

Anti-Subordination and Booking Para-Transit Services: Moving Beyond an Integrationist-Separatist Dichotomy

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The importance of transportation for our ability to participate in society as fully engaged community members cannot be overlooked. Many people are reliant on public transportation to access employment, appointments, community services, social engagements, and many other indispensable aspects of our daily lives. Without access to public transportation, the ability to participate in the community and to access needed services is limited. A vital component of an effective public transportation service is its accessibility, as without access, the public cannot make use of this service to meet their needs. This becomes especially important for persons with disabilities, as public transportation can be largely inaccessible for many persons with disabilities. For persons with disabilities, then, inaccessible public transportation can be a significant barrier for full and active engagement in society. The importance of ensuring accessibility of transportation for persons with disabilities can be seen in its inclusion in the *Accessibility for Ontarians with Disabilities Act* as one of five areas for standard development.¹ The provision of specialized transit services, such as para-transit services, is an example of one effort to address the inaccessibility of conventional public transportation. Para-transit services offer service users accessible transportation by providing rides in vehicles with accessible features such as: lift-equipped vans, trained drivers, and door-to-door pick-up and drop-off.²

¹ *Accessibility for Ontarians with Disabilities Act*, SO 2005, c 11 [AODA].

² Ontario, Human Rights Commission, "Whether 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",

These services create a separate service for persons with disabilities who experience barriers to accessing conventional transportation services. However, the provision of para-transit services comes with its own barriers that create unequal conditions for persons with disabilities reliant on these services.

This paper will look at the concerns raised by persons with disabilities reliant on para-transit services, specifically at “pre-booking” requirements, coupled with the uncertainty of obtaining a ride at a needed time by looking at examples from across Canada. Using an anti-subordination framework for critique, this paper will begin with a brief overview of an anti-subordination model, followed by an overview of the discrete concerns raised in the implementation of para-transit services, which will include: a brief look at the inception of para-transit services, the challenges to providing effective services faced by many service providers, and the concerns raised by service users, specifically “pre-booking” and uncertainty. Following a discussion of these concerns, this paper will look at an Ontario Human Rights Tribunal decision, *Austin v London Transit Commission*, where discrimination is alleged on the basis of the booking system for the para-transit system in London, Ontario.³ Looking at the gaps in how the human rights tribunal addressed concerns arising out of para-transit booking system from an anti-subordination perspective, this paper will move onto a discussion of the *AODA* and how it addresses accessibility concerns with para-transit services. These analyses will highlight the ways that our jurisprudence and legislation both seek to promote accessibility to transportation for persons with disabilities, and may hinder accessibility, in the provision of para-transit services.

Position Paper, at 6, online at: <<http://www.ohrc.on.ca/en/whether-para-transit-services-provided-public-transit-services-cities-toronto-hamilton-london-and/para-transit-programs>> [OHRC, “Para-transit Services”].

³ *Austin v London Transit Commission*, [2013] OHRTD No 2138 [*Austin*, 2013].

Anti-Subordination Model

In her book, *When is Separate Unequal? A Disability Perspective*, Ruth Colker suggests that an anti-subordination model is necessary to move away from a conflation of “separate” and “unequal”, and therefore away from an absolutist integrationist perspective.⁴ Building on Catharine MacKinnon’s “path-breaking work in feminist theory,”⁵ Colker understands disability discrimination to be “a problem of dominance and submission rather than as a problem of different treatment,”⁶ and makes it clear that she is not removing the concept of “impairment” in understanding disability from her theorizing.⁷ This approach allows room for “different treatment” in the form of “affirmative action” or “reasonable accommodation” by framing these remedies in the context of power or subordination, which bars erroneous claims of “reverse discrimination” or “inappropriate discrimination” on the basis of these remedies.⁸ An anti-subordination approach does not see all distinctions on the basis of disability as the same; “[s]ome are vestiges of subordination while others reflect attempts to remedy societal subordination.”⁹

While Colker looks specifically at the education and healthcare context when exemplifying her position in favour of an anti-subordination approach to disability theory,¹⁰ this paper argues that an anti-subordination approach is also appropriate in the context of providing adequate transportation for persons with disabilities who are unable to access conventional transit systems. An anti-subordination model allows for different treatment on the basis of disability *if* that treatment comes as a remedy for subordination; where separate can mean equal.

⁴ Ruth Colker, “Anti-Subordination Above All: A Disability Perspective” in *When is Separate Unequal? A Disability Perspective* (Cambridge University Press, 2015) 10 at 10 [Colker].

⁵ *Ibid* at 12.

⁶ *Ibid*.

⁷ *Ibid* at 13.

⁸ *Ibid* at 14.

⁹ *Ibid* at 22.

¹⁰ *Ibid*.

However, it does not presuppose that separate is equal. Instead it allows for a critical analysis to determine whether a separate or integrationist approach is best suited for equality in the circumstances. When it comes to providing accessible public transportation, an absolutist integrationist, or exclusively separatist, approach would be inattentive to the needs of persons with disabilities accessing these services. There is no “one size fits all” model for creating conditions of equality when it comes to the varied and nuanced realities of disability and therefore it is important to acknowledge that one approach cannot fully address the needs of all persons with disabilities. An anti-subordination model allows for an approach to accessible transit that encompasses both maximized accessibility of conventional public transit systems alongside access to separate para-transit services as needed. Thus, using an anti-subordination framework will be useful in looking at the concerns that stem from reliance on para-transit services and the need for greater accessibility of conventional transit systems, without discounting the value of, and reliance on, para-transit services.

Discrete Concern: Booking Para-Transit Services

Access to transportation is indispensable for independence in society, as it provides, for many people, the ability to attend work shifts, appointments, social functions, run errands, and a myriad of other engagements that are part of our daily living routines.¹¹ Accessible transportation is therefore essential in allowing the opportunity for many persons to feel part of the community, and to participate fully and independently in society. For many persons with

¹¹ See generally, Chris Shannon, “CBRM Handi-Trans Expands Hours of Service”, *Cape Breton Post* (7 May 2015), online: <<http://www.capebretonpost.com>> [Shannon]; Kevin Rollason, “Handi-Transit Users to File Complaint with Ombudsman”, *Winnipeg Free Press* (15 October 2015), online: <<http://www.winnipegfreepress.com>> [Rollason]; and Stephania Seccia, “Transit Plan Tries to Fix Access Issues”, *24 Hours Vancouver* (19 March 2015), online: <<http://vancouver.24hrs.ca>> [Seccia].

disabilities in particular, accessible transportation systems are a necessity for independence.¹² As John Young, executive director of the Independent Living Resource Centre in Winnipeg argues, “[i]f we don’t have transportation we don’t have independence.”¹³ Despite the importance of this service however, access to transportation comes with many barriers for persons with disabilities. Not only are public transit systems largely inaccessible for many persons with disabilities, but para-transit services offered municipally as an accessible alternative have many challenges as well, and are often a noticeably less convenient option: persons reliant on para-transit services note the challenges of “pre-booking” and uncertainty as two significant concerns.

One significant barrier for persons with disabilities reliant on para-transit services is the unreliable and rigid booking systems that determine when and if a service user is able to access these services. Booking systems for para-transit services require service users to plan well in advance for their use of these services, sometimes up to seven or eight days in advance.¹⁴ When changes to a service user’s plans require changes to bookings that may result in cancellation, they can be faced with fines if these changes are not made far enough in advance.¹⁵ Thus, there is an expectation that persons reliant on para-transit services will know, concretely, and without change, exactly when they will need access to public transportation. Further, despite advanced planning efforts (and requirements) of service users, there is sometimes no guarantee that a booking sought will be made available, as bookings are not guaranteed and are given on a “first come first served”¹⁶ or priority basis.¹⁷ This unreliability and lack of flexibility to service

¹² Ontario, Human Rights Commission, “Discussion Paper: Accessible Transit Services in Ontario”, online at: <<http://www.ohrc.on.ca/en/discussion-paper-accessible-transit-services-ontario/part-i-transit-and-human-rights>> [OHRC, “Discussion Paper”].

¹³ Rollason, *supra* note 11.

¹⁴ Seccia, *supra* note 11.

¹⁵ Rollason, *supra* note 11.

¹⁶ See, *Austin* 2013, *supra* note 3; *Austin v London Transit Commission*, [2014] OHRTD No 740 [*Austin* 2014].

¹⁷ For example, in Windsor, the priorities of bookings are: employment, education, medical, persons business, leisure. See OHRC, “Para-transit Services”, *supra* note 2.

accessibility is a significant barrier to persons with disabilities who rely on para-transit to get to work, medical or therapy appointments, and social engagements (amongst others), when conventional transit systems are inaccessible to them.

Para-transit systems were implemented in Ontario in the 1970s in response to the lack of accessibility of conventional transit systems for many persons with disabilities.¹⁸ These segregated services were designed to accommodate persons with disabilities by offering such services as lift-equipped vans, trained drivers, and door-to-door pick-up and drop-off.¹⁹ However, various expansions and narrowing of the eligibility requirements over the decades has resulted in increased reliance on para-transit services, as well as significant funding cuts in this area;²⁰ “[a]ccording 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.”²¹ This shows the mass amount of persons reliant on para-transit services, while also implying the scarcity of services available. Para-transit services are confined to budgets allocated by municipalities, which can limit service availability.²² This overstrain of services has resulted in barriers to providing accessible transportation that meets the needs of service users through para-transit, and highlights a significant flaw of relying on segregated services to achieve accessibility for persons with disabilities reliant on public transportation. The negative effects of this strain on the realities of booking para-transit services cannot be overlooked.

¹⁸ OHRC, “Para-transit Services”, *supra* note 2.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² See, *Austin* 2013, *supra* note 3 at paras 31, 36.

In October of 2015, affected service users of Winnipeg’s para-transit service, “Handi-Transit”, rallied together to put forward a complaint to the ombudsman.²³ Amongst the concerns presented was a frustration with the current booking system, which creates a lack of certainty for service users reliant on the system. Participants highlighted the amount of pre-planning necessary in order to book something simple, like a hair appointment, but that the system’s priority booking constraints could mean that a service user cannot access the service at the needed time.²⁴ This concern is not unique to Winnipeg and the Hani-Transit system. In a 2006 judgment of the Alberta Queen’s Bench, the complainant highlighted the inadequacies of the Edmonton para-transit system, “DATS”, as including a three-day pre-booking and no guarantee that the requested ride will arrive on time.²⁵ In Cape Breton, the advanced booking times for their para-transit service, “Hani-Trans”, have been at issue in the past.²⁶ Para-transit users in Vancouver have also highlighted this concern, noting that their “HandyDart” service can require planning of up to a week in advance.²⁷ In Ontario, there has been a push to decrease the time needed in advance when booking “Wheel-Trans” in Toronto,²⁸ and an application was brought before the Ontario Human Rights Tribunal by a London, Ontario resident who described the pre-booking times, coupled with uncertainty in obtaining a required booking, as “frustrating, stressful and humiliating.”²⁹

It is clear from these examples that despite efforts to provide accessible transportation services through specialized services like para-transit, there are significant barriers that still exist

²³ Rollason, *supra* note 11.

²⁴ *Ibid.*

²⁵ *Laidlaw Transit Ltd (cob Yellow Cab) v Alberta (Human Rights and Citizenship Commission)*, 2006 ABQB 874, [2006] AJ No 1559 (QL) at para 14.

²⁶ Shannon, *supra* note 11.

²⁷ Seccia, *supra* note 11.

²⁸ See, Donovan Ritch, “Transit Crisis in Toronto Reaching a Breaking Point”, *Fightback: The Marxist Voice of Labour and Youth* (14 January 2015) online: <<http://www.marxist.ca/canada/ontario/989-transit-crisis-in-toronto-reaching-a-breaking-point.html>>.

²⁹ Austin 2013, *supra* note 3.

for persons with disabilities reliant on these services. Service users have expressed that the length of the advanced booking requirements, coupled with the uncertainty of obtaining services at required times, creates unfair conditions, particularly as services users are predominantly unable to access conventional transportation services due to the inaccessibility of these services.

Human Rights Jurisprudence: *Austin v London Transit Commission*

In 2013 an application was filed with the Ontario Human Rights Tribunal under section 34 of the *Human Rights Code*, where the applicant highlighted the above-mentioned concerns – “pre-booking” times and uncertainty – as factors in his claim of discrimination.³⁰ The application was filed by a para-transit service user who alleged “that the ‘first come first served, advance booking features’ of the service violate his right to be free from discrimination in that, as a person with a disability, he is denied equal access to an equivalent public transportation system available to other residents of London, Ontario.”³¹ The applicant provided the Tribunal two examples in his submissions of when this system had interfered with his right to be free from discrimination, leading to feelings of frustration, stress, and humiliation.³² The para-transit system requires booking three days in advance of an appointment and after “the line opens at 7:00 a.m., bookings fill up quickly.”³³ This creates a situation where, although a three-day advanced booking is not required explicitly, the need to secure rides has resulted in a requirement to make one’s booking as close as possible the start of the three-day opening.

On the first occasion, the applicant was unable to book a trip with the para-transit service as there were no slots available and was “left with the impression that it was his fault that they could not fit him in because he called to arrange a booking in the afternoon,” instead of closer to

³⁰ *Ibid* at para 2.

³¹ *Ibid*.

³² *Ibid* at paras 2-5.

³³ *Ibid* at para 3.

the 7:00 a.m. opening.³⁴ The applicant, who had called to arrange a booking one the day that booking opened, was unable to secure his needed ride as he had called too late in the day. This example highlights the necessity of calling at the beginning of the three-day window if relying on the para-transit service. On the second occasion, the applicant, again calling three days in advance, was only able to secure a pick-up time a mere fifteen minutes prior to his hospital appointment and was given the option “to call back on the day of the appointment to see if he could be picked up earlier.”³⁵ The uncertainty that stems from not being able to secure a needed booking when calling three-days in advance is not relieved by the opportunity to call back the day of an appointment to “see if he could be picked up earlier.” There is still an element of uncertainty as to whether the change can be accommodated. These two examples provided by the applicant demonstrate how pre-booking and uncertainty play out in para-transit booking systems to the detriment of the service user.

The applicant argued that the effects of these concerns results in discrimination on the basis of disability and turned to the Ontario Human Rights Tribunal to hear his case. The tribunal first asked: “Was the applicant subject to discrimination on the basis of disability in the provision of public transit services?”³⁶ In order to set out a *prima facie* case of discrimination, the applicant bears the onus³⁷ on a balance of probabilities,³⁸ of establishing three elements: (i) [the] applicant is a member of a group protected by the *Code*, (ii) the applicant was subjected to adverse treatment, and (iii) the *Code* ground was a factor in the alleged adverse treatment.”³⁹ Thus, in this case the three elements were: (i) the applicant has a disability within the meaning of the *Code*, (ii) the applicant is “denied equal access to an equivalent public transportation system

³⁴ *Ibid.*

³⁵ *Ibid* at para 4.

³⁶ *Ibid* at para 47.

³⁷ *Ibid* at para 49.

³⁸ *Ibid* at para 63

³⁹ *Austin* 2014, *supra* note 16 at para 17.

available to other London residents,”⁴⁰ or that “the respondent failed to provide him with reasonable accommodation short of undue hardship in the provision of transit services,”⁴¹ and (iii) the applicant’s disability was a factor in this unequal treatment. The tribunal found that the applicant was unable to establish a *prima facie* case of discrimination as any disadvantage the applicant may have faced was due to his place of residence, rather than to his disability as the applicant submitted that on some occasions he was able to access the conventional transit services when buses were “accessible”.⁴²

Although the tribunal found that there was no *prima facie* case of discrimination, it still discussed the second stage of the analysis: “Has the respondent established accommodation to the point of undue hardship?”⁴³ At this stage, had a *prima facie* case of discrimination been found, “the onus shifts to the respondent to prove on a balance of probabilities that the discriminatory rule has a reasonable and *bona fide* justification.”⁴⁴ In order to do this, the respondent must make out three elements: “(1) it adopted the standard for a purpose or goal that is rationally connected to the function being performed; (2) it adopted the standard in good faith, in the belief that it is necessary to the fulfillment of the purpose or goal; and (3) 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.”⁴⁵ In this case it is the three-day booking window that is at issue, and the tribunal saw the test hinging on the final element, asking, “whether the respondent has demonstrated that it could not accommodate the applicant without undue hardship.”⁴⁶ Balancing the need for

⁴⁰ *Austin* 2013, *supra* note 3 at para 48.

⁴¹ *Ibid* at para 49.

⁴² *Ibid* at para 62.

⁴³ *Ibid* at para 65.

⁴⁴ *Ibid*.

⁴⁵ *Ibid* at para 66.

⁴⁶ *Ibid* at para 70.

accommodation with available resources, the tribunal found “that the respondent has provided accommodation to the point of undue hardship.”⁴⁷ Thus, even when the tribunal imagined that a *prima facie* case of discrimination was made out, it ultimately found that the respondent was able to provide accommodation to the point of undue hardship.

One of the focuses of the tribunal’s decision was evidence that the respondent was taking measures to increase accessibility of the conventional transit system for persons with disabilities. They note that, “Following a replacement schedule, as of April 2012, all of the LTC’s [London Transit Commission; respondent] conventional buses are low-floor, accessible buses.”⁴⁸ By focusing on the measures the respondent was taking to increase accessibility of conventional transit systems, the tribunal recognized that barriers to accessible public transportation are largely the result of built environment, in this case the actual transit vehicles used. The reasoning follows that if we focus on efforts to increase accessibility of conventional transit systems, there will less need to rely on para-transit systems and thus less conflicts with para-transit booking systems.

By focusing on the built-environment as a barrier to accessibility, the tribunal appears to be adopting a social model of disability approach. Under the social model of disability, “disability is the outcome of social arrangements that work to restrict the activities of people with impairments through the erection of social barriers.”⁴⁹ Thus, by replacing conventional buses with “low-floor, accessible buses,” the tribunal sees the actions of the respondent as dismantling one of the barriers that precludes persons with disabilities from full participation in society. This, on its face, appears to address the applicant’s claim that “he is denied equal access

⁴⁷ *Ibid* at para 75.

⁴⁸ *Ibid* at para 78.

⁴⁹ Carol Thomas, “Disability Theory: Key Ideas, Issues and Thinkers” in Colin Barnes, Mike Oliver & Len Barton, eds, *Disability Studies Today* (Cambridge, UK: Polity Press, 2002) 38 at 40.

to an equivalent public transportation system available to other residents of London, Ontario,”⁵⁰ but one can ask: does addressing this physical barrier for persons with disabilities accessing conventional public transportation address the problems that have been vocalized regarding the pre-planning and uncertainty inherent in para-transit booking systems? While attentive to the fact that barriers for persons with disabilities in accessing conventional public transportation can be largely due to physical accessibility of transportation vehicles, the tribunal, using a social model framework, failed to address an important aspect of this analysis: that an integrationist approach is not always the ideal response to inequality based on disability.

Taking an anti-subordination approach, it is important to acknowledge that both a formal equality, and an integration-style approach may be insufficient to address inequalities experienced by persons with disabilities.⁵¹ An anti-subordination approach “does not ignore the benefits that can be attained through integration...[but] suggests that we have a more open-minded approach that does not reflexively choose integration when other approaches might be better.”⁵² An anti-subordination approach allows for both a focus on improving the accessibility of conventional transit systems from an integrationist perspective, but also allows for consideration to be paid to the need for a separate, tailored service like para-transit services. The tribunal appears to be taking an integrationist approach by relying on the efforts of the respondent in improving accessibility of the conventional transit services to find that the respondent was accommodating to the point of undue hardship. However, what the tribunal fails to recognize is that fully integrated services under the conventional transit system may not be sufficient to address the needs of persons with disabilities who rely on para-transit. This is not to discount the importance of efforts to increase accessibility of conventional transit services. There

⁵⁰ *Austin* 2013, *supra* note 3 at para 2.

⁵¹ *Colker*, *supra* note 4 at 23.

⁵² *Ibid* at 26.

is absolutely a need for this. Instead, taking an anti-subordination approach, increasing accessibility of conventional transit services alongside addressing the concerns raised regarding the para-transit booking system, is a more inclusive way to ensure equality for persons with disabilities in accessing public transportation. It steps away from a formal equality approach and recognizes that needs of persons with disabilities are varied and are not sufficiently addressed by one approach on its own.

The tribunal, if it had taken an anti-subordination approach, would have appreciated the efforts of the respondent to increase accessibility of conventional transit services, but would have also recognized the important role that para-transit services have for persons reliant on it, and thus would have addressed the concerns of pre-booking and uncertainty as they stand in the para-transit system instead of viewing increased accessibility of conventional transit services as the ideal remedy. Instead, the tribunal looked at the issue within a social model of disability and took an absolutist integration approach to addressing the concerns that exist regarding the availability of para-transit services.

Regulatory Standards: *Accessibility for Ontarians with Disabilities Act*

The *Accessibility for Ontarians with Disabilities Act*⁵³ also looks at booking requirements for para-transit services. The *Integrated Accessibility Standards* [“Regulation”] of the *AODA*, “establishes the accessibility standards for each of information and communications, employment, *transportation* and the design of public spaces.”⁵⁴ The Regulation provides the standards, therefore, for accessible transportation. Under the umbrella of transportation, the Regulation looks at public transportation and specifically at “specialized transportation services.” Although there is no definition provided as to what constitutes a “specialized transportation

⁵³ *AODA*, *supra* note 1.

⁵⁴ *Integrated Accessibility Standards*, O Reg 119/11, s1(1) [Regulation] [emphasis added].

service,” the Regulation suggests a distinction between “conventional transportation services” and “specialized transportation services,”⁵⁵ and a categorization of para-transit services as “specialized transportation services” is therefore most appropriate as these services are not understood to be “conventional transit services.” Therefore in looking to the legislation regarding para-transit services, one must understand para-transit services as “specialized transit services.”

Under section 71(1), “Booking,” of the Regulation: “Every specialized transportation service provider shall, where the specialized transportation services require reservations, (a) provide same day service to the extent that it is available; and (b) where same day service is not available, accept booking requests up to three hours before the published end of the service period on the day before the intended day of travel.”⁵⁶ Based on this section of the Regulation, para-transit services, which require reservations, must, to the extent available, either provide same day service *or* accept a booking request up to three hours before the end of the day on the day before the service is needed.⁵⁷ The booking schedule of a para-transit service, under the Regulation, requires little “pre-planning” – a challenge or barrier that service users have indicated inhibits their ability to use public transportation effectively. As discussed above, para-transit services can often require pre-planning of up to one week in advance. In *Austin*, the applicant highlighted the three-day advanced booking required to access the para-transit service. With these advanced booking windows, the service provider, while not precluding a booking request up to the day the service is required, fosters conditions whereby reservations fill up quickly and thus booking requests may be made, but not accommodated if it is too close to the date of travel. By requiring same-day service “to the extent available,” along with the caveat that

⁵⁵ “Specialized transportation services” are provided by either a “specialized transportation service provider” or a “conventional transportation service provider,” however it is clear that when the service *provider* is “conventional” the “specialized transportation *services*” are distinct from “conventional transportation *services*.” See, Regulation, *supra* note 54 at s 45(1),(2).

⁵⁶ *Ibid* at s 71(1)(a),(b).

⁵⁷ *Ibid*.

if same day service is unavailable then booking requests will be accepted up to three hours before the end of service the day prior, the Regulation seem to be reducing the amount of pre-planning required of service users when booking para-transit services.

It would appear that this Regulation, therefore, makes reliance on public transportation via the use of specialized transportation services more accessible. However, the Regulation is far from perfect to address the needs of persons with disabilities reliant on public transportation. While eliminating the need to “pre-book” well in advance of appointments, the Regulation does not address the uncertainty faced by many service users as to the availability of access to these services. Although booking requests are required to be accepted under the Regulation, there is an obvious gap where a requirement to make services *available* up to the day before, or day of if possible, service is required. One of the challenges or barriers indicated by service users is the uncertainty in service accessibility for needed appointments and travel plans. The Regulation does little to address this concern. Under section 45(1) of the Regulation, a conventional transportation service provider is required to provide an alternative accessible method of transportation if “any person with a disability who, because of his or her disability, is unable to use conventional transportation services.”⁵⁸ This section might provide room for interpretation of the Regulation as requiring accessible service provision for persons with disabilities, however, again it fails to require that services be made available at, or near, a required time. It is also important to note that this section is followed by a caveat whereby this section will not apply, “where specialized transportation services are provided by a specialized transportation service provider in the same jurisdiction where the conventional transportation service provider provides transportation services.”⁵⁹ Thus, a requirement to provide accessible alternatives to conventional

⁵⁸ *Ibid* at s 45(1).

⁵⁹ *Ibid* at s 45(2).

transportation service only arises where specialized transportation services are not provided by specialized transit providers.

Not only do the standards under the Regulation seem inadequate to address the concerns of persons with disabilities reliant on para-transit services in regards to booking systems, but even if the standards did provide an adequate framework to improve the experiences of para-transit service users there is a significant gap in the enforcement mechanisms to ensure compliance. Dianne Wintermute, staff lawyer at ARCH Disability Law Centre wrote a report on behalf of ARCH articulating this concern.⁶⁰ According to this report, along with a reading on the Regulation, there are significant gaps to ensuring meaningful investigations, providing public complaint processes and follow-up, and to ensure individuals denied accessibility under the Regulation receive compensation or redress.⁶¹ Without adequate compliance and enforcement mechanisms, any efforts of the *AODA* and the Regulation are minimized and can almost be considered moot. Therefore, if concerns such as those that arise in the context of accessing para-transit services, specifically regarding booking requirements, are to be meaningfully addressed through legislation, there must be more robust mechanisms in place. These mechanisms must include meaningful complaint processes that will produce results for persons making complaints. This is especially important, as it may be close to impossible to develop standards that encompass the needs of all persons with disabilities given the diversity within the disability community. There are almost ten million people reliant on para-transit services in Ontario.⁶² The needs of all ten million of these individuals will be different, and thus providing an opportunity

⁶⁰ Dianne Wintermute, “The AODA and the Integrated Accessibility Standards” (25 August 2011), *Accessibility for Ontarians with Disabilities Act Alliance* (blog), online: <<http://www.aoda.ca>> [Wintermute].

⁶¹ *Ibid.*

⁶² OHRC, “Para-transit Services”, *supra* note 2.

for those whose needs are not being met to bring forward claims will create more opportunity to improve and move towards fully accessible transit services for all.

Conclusion

Ensuring accessible transportation services for persons with disabilities in an environment where conventional transportation services are largely inaccessible comes with some challenges. These challenges manifest in the creation of additional barriers for persons with disabilities, and an example of this can be seen in the pre-booking requirements and uncertainty of available services for para-transit service users. These barriers can hinder the lives of persons reliant on para-transit services by requiring a level of pre-planning not required of a conventional transportation service user, creating an additional step in order to participate actively in the community and attend necessary appointments. Not only is there a need to know one's schedule well in advance of the date that service is required, but even taking measures to pre-plan does not ensure access to needed services. Despite pre-planning in accordance with the booking schedules of para-transit services, service users report not being able to book needed rides at appropriate times and being unsure if they will be able to change a booking if needed.

One way that the concerns around pre-booking and uncertainty have been addressed is through the Ontario Human Rights Tribunal in *Austin v London Transit Commission*. In this decision, the tribunal did not see the pre-booking and uncertainty of access as a form of discrimination on the basis of the applicant's disability, and they also found that the respondent had provided accommodations to the point of undue hardship. The tribunal focused largely on the fact that the respondent had been working towards improving the accessibility of the *conventional* transit system but did not focus on the gaps of the para-transit service, which were at issue. The tribunal, in this case, took an integrationist approach in their focus on the

accessibility of the conventional transit system over the para-transit system. While not arguing against the need to improve the accessibility of conventional transit systems and therefore not diminishing the importance of the respondent's focus on increasing conventional transit system accessibility, this paper argues that a more inclusive approach would be to take an anti-subordination approach. An anti-subordination approach recognizes that it may be necessary to champion the need for separate services alongside an integrationist approach. This means that there is absolutely a need to improve accessibility of conventional transit systems, but there is also a need to be attentive to improving the conditions of para-transit services in order to maximize accessibility of all transit systems, for all users. An anti-subordination approach recognizes that "low-floor, accessible" buses do not meet all of the varied and nuanced needs of persons with disabilities and that para-transit services are essential to some. It rejects a formal equality argument, and seeks substantive equality by moving beyond an integrationist-separatist dichotomy.

The *AODA* has also looks at the booking systems of para-transit services, but again, there is little help in this regard. Although the Regulation requires same day service – or booking availability up to three hours before the end of the service day on the day prior – reducing the amount of pre-planning necessary for service users, it does not alleviate the uncertainty that many users face. The Regulation does not have robust or substantial enforcement mechanisms, which leaves service users without recourse when their accessibility needs, in this instance certainty around service provision, are not being met. Without a meaningful enforcement or compliance requirement, little can be done to address the services that do not adhere to the Regulation requiring same-day service availability. This leaves service users reliant on human rights tribunals, which as demonstrated, take an integrationist approach and thus ignore the issue

of para-transit service accessibility in favour of improved accessibility of conventional transit services. This integrationist-separatist dichotomy is not an effective way to achieve equality for persons with disabilities.

Making transit services accessible is essential if all persons in our communities are to have an equal opportunity to participate meaningfully in society through work, volunteering, engaging socially, making appointments, and other engagements of daily living. Accessible transit means more than unreliable para-transit services that require pre-planning beyond what is allowed for in the *AODA* Regulation. It means more than providing low-floor, accessible buses – although this is an important element. Instead, it means maximizing the accessibility of conventional transit systems while also working to improve the availability of para-transit services, recognizing that there are aspects of para-transit services that are needed by some members of the disability community that cannot be replicated through conventional transit services. An example of a meaningful approach to accessible transit services that takes these concerns into account can be seen on the east coast. The “Handi-Trans” buses in Cape Breton increased the hours of their services by forty hours in April of 2015.⁶³ The increased hours has reduced the pre-planning windows required of service users in the past and Handi-Trans service user, Susan Burke, shared that the change, “gets me out of the house more. I’m now able to do more errands during the day and actually go out after work if I want to instead of staying home.”⁶⁴ Recognizing that there is a reliance on para-transit services for meaningful engagement in the community means that attention needs to be paid to the quality and availability of the services provided. There is a need to address the concerns articulated surrounding availability of para-transit services while also improving the accessibility of conventional services and this

⁶³ Shannon, *supra* note 11.

⁶⁴ *Ibid.*

requires a combination of moves towards accessibility, which can include: increasing the hours of operation of para-transit services; making enforcement mechanisms for *AODA* Regulation standards more robust; and increasing accessibility of conventional transit services with low-floor, accessible buses, amongst others. This requires a move beyond a separatist-integrationist dichotomy using an anti-subordination approach to disability.

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