Halifax, NS

lukacs@AirPassengerRights.ca

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VIA EMAIL: ***consultations@otc-cta.gc.ca***
Canadian Transportation Agency
15 Eddy Street
Gatineau, Quebec K1A 0N9

Dear Madam or Sir:

Re: Phase II of the *Accessible Transportation for Persons with Disabilities Regulations*

Please accept the following submissions with respect to Phase II of the *Accessible Transportation for Persons with Disabilities Regulations*.

I. Overview

The One-Person-One-Fare (1P1F) requirements are based on the recognition that various aids necessary for persons with disabilities to travel by air (service dog, attendant, etc.) serve the same purpose as the eyes, arms, or legs of able-bodied passengers: they are part and/or an extension of the disabled person's body. In the same way that no airline may charge an extra fee for transporting passengers' eyes, arms, or legs, the constitutionally protected principle of substantive equality dictates that no extra fee may be charged in the case of persons with disabilities.

In light of section 5 and 6 of the *Accessible Canada Act* and ss. 6(1) and 15(1) of the *Charter*, the 1P1F requirements must apply to all travel by air within, to, and from Canada, regardless of the carrier's nationality.

The bilateral agreements cited by opponents of the 1P1F requirements have no force of law in Canada. As such, these agreements cannot override Part V of the *Canada Transportation Act*, nor can such agreements override ss. 5(f) and 6 of the *Accessible Canada Act* or ss. 6(1) and 15(1) of the *Charter*.

Alternatively, imposing the 1P1F requirements is permitted under the "prevention of unreasonably discriminatory prices or practices" exception to bilateral aviation treaties.

II. History of the 1P1F Requirements

(a) The Agency's 1P1F Decision (2008)

In 2008, in its landmark "One Person One Fare" (1P1F) Decision, the Agency held that the requirement of paying for an additional seat is an undue obstacle to the mobility of passengers who need additional seating for themselves or for a support person due to their disabilities.[1]

> [...] the Agency finds that:
>
> - the fare policies of the carrier respondents Air Canada, Air Canada Jazz and WestJet related to domestic air services, and
> - the airport improvement fee policy of the Gander International Airport Authority
>
> constitute undue obstacles to persons with disabilities who require additional seating to accommodate their disabilities to travel by air insofar as they require these persons with disabilities to pay additional fares and charges for transportation services that are over and above what other passengers pay for the same transportation services to have their disability-related needs accommodated.[2]

Ultimately, the Agency made the following order with respect to Air Canada, Air Canada Jazz, and WestJet:

> [916] The carrier respondents shall not charge a fare for additional seats provided to the following persons with disabilities:
>
> - those persons who are required, under the terms of the carriers' tariff set out earlier in this Decision, to be accompanied by an Attendant;
> - those persons who are disabled by obesity; and
> - those other persons who require additional seating for themselves to accommodate their disability to travel by air.[3]

The 1P1F Decision was confined to air transportation within Canada, and did not apply to flights to and from Canada.

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1 Decision No. 6-AT-A-2008, paras. 136, 170, and 909.
2 Decision No. 6-AT-A-2008, para. 909.
3 Decision No. 6-AT-A-2008, para. 916.

(b) The Agency's refusal to decide whether 1P1F should apply to all flights (2013-2019)

Since 2013, the Agency has adopted an approach that is hostile to the systemic challenges faced by passengers with disabilities, and has been grasping for every possible excuse to not address the "One Person One Fare" rule in the context of international transportation of passengers.

In 2015, the Agency refused to decide the question of whether the "One Person One Fare" rule should be expanded to all flights, including transborder and international routes:

> [67] In the absence of a proceeding that would provide the Agency with the breadth of perspective required to properly assess and evaluate this significant remedy, the Agency cannot discharge its responsibilities in a fair and informed way. The Agency is limited by the legislative mandate provided to it in the CTA which does not, at this time, include own motion powers to conduct broader, more systemic investigations.
>
> [68] In light of the above, the Agency grants WestJet's request that the Agency dismiss this aspect of Ms. Cheung's application and will not consider expanding the application of the one-person, one-fare principle to transborder or international routes in the context of this application and at this time.[4]

In 2016, the Agency stayed the application by the Council of Canadians with Disabilities (CCD) against Air Canada that sought to have the "One Person One Fare" rule imposed on international flights too.[5]

(c) The *Accessible Transportation for Persons with Disabilities Regulations* (2019)

In June 2019, the Agency promulgated the *Accessible Transportation for Persons with Disabilities Regulations*, SOR/2019-244 [*ATPDR*] pursuant to ss. 170(1), 170(2), and 177(1) of the *Canada Transportation Act*.

Sections 50-52 of the *ATPDR* require carriers to accommodate persons with disabilities by transporting a support person or a service dog, or to provide additional seating space if these are required due to the passenger's disability.

Subsection 31(1) of the *ATPDR* creates the incorrect impression that the 1P1F requirements are fully incorporated therein:

> **31 (1)** Subject to subsection (2), it is prohibited for a carrier to impose a fare or any other charge for any service that the carrier is required by this Part to provide to any person.[6]

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4 *Cheung v. WestJet*, Decision No. 324-AT-A-2015, paras. 68-69.
5 Decision No. LET-A-23-2016.
6 *Accessible Transportation for Persons with Disabilities Regulations*, s. 31(1) (emphasis added).

Regrettably, due to the phrase "subject to subsection (2)," this is not the case. Subsection 31(2) of the *ATPDR* excludes transportation between Canada and a foreign country from the scope of the 1P1F requirements:

> **31 (2)** The prohibition in subsection (1) does not apply to a carrier in respect of any service that the carrier is required to provide under section 50, 51 or 52 if that service is provided by the carrier for the purpose of a transportation service between Canada and a foreign country.[7]

In 2019, the issue of whether the 1P1F requirements should apply to international transportation was deferred to the present, second phase of consultation and regulation-making exercise.

III. Canada's Obligations to Persons with Disabilities

Over the past century, Canada has experienced unprecedented progress in the area of human rights. In 1940, the majority of the Supreme Court of Canada found nothing untoward in a person of colour being refused service at a business for the sole reason of their colour.[8] Fortunately, nowadays there is a broad consensus, codified in the *Charter* and in federal and provincial human rights legislation, that any form of racism is unacceptable.

Yet, accessibility and accommodation of disabilities have remained the neglected stepchildren of human rights legislation in Canada. The rights of persons with disabilities often exist only on paper, but remain dead letter due to inadequate enforcement and access to justice. The reason for this disparity between accessibility rights and other areas of human rights legislation is that the provision of accessible services comes at a financial cost, which service providers are reluctant to bear.

Financial considerations, however, do not and cannot trump human rights, and do not excuse Canada from complying with its obligations under the *Charter*, the *UN Convention on the Rights of Persons with Disabilities* [*UNCRPD*], and the *Accessible Canada Act*.

(a) The *Charter*

Subsection 15(1) of the *Charter* provides that:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[9]

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[7] *Accessible Transportation for Persons with Disabilities Regulations*, s. 31(2) (emphasis added).
[8] *Christie v. The York Corporation*, [1940] SCR 139.
[9] *Canadian Charter of Rights and Freedoms*, s. 15(1) (emphasis added).

Subsection 6(1) of the *Charter* provides that:

> Every citizen of Canada has the right to enter, remain in and leave Canada.[10]

For persons with disabilities, public transportation is the predominant if not the only means to exercise their constitutional right to enter and leave Canada. It was held in *Withler* that s. 15(1) of the *Charter* guarantees substantive, not merely formal, equality before the law.

> What is required is not formal comparison with a selected mirror comparator group, but an approach that looks at the full context, including the situation of the claimant group and whether the impact of the impugned law is to perpetuate disadvantage or negative stereotypes about that group.[11]

(b) The *UN Convention on the Rights of Persons with Disabilities*

The *UN Convention on the Rights of Persons with Disabilities* [*UNCRPD*] is an international human rights treaty. It has been signed by more than 160 states, including Canada. Sub-articles 5(1)-(2) of the *UNCRPD* provide that:

> **Article 5 - Equality and non-discrimination**
>
> 1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
>
> 2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.[12]

(c) The *Accessible Canada Act*

The *Accessible Canada Act* was enacted as part of Canada's ongoing efforts to meet its obligations under the UNCRPD:

> Whereas Canada is a State Party to the United Nations Convention on the Rights of Persons with Disabilities and Canada has agreed to take appropriate measures respecting accessibility and to develop and monitor minimum accessibility standards;[13]

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[10] *Canadian Charter of Rights and Freedoms*, s. 6(1) (emphasis added).
[11] *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para. 40.
[12] *UN Convention on the Rights of Persons with Disabilities*, Articles 5(1)-(2) (emphasis added).
[13] *Accessible Canada Act*, Preamble.

Subsection 5(f) of the *Accessible Canada Act* provides that:

> **5** The purpose of this Act is to benefit all persons, especially persons with disabilities, through the realization, within the purview of matters coming within the legislative authority of Parliament, of a Canada without barriers, on or before January 1, 2040, particularly by the identification and removal of barriers, and the prevention of new barriers, in the following areas:
>
> (f) transportation; [...][14]

Section 6 of the *Accessible Canada Act* provides that:

> **6** This Act is to be carried out in recognition of, and in accordance with, the following principles:
>
> (a) all persons must be treated with dignity regardless of their disabilities;
>
> (b) all persons must have the same opportunity to make for themselves the lives that they are able and wish to have regardless of their disabilities;
>
> (c) all persons must have barrier-free access to full and equal participation in society, regardless of their disabilities;
>
> (d) all persons must have meaningful options and be free to make their own choices, with support if they desire, regardless of their disabilities;
>
> (e) laws, policies, programs, services and structures must take into account the disabilities of persons, the different ways that persons interact with their environments and the multiple and intersecting forms of marginalization and discrimination faced by persons;
>
> (f) persons with disabilities must be involved in the development and design of laws, policies, programs, services and structures; and
>
> (g) the development and revision of accessibility standards and the making of regulations must be done with the objective of achieving the highest level of accessibility for persons with disabilities.[15]

[14] *Accessible Canada Act*, s. 5(f) (emphasis added).
[15] *Accessible Canada Act*, s. 6 (emphasis added).

IV. The 1P1F Requirements Must Apply to All Travel by Air within, to, and from Canada

The Agency already recognized in its 1P1F Decision that the policy of charging additional fees or fares creates an undue obstacle to the mobility of persons with disabilities who require additional seating to accommodate their disabilities when travelling by air.[16]

By exercising its regulation-making powers under s. 170(1) of the *Canada Transportation Act* to make ss. 31(1) and 50-52 of the *ATPDR* and to incorporate the 1P1F requirements therein for transportation within Canada, the Agency reaffirmed that:

(i) charging additional fees or fares creates an undue obstacle in the transportation network under the legislative authority of Parliament to the mobility of persons with disabilities; and

(ii) the 1P1F requirements are necessary for the purpose of eliminating these undue obstacles.

Thus, the Agency has already correctly recognized the need for regulatory intervention to achieve the substantive equality for passengers with disabilities guaranteed by s. 15(1) of the *Charter*, that is, the same access to transportation as able-bodied passengers enjoy.[17]

Consequently, the question is no longer *whether* there are undue obstacles (barriers) and *whether* there is a need for regulatory intervention. Both of these questions have already been answered in the affirmative by the Agency's regulation-making.

Instead, the correct question to be asked is whether there is any reason to limit the scope of the 1P1F requirements to travel within Canada. This question must be answered in the negative.

The undue obstacles (barriers) experienced by passengers with disabilities travelling by air and the need for regulatory intervention to uphold the human rights of these passengers does not depend on the route they are travelling on. The undue barriers and the human rights are the same whether the passengers travel entirely within Canada or internationally. As the saying goes: what is sauce for the goose is sauce for the gander.

If there is any difference between transportation within Canada and internationally, it is that the harm caused by discrimination in the latter may be even greater, because public transportation is the main if not the only means for persons with disabilities to exercise their right to leave and enter Canada, protected by s. 6(1) of the *Charter*. Consequently, the 1P1F requirements are necessary not only to uphold the equality rights of persons with disabilities guaranteed by s. 15(1) of the *Charter*, but also to ensure that they are able to exercise their mobility rights guaranteed by s. 6(1) of the *Charter* in the same way as their able-bodied counterparts.

Therefore, bearing in mind ss. 5(f) and 6 of the *Accessible Canada Act*, the 1P1F requirements must apply to all travel within, to, and from Canada.

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[16] Decision No. 6-AT-A-2008, para. 916.

[17] *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para. 40.

V. Opponents of 1P1F Cite Unimplemented Bilateral Agreements that Have No Force of Law in Canada

(a) Unimplemented treaties have no force of law in Canada

Canada's constitutional law does not recognize signed and ratified treaties as part of the domestic law of Canada, *unless* they have been implemented by statute. The full Supreme Court of Canada agreed with L'Heureux-Dubé J. that:

> International treaties and conventions are not part of Canadian law unless they have been implemented by statute [...].[18]

In order to give a treaty the force of law in Canada, the appropriate legislature (federal or provincial) must pass legislation that implements the treaty as domestic law. The federal *Carriage by Air Act* is an example of such an implementing legislation. The executive signed the *Warsaw Convention*, the various protocols, and the *Montreal Convention*, but it was not sufficient to merely table these treaties in the House of Commons. In order to give these treaties the force of law in Canada, Parliament had to pass implementing legislation, turning these treaties into domestic law of Canada. In the case of the *Montreal Convention*, subsection 2(2.1) accomplishes this task:

> **2(2.1)** Subject to this section, the provisions of the Convention set out in Schedule VI, in so far as they relate to the rights and liabilities of carriers, carriers' servants and agents, passengers, consignors, consignees and other persons, have the force of law in Canada in relation to any carriage by air to which the provisions apply, irrespective of the nationality of the aircraft performing that carriage.

In the absence of implementing legislation, a treaty has no force of law in Canada—even if it was signed, ratified, and published in the *Canada Treaty Series*. In the context of aviation treaties, this principle has been reaffirmed by the Supreme Court of Canada in *Pan American World Airways Inc. v. The Queen et al.*:

> There is no occasion here to apply a principle of construction favouring the compatibility of domestic law with international law. Either international law invoked in this case is effective because expressly incorporated into Canadian law or the exactions are not, in any event, authorized under Canadian law; there is no other challenge that the appellants can mount.[19]

This principle was followed by the Federal Court of Appeal in *Aerlinte Eirann Teoranta v. Canada (Minister of Transport)*. In that case, the airline challenged the validity of certain fees on the basis of inconsistency with the *Convention on International Civil Aviation*, December 7, 1944, Can. T.S.

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[18] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para. 69 (majority), and para. 79 (dissent); see also *Ahani v. Canada (Attorney General)*, 2002 CanLII 23589 (ON CA) at para. 34 (leave to appeal ref'd: S.C.C. File No. 29058).

[19] *Pan American World Airways Inc. v. The Queen et al.*, [1981] 2 SCR 565.

1944 No. 36 [the *Chicago Convention*]. The Federal Court of Appeal rejected the airline's *Chicago Convention*-based argument, and held that "since the international convention relied on herein has not been expressly incorporated into the law of Canada, it does not assist the appellants."[20]

Thus, it is settled law that an unimplemented treaty has no force of law in Canada. The signature, ratification, and publication of a treaty in the *Canada Treaty Series* does not turn the treaty into a law of Canada.

(b) Bilateral aviation agreements are unimplemented treaties

Opponents of the 1P1F requirements cite bilateral aviation agreements that purport to "prohibit interference in the pricing choices of airlines from other countries." An example of such an agreement is the *Air Transport Agreement Between the Government of Canada and the Government of the United States of America*, Can. T.S. 2007 No. 2. Alas, this and all other similar aviation agreements are unimplemented treaties that have no force of law in Canada because of the absence of implementing legislation.

Consequently, air carriers cannot resist implementation of the 1P1F requirements for all air travel to and from Canada on the basis of these unimplemented treaties. The language of s. 78(1) of the *Canada Transportation Act* [*Act*] provides further support to this conclusion:

> **78 (1)** Subject to any directions issued to the Agency under section 76, the powers conferred on the Agency by this Part shall be exercised in accordance with any international agreement, convention or arrangement relating to civil aviation to which Canada is a party.[21]

Subsection 78(1) is in Part II the *Act*, and it applies only to how the Agency exercises "powers conferred on the Agency by this Part." Therefore, subsection 78(1) and unimplemented treaties do not limit in any way the Agency's powers under Part V of the *Act*.

(c) Conclusion

Non-Canadian air carriers oppose the 1P1F requirements on the basis of unimplemented bilateral aviation agreements that have no force of law in Canada.

The Agency's powers under Part V of the *Act*, and the Agency's obligations under ss. 5(f) and 6 of the *Accessible Canada Act* and ss. 6(1) and 15(1) of the *Charter*, are unaffected by these unimplemented bilateral treaties.

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[20] *Aerlinte Eirann Teoranta v. Canada (Minister of Transport)*, 1990 CanLII 8110 (FCA) at para. 19.

[21] *Canada Transportation Act*, s. 78(1) (emphasis added).

VI. Alternatively, Imposing the 1P1F Requirements is Permitted under the "prevention of unreasonably discriminatory prices or practices" Exception to Bilateral Aviation Treaties

Bilateral aviation treaties recognize the right of the party states to intervene to prevent unreasonably discriminatory prices or practices:

> Article 6 - Pricing
>
> 1. The Parties acknowledge that market forces shall be the primary consideration in the establishment of prices for air transportation. Intervention by the aeronautical authorities shall be limited to:
>
> a. prevention of unreasonably discriminatory prices or practices;[22]

Such bilateral aviation agreements, being international treaties, must be interpreted according to Articles 32(b) and 64 of the *Vienna Convention*.[23] Article 32(b) of the *Vienna Convention* allows recourse to supplementary means of interpretation to avoid manifestly absurd or unreasonable meaning. Such supplementary means of interpretation include other treaties between the parties.[24] Article 64 of the *Vienna Convention* provides that if a new peremptory norm of international law emerges, then any existing treaty which is in conflict with that norm becomes void and terminates, at least to that extent.[25]

The *UN Convention on the Rights of Persons with Disabilities* [*UNCRPD*], signed in 2006, is an international human rights treaty. It has been signed by more than 160 states, including all states that are relevant to the present complaint that are parties to the bilateral aviation treaties. Article 5(2) of the *UNCRPD* guarantees persons with disabilities "effective legal protection against discrimination." It is a new peremptory norm within the meaning of Article 64 of the *Vienna Convention*.

Thus, the phrase "unreasonably discriminatory prices or practices" in bilateral aviation agreements must be interpreted in a manner that is harmonious with the UNCRPD, including the right of persons with disabilities to "effective legal protection against discrimination." Consequently, the phrase "unreasonably discriminatory prices or practices" must be interpreted as encompassing prices or practices that amount to undue obstacles (barriers) to the mobility of persons with disabilities. In particular, the aforementioned aviation agreements explicitly permit intervention for the elimination of discrimination against persons with disabilities.

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[22] *Air Transport Agreement Between the Government of Canada and the Government of the United States of America*, Can. T.S. 2007 No. 2 (emphasis added).

[23] *Vienna Convention on the Law of Treaties, 1969*, [1980] Can. T.S. No. 37.

[24] *Walz v. Clickair SA*, European Court of Justice (Case C-63/09) at paras. 23-29.

[25] See also *Stott v. Thomas Cook Tour Operators Ltd*, [2014] UKSC 15 at para. 68.

The Agency's findings that charging an extra fee to passengers who need additional seating for themselves or for a support person due to their disabilities constitutes an undue obstacle (barrier) to the mobility of persons with disabilities implies that such charges are also "unreasonably discriminatory" and/or that the practice of imposing such charges on persons with disabilities is an "unreasonably discriminatory practice."

Therefore, the bilateral aviation agreements cited by non-Canadian airlines explicitly permit imposing the 1P1F requirements on international flights. Hence, even if these bilateral aviation agreements had the force of law in Canada (which is not the case), they are not a valid basis for objecting to imposing the 1P1F requirements on all flights within, to, and from Canada.

Sincerely yours,

Dr. Gábor Lukács