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Sonia Gangopadhyay
Canadian Transportation Agency
15 Eddy Street
Gatineau, Quebec K1A 0N9

Dear Ms. Gangopadhyay:

**Re: *Accessible Transportation for Persons with Disabilities Regulations*
Canada Gazette, Part I, Volume 153, Number 10 (March 9, 2019)**

Please accept the following submissions concerning the proposed *Accessible Transportation for Persons with Disabilities Regulations* [Proposed Regulations].

I. Overview

The creation of binding regulations, setting out clearly defined obligations for carriers and clearly defined rights for passengers with disabilities, has been long overdue, and it is necessary in order to comply with Canada's obligations under Article 5 of the *UN Convention on the Rights of Persons with Disabilities* [UNCRPD].

The Proposed Regulations miss the mark in two critical areas.

(a) Narrow Scope – Inconsistency with ss. 6(1) and 15(1) of the *Charter*

The scope of the Proposed Regulations is limited to “large air carriers,” which transport at least one million passengers per year.¹ In addition, some of the most important provisions are confined to transportation within Canada, and do not apply to transportation between Canada and points outside of Canada.²

¹ Paragraph 23(1)(a) and subsection 23(2).

² Paragraph 28(2).

It is submitted that the narrow scope of the Proposed Regulations perpetuates the disadvantage of passengers with disabilities, and as such it is inconsistent with the constitutional requirement of substantive equality enshrined in s. 15(1) of the *Charter*, and infringes upon the mobility rights of persons with disabilities, protected by s. 6(1) of the *Charter*.

It is further submitted that:

1. in paragraph 23(1)(a), the word “large” should be deleted, and it should read:

every ~~large~~ air carrier that holds a domestic licence or an international licence and provides a domestic service or an international service for the transportation of passengers;

2. paragraph 23(2) should be deleted; and
3. paragraph 28(2) should be deleted.

(b) Damage, Destruction, or Loss of Mobility Aids – Inadequate Protection

The Proposed Regulations exclude international carriage by air from the scope of the obligation to compensate persons with disabilities for expenses they have incurred due to the damage, destruction, or loss of their mobility aids.³ The main protection offered to passengers travelling with mobility aids internationally appears to be the making of a “special declaration of interest” under the *Montreal Convention*⁴—a right that all passengers have with respect to any checked baggage.

It is submitted that this protection is inadequate, a step backwards compared to the *status quo*,⁵ and fails to recognize that mobility aids form an inherent part of the body of a person with disabilities.

It is further submitted that:

4. the Proposed Regulations should enshrine the principle that mobility aids are an extension of the body of a person, and as such, damage to mobility aids is a form of “bodily injury” within the meaning of Article 17(1) of the *Montreal Convention*; and
5. the Proposed Regulations should, at the very least, enshrine the *status quo* that airlines waive their normal liability limits with respect to mobility aids.⁶

³ Subsection 57(2).

⁴ Section 58.

⁵ See, for example, Air Canada’s International Tariff Rule 105(B)(4).

⁶ See, for example, Air Canada’s International Tariff Rule 105(B)(4).

II. 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.⁷ 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 step-children of human rights legislation in Canada. 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* and the *UNCRPD*.

(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.⁸

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

Every citizen of Canada has the right to enter, remain in and leave Canada.⁹

For persons with disabilities, public transportation is the predominant if not the only means to exercise their constitutional right to enter and leave Canada. The Supreme Court of Canada confirmed in *Withler v. Canada (Attorney General)* 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.¹⁰

⁷ *Christie v. The York Corporation*, [1940] SCR 139.

⁸ *Canadian Charter of Rights and Freedoms*, s. 15(1) (emphasis added).

⁹ *Canadian Charter of Rights and Freedoms*, s. 6(1) (emphasis added).

¹⁰ *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para. 40.

(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.¹¹

III. Part 2 of the Proposed Regulations Should Apply to All Air Carriers

It is submitted that the ultimate **effect** of the Proposed Regulations is to perpetuate disadvantage by depriving persons with disabilities access to transportation services offered by start-up airlines, which often offer prices that are lower than those of the legacy carriers.

The scope of Part 2 of the Proposed Regulations is limited to “large air carrier”:

23 (1) Unless otherwise specified, this Part applies to

- (a) every large air carrier that holds a domestic licence or an international licence and provides a domestic service or an international service for the transportation of passengers;¹²

The Proposed Regulations define a “large air carrier” based on the volume of passengers it transports (and not based on the aircraft being used):

23 (2) In paragraph (1)(a), large air carrier means

- (a) an air carrier that transported one million passengers or more during each of the two preceding calendar years; or
- (b) an air carrier that is, under a commercial agreement with a carrier referred to in paragraph (a), operating a flight or carrying passengers on behalf of that carrier.¹³

¹¹ *UN Convention on the Rights of Persons with Disabilities*, Articles 5(1)-(2) (emphasis added).

¹² Proposed Regulations, s. 23(1) (emphasis added).

¹³ Proposed Regulations, s. 23(2) (emphasis added).

The Proposed Regulations are made pursuant to s. 170 of the *Canada Transportation Act*, “for the purpose of eliminating undue obstacles in the transportation network under the legislative authority of Parliament to the mobility of persons with disabilities.”¹⁴ Thus, in making the Proposed Regulations, the Agency acknowledges that persons with disabilities face undue obstacles, and that the measures enumerated in the Proposed Regulations are necessary to ensure that persons with disabilities have access to the same services as their able-bodied counterparts.

Yet, inexplicably, Part 2 of the Proposed Regulations would not apply to start-up airlines, such as Flair Air and Swoop, which operate large aircraft (e.g., Boeing 737-800) on the same or similar routes as Air Canada or WestJet.

Consequently, the **effect** of paragraph 23(1)(a) is that start-up airlines, such as Flair Air and Swoop, will not be required to provide accessible transportation to persons with disabilities.

Access to the transportation services of such start-up airlines carries economic benefits for passengers. For example, both Flair Air and Swoop call themselves an “ultra low-cost airline,” and offer air transportation at prices that are often lower than those offered by the “large air carriers” within the meaning of the Proposed Regulations, such as Air Canada or WestJet.

Therefore, the **effect** of paragraph 23(1)(a) is that it deprives passengers with disabilities from access to transportation on start-up airlines and the economic benefits of using such services.

Hence, the **impact** of paragraph 23(1)(a) is to perpetuate the disadvantage of persons with disabilities. Such an effect is inconsistent with s. 15(1) of the *Charter*, and as such it is unconstitutional.

It is therefore submitted that the Proposed Regulations should be amended to apply to all air carriers, regardless of the volume of passengers transported.

Recommended Amendments

1. In paragraph 23(1)(a), the word “large” should be deleted, and it should read:

every ~~large~~ air carrier that holds a domestic licence or an international licence and provides a domestic service or an international service for the transportation of passengers;

2. Paragraph 23(2) should be deleted.

¹⁴ *Canada Transportation Act*, s. 170.

IV. The “One Person One Fare” Rules Should Apply to International Transportation

It is submitted that the ultimate **effect** of the Proposed Regulations is to perpetuate disadvantage by depriving persons with disabilities from access to public transportation to and from Canada.

(a) History: The Agency’s “On Person One Fare” (1P1F) Decision

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.¹⁵

[...] 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.¹⁶

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.¹⁷

The “One Person One Fare” Decision was confined to air transportation within Canada, and did not apply to flights to and from Canada.

¹⁵ [Decision No. 6-AT-A-2008](#), paras. 136, 170, and 909.

¹⁶ [Decision No. 6-AT-A-2008](#), para. 909.

¹⁷ [Decision No. 6-AT-A-2008](#), para. 916.

(b) History: The Agency’s refusal to decide whether the “One Person One Fare” rule should be expanded to all flights

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.¹⁸

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.¹⁹

(c) The Proposed Regulations perpetuate disadvantage

Sections 46-48 of the Proposed Regulations 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 28(1) of the Proposed Regulations creates the incorrect impression that the “One Person One Fare” is incorporated in the Proposed Regulations:

28 (1) Subject to subsection (2), it is prohibited for a carrier to impose a fare or to impose any other charge or fee for any service that the carrier is required by this Part to provide to any person.²⁰

This is, however, not the case. Subsection 28(2) excludes transportation between Canada and a foreign country from the scope of the “One Person One Fare” rule:

¹⁸ *Cheung v. WestJet*, Decision No. 324-AT-A-2015, paras. 68-69.

¹⁹ Decision No. LET-A-23-2016.

²⁰ Proposed Regulations, s. 28(1).

28 (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 46, 47 or 48 if that service is provided by the carrier for the purpose of a passenger transportation service between Canada and a foreign country.²¹

The Agency has already recognized in its “One Person One Fare” 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.²²

The Proposed Regulations also correctly recognize 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.²³

This undue obstacle 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 obstacles and the human rights are the same whether the passengers travel entirely within Canada or internationally.

Yet, the **effect** of paragraph 28(2) of the Proposed Regulations is to perpetuate the disadvantage of being charged additional fares and fees suffered by persons with disabilities travelling internationally who require additional seating to accommodate their disabilities. Such an effect is inconsistent with s. 15(1) of the *Charter*.

Furthermore, 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*. Thus, the **effect** of paragraph 28(2) of the Proposed Regulations not only denies passengers with disabilities the substantive equality to which they are entitled pursuant to s. 15(1) of the *Charter*, but also infringes upon their rights under s. 6(1) of the *Charter*.

Therefore, it is submitted that paragraph 28(2) of the Proposed Regulations is unconstitutional and should be deleted.

(d) Inappropriate reliance on unspecified “international treaties”

Paragraph 28(2) of the Proposed Regulations cannot be justified by claims about the need for “further analysis and consultations at the international level (for example, with respect to the implications for international treaties).”

These claims are devoid of any merit for the following reasons.

²¹ Proposed Regulations, s. 28(2).

²² [Decision No. 6-AT-A-2008](#), para. 916.

²³ *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para. 40.

First, in order to incorporate a treaty into Canadian domestic law, the enactment of a statute is required, and the statute must do more than simply “approve” the treaty.²⁴ 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 [...].²⁵

Second, and perhaps more importantly, it is trite law that in the case of a conflict between the *Charter* and a statute, the *Charter* prevails unless Parliament expressly declared the statute to operate notwithstanding the *Charter*.

Recommended Amendment

3. Paragraph 28(2) should be deleted.

V. The protection offered in the case of damage, destruction, or loss of mobility aids on international travel is inadequate (s. 58)

Section 57 of the Proposed Regulations requires carriers to arrange, at their own expense, for the repair or replacement of damaged or lost mobility aids and to provide passengers travelling with a mobility aid with a temporary replacement in the case of a delay in the transportation of mobility aids. These provisions appear to restate, to a great extent, [section 155](#) of the *Air Transportation Regulations*. In addition, paragraph 57(1)(b) requires carriers to

[...] reimburse the person for any expenses they have incurred because the mobility aid was damaged, destroyed or lost during transport or because it was not available to them at the time of their arrival at their final destination;²⁶

Alas, this latter provision does not apply to international carriage by air of mobility aids:

57 (2) Paragraph (1)(b) does not apply to an air carrier if the mobility aid is carried on an international service.²⁷

Instead, the main protection offered to passengers with disabilities travelling with mobility aids internationally appears to be the making of a “special declaration of interest” under Article 22(2) of the *Montreal Convention*:

²⁴ Constitutional Law of Canada, 5th Edition (Carswell), Part I, subsection 11.4.

²⁵ *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).

²⁶ Proposed Regulations, para. 57(1)(b).

²⁷ Proposed Regulations, s. 57(2).

Article 22 – Limits of Liability in Relation to Delay, Baggage and Cargo

2. In the carriage of baggage, the liability of the carrier in the case of destruction, loss, damage or delay is limited to 1 000 Special Drawing Rights for each passenger unless the passenger has made, at the time when the checked baggage was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the passenger's actual interest in delivery at destination.²⁸

It is submitted that this protection is inadequate in several ways: (a) it is impractical; (b) it appears to be a step backward; and (c) it overlooks the fact that mobility aids are not simply “baggage,” but an extension of the body of a person with a disability.

(a) Impracticality

Subsection 58(2) of the Proposed Regulations requires the carrier to permit a person with disabilities to make a special declaration of interest at any time before the mobility aid is handed over to the carrier, but overlooks several practical facts.

First, under Article 22(2) of the *Montreal Convention*, a passenger making a “special declaration of interest in delivery at destination” also has to pay “a supplementary sum” (premium) to the carrier in order to invoke a higher liability limit. Thus, the carrier can practically circumvent or defeat the intent of the Proposed Regulations by demanding a prohibitively high “supplementary sum,” which it is entitled to do.

Second, major Canadian airlines limit the amount of “special declaration of interest in delivery at destination” a passenger can make. For example, Air Canada's International Tariff Rule 105(D)(2) provides:

Limits on declared higher values the declared value for personal property, including baggage, shall not exceed the limits of \$2,500.

In a similar fashion, WestJet limits the maximum special declaration of interest a passenger may make to \$3,000.²⁹

Given that mobility aids have a substantially higher value, it is submitted that the protection offered by section 58 is illusory.

²⁸ *Carriage by Air Act*, Schedule VI (“*Montreal Convention*”), Article 22(2).

²⁹ WestJet's International Tariff Rule 60(D)(III).

(b) A Step Backward?

Currently, Air Canada's International Tariff Rule 105(D)(4) provides:

Normal carrier limit of liability will be waived for substantiated claims involving loss damage or delay in delivery to mobility aids such as wheelchairs, walkers, crutches, scooters and other mobility aid. When such items have been accepted into the care of the carrier as checked baggage or otherwise.

Section 58 of the Proposed Regulations suggests, however, that once the Proposed Regulations come into force, passengers with disabilities would have to make a "special declaration of interest" in order to ensure that the carrier does not invoke the *Montreal Convention* to limit its liability to 1,131 SDR (approximately CAD\$2,100). If this is indeed the intent of the Proposed Regulations, then it is certainly a step backward.

It is submitted that section 58 of the Proposed Regulations should be replaced with a provision that requires or deems air carriers to have contractually waived the liability limits under the *Montreal Convention*. It is to be noted that such a waiver is explicitly permitted pursuant to Article 27 of the *Montreal Convention*:

Article 27 - Freedom to Contract

Nothing contained in this Convention shall prevent the carrier from refusing to enter into any contract of carriage, from waiving any defences available under the Convention, or from laying down conditions which do not conflict with the provisions of this Convention.³⁰

(c) Mobility Aids are an Extension of the Body of the Passenger

Able-bodied persons take it for granted that they can transport themselves from one place to another—an ability that provides independence to a person. It is for this reason that a bodily injury that impacts a person's mobility is regarded as a serious and life-altering event, requiring a substantial compensation.

For a person with disabilities, a mobility aid is not a piece of property owned for convenience, but rather it is the legs of the person for all practical purposes. It provides the mobility that legs provide to an able-bodied person. Damage, destruction, or loss of a mobility aid means loss of mobility for the owner much in the same way as an injury to the legs of an able-bodied person would.

Thus, mobility aids are an extension of the body of the person, and deserve the same level of protection from society as one's body. It follows that in carriage by air, mobility aids should not be treated as mere checked baggage, but rather as constituting part of the passenger's body.

³⁰ *Carriage by Air Act*, Schedule VI ("*Montreal Convention*"), Article 27.

Therefore, it is submitted that damage, destruction, and loss of mobility aids should be treated as “bodily injury” within the meaning of the *Montreal Convention*, and should be subject to substantially more favourable liability rules:

17 (1) The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

22 (1) For damages arising under paragraph 1 of Article 17 not exceeding 100 000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability.³¹

Recommended Amendments

4. The Proposed Regulations should, at the very least, enshrine the *status quo* that airlines waive their normal liability limits with respect to mobility aids.
5. The Proposed Regulations should enshrine the principle that mobility aids are an extension of the body of a person, and as such, damage to mobility aids is a form of “bodily injury” within the meaning of Article 17(1) of the *Montreal Convention*,

Sincerely yours,

Dr. Gábor Lukács

³¹ *Carriage by Air Act*, Schedule VI (“*Montreal Convention*”), Articles 17(1) and 21(1).