

Position Paper

Re: Whether the para-transit services provided by public transit services in the cities of Toronto, Hamilton, London, and Windsor are special programs under the Ontario *Human Rights Code*.

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Background

Public transit in cities across Ontario is fundamental to the ability of many people to participate meaningfully in the life of their communities. Public transportation is used to access employment, education, public and social services and community activities.

Equal access by persons with disabilities to public transportation is a right protected under the Ontario *Human Rights Code*¹ (“Code”). Equal access to transit services is not a reality for many citizens of the Province and despite its importance in our daily lives, barriers to public transit services remain.

Over the past years, the Ontario Human Rights Commission has received numerous complaints against transit providers in Ontario alleging that aspects of their respective transit service, including para-transit service, infringe the right to equal treatment with respect to services on the ground of disability. Transit providers frequently take the position that the para-transit service operating in their respective community is a “special program” under section 14 of the *Code*.

In 2002, the Commission settled a series of complaints with the Toronto Transit Commission (“TTC”) regarding its para-transit operation, Wheel-Trans, and fees charged to Wheel-Trans users.² In response to the complaints, the TTC claimed that Wheel-Trans was a “special program” within the meaning of section 14 of the *Code*. Most recently, in December 2004, the Commission settled a series of complaints with the City of Hamilton, regarding its para-transit service, DARTS (Disabled and Aged Regional Transit System).³ As in the TTC complaints, the City of Hamilton asserted a position that its Accessible Transportation Services Program, which included the DARTS service, was a “special program” within the meaning of section 14 of the *Code*. Neither of these settlements addressed the issue of whether the respective para-transit services were, or were not, “special programs”.

In recent years, the Commission has undertaken a number of significant initiatives to promote public discussion and facilitate improvements in accessible public transportation. In February 2001, the Commission released a Discussion Paper on Accessible Transit services in Ontario. The Paper was developed to promote public discussion on the accessibility of local mass passenger transportation in Ontario. The Discussion Paper was followed by a period of public consultation with stakeholders, including transit providers, disability consumer and advocacy groups, seniors' organizations, labour organizations and numerous individuals. These consultations led to the development of the Commission's Consultation Report "Human Rights and Public Transit Services in Ontario", released in April 2002, which set out the Commission's theoretical framework for its work in the area of accessible public transportation.

The position taken by the Commission in its Consultation Report is that para-transit services are a form of accommodation that can be required to meet the duty to accommodate under the *Code*:

Where individuals are unable, because of their disabilities or because of the non-inclusive design of many older transit systems, to access conventional transit systems, transit service providers have a duty to accommodate these needs, up to the point of undue hardship. While some transit providers argue that para-transit is a type of voluntary special program under human rights law, it is the position of the Commission that para-transit is a form of accommodation that can be required to meet the duty of accommodate under the *Code*.⁴

It became apparent to the Commission from its public transit consultations that a discrepancy exists with many transit providers in the interpretation and application of the duty to accommodate under the *Code* and the provision of para-transit services. The Commission believes that there is an important public interest to be served in dealing with this issue directly.

Under section 14 of the *Code*, the Commission has the authority to inquire into a program, on its own initiative, and has the discretion to declare, by order, that the

program does, or does not, satisfy the requirements of the special program provision in section 14(1) of the *Code*.

Hence, the Commission has authorized its staff to inquire into the following “programs”:

- In the City of Toronto, the para-transit service “Wheel-Trans”;
- In the City of Hamilton, the para-transit service “DARTS” (Disabled and Aged Regional Transit System);
- In the City of Windsor, the para-transit service “Handi-Transit”;
- In the City of London, the para-transit service provided by the London Community Transportation Brokerage.

As part of the inquiry, this position paper is being circulated to solicit submissions from stakeholders, with a view to assisting the Commission in determining whether to exercise its declaratory power under section 14 of the *Code* regarding the aforementioned programs.

Section 14

Section 14 of the *Code* provides as follows:

14.(1) A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.

- (2) The Commission may,
- (a) upon its own initiative;
 - (b) upon application by a person seeking to implement a special program under the protection of subsection (1); or
 - (c) upon a complaint in respect of which the protection of subsection (1) is claimed,
- inquire into the special program and, in the discretion of the Commission, may by order declare,
- (d) that the special program, as defined in the order, does not satisfy the requirements of subsection (1); or

(e) that the special program as defined in the order, with such modifications, if any, as the Commission considers advisable, satisfies the requirements of subsection (1).

(3) A person aggrieved by the making of an order under subsection (2) may request the Commission to reconsider its order and section 37, with necessary modifications, applies.

(4) Subsection (1) does not apply to a special program where an order is made under clause (2)(d) or where an order is made under clause (2)(e) with modifications of the special program that are not implemented.

(5) Subsection (2) does not apply to a special program implemented by the Crown or an agency of the Crown.

The para-transit programs

According to statistics compiled by the Canadian Urban Transit Association (CUTA) for 2003, there are 74 para-transit programs providing public transit services in Ontario to almost ten million people.⁵ The nature of para-transit programs vary widely across the province. The service can be provided through a number of different institutions. In some communities, services are provided directly by a municipality or by a municipal transit commission. In others, the para-transit services are contracted out to specialized providers. For each program, eligibility requirements vary, as do fare structures, and booking requirements.

The Commission, on its own initiative, has authorized its staff to inquire, under section 14(2) of the *Code*, into the para-transit services provided in four Ontario communities - Toronto, Hamilton, Windsor and London - to determine whether it will exercise its declaratory power under section 14(2) regarding the “special program” status of these services.

It is important to consider the context in which each of these para-transit services operate, specifically in the context of the accessibility of the broader public transit services provided in each respective community. What follows below is a brief

description of the four para-transit services as well a description of the accessibility of the “conventional” transit services in each of these communities.

City of Toronto

- Transit Service-Provider: Toronto Transit Commission
- Para-Transit Service: Wheel-Trans

Background

The Toronto Transit Commission (“TTC”) provides public transit services for the City of Toronto. The TTC was created on January 1, 1954 by the Municipality of Metropolitan Toronto Act.⁶ In 1997, the municipalities within Metropolitan Toronto were amalgamated by the provincial government to form the City of Toronto. Today, the TTC is regulated by the City of Toronto Act, 1997 (No.2).⁷

Conventional Transit Service

The TTC operates a transit system using buses, subways and streetcars on fixed routes. This is referred to as the “conventional system”. The conventional bus system currently consists of 138 fixed bus routes, of which 39 routes are currently designated as “accessible” in the TTC regular-route system, with accessible buses in the TTC fleet assigned to these routes. The TTC operates an active bus fleet of approximately 1436 buses.⁸ Of this fleet, approximately 237 buses are lift-equipped and approximately 101 buses are accessible low-floor buses. The TTC’s current policy is that all new bus purchases will be accessible low-floor buses and a target of year 2012 is set for having the bus fleet 100% accessible.⁹ The conventional subway/RT (rapid transit) system consist of three subway lines (Yonge/University, Bloor/Danforth and Sheppard) and one rapid transit line (Scarborough RT). Of the 69 stops on these lines, only 20 stops were accessible as of 2003.¹⁰ About 50% of the subway cars are accessible. The TTC’s current fleet of streetcars consists of 248 streetcars

operating on 11 routes. Neither of the two streetcar designs employed in the TTC's fleet have low-floor accessibility. The TTC has determined that lift equipment cannot be installed on the current streetcar fleet and that making the streetcar network accessible is problematic.¹¹

Para-Transit Service – Wheel Trans

In 1973, a pilot project was initiated by the Toronto Transit Commission, at the request of the City of Metropolitan Toronto, to serve the transportation needs of persons unable to board conventional public transit due to physical mobility impairments. This early pilot project, jointly funded by the Province of Ontario and the Municipality of Metropolitan Toronto, involved 48 registrants and 7 mini-vans and operated on weekdays, during peak hours, for “work” trips only. The service was expanded over the years to include a greater number of applicants and increased hours of service. The success of the initial pilot project resulted in permanent funding for the service by 1979 from the province and from Metro Toronto on a shared basis. The TTC's role in the service to this point was as an administrative overseer, however, as problems arose with the quality of the service provided by independent contractors, the TTC was urged, by advocacy groups and the general public, to take control over all aspects of the para-transit service, Wheel-Trans, which it did as of January 1, 1989.¹²

The Wheel-Trans service provides door-to-door service for persons who have restricted physical mobility. Registrants make bookings through an automated phone line, TTY or by contacting staff. In 2003, Wheel-Trans provided over 1.5 million trips to 31,126 registrants.¹³

Eligibility for the Wheel-Trans service is not based on particular disabilities, general health or income but is based upon an individual's level of physical functional mobility in the home, within the area immediately surrounding the home, in the community at large, as well as the permanency of the disability.¹⁴

Applicants must attend an in-person interview and no letter is required from a medical doctor.¹⁵ An applicant can appeal the decision of the TTC to deny registration for Wheel Trans service. Persons may apply for temporary or permanent registration. To apply for Wheel-Trans service, there is no registration fee.¹⁶

There are 145 accessible buses used by the Wheel-Trans program. There are also 73 accessible taxis, which operate under contract with the TTC.¹⁷ The Wheel-Trans fleet will be expanded by 12 buses by 2011.¹⁸

Wheel-trans also services four community bus routes, operated on a fixed route and provide regularly scheduled accessible service. Smaller buses are used so that they can enter the driveways of facilities, such as nursing homes and facilities for seniors and persons with disabilities. Registrants do not have to book in advance to use the community bus.

Service is provided seven days of the week. On weekdays, Wheel Trans operates from 6 am to 1 am. On weekends and holidays, Wheel-Trans operates from 7 a.m. to 1 a.m..

Wheel Trans operates within the City of Toronto and provides service in an area equal to that serviced by conventional transit routes. Also, Wheel-Trans provides connections to services in adjacent municipalities and the airport,¹⁹ similar to the conventional service.

City of Hamilton

- Transit Service-Provider: City of Hamilton
- Para-Transit Service: DARTS

Background

The Hamilton Street Railway Company (HSR) operated streetcars, first horse-drawn, then electric-powered in Hamilton commencing in 1874. In the mid-20's, motor buses were used on routes, and the last streetcar was retired in 1951. In 1960, the City of Hamilton purchased the HSR and the Hamilton Transit Commission was established to operate this organization. In 1977, the company came under the jurisdiction of the Regional Municipality of Hamilton-Wentworth, and now the amalgamated City of Hamilton.

Conventional Transit Service

The City of Hamilton provides public transit service by means of fixed route transit service through the Hamilton Street Railway Company ("HSR"). Planning and delivery of the transit services are the responsibility of the Transit Division of the City, a division of the Transportation, Operations and Environment Department.

The City operates 28 fixed public transit bus routes with a total bus fleet of 198 buses.²⁰ Of the total fleet, 114 buses are accessible low-floor buses.²¹ These buses operate on several, but not all, of the routes in Hamilton. On weekdays and Saturdays, certain routes only operate the low-floor buses at certain times of the day. On Sundays, all routes operate the low-floor buses.²²

Para-Transit Service – DARTS (Disabled and Aged Regional Transit System)

In 1991, the Transportation Department of the then Regional Municipality of Hamilton-Wentworth initiated a study of transportation services for people with disabilities in the Hamilton region in order to develop a plan for addressing the transportation needs of persons with mobility-impairing disabilities.

The City of Hamilton now provides accessible transportation services to persons with disabilities through its Accessible Transportation Services (ATS) program, administered within the Transit Division of the City. The program is responsible for eligibility, registration, orientation, database management, taxi-scrip distribution and management of all programs pertaining to public transit for persons with disabilities in the City.

One component of the ATS program is the para-transit service, DARTS. DARTS is a private not-for-profit corporation. The City contracts with DARTS to provide a door-to-door, wheelchair accessible van service. The City of Hamilton (then the Regional Municipality of Hamilton-Wentworth) entered into a contract in December 1995, pursuant to which the Region granted DARTS the right to provide, maintain and operate a para-transit service in the City (then Region) for the conveyance of persons with disabilities. The contract was initially for a five-year term, but has been extended since then.

DARTS is available to persons with disabilities who are unable to access regular transit and require the assistance of a personal mobility device such as a wheelchair, scooter or walker.²³ As of July 1 2004, new registrations for DARTS are limited to: persons with a disability who are unable to use conventional transit due to the nature of their disability, and who use a wheelchair, scooter or walker, or who require kidney dialysis, or who are diagnosed with Alzheimer's.²⁴

There were 8,698 registrants of the ATS program in 2003.²⁵ ATS (Accessible Transit Services) is responsible for managing the registration process. Assessment of applications and registration for accessible transportation services is carried out by the ATS. The applicant's physician must sign applications. There is also an assessment interview. Effective July 1, 2004, the annual ATS program fee of \$15.00 was eliminated.²⁶ The City retains responsibility, through the ATS program for registering persons for the DARTS service. The City also sets the fares for DARTS and is required to purchase the

vehicles and equipment required by DARTS. DARTS is required to maintain a booking and dispatching function and to pay all expenses for providing, operating and maintaining the service.

DARTS leases over 60 accessible buses from the City of Hamilton ²⁷ Service is provided from one accessible building door entrance to another accessible building door entrance (accessible = no more than one step"). Reservations can be made no earlier than 7 days in advance. Depending on the availability of rides, DARTS will also take reservations on the day of service.

DARTS passengers may purchase a book of ten prepaid tickets for \$21. (This is compared to users of the conventional systems purchases 5 tickets for \$8.50.) DARTS operates from 7 a.m. to 11 p.m. on weekdays, from 8 a.m. to 11 p.m. on weekends and from 9:30 am to 11 p.m. on holidays.

The DARTS service area includes all addresses within the amalgamated City boundaries. It services an area greater than the transit area serviced by the HSR.

City of Windsor

- Transit Service-Provider: Transit Commission (Transit Windsor)
- Para-Transit Service: Handi-Transit

Background

The Sandwich Windsor and Amherstburg Railway system began with its first street car service in Windsor in 1886. The first trolley bus was utilized for public transportation in 1922. In 1977, responsibility for the Railway was transferred to

the City of Windsor and renamed “Transit Windsor”. This service is currently provided by a Transit Commission.

Conventional Transit Service

Transit Windsor provides conventional public transit within the municipal boundaries of the City of Windsor. Only some fixed routes on the conventional system are serviced by low floor buses. As of 2003, 6 of 15 fixed bus routes were accessible.²⁸ Only low floor buses are used on accessible routes at designated hours (which are advertised on the website)²⁹. As of 2003, 23 of a total fleet of 96 buses were low-floor, representing approximately 24% of the fleet.³⁰ There is a 10 year fleet replacement plan in place to achieve a fleet of 100% accessible low-floor buses.

Para-Transit Service – Handi Transit

Handi- Transit, a private, non-profit organization has a contract with the City of Windsor to provide para-transit services in the City of Windsor. Handi-Transit is a pre-booked, curb-to-curb transportation service for persons with physical disabilities who are unable to use the conventional bus system. The operating funding sources for Handi-Transit are passenger and other operating revenue and a grant from the City of Windsor.

There is an application process, which includes an application form that must be signed by a physician. Persons may register temporarily (6 months) or permanently – depending on the advice of her physician. There is no cost to register.

Persons with disabilities other than physical disabilities (i.e. Alzheimer’s or Downs syndrome) may also access Handi-Transit. Registration is not restricted

to persons with physical disabilities. They do however need to get the application form signed by their physicians.

There were 2,190 registrants of Handi-Transit in 2003³¹.

Handi-Transit has 12 – 15 mini- buses.³² Bookings are available up to three weeks in advance. Same day bookings may also be made. Bookings, however, are not guaranteed: Priorities of bookings are given in the following order: employment, education, medical, persons business, leisure. The cost of individual tickets is \$2.30 (except to tickets to neighbouring LaSalle which are \$5.25)

Handi-Transit serves the city of Windsor and also the neighbouring Town of LaSalle. Conventional transit service operates only within the boundaries of the City of Windsor.

City of London

- Transit Service-Provider: Transit Commission – London Transit
- Para-Transit Service: London Community Transportation

Background

The London Transit Commission was originally incorporated by the Legislature in 1873 as the “London Street Railway Company”. The first streetcar service commenced in 1875. In 1931, the City of London bought the London Street Railway Company and formed the London Transportation Commission, which was later renamed as the London Transit Commission. The first scheduled bus operated in the City in 1926. The last streetcar ran in 1940.

Conventional Transit Service

There are a total of 36 fixed bus routes operated by London Transit. As of September 2004, 18 of these routes were designated accessible.³³ Of the 10 mainline downtown buses routes, 6 are designated as low floor bus accessible. All 10 downtown/ suburban routes are accessible.³⁴ 48% of the bus fleet was accessible in 2003.³⁵ By December 2004, it is projected that 104 of the 178 buses will be accessible low-floor buses.³⁶

Para-Transit Service

Responsibility for public para-transit service used to rest with the City of London. At that time, private contractors provided the service for the City. But in 1997, responsibility for provision of the para-transit service was transferred to the London Transit Commission. London Transit services encompasses a range of service delivery options designed to meet the range of needs of the citizens of London who have a disability which prevents them, on a regular basis, from being able to use London's regular, fixed route transit service.³⁷ These services are organized through the London Community Transportation Brokerage and include a community bus, trip planning services to assist persons with disabilities to find accessible routes on the fixed route system, medical shuttles and para-transit service.

The Para-Transit program is a shared ride door-to-door service. London Transit has a contract with a brokerage operator for the provision of drivers and accessible vans. All other functions of the para-transit service, including registration, booking and dispatching is handled through London Transit.

In order to apply for services, an applicant must obtain a registration form from London Community Transportation Brokerage directly. A health care

professional must complete part of the application form. Effective January 1, 2004, the \$30 3-year registration fee for the specialized service was eliminated.³⁸

Registrants are able to book trips three days in advance. Trips, with the exception of subscription trips, are awarded on a first come first serve basis.³⁹ Trips, however, are not guaranteed.⁴⁰ Trips on the Para-Transit system cost the same as conventional transit (\$2.18 per trip). Companions must each pay the same fare as the customer. Drivers will not assist with carrying parcels. (Although amendments were made to this policy in July 2004.⁴¹ The program operates 21 vehicles.⁴²

Excessive late cancellations or no-shows could result in suspension of an individual's registration.⁴³ There is an appeal process effective July 2004.⁴⁴

The Para-Transit system operates on weekdays from 7 a.m. to 11:30 p.m., and on weekends and holidays from 8:30 a.m. to 11:30 p.m. The Para-Transit service operates within the City of London boundaries (as defined in 1998).⁴⁵

In 2004, there were 1,850 registrants for the shared ride, door-to-door service.

London Transit's Para-Transit Program services the entire area of the City of London, which includes, since 1997, outlying communities which were annexed to the City. The conventional transit service has not extended to provide service to these outlying areas.

The issues

- Does the provision of para-transit service by the TTC, through its Wheel-Trans operations, meet the requirements of a "special program" within the meaning of section 14(1) of the *Code*?
- Does the provision of para-transit service by the City of Hamilton, through the para-transit organization DARTS, constitute a "special program" within the meaning of section 14(1) of the *Code*?
- Does the provision of para-transit service by the Windsor Transit Commission, through the para-transit organization Handi-Transit,

constitute a “special program” within the meaning of section 14(1) of the *Code*?

- Does the provision of a para-transit service by the London Transit Commission, through the London Community Transportation Brokerage, constitute a “special program” within the meaning of section 14(1) of the *Code*?
- Should the Commission exercise its declaratory authority under section 14(2) of the *Code* as against any or all of the aforementioned para-transit services?

Analytical framework

A. General principles regarding the interpretation of human rights legislation

In considering the interpretation and application of section 14(1) of the *Code* to the para-transit services in question, it is important to articulate the principles which govern how human rights legislation ought to be interpreted.

A human rights code is not like an ordinary law. It is a fundamental law which declares public policy.⁴⁶ Because a human rights code is not an ordinary statute, rules of statutory interpretation which advocate a strict grammatical construction of the words are not the proper approach to take in interpreting its provisions; focusing on the limited words of the section itself would ignore the dominant purpose of human rights legislation.⁴⁷ A human rights code is remedial legislation and is to be given such interpretation as will best ensure its objects are attained.⁴⁸

B. Equality in Provision of Services

The *Code* provides that “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, age, marital status, same-sex partnership status, family status or disability.”⁴⁹ In order to establish a *prima facie* case of discrimination a complainant must show that he or she has been subjected to differential treatment in services, goods or

facilities based at least in part on one of the listed protected grounds. In the disability context, differential treatment can arise when there is inequality of access to a service, good or facility.

C. *The Duty to Accommodate*

Accommodation is an integral part of the right to equal treatment guaranteed in the *Code*. Accommodation refers to what is required in the circumstances to avoid discrimination and achieve equality.⁵⁰ There is no particular formula or standard that must be employed when accommodating persons with disabilities, however there are certain principles that serve to guide the process of accommodation.

First, the duty to accommodate persons with disabilities requires that accommodation must be provided in a manner that most respects the dignity of the person, if to do so would not create undue hardship. Second, individualization is the essence of accommodating persons with disabilities, hence, there is no set formula for accommodation. Third, the goal of accommodation is to allow for the integration and full participation of persons with disabilities into our communities. To achieve these goals, those governed by human rights legislation (service-providers) are required in all cases to accommodate the characteristics of affected groups within their standards and designs.⁵¹ In addition, existing barriers must be removed. Finally, differential treatment or a modified service may be required in order to provide equal access where inclusive designs and removal of existing barriers do not allow for full participation.⁵²

Where *prima facie* discrimination has been established, the service provider can respond that it is accommodating the needs of people with disabilities to the point of undue hardship, pursuant to sections 11 and 17 of the *Code*. In 1988, the *Code* was amended to incorporate this concept of accommodation short of undue hardship. Prior to 1988, a respondent could escape liability if the only reason for the alleged liability was lack of access or “lack of amenities” for people

with disabilities.⁵³ The current legislative regime imposed the duty to accommodate on all service providers in Ontario as of April 1988.

The content of the duty to accommodate was described by the Supreme Court of Canada in *Central Okanagan School District No. 23. v. Renaud*⁵⁴ as follows:

... More than mere negligible effort is required to satisfy the duty to accommodate. The use of the term "undue" infers that some hardship is acceptable; it is only "undue" hardship that satisfies this test. The extent to which the discriminator must go to accommodate is limited by the words "reasonable" and "short of undue hardship". These are not independent criteria but are alternate ways of expressing the same concept. What constitutes reasonable measures is a question of fact and will vary with the circumstances of the case.

The Supreme Court in *Grismer*⁵⁵ and *Meiorin*⁵⁶ reinforced this concept. In *Grismer*, the Court confirmed that "those who provide services subject to the *Human Rights Code* must adopt standards that accommodate people with disabilities where this can be done without sacrificing their legitimate objectives and without incurring undue hardship."⁵⁷

The first duty is to design systems to be as inclusive as possible, following the principles of universal design. No new barriers should be created, and any existing barriers should be removed progressively over time. Some barriers are more complex than others. Therefore, easier barriers should be removed first, and more complex or expansive barrier-removal solutions can be phased in. Although a system may never reach full inclusiveness, the duty is to maximize inclusiveness to the highest possible extent. Any remaining unmet need must be accommodated short of undue hardship.

D. *Special Programs*

Section 14 of the *Code* allows special programs to be implemented that might otherwise be considered to be discriminatory under the *Code*. Section 14(1) defines a special program as a program that is:

- designed to relieve hardship or economic disadvantage; or
- designed to assist disadvantaged persons or groups to achieve equal opportunity; or
- likely to contribute to the elimination on the infringement of rights protected under the Code.

The implementation of a special program can assist groups of people who historically experience discrimination, economic hardship and disadvantage by putting into place measures that respond to the particular needs of these groups which helps to reduce discrimination. These “programs” are protected by section 14.

In evaluating whether programs can be protected from review under the *Code*, the dual purpose of section 14(1) – protection of affirmative action programs and the promotion of substantive equality - must be borne in mind.⁵⁸

i. Protection of Affirmative Action Programs

Section 14(1) is linked explicitly to the notion of protecting from review under the equality provisions contained in Part I of the *Code* affirmative action programs challenged on the basis of formal equality. Hansard debates demonstrate this aim of the Legislature:

Provision is made to exempt affirmative action plans or programs legitimately designed to benefit particular classes of persons. This is in response to the view expressed by many special interest groups that special programs to help their members achieve equal opportunity should be allowed to operate with the minimum amount of difficulty.⁵⁹

Members of advantaged groups cannot, therefore, use the *Code* to strike down special programs from which they are excluded.

ii. Promoting Substantive Equality

The second purpose of section 14(1) of the *Code* is to promote substantive equality.⁶⁰ The purpose of section 14(1) is not simply to exempt or protect affirmative action programs from challenge. It is also an interpretive aid that clarifies the full meaning of equal rights promoting substantive equality. Thus, section 14(1) must not be interpreted and applied in a manner, so as to prevent a program from review, when to do so would permit substantive equality to be undermined.

Special programs must be designed and must operate “so that restrictions within [the] program are rationally connected to the program. Otherwise, the provider of the program will be promoting the very inequality and unfairness it seeks to alleviate.”⁶¹ Restrictions in the program cannot be arbitrary, and indeed must be demonstrably related to the goal of the program. In other words, special programs must not include eligibility restrictions that unreasonably restrict who can benefit from them.

Application in the transit context

Applying the principles articulated above, in the context of the public transit services currently provided in the 4 identified communities, it is the position of staff of the Commission that the para-transit services in these communities are not special programs within the meaning of section 14(1) of the *Code*. Rather, these services are measures provided pursuant to the duty to accommodate under the *Code*. A special program, in the view of Commission staff, is one that is “extra”, or in addition to, that which is required under the duty to accommodate. This conclusion is based on the following analysis:

Most (if not all) accommodations provided under the duty to accommodate will have the effect of relieving hardship or economic disadvantage, assisting

disadvantaged groups, or contributing to the elimination of discrimination. Section 14(1) of the *Code*, permits discrimination in the provision of services if a program has one or more of these objects, and it could be said that the para-transit services in Toronto, London, Windsor and Hamilton meet one, if not all, of these objects. However, special programs and the duty to accommodate each carry different implications for service providers. A service provider has an *obligation* to ensure it is providing its service in a non-discriminatory manner, and has a *duty* to provide accommodation, short of undue hardship. Special programs, on the other hand, are *voluntary*, not obligatory, under section 14.

If a program appears to meet the description of a special program, as in the case of the four para-transit services being considered, it must be determined whether the program is in fact a means of meeting the duty to accommodate. If the program is being provided as an accommodation measure, it cannot also be a voluntary special program exempt from review by the operation of section 14(1). In the context of each of the four communities where full accessibility to public transit services is not a reality, to hold otherwise would circumvent the purpose of the *Code* and enfeeble its proper impact by diluting the duty to accommodate standard.

Even if a program started as a form of affirmative action, the legislative enactment of the duty to accommodate in 1988 may have changed the legal characterization of the program. This would be the case if a service provider, before 1988, was engaged in running a “parallel” service for people with disabilities without an explicit statutory obligation to do so.

In this way, it can be seen that a special program under the *Code* is not a substitute for accommodation. The duty to accommodate is not voluntary or temporary, but is a permanent and ongoing obligation under sections 1, 11 and 17 of the *Code*. The duty applies to all service providers in Ontario. Therefore, the first question that must be asked when assessing an alleged special program

is whether the program's provider has an existing duty to accommodate under the *Code*. If so, the inquiry turns to whether the provider is accommodating to the point of undue hardship. Only after the duty to accommodate inquiry has been exhausted does the special program analysis begin.

This interpretation ensures internal coherence in the *Code*, in that it provides for a robust application of the duty to accommodate before the special program defence can be invoked. It also demonstrates that a special program cannot be implemented where there is an existing legal duty to take the steps that the proposed special program would institute. Where a program goes beyond what the legal duty to accommodate would require, then that "extra" portion would likely qualify as a special program that is optional, but not mandatory, under the *Code*.

The TTC, London Transit, Windsor Transit and the City of Hamilton have the authority to provide public transit services in each of their respective communities. They do so by offering public transportation in the form of buses travelling on fixed street routes, and in the case of the TTC, by subways and streetcars on fixed routes (also referred to as "conventional transit systems"). The conventional transit systems in each of the four communities were not initially designed to be accessible to people with various disabilities, most particularly people with mobility disabilities who require the use of wheelchairs, scooters, walkers and other assistive devices. As such, persons with disabilities cannot readily access the public transit services provided in the communities as compared to the able-bodied. As public transit is a "service" under the *Code*, these transit service-providers have an obligation under the *Code* to ensure that their services are provided in a manner free from discrimination, including discrimination based on disability. This obligation imposes upon the transit providers a duty to accommodate the needs of persons with disabilities to access public transportation, short of undue hardship.

Accommodation measures in the transit context would include planning for accessibility and inclusive design on a go-forward basis, as well as removing barriers that currently exist in the conventional transit system. Each of the four transit-providers are working towards increased accessibility of their service, however, full accessibility has not yet been achieved by any of these transit-providers. The needs of persons with disabilities that are not being met by the current level of accessibility of the conventional transit systems in Toronto, London, Windsor and Hamilton are being met somewhat by the provision of para-transit service in these communities. A transit provider that is progressing towards full accessibility of its service will require a spectrum of accommodations. A conventional system that is becoming increasingly accessible, along with accessible taxis, community bus service, and para-transit service, together constitute a spectrum of accommodations required to satisfy the duty to accommodate under the legislation. In this context, para-transit service is an alternative or next-best form of accommodation for people who are unable to use those parts of the conventional transit system which have yet to be, or might never be, rendered fully accessible.

In Windsor, London and Hamilton, the para-transit services in these communities provide service in an area greater than that serviced by the conventional transit system. In Windsor, Handi-Transit provides service to the neighbouring Town of LaSalle, while Transit Windsor does not service this community. In London, following the annexation of smaller neighbouring communities into the City of London in 1997, the para-transit service travels to destinations in these outlying communities, whereas London Transit does not service these areas. In Hamilton, the area serviced by DARTS is significantly larger than the area serviced by conventional transit. In these cases, this “extra” aspect of the respective para-transit services may qualify as a special program and not part of the duty to accommodate. However, a strong argument can be made that this aspect of the respective services also qualifies as part of the duty to accommodate. Persons with disabilities may not have the ability, as does an

able-bodied person, to walk or drive, or otherwise access with ease, the outlying points of service on the conventional transit system. Further, it must be recognized that the fact that the para-transit services in Hamilton, London and Windsor operate to and from destinations outside the area serviced by conventional transit routes is as a result of the door-to-door nature of para-transit service. Thus, this “extra” ought not to be hived off as a “special program”.

Conclusion

Based on the foregoing analysis, the issues set out in section 4 of this paper can be answered as follows:

- Does the provision of para-transit service by the TTC, through its Wheel-Trans operations, meet the requirements of a “special program” within the meaning of section 14(1) of the *Code*? **No.**
- Does the provision of para-transit service by the City of Hamilton, through the para-transit organization DARTS, constitute a “special program” within the meaning of section 14(1) of the *Code*? **No.**
- Does the provision of para-transit service by the Windsor Transit Commission, through the para-transit organization Handi-Transit, constitute a “special program” within the meaning of section 14(1) of the *Code*? **No.**
- Does the provision of a para-transit service by the London Transit Commission, through the London Community Transportation Brokerage, constitute a “special program” within the meaning of section 14(1) of the *Code*? **No.**
- Should the Commission exercise its declaratory authority under section 14(2) of the *Code* as against any or all of the aforementioned para-transit services? **Yes, with respect to each of the aforementioned para-transit services.**

Endnotes

¹ R.S.O. 1990, c. H.19, as amended

² *Odell et al. v. Toronto Transit Commission*

³ *Neusch and Fox v. City of Hamilton et al.*

⁴ OHRC Consultation Report “Human Rights and Public Transit Services in Ontario” (2002) at 17

⁵ CUTA Ontario Specialized Transit Services 2003 Fact Book

⁶ S.O. 1953, c. 73. Section 106 of the Act, specified the mandate and powers of the Commission:

s. 106 On or after the 1st day of January 1954, the Commission,

Shall consolidate and co-ordinate all forms of local passenger transportation within the Metropolitan Area, with the exception of steam railways and taxis, and shall plan for the future development of such transportation so as to serve best the inhabitants of the Metropolitan Area;

Shall have and may exercise, with respect to the entire Metropolitan Area, all the powers, rights, authorities and privileges with respect to the construction, maintenance, operation, extension, alteration, repair, control and management of local passenger transportation which the Former Commission [Toronto Transportation Commission] has with respect to any part of the Metropolitan Area on the 31st day of December 1953;

Shall have and may exercise all the powers, rights, authorities and privileges with respect to the construction, maintenance, operation, extension, alteration, repair, control and management of local transportation systems heretofore or hereafter conferred upon or exercisable by the council or corporation of any area municipality, and such power, rights, authorities and privileges shall not be exercised by any area municipality or its council or by the Metropolitan Corporation or the Metropolitan Council

⁷ S.O. 1997, c. 2. Section 25 of the Act continues the TTC’s existence:

s. 25 The Commission known as the Toronto Transit Commission in English and Commission de Transport de Toronto is continued.

⁸ TTC Accessible Transit Services Plan (2003) at 17

⁹ TTC Accessible Transit Services Plan (Status Report, September 2004)

¹⁰ TTC Accessible Transit Services Plan (2003) at 24

¹¹ TTC Accessible Transit Services Plan (2003) at 29

¹² “A Brief History of Wheel-Trans Service” – Report of the TTC Task Force on Accessible Transit, Appendix 1.

¹³ TTC Operating Statistics (2003)

¹⁴ http://www.city.toronto.on.ca/ttc/pdf/wheeltrans_info_feb2004.pdf

¹⁵ TTC, *Accessible Transit Services Plan* (2003), at 9

¹⁶ see *Odell et al. v. Toronto Transit Commission* (Minutes of Settlement, May 2002)

¹⁷ TTC, *Accessible Transit Services Plan* (2003), at 9

¹⁸ TTC, *Accessible Transit Services Plan* (2003), at E-2

¹⁹ TTC, *Annual Report 2003* at

²⁰ CUTA Ontario Urban Transit Fact Book (2003 Operating Data)

²¹ CUTA Ontario Urban Transit Fact Book (2003 Operating Data)

²² <http://www.city.hamilton.on.ca/Living-Here/Transit/Accessible-Transportation/introducingalf.asp>

²³ www.cityhamilton.on.ca/printver.asp

²⁴ [http://www.city.hamilton.on.ca/Living-Here/Transit/Accessible-](http://www.city.hamilton.on.ca/Living-Here/Transit/Accessible-Transportation/DARTS/registration.asp)

[Transportation/DARTS/registration.asp](http://www.city.hamilton.on.ca/Living-Here/Transit/Accessible-Transportation/DARTS/registration.asp)

²⁵ *CUTA Fact Book*, *supra* at 25

²⁶ per *Neusch and Fox v. City of Hamilton et al.* (Minutes of Settlement, December 2003)

- ²⁷ *The State of DARTS: The 2004 DARTS Para-Transit Service Annual Report* (2004) online: <http://www.city.hamilton.on.ca/Living-Here/Transit/Accessible-Transportation/DARTS/docs/AnnualReport2004.pdf> at 20
- ²⁸ CUTA Ontario Urban Transit Fact Book (2003 Operating Data)
- ²⁹ “Accessible Transit Routes Using Low Floor Bus Technology” last accessed 29 September 2004 [www.citywindsor.ca/transitwindsor/lowfloor.asp]
- ³⁰ *CUTA operating data* at 100
- ³¹ *CUTA Fact Book, supra* at 71
- ³² *CUTA Fact Book, supra* at 71
- ³³ London Transit, *Accessibility Plan - 2004 Update* (September 2004) at 4
- ³⁴ London Transit, *Accessibility Plan - 2004 Update* (September 2004) at 2
- ³⁵ CUTA Operating Data at 46
- ³⁶ London Transit, *Accessibility Plan - 2004 Update* (September 2004) at 2
- ³⁷ www.londontransit.ca/paraFAQ.htm
- ³⁸ London Transit, *Accessibility Plan - 2004 Update* (September 2004) at 5
- ³⁹ London Transit, *Accessibility Plan - 2004 Update* (September 2004) at 3
- ⁴⁰ www.londontransit.ca/paraFAQ.htm
- ⁴¹ London Transit, *Accessibility Plan - 2004 Update* (September 2004) at 6
- ⁴² London Transit, *Accessibility Plan - 2004 Update* (September 2004) at 3
- ⁴³ www.londontransit.ca/paraFAQ.htm
- ⁴⁴ London Transit, *Accessibility Plan - 2004 Update* (September 2004) at 6
- ⁴⁵ London Transit, *Accessibility Plan - 2004 Update* (September 2004) at 6
- ⁴⁶ *Insurance Corp. of B.C. v. Heerspink* [1982] 2 S.C.R. 145 at 158
- ⁴⁷ *O'Malley v. Simpsons-Sears Ltd.* [1985] 2 S.C.R. 536 at 546
- ⁴⁸ *CNR v. Canadian Human Rights Commission (“Action Travail”)* [1987] 1 S.C.R. 1114 at 1133
- ⁴⁹ Code, s. 1
- ⁵⁰ *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* [1999] 3 S.C.R. 868 at para. 22 (“Grismer”)
- ⁵¹ *British Columbia (Public Service Employee Relations Commission v. B.C.G.S.E.U.* [1999] 3 S.C.R. 3 at para. 68 (“Meiorin”)
- ⁵² OHRC Policy and Guidelines on Disability and the Duty to Accommodate (2000)
- ⁵³ See discussion in *Turnbull v. Famous Players Inc. (No. 1)* (2001), 40 C.H.R.R. D/333 [Ont. Bd. Inq.] at para. 201.
- ⁵⁴ *Central Okanagan School District v. Renaud* [1992] 2 S.C.R. 970 at para. 19
- ⁵⁵ *Grismer, supra.*
- ⁵⁶ *Meiorin, supra.*
- ⁵⁷ *Grismer, supra* at para. 44.
- ⁵⁸ *Ontario Human Rights Commission v. Ontario* (1994), 117 D.L.R. (4th) 297 at 333 (“Roberts”). This approach was confirmed by the Supreme Court of Canada in a Charter case, *Lovelace v. Ontario* [2000] 1 S.C.R. 950
- ⁵⁹ Ontario, Legislative Assembly Debates, vol. 5, pp. 5098 (December 9, 1980).
- ⁶⁰ *Roberts, supra* at p. 332
- ⁶¹ *Roberts, supra* at p. 339