

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

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Transportation is the lifeline that connects persons with disabilities with the community, and facilitates greater opportunities for work, social inclusion and overall independence. Adequate accessible transportation has long been a concern of persons with disabilities, yet there is a dearth of sustained research on the legal and societal implications of transportation inequality for persons with disabilities. This article contributes to the research on both transportation inequality and equality theory 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 their legal claims. Ultimately, the author argues that narrow interpretations of prevailing law and doctrine have resulted in missed opportunities for achieving transportation equality on the ground for persons with disabilities. These opportunities may be captured by the application of a new theory of equality that addresses disability discrimination through the lens of what the author terms the ‘universality of the human condition’.

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Lien vital qui relie les personnes en situation de handicap à la communauté, le transport accroît les possibilités de travail, d'inclusion sociale et, globalement, d'autonomie. L'accès à des modes de transport adéquats est depuis longtemps source de préoccupation pour les personnes en situation de handicap, mais il y a néanmoins très peu de recherches soutenues sur les conséquences juridiques et sociétales de l'inégalité en matière de transport pour les personnes handicapées. Le présent article se veut une contribution à la recherche à la fois sur l'inégalité en matière de transport et sur la théorie de l'égalité, et ce, au moyen d'une analyse empirique et théorique des décisions des tribunaux des droits de la personne relatives à l'égalité des transports au Canada. Ainsi, il examine les préoccupations du point de vue des personnes en situation de handicap en se concentrant sur la substance de leurs revendications juridiques. Enfin, l'auteur fait valoir que des interprétations étroites de la loi et de la doctrine en vigueur ont privé les personnes handicapées d'occasions concrètes de parvenir à l'égalité en matière de transport. Ces occasions peuvent être appréhendées par l'application d'une nouvelle théorie de l'égalité qui traite de la discrimination fondée sur la déficience à travers le prisme de ce que l'auteur appelle « l'universalité de la condition humaine ».

Transportation is the lifeline that connects persons with disabilities with the community, facilitating greater opportunities for work, social inclusion and overall independence. Adequate accessible transportation has long been a concern of persons with disabilities,¹ yet there is a dearth of sustained research on the legal and societal implications of transportation inequality for persons with disabilities in Canada.² This article 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 so doing, 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. Insights drawn in part from standard-setting regulatory processes, such as the one established under the *Accessibility for Ontarians with Disabilities Act, 2005* may assist people with disabilities in vindicating these equality rights.³

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 article 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 article, 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

¹ See generally the Council of Canadians with Disabilities' ongoing work documenting various major issues of transportation for persons with disabilities at Council of Canadians with Disabilities, "Transportation" (19 January 2018), *Council of Canadians with Disabilities*, online: <<http://www.ccdonline.ca/en/transportation>>.

² The socio-legal literature that exists includes: Ena Chadha, "Running on Empty: The 'Not So Special Status' of Paratransit Services in Ontario" (2005) 20 *Windsor Rev Legal Soc Issues* 1 [Chadha], "Transportation Barriers" in Ravi Malhotra & Morgan Rowe, *Exploring Disability Identity and Disability Rights through Narratives* (New York: Routledge, 2014) 125; Lisa Vanhala, *Making Rights a Reality?: Disability Rights Activists and Legal Mobilization* (New York: Cambridge University Press, 2011).

³ SO 2005, c 11 [AODA].

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 in clarifying the contours of what is sought by persons with disabilities seeking transportation equality, and which also provides a reason for respondents to be more responsive to these claims. In developing this framework, I draw on the cases as well as 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 on the development of laws affecting persons with disabilities, and provide insight on what was helpful in moving discussions forward. Finally, I show how the universality of the human condition can be a valuable 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 to gain a more powerful voice for change.

I. Disability Discrimination in Transportation: Canadian 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.⁴ These administrative actors exist in every province and territory across Canada. At the federal

⁴ In two provinces, British Columbia and Ontario, legislative reform to provide direct access to the human rights tribunal took place in the 2000s (see *Human Rights Code* RSBC 1996, c 210, [BC Code], s 21 and *Human Rights Code*, RSO 1990, c H.19 [Code], 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 can then be taken to the human rights tribunal of the jurisdiction for an adjudicative resolution (see e.g. Québec's *Charter of Human Rights and Freedoms*, CQLR c C-12, ss 80–82). 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

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 legislation; 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.⁵ Protection from discrimination is restricted to specific social areas such as the provision of goods and services, employment and rental accommodation.⁶

There have been 82 reported human rights decisions across Canada addressing allegations of disability discrimination within transportation services between the years 1976 and 2016.⁷ 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.⁸ 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.

The year 1976 was chosen as the beginning of the time period examined because it is the year in which “disability” was added to the New Brunswick *Human Rights Code* as a ground of discrimination.⁹ The New Brunswick *Human Rights Code* is the first human rights statute in Canada to include “disability”

to be taken to the Superior Court. The Commission is responsible for referring such matters to the Superior Court. (*The Saskatchewan Human Rights Code*, SS 1979, c S-24.1, ss 29.6, 29.7). It will represent the complainant free of charge before the court. See Saskatchewan Human Rights Commission, “Information Sheets – How to File A Complaint”, online: <<http://saskatchewanhumanrights.ca/learn/fact-sheets/how-to-file-a-complaint>>.

⁵ A typical provision is found at section 1 of Ontario’s *Code*, *supra* note 4, 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.”

⁶ See e.g. *Code*, *supra* note 4, ss 1, 2, 5.

⁷ The resulting dataset of cases for the study has been publicly archived and is available through the Dataverse global repository. See Laverne Jacobs, “Human Rights Tribunal Decisions on Transportation and Disability Discrimination in Canada: 1976 to 2016”, online: Scholars Portal Dataverse <<https://dataverse.scholarsportal.info/dataset.xhtml?persistentId=doi:10.5683/SP/16EJAV>> [Dataset].

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

⁹ *Human Rights Act*, RSNB 1973, c H-11, as amended by SNB 1976, c 31, s 1.

among the grounds of discrimination,¹⁰ although it is now a prohibited ground in all 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 include a mixture of public transit authorities (responsible for both conventional and paratransit systems), bus and motor coach lines open to the public, and taxi services.¹¹

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 per year. The number of transportation claims over the 40-year period is a drop in the bucket in comparison to the number of human rights 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 per year.¹²

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, self-represented litigants brought almost half of all the transportation cases.¹³ In Ontario, self-represented litigants brought approximately 65% of the cases.

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 undertaken with an ear attuned to what the applicants are requesting. As self-represented litigants made many of the applications, what the litigant was seeking was 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, the cases have been organized into the following three categories: a) cases in which claimants are seeking transportation

¹⁰ See the discussion in Dianne Pothier, "Tackling Disability Discrimination at Work: Toward a Systemic Approach" (2010) 4:1 McGill JL & Health 17 at 18–19.

¹¹ 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.

¹² 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 Ontario, Social Justice Tribunals Ontario, 2015–2016 *Annual Report*, online: <<http://www.sjto.gov.on.ca/documents/sjto/2015-16%20Annual%20Report.html#sjto2>>.

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

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. Each of these categories will next be examined.

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, 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.¹⁴ 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)*¹⁵ and *Austin v London Transit Commission*¹⁶ are two illustrative examples. Together they present some of the most significant procedural and substantive challenges that are experienced by litigants advocating for infrastructural changes to transportation services through the statutory human rights system.

¹⁴ A useful definition of conventional and specialized transportation services can be found in the Transportation Standards enacted under the AODA, *supra* note 3. 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 *Integrated Accessibility Standards*, O Reg 191/11, s 33.

¹⁵ *Browne v Niagara (Regional Municipality)*, 2010 HRTO 2141 [*Browne*].

¹⁶ *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 48 [*Shiell*]; *Daniel v Peel (Regional Municipality)*, 2016 HRTO 1159 [*Daniel*]; *Puharich v Ontario (Health and Long Term Care)*, 2016 HRTO 574 [*Puharich*] and *Martyn v Laidlaw Transit Ltd*, 2008 AHRC 2 [*Martyn*]. For a breakdown of the number of cases in each of the three categories (transportation restructuring, broader family dynamic and transportation conflict), please see the Comparisons section of the transportation dataset, available at Dataset, *supra* note 7.

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 12 cities and towns in the Niagara Region. The inter-municipal specialized transit program began in 2006 and was reserved exclusively for medical appointments. By the end of June 2007, it 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 metres. Moreover, to be eligible, the user must also have required the service for one of three purposes: to attend medical appointments, to participate in paid employment at the same place of employment at least three times per 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 *Code*.¹⁷ 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 per week, a fact that further rendered her ineligible to receive the special transit service.

¹⁷ *Browne*, *supra* note 15 at para 26. The definition of "disability" is broad under the *Code*, *supra* note 4. Section 10(1) 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*.

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 disabilities that were not on the list. Ms. Browne wanted to reduce her 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 her to travel between St. Catharines, Ontario and her destination in Welland, Ontario using the system of buses and other forms of public transportation that were 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 held that while the *Code* provides a right to equal treatment with respect to a service, it presupposes that the service already exists. The adjudicator held that the *Code* cannot be used to order the creation of a new service, and by extension, cannot be used to order the municipality to create an inter-municipal transit system.¹⁸

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.¹⁹ 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.²⁰

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.²¹ In recent

¹⁸ *Browne*, *supra* note 15 at paras 22, 23, 29-32.

¹⁹ *Ibid* at para 35.

²⁰ *Ibid* at para 36.

²¹ This principle has been articulated by the Supreme Court of Canada in *Prassad v Canada (Minister of*

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.²² These flexible processes have been termed “inquisitorial processes” generally and sometimes “active adjudication” within the Canadian context.²³

One key Canadian example of this type of legislative amendment is found in the *Code* itself, which provides that the Human Rights Tribunal for Ontario may use “alternatives to traditional adjudicative or adversarial procedures” and explicitly permits the tribunal to define and narrow the issues before it.²⁴ 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.²⁵ 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.²⁶ 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.

Employment and Immigration), [1989] 1 SCR 560 at 558–69, [1989] 3 WWR 289 [Prasad].

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

²³ See Samantha Green and Lorne Sossin, “Administrative Justice and Innovation: Beyond the Adversarial/Inquisitorial Dichotomy” in Jacobs & Baglay, *ibid* at 71.

²⁴ See *Code*, *supra* note 4, s 43(3) 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 Human Rights Tribunal of Ontario, *Rules of Procedure*, r 1.7(h).

²⁵ Michelle Flaherty, “Self-Represented Litigants: A Sea Change in Adjudication” in Peter Oliver & Graham Mayeda, eds, *Principles and Pragmatism: Essays in Honour of Louise Charron* (Toronto: LexisNexis Canada, 2014) 323 at 337–38.

²⁶ See generally Robert Thomas, “From “Adversarial v Inquisitorial” to “Active, Enabling, and Investigative”: Developments in UK Administrative Tribunals” in Jacobs & Baglay, *supra* note 22 at 51.

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. However, *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.²⁷ It expanded robustly through the 1970s and 1980s only to be stripped of funding in the mid-1990s when the Conservative Party was elected to power.²⁸ The service in London was, at the time of the application, a first-come first-serve, door-to-door system that required pre-booking to obtain a ride. This was similar to other major cities in Canada.²⁹ 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 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.³⁰

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 he should have called as soon as the booking window opened at 7 a.m. as opposed to calling in the afternoon in order to obtain a ride since “bookings fill up quickly”.³¹ 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”.³² Mr. Austin elaborated on this point. The adjudicator noted that Mr. Austin went on to argue 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

²⁷ Chadha, *supra* note 2 at 3–5.

²⁸ *Ibid.*

²⁹ See e.g. information on Toronto’s Wheel-Trans service, “Wheel-Trans”, *Toronto Transit Commission*, online: <https://www.ttc.ca/WheelTrans/About_Wheel-Trans/index.jsp#top>.

³⁰ *Austin*, *supra* note 16 at para 5.

³¹ *Ibid* at para 3.

³² *Ibid* at para 2.

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.³³

The transit company 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 had complained that they had “spent too long on vehicles, because of other pick-ups and drop-offs”,³⁴ the company had agreed not to keep paratransit users on a bus for more than an hour. 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.³⁵

The Tribunal found that Mr. Austin had not made out a *prima facie* case of discrimination.³⁶ It went on to hold, however, that had a *prima facie* case of discrimination been 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.³⁷

Reasonable accommodation is a cornerstone of Canadian human rights law. The concept of reasonable accommodation involves 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

³³ *Ibid* at para 48.

³⁴ *Ibid* at para 24.

³⁵ *Ibid* at para 49.

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

³⁷ *Ibid* at paras 83–84.

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...³⁸

The challenge of using a reasonable accommodation lens is that it is, by nature, a tool that allows for the possibility of lesser substitutes being 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.³⁹

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

The Tribunal’s analysis is also disappointing because the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD),⁴⁰ 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 of the CRPD. Article 9 of the CRPD indicates that “States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to ... transportation,

³⁸ See *Council of Canadians with Disabilities v VIA Rail Canada Inc*, 2007 SCC 15 at para 121, [2007] 1 SCR 650, [VIA Rail]. 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) 189.

³⁹ Shelagh Day & Gwen Brodsky, “The Duty To Accommodate: Who Will Benefit?” (1996) 75 Can Bar Rev 433 at 462.

⁴⁰ *United Nations Convention on the Rights of Persons with Disabilities*, 30 March 2007, 44910 UNTS 2515 (entered into force 3 May 2008), [CRPD]. Canada ratified the CRPD on March 11, 2010. See United Nations Treaty Collection, “15. Convention on the Rights of Persons with Disabilities”, online: <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=_en&clang=_en>. The Government of Canada tabled the Optional Protocol to the CRPD in the House of Commons on November 30, 2017. See Employment and Social Development Canada, “The Government of Canada tables the Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities”, (Ottawa: ESDC, 30 November 2017), online: <https://www.canada.ca/en/employment-social-development/news/2017/11/the_government_ofcanadatablestheoptionalprotocoltotheunitednatio.html>.

both in urban and in rural areas".⁴¹ The goal of inclusion in the community 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.⁴²

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. Put another way, 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 earliest international instruments to bring to light the importance of family support for parents with disabilities.⁴³ Rule 9 of the *Standard Rules* is dedicated to family life and personal integrity, and maintains that States Parties should promote the full participation of persons with disabilities in family life and refrain from discrimination in parenthood.⁴⁴ The CRPD builds on these ideas. Article 23 of the CRPD requires States Parties to take measures to 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.⁴⁵

⁴¹ CRPD, *supra* note 40, art 9(1) states:

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...

⁴² Additional cases dealing with the issue of transportation restructuring include: *Shiell*, *supra* note 16; *Wozenilek v Guelph (City)*, 2010 HRTO 1652 [*Wozenilek*] and *Martyn*, *supra* note 16.

⁴³ See *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, GA, 48th Sess, Annex, Agenda Item 109, UN Doc A/RES/48/96 (1993) [*Standard Rules*].

⁴⁴ See *ibid*, Rule 9.

⁴⁵ See CRPD, *supra* note 40, art 23. 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

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*.⁴⁶ 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 their ages and the proximity of their house to the school. For several years, Ms. Contini had made a special request for bussing service and the school board had acceded to her request. 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 could drive the children to school.⁴⁷

Ms. Contini was a self-represented litigant and her argument did not conform perfectly to 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.⁴⁸

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.⁴⁹

Based on these excerpts, it is evident that Ms. Contini was concerned about two related problems. First, she wanted assistance so that she could do her share of the housework, specifically getting her children to school. For this, she was requesting assistance to have her children driven. Second,

with disabilities in the performance of their child-rearing responsibilities.

See also CRPD, *supra* note 40, art 6 which emphasizes the need to support women and girls with disabilities.

⁴⁶ *Contini v Rainbow District School Board*, 2012 HRTO 295 [*Contini*].

⁴⁷ *Ibid* at para 8.

⁴⁸ *Ibid* at para 9.

⁴⁹ *Ibid* at para 10.

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.⁵⁰ The Tribunal focused, therefore, only on whether certain core aspects of the discrimination analysis were present.⁵¹ 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. 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, a bus or if they walked with a group of other children.⁵²

Regardless of whether one is willing to accept the adjudicator's analysis, a larger question remains as to whether anti-discrimination 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 had a policy allowing for bussing three days per 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

⁵⁰ *Contini v Rainbow District School Board*, 2011 HRTO 1340 at para 28.

⁵¹ For more on the discrimination analysis, see *Battlefords and District Co-operative Ltd v Gibbs*, [1996] 3 SCR 566, 140 DLR (4th) 1 citing *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1.

⁵² *Contini*, *supra* note 46 at paras 27–28.

proving discrimination within the legal doctrine.⁵³ 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, the 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 these issues as obligations that should be kept within the family, instead of spreading them out within an interdependent society with support from the state.⁵⁴ The consequence of this approach is that the social inclusion of persons with disabilities becomes an entirely 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 a disability 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.⁵⁵ 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. It could also have been understood as a perpetuation of the stereotype that support for persons with disabilities should be a private responsibility assigned 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,⁵⁶ 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

⁵³ See e.g. *Ontario (Disability Support Program) v Tranchemontagne*, 2010 ONCA 593 at para 104, 102 OR (3d) 97.

⁵⁴ See generally 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 Michael J Prince, *Absent Citizens: Disability Politics and Policy in Canada* (Toronto: University of Toronto Press, 2009).

⁵⁵ 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", CRPD, *supra* note 40 art 4(1)(c).

⁵⁶ See the Government of Canada's first report to the UN regarding the CRPD, which outlines the legal landscape that is in place in Canada and acknowledges some of the shortcomings: Canada, Ministry of Canadian Heritage and Official Languages, *Convention on the Rights of Persons with Disabilities* (Ottawa: MCHOL, 2014).

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 happened to them in the process of using a transportation system. The vast number of disability transportation cases fall within this category.⁵⁷ 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.⁵⁸ A still larger number of incidents do not even attract media attention.⁵⁹ 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.⁶⁰ Approximately a third of the cases of transportation conflict were dismissed at the preliminary stage,⁶¹ and almost two-thirds of those dismissed were dismissed for being deemed to have no prospect of success.⁶² There are therefore not many extensively reasoned or

⁵⁷ 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%.

⁵⁸ See e.g. Laurie Monsebraaten & Tess Kalinowski, "Wild ride for Laurier University student in a wheelchair", *Toronto Star* (29 January 2014), online: <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", *Times Colonist* (17 February 2014), online: <<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* (7 August 2015), online: <<https://chrwradio.ca/content/ltc-investigating-drivers-treatment-passenger-wheelchair>>; Hilary Beaumont, "Stranded by Halifax Transit", *The Coast* (18 September 2014), online: <<http://www.thecoast.ca/halifax/stranded-by-halifax-transit/Content?oid=4416201>>; Steven Goetz, "Guide dog handler refused service by Toronto taxis, UberX", *Toronto Metro* (18 October 2015), online: <<http://www.metronews.ca/news/toronto/2015/10/18/guide-dog-handler-refused-service-by-toronto-taxis.html>>.

⁵⁹ Peter Best, (Address delivered at the Transportation & Disability Law Panel, Faculty of Law, University of Windsor, 2 November 2016) [unpublished].

⁶⁰ 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.

⁶¹ Exactly 30.6% of the conflict cases were dismissed at a preliminary stage.

⁶² 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 e.g. *Coughlin v Pacific Coach Lines*, 2011 BCHRT 271 and *Halabi v Coast Mountain Bus Co.*, 2006 BCHRT 310 [*Halabi*], decided by the BC Human Rights Tribunal.

even completed cases to examine,⁶³ 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 claims for multiple related transportation incidents in a single application, or discrimination claims in relation to different disabilities that an individual experienced in a single transportation incident, even less guidance is available.⁶⁴ In addition, we see in the cases that the time of persons with disabilities often does not appear to be valued in the same way as the time of members of the mainstream public. 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.⁶⁵ This is particularly disconcerting as the assistance needed usually relates to the safety and security of the disabled person.

Halabi is an 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.⁶⁶ 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.⁶⁷ In support of his claim, Mr. Halabi submitted an affidavit in which

⁶³ See, however, the successful cases of *Lepofsky v Toronto Transit Commission*, 2005 HRT0 20, and *Lepofsky v TTC*, 2007 HRT0 23 in which the Toronto Transit Commission was held to have discriminated against persons with disabilities by not calling out the stops at subway stations and bus stops, and was required to rectify its practice.

⁶⁴ *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 post-traumatic 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 e.g. Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13 CJWL 37.

⁶⁵ See also *Lepofsky v Toronto Transit Commission* and *Lepofsky v TTC*, *supra* note 63.

⁶⁶ *Halabi*, *supra* note 62 at para 26. See also *Caldwell v Coast Mountain Bus Company*, 2005 BCHRT 586.

⁶⁷ *Halabi*, *supra* note 62 at para 5.

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 side 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”.⁶⁸ 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.⁶⁹

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.⁷⁰ 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.⁷¹ As the BC Tribunal itself has explained in its jurisprudence, the Tribunal’s role is to assess whether there is a reasonable prospect that the complaint will succeed based on all of the material before it.⁷² 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.⁷³ The Tribunal’s task is simply to determine whether the complaint has any chance of succeeding at all.⁷⁴ 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.⁷⁵

⁶⁸ *Ibid* at para 20.

⁶⁹ The Tribunal set out Mr. Halabi’s complaint at para 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.

⁷⁰ *Ibid* at paras 11-27.

⁷¹ See *BC Code*, *supra* note 4, s 27(1)(c); *Halabi*, *supra* note 62 at para 13 and *Bell v Dr. Sherk and others*, 2003 BCHRT 63 at paras 22-23 [*Bell*]. It was held in *Workers’ Compensation Appeal Tribunal v Hill*, 2011 BCCA 49 at para 27, 299 BCAC 129, that the “complainant must only show the evidence takes the case out of the realm of conjecture”.

⁷² See *Wickham and Wickham v Mesa Contemporary Folk Art*, 2004 BCHRT 134 at para 11 [*Wickham*] and *Bell*, *supra* note 71 at para 28.

⁷³ *Wickham*, *ibid*.

⁷⁴ *Ibid* at paras 11-12.

⁷⁵ The *BC Human Rights Tribunal Rules of Practice and Procedure* permit the Tribunal to provide the complainant with an opportunity to submit further or clarifying information before the application is filed (British

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.⁷⁶ 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.⁷⁷ 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 want to explore in greater detail through a hearing. This critique relates to the underlying purposes and policy goals of 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.⁷⁸ If they are able to use their powers in a way that effectively avoids their purpose, then this is an element of social and administrative justice that definitely requires attention.⁷⁹

Columbia, BC Human Rights Tribunal, *Rules of Practice and Procedure*, r 12 [BCHRT Rules]). However, Rule 2.2 of the BCHRT Rules also allows the Tribunal to waive or vary its rules "as it considers appropriate in the circumstances". Moreover, Rule 1 states that the purpose of the Rules is to "to facilitate the just and timely resolution of complaints". All of these elements of the BCHRT Rules 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 the credibility of his 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 para 25 [*Heilman*]).

⁷⁶ *Halabi*, *supra* note 62 at para 21.

⁷⁷ See the historical examination of the 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, 108–37.

⁷⁸ 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 *BC Code*, *supra* note 4, 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 *Code*, *supra* note 4, and in the Nova Scotia *Human Rights Act*, RSNS 1989, c 214, s 2.

⁷⁹ See also *Johnson v AC Taxi Ltd*, 2008 BCHRT 242 at paras 57, 95 [*Johnson*], in which the respondent taxi company argued that it should not have to pay for any additional medication for the aggravation of Mr.

Third, by finding that 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 transportation retaliation.⁸⁰ The Tribunal dealt with this issue in a cursory way, however, as it had already determined that there was a lack of essential medical evidence. As a result, the factual and legal questions relating to retaliation were not examined in detail and an opportunity was missed to provide guidance on this 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 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 (that he had been denied access to bus services to give 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 able-bodied public.

In sum, it is clear that the adjudication of one's transportation conflict case by a human rights tribunal may be thwarted by a number of actions 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. This may lead 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 also not be addressed and the time of persons with disabilities may not be empathetically considered.

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.

⁸⁰ See e.g. *Heilman*, *supra* note 75; *Basic v Yellow Cab Company*, 2007 BCHRT 408; *Wright v Coast Mountain Bus Company*, 2014 BCHRT 73 and *Baker v Coast Mountain Bus Company*, 2008 BCHRT 248.

In the next section, I will address how a different equality framework may serve to ameliorate the analysis of human rights adjudicators and bridge the gap between what human rights claimants seek as 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 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.

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 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 disproportionately negative impact for individuals with disabilities. The analysis in the previous part of this article showed ways in which the current anti-discrimination legal framework leaves manifold opportunities for this aspect of the voices 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.⁸¹ These barriers, which may be caused by architecture, the environment, and stigmatizing attitudes, to name a few, constitute the

⁸¹ On the social model of disability see, for example, Anita Silvers, "An Essay on Modeling: The Social Model of Disability" in D Christopher Ralston & Justin Ho, eds, *Philosophical Reflections on Disability* (New York: Springer, 2010) 19 at 19–36, [Silvers]. 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 & Mike Oliver, eds, *Disability Studies Today* (Cambridge, UK: Polity Press, 2002) 38 at 38–57; Paula E Berg, "Ill/Legal: Interrogating the Meaning and Function of the Category of Disability in Antidiscrimination Law" (1999) 18:1 Yale L & Pol'y Rev 1 and Tom Shakespeare, *Disability Rights and Wrongs* (New York: Routledge, 2006) at 9–28.

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.⁸²

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 effect viable legal and social change.

One tool that is often used to connect the social model of disability to equality is anti-discrimination legislation. In Canada and the United States, anti-discrimination 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.⁸³ 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.⁸⁴ Distributional equality therefore aims at redistributing socio-economic resources to less wealthy and more marginalized members of society.⁸⁵

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.⁸⁶ She provides the following examples of inequality due to misrecognition:

⁸² See Silvers, *supra* note 81.

⁸³ Nancy Fraser, "From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age" (1995) 1:212 *New Left Rev* 68, [Fraser, 1995] at 73–74. The most well recognized and influential work on this topic is Nancy Fraser & Axel Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange* (New York: Verso, 2003).

⁸⁴ Fraser, 1995, *supra* note 83 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 e.g. Ingrid Robeyns, "Is Nancy Fraser's Critique of Theories of Distributive Justice Justified?" (2003) 10:4 *Constellations* 538.

⁸⁵ Sandra Fredman, "Redistribution and Recognition: Reconciling Inequalities" (2007) 23:2 *SAJHR* 214 at 216 [Fredman].

⁸⁶ Fraser, 1995, *supra* note 83 at 71.

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).⁸⁷

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 anti-discrimination laws, designed to promote equality.⁸⁸ 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 human rights context than it is in the constitutional human rights context.

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 the 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 that the entities responsible for transportation invest the necessary time to ensure their safe transport. Identity recognition also plays a role in transportation conflict claims, and is 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 the human condition is to bring attention to experiences that we all may share through

⁸⁷ *Ibid.*

⁸⁸ Sujit Choudhry, "Distribution vs. Recognition: The Case of Anti-Discrimination Laws" (2001) 9:1 *Geo Mason L Rev* 145; Fredman, *supra* note 85; Claire Mummé, "The Ontario *Human Rights Code's* Distributive and Recognition Functions in the Workplace" (2014) 18 *CLEJLJ* 145.

life as human beings, such as raising children, the need to feel safe, the need to get to medical appointments and the need to organize one's time in an efficient manner. It is also to have acknowledged within legal analysis that the law should be used as a tool to support everyone, including people with disabilities, so that they can live through these experiences reasonably.

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 H Rioux.⁸⁹ Equality of well-being refers to devising means to ensure that all individuals have the support to exercise their fundamental rights.⁹⁰ Rioux suggests that equality of well-being is part of a discussion focused 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 practical reality, this means ensuring that the additional challenge(s) of 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 anti-discrimination 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.⁹¹ Unlike Fineman, I suggest that equality in the anti-discrimination analysis does not have to emphasize vulnerability and the negative connotations often associated with it.⁹² Instead, it should affirm the independence and empowerment that

⁸⁹ 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 Can JL & Jur 127 at 128 [Rioux].

⁹⁰ See *ibid* at 142–43. 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, 2006).

⁹¹ See Martha A Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition" (2008) 20:1 Yale JL & Feminism 1.

⁹² 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

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 idea stems from a research study on the experiences of persons with disabilities who consulted with government on the development of laws affecting them. In semi-structured interviews conducted with persons with disabilities and organizations dedicated to disability issues about the consultations in which they had been involved, the connecting power of universality emerged as a strong theme.⁹³ 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 non-disabled persons and often taken for granted.

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*⁹⁴ described a decisive moment for the committee, which had been having a very difficult time 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.⁹⁵

Similarly, an interviewee in the United States spoke to me about consulting with local government officials and representatives of an elevator company, including several lawyers, in order to prevent the 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.⁹⁶

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) 83 Wash Law Rev 513.

⁹³ Laverne Jacobs, *Combating Disability Discrimination by Regulation: A Comparative Study of Canadian and American Approaches* (University of Windsor, REB #14-077). The study is ongoing and involved interviews and observations in Canada and the United States. Participants in Canada were selected because they had participated in the AODA Transportation Standard Consultation 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.

⁹⁴ AODA *supra* note 3.

⁹⁵ Interview (17 June 2014) in Toronto, Ontario.

⁹⁶ Interview (8 July 2014) in Berkeley, California.

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 the final part of this article, 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”.⁹⁷ 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.⁹⁸

Generally, while the first two parts of the *prima facie* test are relatively easy to fulfill, much litigation and academic debate continue in an effort to establish the proper framework of analysis for the third part of the test. Indeed,

⁹⁷ See *Moore v British Columbia (Education)*, 2012 SCC 61 at para 33, 351 DLR (4th) 451 [Moore].

⁹⁸ 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: *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 at para 38, 176 DLR (4th) 1 [Meiorin]; *VIA Rail*, *supra* note 38 at para 130 and *Moore*, *ibid* at para 49. The discrimination analysis, first set out in an employment context by the Supreme Court of Canada in *Meiorin*, was brought into the realm of disability and services in *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 at para 20, 181 DLR (4th) 385 [Grismer], and consists of ascertaining that the defendant:

1. adopted the standard for a purpose or goal that is rationally connected to the function being performed;
2. adopted the standard in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and
3. [that] the standard is reasonably necessary to accomplish its purpose or goal, in the sense that the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship.

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”.⁹⁹ 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).¹⁰⁰

The universality of the human condition may be a valuable tool in establishing a connection between the protected characteristic and the adverse impact. In the case 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 (that of riding a bus with security) were understood as a universally common 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 his 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

⁹⁹ On this topic, see Jennifer Koshan, “New Developments on the Test for Discrimination Under Human Rights Legislation: Time for Rehab?” (21 August 2015) *ABlawg* (blog), online: <<http://ablawg.ca/2015/08/21/new-developments-on-the-test-for-discrimination-under-human-rights-legislation-time-for-rehab/>>.

¹⁰⁰ See *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l’Hôpital général de Montréal*, 2007 SCC 4, 277 DLR (4th) 577 and *Honda Canada Inc v Keays*, 2008 SCC 39, [2008] 2 SCR 362. 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, [2015] 2 SCR 789. See also the insightful discussion on this topic by Jennifer Koshan, *ibid.*

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, that this universal experience is one that the applicant with the disability would not have difficulty in obtaining, or that the experience would not have a disproportionate negative impact on that person. This leads to a greater sharing of the burden of 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 and would characterize litigation within 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 criticized,¹⁰¹ 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 used as a guiding principle that adjudicators take into account when determining whether an applicant's file should be dismissed as having no reasonable prospect of success. As discussed above, in deciding if there is a reasonable

¹⁰¹ See e.g. *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396.

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".¹⁰² 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 for reasonableness. In the same way that an adjudicator should consider at the *prima facie* test stage 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 the complainant with disabilities to achieve, this consideration could equally play a part in the discussions at the preliminary stages of determination.

The theory of the universality of the 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 the 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 adjudicating human rights at the domestic level in Canada.¹⁰³ It also conforms to 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. It goes almost without saying, however, 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.¹⁰⁴ 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.

¹⁰² Wickham, *supra* note 72 at para 11; see also Bell, *supra* note 71 at para 28.

¹⁰³ See *supra* note 78 and accompanying text.

¹⁰⁴ Grismer, *supra* note 98.

IV. 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 can be drawn from this set of reported decisions over the 40-year period: cases seeking transportation restructuring, cases seeking access to transportation in support of a broader family dynamic and cases of conflict 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 and it could be used more widely in disability discrimination matters. While the basis of this discussion has been a case study originating in Canada, I invite advocates and jurists in other jurisdictions to consider the potential of the universality of the human condition as a valuable tool for pursuing substantive equality for people with disabilities in their jurisdictions.