishing a connection between the protected characteristic and the adverse impact. To take the example of Mr. Halabi discussed earlier, the bus company’s decision not to permit Mr. Halabi to choose the side of the bus on which he sat (the adverse impact) could be connected to Mr. Halabi’s assertion that he was weaker on one side (disability) and felt safer seated on the side of the bus where he could hold on tighter, if this experience (the experience of riding a bus with security) were understood as a universally common experience, and one that persons with disabilities find difficult to achieve. More specifically, by applying the theory of the universality of the human condition, once the bus company’s failure to recognize this overall hardship for people with disabilities is identified explicitly, the connection between the adverse impact of the decision on Mr. Halabi and disability becomes readily apparent. A similar analysis may be applied to cases like that of Ms. Contini. Once the experience of transporting one’s children to various activities is seen as a common experience that parents with disabilities may find difficult to experience, then it should not be difficult to link the decision not to provide her with transportation support for her children with disability. Respondents may be able to counter connections drawn in reliance on the universality of the human condition by arguing that the experience is not one that is a universally common experience or, that, even if universally common, it is not one that persons with the applicant’s disabilities have difficulty in achieving.

By asking human rights adjudicators to recognize the universality of the human condition and how it may play a role in showing a connection between disability and the adverse action that is at the centre of the complaint, we see not only more of a genuine recognition of the experiences of persons with disabilities and their claim for equality but also an effort to shift the burden of proof so that it is not disproportionately shouldered by persons with disabilities. Under the current law, it can be difficult for human rights applicants to show that there is a connection between the adverse decision and their disability. However, by adopting the proposed approach, respondents will be invited to think about how to demonstrate that an experience is not a universal one or that this particular universal experience is one that persons with the applicant’s disabilities do not have difficulty in obtaining. This leads to a greater sharing of the burden of

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<sup>96</sup> On this topic, see Jennifer Koshan, “New Developments on the Test for Discrimination Under Human Rights Legislation: Time for Rehab?” *ABlawg* (August 21, 2015), <http://ablawg.ca/2015/08/21/new-developments-on-the-test-for-discrimination-under-human-rights-legislation-time-for-rehab/>.

<sup>97</sup> See *Health Centre(Montreal General Hospital) v Syndicat des employes de l’Hopital General de Montreal*, 2007 SCC 4 and *Honda Canada Inc v Keays*, 2008 SCC 39. These cases take different approaches as to the factors that should be considered. Unfortunately, the Supreme Court of Canada did not take the opportunity to clarify this confusion in the later case of *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc. (Bombardier Aerospace Training Center)* 2015 SCC 39. See also the insightful discussion on this topic by Jennifer Koshan, *ibid*.

proof between the applicant and the respondent. Recognition of the experiences of persons with disabilities and a greater sharing of the burden of proof between the applicant and the respondent would be positive steps in litigating for a substantive and social model of equality.

I want to highlight further that the approach put forward differs from a comparator group analysis. Comparator groups, which have been roundly and appropriately denounced, ask that an adjudicator determine whether there are others in similar positions who have had access to the service in question. Much of the analysis focuses on how to identify comparable groups of people and define the service in question in order to compare equality of access between the applicant's "group" and others. By contrast, the universality of the human condition requires the adjudicator to think about the circumstances of the particular applicant before them and to ask whether the experience is one that the particular applicant would have difficulty experiencing because of their specific disabilities. In other words, the universality of the human condition requires recognition that there are universal experiences but focuses on an analysis of the ability of the specific applicant in question to engage in the universal experience with satisfaction. This approach is much more in keeping with the goals of substantive as opposed to formal equality.

The second place where the universality of the human condition may be incorporated as a useful tool is at the stage of deciding preliminary applications for dismissal. Once human rights adjudicators recognize the universality of the human condition and how it may play a role in showing a connection between disability and the adverse action that is at the centre of the complaint, it is a natural step for the universality of the human condition to figure also within analyses for preliminary dismissal.

For example, the universality of the human condition could be a guiding principle that adjudicators take into account in determining whether an applicant's file should be dismissed for having no reasonable prospect of success. As discussed above, in deciding if there is a reasonable prospect of success, the tribunal's task is to determine whether the complaint has any chance of succeeding at all. The test for reasonable prospect of success requires "an assessment, based on all of the material before the Tribunal, of whether there is a reasonable prospect the complaint will succeed"<sup>98</sup>. Yet, based on the jurisprudence, it seems that the question of what is "reasonable" is not well defined. I suggest that the universality of the human condition be put at the heart of the tribunal's questioning and testing of the material and witnesses before it for reasonableness. In the same way that an adjudicator should consider if the respondent has paid sufficient attention to whether the experience at the heart of the complaint is a common life experience which is more difficult for a person with the complainant's disabilities to achieve at the stage of the *prima facie* test, this consideration could equally play a part in the discussions at the preliminary stages of determination.

The theory of the universality of human condition may also open the door to recognizing that the very act of bringing a complaint through an adjudication process may itself be particularly challenging for persons with disabilities. Considering human rights adjudication claims within the framework of the universality of human condition and recognizing additional challenges faced by persons with disabilities should also prompt adjudicators to employ whatever discretion they have to facilitate just processes. This final element is very much in keeping with the purposes of the enabling legislation of several of the administrative bodies responsible for

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<sup>98</sup> See *Bell v Dr Sherk*, *supra* note 62.

adjudicating human rights at the domestic level in Canada<sup>99</sup> and the overall common law understanding that administrative actors are masters of their own process and may employ non-adversarial techniques such as active adjudication and inquiry.

The aim of this discussion has been to demonstrate how the first order equality analysis (that is, prior to the reasonable accommodation stage) may be bolstered by reference to the universality of the human condition. However, it goes almost without saying that the proposed theory may also form part of the analysis of what is reasonable at the stage of determining reasonable accommodation. That is, whether there is a *bona fide* reasonable justification for the actions of the respondents.<sup>100</sup> In Canada, respondents have an obligation to accommodate persons with disabilities to the point of undue hardship. Within this analysis, keeping an ear attuned to the theory of the universality of the human condition may prompt adjudicators to use active means to ensure that both parties have all possible opportunities to participate fully in the discussion of what the applicant may need and its feasibility.

## Conclusion

In conclusion, this article has analyzed, both empirically and theoretically, the experience of persons with disabilities who have brought transportation inequality claims before statutory human rights tribunals in Canada between 1976 and 2016. Three categories of cases can be drawn from this set: cases seeking transportation restructuring, cases seeking access to transportation in support of a broader family dynamic and cases in which the complainant seeks to assert that their need for transportation as a person with a disability does not lead to a loss of efficiencies as perceived by some members of the mainstream population. In this article, I propose a new theoretical framework, termed *the universality of the human condition* that could help to strengthen the analyses of human rights adjudicators, leading to substantive equality based on the social model of disability. The theory of the universality of human condition develops a means for adjudicators to draw a rebuttable inference about the connection between the adverse impact and the protected characteristic of disability. Although the theory is developed from a set of cases dealing with claims of disability discrimination in transportation services, there is nothing about the theory that is specific to transportation fact scenarios. Because the theory is not specific to transportation claims, it could be used more widely within disability discrimination matters within the statutory human rights context. The basis of the discussion has been a case study originating in Canada; however, I offer the ideas in this article to advocates and jurists in other jurisdictions as well to consider the potential of the universality of human condition as a valuable tool in pursuing substantive equality for people with disabilities.

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<sup>99</sup> See *supra* note 69 and accompanying text.

<sup>100</sup> *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* [1999] 3 SCR 868 at 870.

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