Court File No. CV-25-00100065-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

AIR PASSENGER RIGHTS

Applicant

- and -

THE ATTORNEY GENERAL OF CANADA

Respondent

FACTUM OF THE APPLICANT

January 23, 2026

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PART I – OVERVIEW

1. This is an application seeking a declaration, pursuant to section 52(1) of the *Constitution Act, 1982*, that subsection 85.09(1) of the *Canada Transportation Act* ["***CTA***"] violates the right to freedom of expression guaranteed by section 2(b) of the *Canadian Charter of Rights and Freedoms* ["***Charter***"] and cannot be reasonably justified by section 1.[1]

2. In 2023, Parliament enacted new sections of the *CTA* to divert most air passenger claims for compensation from airlines away from an existing process administered by the Canadian Transportation Agency ["**Agency**"].[2] This new adjudicative forum is for passengers with claims that airlines failed to fulfill tariff conditions or to pay required compensation under the *Air Passenger Protection Regulations* ["***APPR***"].[3] The decision-makers in this new tribunal are Complaint Resolution Officers ["**CROs**"], appointed from among the staff of the Agency.[4]

3. Among the 2023 enactments is subsection 85.09(1), which imposes a blanket, mandatory confidentiality requirement over "all matters" relating to the process of dealing with an air passenger complaint that is heard by a CRO.[5] It applies to the optional mediation stage of the process, the mandatory adjudicative stage, all decisions and orders of the CRO, and all documents filed in the proceeding, whether for mediation or adjudicative purposes.[6]

4. The Agency aggressively enforces this confidentiality requirement – including by sending repeated, coercive, and threatening messages to complainants and policing the social media of those who share copies of CRO decisions.[7] This is despite the fact that decisions of the CRO, once made, become enforceable as decisions of the Agency, which in turn can be taken out and enforced as court orders – consequently becoming public record.[8] The impugned subsection, on its face, is a broad and sweeping violation of section 2(b) of the *Charter*.

5. The applicant, Air Passenger Rights ["**Applicant**"], claims that subsection 85.09(1) unjustifiably infringes the *Charter*'s guarantee of freedom of expression. The Applicant points to established jurisprudence which recognizes the inextricable ties between the open court principle

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[1] *Canadian Charter of Rights and Freedoms* ["***Charter***"], at ss. 1 and 2(b), Part I of the *Constitution Act, 1982* ["***Constitution Act***"], being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11; *Constitution Act* at s. 52(1); *Canada Transportation Act*, S.C. 1996, c. 10 ["***CTA***"], at s. 85.09(1).
[2] *CTA* at ss. 85.01-85.16.
[3] *Air Passenger Protection Regulations*, SOR/2019-150 ["***APPR***"].
[4] *CTA* at s. 85.02; Cross-Examination of Vincent Millette, dated October 22, 2025 ["**Millette Transcript**"], at q. 138.
[5] *CTA* at s. 85.09(1).
[6] Millette Transcript at qq. 25-28 and 49.
[7] Affidavit of Dr. Gábor Lukács, affirmed May 28, 2025 ["**Lukács Affidavit**"], at paras. 30-33 and Ex. "D", Application Record of the Applicant, dated June 3, 2025 ["**AR**"] at Tabs 3 and 3-D; Affidavit of Nancy Pierce, affirmed May 28, 2025 ["**Pierce Affidavit**"], at paras. 16-23 and Exs. "I" to "N", AR at Tabs 4 and 4-I to 4-N.
[8] *CTA* at ss. 33 and 85.07(3).

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– which applies to adjudicative records, including at tribunals – and section 2(b) of the *Charter*.[9]

6. The respondent, the Attorney General of Canada ["**Respondent**"], seeks to justify the impugned provision on the basis of efficiency.[10] The Respondent cannot establish a pressing and substantial objective with a rational connection to the impugned provision, nor that it is proportionate given the high social and democratic interests reflected in the open court principle.[11]

7. The Applicant seeks an order reading down subsection 85.09(1) such that it does not apply to adjudicative records, including the decisions and orders of the CRO and other materials relied on for adjudication, or alternatively, striking the subsection as having no force and effect.[12] If necessary, the Applicant requests leave of the court for exceeding the permitted factum length.

PART II – THE FACTS

A. The Parties and Other Relevant Persons

8. The Applicant is a federal not-for-profit corporation with a registered office in Halifax, Nova Scotia.[13] The Applicant provides information and resources to members of the public relating to air passenger rights, issues, rules, and legal processes.[14] It advocates on behalf of the general public to improve air passenger rights and conditions for air travellers in Canada.[15] The Applicant uses a Facebook group to provide insights and information to the public about developments in the law on air passenger rights.[16]

9. The Agency was established under the *CTA* with a broad mandate in respect of all transportation matters under the legislative authority of Parliament. It consists of "not more than five members" who are appointed by the Governor in Council.[17] The Agency serves as (i) a quasi-judicial tribunal to resolve commercial and consumer transportation-related disputes, (ii) a transportation regulator to ensure carriers provide accessible and barrier-free transportation to passengers, and (iii) as an economic regulator, to make determinations and issue licenses and

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[9] *Toronto Star v. AG Ontario*, 2018 ONSC 2586 ["***AG Ontario***"], at para. 55; *R. v. Conway*, 2010 SCC 22 ["***Conway***"], at headnote and para. 20; and *Doré v. Barreau du Québec*, 2012 SCC 12 ["***Doré***"], at para. 4; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, 1996 CanLII 184 (S.C.C.) ["***CBC 1996***"], at headnote and para. 26; *R. v. Canadian Broadcasting Corp.*, 2010 ONCA 726 ["***CBC 2010***"], at paras. 44 and 50; *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3 ["***CBC 2011a***"], at para. 12, *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 ["***Edmonton***"], at 1338; *Named Person v. Vancouver Sun*, 2007 SCC 43 ["***Vancouver***"], at para. 31.
[10] Affidavit of Vincent Millette, affirmed August 29, 2025 ["**Millette Affidavit**"], at paras. 13-45.
[11] *R. v. Ndhlovu*, 2022 SCC 38, at para. 119 (the test set out in *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.) ["***Oakes***"]).
[12] Notice of Application, issued May 28, 2025, at paras. 1-5, AR at Tab 1.
[13] Lukács Affidavit at paras. 2-4 and Ex. "A", AR at Tabs 3 and 3-A.
[14] Lukács Affidavit at paras. 8-29 and Exs. "B" and "C", AR at Tabs 3, 3-B, and 3-C.
[15] Lukács Affidavit at paras. 4-5 and Ex. "A", AR at Tabs 3 and 3-A.
[16] Lukács Affidavit at paras. 6, 25, and 30-31, AR at Tab 3.
[17] *CTA* at s. 7.

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permits to carriers of goods and passengers that function within the ambit of Parliament's authority.[18] The role of the CRO is distinct from that of the Agency, as explained below.[19]

B. Air Passenger Complaints Prior to 2023

10. Prior to 2023, air passenger complaints to the Agency were governed by a 2014 regulation ["**2014 Rules**"].[20] This regulation is still in effect and continues to govern air passenger complaints concerning accessibility and other types of proceedings before the Agency.[21] Proceedings under the 2014 Rules were, and remain, subject to the open court principle.[22]

11. In 2019, the *APPR* were enacted, outlining some of the minimum obligations that airlines operating in Canada owe to passengers for matters such as flight delays, cancellations, denials of boarding, and seat assignments.[23]

C. 2023 Legislative Enactments

12. In 2023, new sections of the *CTA* were enacted[24] that diverted most air passenger complaints from the 2014 Rules to the CRO's process.[25] These complaints now follow the process set out in sections 85.04 to 85.12 of the *CTA*.[26] Under this new framework, recourse is available to passengers where an airline has not fulfilled its obligations under the *APPR* or in respect of the airline's tariff. The complainant must have first made a written request to the relevant airline that was not resolved within 30 days.[27]

13. Air passenger disputes brought to the Agency are determined by CROs. The *CTA* confers some nominal measures of adjudicative independence on the CRO. It specifies (i) that CRO decisions are *not* decisions of the Agency, (ii) that CROs have the powers, duties, and functions of a CRO, and *not* of the Agency, and (iii) that proceedings before a CRO are *not* proceedings

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[18] *International Air Transport Association v. Canada (Transportation Agency)*, 2024 SCC 30 ["***IATA***"], at para. 6; Millette Affidavit at paras. 3-6.
[19] *CTA* at ss. 85.02(2)-(3) and 85.06(2).
[20] *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, SOR/2014-104 ["**2014 Rules**"]. The 2014 Rules replaced the *Canadian Transportation Agency General Rules*, SOR/2005-35 ["**2005 Rules**"] (now repealed).
[21] 2014 Rules at s. 2; *CTA* at ss. 85.03-85.04 and 172-172.1; Millette Transcript at qq. 17-18 and 24.
[22] Affidavit of Dr. Gábor Lukács, affirmed September 11, 2025 ["**Lukács Reply Affidavit**"], at paras. 22-35 and Exs. "C" to "F", Reply Application Record of the Applicant, dated September 11, 2025 ["**RAR**"], at Tabs 5 and 5-C to 4-F.
[23] *APPR*.
[24] Lukács Reply Affidavit at para. 13 and fn. 5, RAR at Tab 5; *Budget Implementation Act, 2023, No. 1*, S.C. 2023, c. 26, at s. 459.
[25] *CTA* at s. 85.03; Millette Transcript at q. 21.
[26] *CTA* at s. 85.04 to 85.12.
[27] *CTA* at s. 85.04.

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before the Agency.[28] CROs are appointed from among the staff of the Agency.[29]

14. The *CTA* stipulates that when an air passenger complaint is filed, the *CTA* requires the CRO to first attempt to mediate the complaint.[30] However, mediation is only available where the parties agree to it,[31] meaning that adjudication is the default process for all complaints. The CRO adjudicates the complaint.[32]

15. The *CTA* prescribes the types of remedies that the CRO can order following an adjudication of the complaint.[33] These include an order for compensation to be paid to the passenger or an order for compliance with a term or condition of the airline's tariff. Orders made by the CRO, once filed with the Agency, are enforceable as an order of the Agency, and orders of the Agency can be enforced as orders of the Federal Court or of a provincial superior court.[34] The Respondent concedes that CRO orders become public upon such enforcement.[35]

16. Notably, the CRO complaint process is not the only recourse available to passengers. They can also advance claims in civil courts,[36] which are presumptively open to the public.[37] Air passenger complaints relating to accessibility continue to be governed by the 2014 Rules, which are subject to the open court principle.[38]

D. Subsection 85.09(1) Imposes a 'Closed Court'

17. Subsection 85.09(1) of the *CTA* provides that "all matters" relating to an air passenger complaint are to be kept confidential unless the parties to the complaint (the passenger and the airline) agree to disclose the documents and information in question. It states:

> 85.09 (1) All matters related to the process of dealing with a complaint shall be kept confidential, unless the complainant and the carrier otherwise agree, and information provided by the complainant or the carrier to the complaint resolution officer for the purpose of the complaint resolution officer dealing with the complaint shall not be used for any other purpose without the consent of the one who provided it.[39]

18. The Respondent concedes that this section is broad and captures *all* documents dealt with

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[28] *CTA* at ss. 85.02(2)-(3) and 85.06(2).
[29] *CTA* at ss. 13, 19, and 85.02(1); Lukács Reply Affidavit at para. 9, RAR at Tab 5; Millette Transcript at q. 138.
[30] *CTA* at s. 85.05(1).
[31] Lukács Reply Affidavit at paras. 19-21 and 34 and Ex. "B" (p. 7), RAR at Tabs 5 and 5-B.
[32] *CTA* at s. 85.06; Lukács Reply Affidavit at Ex. "B" (pp. 7-8), RAR at Tab 5-B.
[33] *CTA* at s. 85.07.
[34] *CTA* at ss. 33 and 85.07(3).
[35] Millette Transcript at qq. 61-64.
[36] *IATA* at para. 97.
[37] *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 ["***TorStar 2005***"], at para. 4.
[38] *CTA* at ss. 85.04 and 172-172.1; Lukács Reply Affidavit at Exs. "D" and "F", RAR at Tabs 5-D and 5-F; Millette Transcript at q. 32.
[39] *CTA* at ss. 85.09(1).s

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by a CRO, whether arising from mediation or adjudication.[40] The only exceptions to this blanket prohibition are (i) where the parties to a complaint consent and (ii) limited statutory carveouts.

19. Section 85.09(2) of the *CTA* creates exceptions to confidentiality to permit communications between the Agency and the CRO and to allow the Agency to make limited information public under sections 85.14 and 85.15 of the *CTA*.[41] Those sections authorize the Agency to make public aggregate statistics about complaints in its annual report and limited, tombstone information relating to each complaint, including the flight to which the CRO's order relates, the date of the flight in question, whether the order was in relation to any delay, cancellation, or denial of boarding that was within the carrier's control or not, and whether compensation or a refund was ordered.[42]

20. The public database of the information captured by section 85.14 contains no substantive information to assist a member of the public to determine whether they are entitled to relief from an air carrier and may, in fact, contain inaccurate or misleading information about complaints.[43] The Respondent concedes that this database only contains end-stage statistical reporting about complaints.[44] It does not provide adjudicative transparency, nor any insight into the fact-finding or legal reasoning of the CRO.[45]

21. The Agency's annual report – referred to by section 85.15 – is *only* required to disclose the number of complaints, the names of the carriers complained about, the number of complaints that resulted in an order, and "systemic trends observed".[46] Reporting on "systemic trends" is inherently discretionary.

22. The concentration of the Canadian passenger airline industry means that the respondents to complaints have their own database of CRO files to rely on for future complaints.[47] In contrast, members of the public require consent from both parties to any given complaint[48] – which could simply be withheld. Requesters would also need far more information about any given complaint in the public database to begin with in order to make an informed request for useful information.[49] Access to these adjudicative records is thus controlled by a handful of corporate respondents.

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[40] Millette Transcript at qq. 25-28; Pierce Affidavit at paras. 16-23 and Exs. "I" to "N", AR at Tabs 4 and 4-I to 4-N.
[41] *CTA* at s. 85.09(2).
[42] *CTA* at s. 85.14-85.15.
[43] Pierce Affidavit at paras. 10-15 and 21 and Exs. "G" to "H", AR at Tabs 4, 4-G, and 4-H.
[44] Millette Transcript at qq. 107-126.
[45] Pierce Affidavit at paras. 15 and 21 and Ex. "H", AR at Tabs 4 and 4-H.
[46] *CTA* at s. 85.15.
[47] Millette Transcript at qq. 40-45; Lukács Affidavit at para. 47, AR at Tab 3.
[48] *CTA* at s. 85.09(1); Lukács Affidavit at para. 36 and Ex. "F", AR at Tabs 3 and 3-F; Pierce Affidavit at paras. 20, 22, and 23, AR at Tabs 4, 4-L to 4-N.
[49] Pierce Affidavit at para. 15 and Ex "H", AR at Tabs 4 and 4-H.

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E. The Agency Refuses to Provide Copies of Adjudicative Records

23. As part of its work, the Applicant is necessarily interested in the decision-making process and outcomes of disputes before CROs between passengers and airlines.[50]

24. On July 16, 2024, the Applicant wrote to the Agency to request copies of various decisions, orders, and the documents relied on by the CRO to make their decision, in relation to five (5) air passenger complaint files selected from the public database.[51] On August 9, 2024, the Agency responded and denied the Applicant's request on the basis of subsection 85.09(1) of the *CTA*. The response indicated that none of the parties to any of the complaints were willing to consent to the disclosure of their complaints.[52]

25. Consequently, there is no way for the Applicant to read the decisions or orders of the CRO, or to review the documentation relied on by the CRO to make their decision. The Applicant has no meaningful ability to receive or relay information or resources to the public about air passenger complaint proceedings or how such complaints are decided, or to inform its advocacy for improved air passenger rights based on the content of complaint files and the rulings of CROs.

F. The Agency Enforces Subsection 85.09(1) with Threats and Intimidation

26. The confidentiality requirements under subsection 85.09(1) are strictly enforced and forcefully communicated against passengers. Nancy Pierce – a successful air passenger complainant in one such proceeding[53] – received no fewer than 3 emphatic emails from the Agency citing the confidentiality rules and referring to online content from the *CTA* which expanded on this 'closed court' requirement.[54]

27. Ms. Pierce deposes that she found these messages troubling. She also provides evidence that as a result of the threatening nature of the messages from the Agency, she is unsure if she can refer to any of the complaint materials to seek redress from her credit bureau in response to a related dispute with Air Canada. Ms. Pierce is unclear if she can even share the CRO's decision with any other person who might be able to assist her with this problem.[55]

G. The Agency Polices the Distribution of CRO Decisions Among the Public

28. The Agency also aggressively polices the public distribution of CRO decisions and orders

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[50] Lukács Affidavit at paras. 4-29 and 45-48, AR at Tab 3.
[51] Lukács Affidavit at para. 35 and Ex. "E", AR at Tabs 3 and 3-E.
[52] Lukács Affidavit at para. 36, AR at Tab 3 and 3-F.
[53] Pierce Affidavit at Ex. "G", AR at Tab 4-G; Decision 389952-CO-224, dated September 10, 2024.
[54] Pierce Affidavit at paras. 16-23 and Exs. "I" to "N", AR at Tabs 4 and 4-I to 4-N.
[55] Pierce Affidavit at paras. 24-27, AR at Tab 4.

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among third parties and members of the public.

29. In July 2024, an air passenger published a copy of a CRO decision in the Applicant's Facebook group.[56] The Applicant then received an email from a representative of the Agency to complain that the Applicant had shared this decision. The Agency characterized the decision as "confidential information" and indicated that it could not be shared without the parties' consent.[57]

30. The Applicant objected to the Agency's correspondence. It wrote to the Agency to indicate that the Agency's letter was an affront to the constitutionally guaranteed freedom of expression under section 2(b) of the *Charter* and the open court principle.[58]

H. The Agency Proposes Monetary Fines for Violations of Subsection 85.09(1)

31. In January 2025, the Agency proposed introducing monetary fines for violations of subsection 85.09(1).[59] The Applicant – as an air passenger rights stakeholder – provided detailed feedback to the Agency's proposal. The Applicant's submission to the Agency emphasizes the impact of this policy on its expressive activity. The Applicant advised the Agency that this would constitute an even more extreme violation of the *Charter* guarantee of freedom of expression.[60]

PART III – THE ISSUES

32. There are four main questions before the court in this application:

a. Is accessing and communicating information about CRO decisions, orders, and related adjudicative records constitutionally-protected expression?

b. If so, does subsection 85.09(1) of the *CTA* infringe section 2(b) of the *Charter* in purpose and/or effect by restricting this protected expression?

c. If section 2(b) is infringed by subsection 85.09(1) of the *CTA*, is the infringement justified under section 1 of the *Charter*?

d. If the *Charter* infringement of section 2(b) is not justifiable under section 1, what is the appropriate constitutional remedy?

33. The Applicant submits that the expressive activity in question is constitutionally protected

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[56] Lukács Affidavit at paras. 30-31, AR at Tab 3.
[57] Lukács Affidavit at para. 32 and Ex. "D", AR at Tabs 3 and 3-D.
[58] Lukács Affidavit at para. 33 and Ex. "D", AR at Tabs 3 and 3-D.
[59] Lukács Affidavit at para. 37 and Ex. "G", AR at Tabs 3 and 3-G; *Canadian Transportation Agency Designated Provisions Regulations*, SOR/99-244.
[60] Lukács Affidavit at paras. 38-40 and Ex. "H", AR at Tabs 3 and 3-H.

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by section 2(b) of the *Charter*, that subsection 85.09(1) of the *CTA* restricts this protected expression and cannot be justified under section 1 of the *Charter*, and that the appropriate remedy is a reading down (or alternatively, striking) of the impugned subsection such that it only applies to mediation-related materials and not adjudicative records.

PART IV – LAW AND ARGUMENT

A. Expression Concerning Adjudicative Records is *Charter*-Protected

34. Section 2(b) of the *Charter* provides that "[e]veryone has the … freedom of … expression, including freedom of the press and other media of expression".[61] Transmitting and receiving adjudicative records and information about such records is *Charter*-protected expression.[62] This is well-established in the jurisprudence.

1. Section 2(b) Broadly Protects Expressive Activity

35. Expression protected by section 2(b) has been defined as "any activity or communication that conveys or attempts to convey meaning".[63] The determination of whether an expression attracts *Charter* protection is content neutral. It does not matter whether the expression is offensive or disturbing, or truthful or false.[64] This also encapsulates the right to say nothing or not to be compelled to express oneself.[65] Freedom of expression has been found to protect both 'speakers' and 'listeners', and both the sending and receipt of information.[66] Corporations (such as the Applicant) also enjoy the section 2(b) constitutional guarantee.[67]

36. The constitutional protection of freedom of expression is premised upon the fundamental principles and values that promote the search for and attainment of truth, participation in social and political decision-making, and the opportunity for individual self-fulfillment through expression.[68] The Supreme Court of Canada has maintained that the connection between freedom of expression and the political process is "the linchpin" of section 2(b) protection.[69]

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[61] *Charter* at s. 2(b).
[62] See *AG Ontario* at para. 55; *CBC 1996* at headnote and para. 26; *CBC 2010* at paras. 44 and 50; *CBC 2011a* at para. 12; *Edmonton* at 1338.
[63] *Thomson Newspapers Co. v. Canada (Attorney General)*, 1998 CanLII 829 (S.C.C.) ["***Thomson***"], at para. 81; see also *Irwin Toy Ltd. v. Quebec (Attorney General),* [1989] 1 S.C.R. 927 ["***Irwin Toy***"] at 969.
[64] *R. v. Keegstra*, [1990] 3 S.C.R. 697 ["***Keegstra***"], at 729; *R. v. Zundel,* [1992] 2 S.C.R. 731 at 753; *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30 ["***JTI***"], at para. 60; *R. v. Lucas*, 1998 CanLII 815 (S.C.C.), at paras. 25-26.
[65] *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1080.
[66] *Edmonton* at 1339-1340; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712 ["***Ford***"], at 767; *AG Ontario* at para. 56.
[67] See, for instance, *Keegstra* at 810, and also *Ford, Irwin Toy, Edmonton*, *JTI*, etc.
[68] *Irwin Toy* at 976; *Ford* at 765-766.
[69] *Keegstra* at 763-764; *Thomson* at para. 92; *Harper v. Canada (Attorney General*), 2004 SCC 33, at para. 84.

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2. Section 2(b) is Inextricably Tied to the Open Court Principle

37. The section 2(b) right has been found to be "inextricably tied" to the open court principle.[70] The Supreme Court of Canada has declared that this principle includes "guaranteed access to the courts in order to gather information", and that "measures that prevent the media from gathering that information, and from disseminating it to the public, restrict the freedom of the press".[71]

38. *Charter* protection of the open court principle is unequivocal in the jurisprudence. It is distinguishable from section 2(b) interests that attach to mere governmental documents where, without access, meaningful public discussion and criticism on matters of public interest would be substantially impeded.[72] In those cases, while there is a *prima facie* case for access to the documents in question,[73] there is no general right of access. [74] Where a governmental agency or public administrative body holds records *other than* adjudicative records, those records are not subject to the open court principle, but they are obliged to "implement transparency only where disclosure […] is necessary for democratic process."[75]

39. In contrast, the open court principle confers a *presumptive* right of access. This presumptive right attaches to adjudicative records,[76] exhibits entered into evidence,[77] photocopies of all such records,[78] the ability to attend a courtroom,[79] and the ability to disseminate those records by means of broadcast or other publication.[80] The Federal Court of Appeal has stated – with reference to the Agency – that

> […] where the open court principle is unrestricted in its application, a member of the public has a common law and perhaps a constitutional right to inspect and copy all documents that have been placed on the record that is or was before a court.[81]

40. This and other courts, including the Supreme Court of Canada, have also found that this principle extends to the records of administrative tribunals:

> […T]hese principles apply to administrative tribunals as well as to courts. While the source of administrative tribunals' authority is their enabling statute, "[t]he legitimacy of such tribunals' authority . . . can be effected only if their proceedings are open to the public". This open access, and concomitant protection of freedom of the press, is in keeping with those

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[70] *AG Ontario* at para. 56, citing *CBC 1996* at headnote.
[71] *AG Ontario* at para. 54, citing *CBC 1996* at para. 26.
[72] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 ["***CLA***"], at paras. 33-34.
[73] *CLA* at paras. 33 and 37.
[74] *AG Ontario* at para. 59.
[75] *AG Ontario* at para. 62.
[76] *CBC 2010* at para. 44.
[77] *CBC 2011a* at para. 12.
[78] *Edmonton* at 1338.
[79] *TorStar 2005* at para. 4.
[80] *CBC 2010* at para. 50.
[81] *Lukács v. Canada (Transport, Infrastructure and Communities)*, 2015 FCA 140 ["***Lukács***"], at para. 30.

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> tribunals' obligation "in exercising their statutory functions . . . [to] act consistently with the *Charter* and its values". This is not optional or discretionary on the part of administrative tribunals. As the Supreme Court has stated, "the protection of *Charter* guarantees is a fundamental and pervasive obligation, no matter which adjudicative forum is applying it".[82]

41. When it comes to adjudicative records, transparency is *required* "for the sake of the administration of justice."[83]

3. The Protected Activities in Evidence

42. The undisputed evidence is that subsection 85.09(1) of the *CTA* prohibits the Applicant, Ms. Pierce, and the public from engaging in several expressive activities relating to the adjudicative records of CROs. Those activities include:

a. Communicating with third parties to air passenger complaints about the contents of orders and decisions or documents filed for adjudicative purposes;[84]

b. Accessing decisions, orders, and documents relied on by CROs to make decisions in proceedings other than those to which the person is a party;[85]

c. Sharing information, commentary, guidance, or resources relating to air passenger complaint processes involving CROs;[86]

d. Understanding how CROs apply the *APPR* or laws governing passenger rights;[87]

e. Using the outcomes of CRO proceedings in other legal or dispute processes;[88]

f. Advocating for improvements in air passenger rights, regulations, and protections based on adjudicative records from air passenger complaint processes;[89] and

g. Engaging in communications and promoting institutional and industry accountability, which is in the public interest in a free and democratic society.[90]

43. These are all activities that *prima facie* attract the section 2(b) *Charter* protection as matters of truth-seeking, social and political fulfillment, and democratic governance. More

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[82] *AG Ontario* at para. 55 (footnotes omitted), citing *Southam Inc. v. Canada Minister of Employment and Immigration)*, [1987] 3 F.C. 329 at 336; *Conway* at headnote and para. 20; and *Doré* at para. 4.
[83] *AG Ontario* at para. 63, citing *TorStar 2005* at paras. 1-3 and 8.
[84] Lukács Affidavit at paras. 4-5 and 30-33, AR at Tab 3; Pierce Affidavit at para. 27, AR at Tab 4.
[85] Lukács Affidavit at paras. 4-5 and 34-36, AR at Tab 3.
[86] Lukács Affidavit at paras. 4-5 and 41-48, AR at Tab 3.
[87] Lukács Affidavit at paras. 4-5 and 42, AR at Tab 3.
[88] Lukács Affidavit at paras. 4-5, AR at Tab 3; Pierce Affidavit at para. 25, AR at Tab 4.
[89] Lukács Affidavit at paras. 4-5 and 41-48, AR at Tab 3.
[90] Lukács Affidavit at paras. 4-5 and 41-48, AR at Tab 3.

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particularly, they reflect the protected expressive activity epitomized by the open court principle.

4. The Protection is Not Removed by the Method or Location of the Expression

44. The *Charter* protection of expression can be negated depending on the method or location of the expression.[91] Any method of expression that does not take the form of violence or threats of violence maintains *Charter* protection.[92] Here, there is no basis to conclude that the method is 'violent' or that the location of the impugned expression negates its section 2(b) protection.

45. In respect of location, the rights claimant must show that the expression in a public place is where one would expect constitutional protection for free expression because it promotes "(1) democratic discourse, (2) truth finding and (3) self-fulfillment."[93] Applying this framework in *CBC*, the Supreme Court of Canada found that gathering information at a courthouse to inform the public about an adjudicative proceeding attracts the protection of section 2(b) of the *Charter*, and that constraints on the ability to do so erode democratic discourse, self-fulfillment, and truth-seeking:

> [45] Although the primary purpose of a courthouse is to serve as a place to conduct trials and other judicial proceedings, the presence of journalists in the public areas of courthouses has historically been — and still is — authorized[.] As I mentioned above, the presence of journalists in courthouses is essential. When they conduct themselves appropriately, their presence, far from undermining the values underlying s. 2(*b*), generally enhances those values. Without it, the public's ability to understand our justice system would depend on the tiny minority of the population who attend hearings, and the inevitable result would be to erode democratic discourse, self-fulfilment and truth finding. ...[94]

46. Illustratively, the "closed court" under the *CTA* is broader and further reaching than the prohibition on filming, taking photographs, and conducting interviews in public areas of courthouses that was at issue in *CBC*.[95] Subsection 85.09(1) of the *CTA* does not permit ***any*** expressive activity relating to the proceeding before the CRO and the related records.[96]

B. Subsection 85.09(1) Infringes this Protected Expression in Purpose and Effect

47. To infringe the section 2(b) freedom of expression, the protected activity must be restrained by the legislation in purpose or effect. Subsection 85.09(1) of the *CTA* constrains expression in both respects, though a restriction in *either* is sufficient to ground a *Charter* violation.

1. Purpose

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[91] *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62 ["***Montréal***"], at paras. 60 and 73-75.
[92] *Montréal* at para. 60.
[93] *Montréal* at para. 74.
[94] *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2 ["***CBC 2011b***"], at para. 45 (emphasis added; citation omitted).
[95] *CBC 2011b* at para. 5.
[96] *CTA* at s. 85.09(1); Pierce Affidavit at paras. 17-23, AR at Tab 4.

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48. The purpose of a legislative provision will be found to be one restricting free expression where it (i) restricts the content of expression, (ii) it controls access to a certain message, and (iii) it limits the ability of a person to convey a message to express themselves.[97] These considerations are each clearly engaged. It is acknowledged by the Respondent that subsection 85.09(1) imposes a broad, explicit, and categorical prohibition on the expressive activity of accessing or disseminating adjudicative records from the CRO's process or from communicating about the contents of such records.[98] It is also apparent that the subsection restricts both the expression of speakers/senders and listeners/receivers of adjudicative information and records.[99]

49. First, subsection 85.09(1) restricts the content of expression. It does so by limiting the ability to share information about the decisions and orders of the CRO without the consent of both parties to the given proceeding. This prohibition applies to the parties themselves, but also to strangers to the proceeding. Notably, the scope of information appearing in the public database is of limited assistance.[100] Not only is this information limited, but it can be *wrong*.[101]

50. Second, subsection 85.09(1) of the *CTA* restricts access to certain messages. It does so by prohibiting access to all materials before the CRO. Even the most fundamental documents – the CRO's orders and decisions – require the consent of both the complainant and the respondent airline before they are released.[102] This effectively serves to bar access to these materials for members of the public – including those, like the Applicant, who have a vested interest in sharing information about air passenger complaint proceedings for public interest reasons.

51. While the consent of the passenger and the airline is held out as a method to obtain access, this is not meaningful. The airlines, in particular, have no incentive to provide consent or to facilitate open access to this information. The Respondent confirms that just four airlines are the respondents on 80 percent of these proceedings.[103] This means that each of them has their own sizeable database of materials from air passenger complaint processes. As such, subsection 85.09(1) not only restricts access to certain messages, but creates significant inequality of access these messages. There is no evidence that any airline has ever consented to disclosure.

52. Third, the Agency has weaponized subsection 85.09(1) of the *CTA* against passenger

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[97] *Irwin Toy* at 974.
[98] Millette Transcript at qq. 25-28.
[99] Lukács Affidavit at paras. 30-36, AR at Tab 4.
[100] Millette Transcript at qq. 107-126.
[101] Pierce Affidavit at paras. 14-15 and 17-18 and Ex. "H", AR at Tabs 4 and 4-H; *CTA* at s. 85.14; Millette Transcript at q. 126.
[102] *CTA* at s. 85.09; Lukács Affidavit at paras. 32 and 36 and Exs. "D" "F", AR at Tabs 3, 3-D, and 3-F; Pierce Affidavit at paras. 19 and 22 and Exs. "K" and "M", AR at Tabs 4, 4-K, and 4-M.
[103] Millette Transcript at qq. 37-42.

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complainants and members of the public who share information about such proceedings. As the record shows, the Agency sends numerous coercive and threatening communications cautioning passengers from sharing information about their complaint proceeding with others.[104] The record also shows that the Agency proactively attempted to chill the expressive rights of the Applicant to share information about a CRO decision.[105] The Agency is now proposing to levy fines against parties to engage in communications about these adjudicative proceedings or their outcomes.[106]

53. There is, consequently, no doubt that the impugned provision infringes section 2(b) of the *Charter* in its purpose, as that is exactly what the subsection is designed and enforced to do.

2. Effect

54. While it is sufficient that subsection 85.09(1) of the *CTA* violates section 2(b) of the *Charter* in its purpose, it also infringes the right in its effect. A law will breach section 2(b) where the expression impeded is one that advances the values underlying freedom of expression – namely participation in social and political decision-making and the search for truth and self-fulfillment.[107]

55. As stated above, accessing information intertwined with norms of democratic governance – and in particular, judicial proceedings and adjudicative documents – is inextricably tied to the public's ability to engage with the justice system, law, and public policy impacting them and their interests.[108] Subsection 85.09(1) restricts that access entirely, and erodes democratic discourse, self-fulfilment and truth finding that section 2(b) of the *Charter* is meant to safeguard.

56. The Applicant's functions and service to the public rely on the constitutional guarantee of section 2(b).[109] Without open access to adjudicative records of air passenger complaint proceedings, it cannot properly relay information about the recourse available to passengers, about how air passenger rights are being interpreted by CROs and enforced by the Agency, or about how such law, policy, and regulation ought to be improved to better protect passengers.[110]

57. A byproduct of subsection 85.09(1) is that it creates a closed and unequal tribunal with informational asymmetry between complainant members of the public and the respondent airlines. It weakens the *Charter*'s guarantee of equality before and under the law, and to the equal

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[104] Pierce Affidavit at paras. 16-27 and Exs. "I" to "N", AR at Tabs 4 and 4-I to 4-N.
[105] Lukács Affidavit at paras. 30-33 and Ex. "D", AR at Tabs 3 and 3-D.
[106] Lukács Affidavit at paras. 37-40 and Exs. "G" and "H", AR at Tabs 3, 3-G, and 3-H.
[107] *Irwin Toy* at 976.
[108] *AG Ontario* at para. 55; *Vancouver* at para. 31. See also other authorities cited at notes 9 and para.40, *supra*.
[109] Lukács Affidavit at paras. 4-29 and 41-44, AR at Tab 3.
[110] Lukács Affidavit at paras. 45-48, AR at Tab 3.

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protection and benefit of the law, which offends the democratic values underlying section 2(b).[111]

C. The Infringement of Freedom of Expression is Not Justifiable

58. Section 1 guarantees the rights set out in the *Charter* but allows for infringements provided that the government can establish that they are reasonably justified in a free and democratic society.[112] Once a restriction on a protected expressive activity is established in purpose or effect, the onus shifts to the Respondent to justify the infringement under section 1 of the *Charter*.[113]

59. At the outset, it is noted that blanket statutory restraints on expression about adjudicative decision-making attract exacting scrutiny. Subsection 85.09(1) fails every stage of the *Oakes* analysis for this reason. While *discretionary* restrictions on expression are constitutional because the *Dagenais/Mentuck* test incorporates balancing considerations,[114] the *CTA* does not impose a discretionary ban – it is a *mandatory* one. Legislative enactments that automatically limit court openness require justification under section 1 of the *Charter,* following the *Oakes* test.[115]

60. Under *Oakes*, when a protected right is infringed, the government must justify its action:

> A limitation to a constitutional guarantee will be sustained once two conditions are met. **First**, the objective of the legislation must be pressing and substantial. **Second**, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: **(1)** the rights violation must be rationally connected to the aim of the legislation; **(2)** the impugned provision must minimally impair the *Charter* guarantee; and **(3)** there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. In all s. 1 cases the burden of proof is with the government to show on a balance of probabilities that the violation is justifiable.[116]

1. There is No Pressing and Substantial Objective

61. No pressing and substantial objective has been adduced by the Respondent to support the blanket confidentiality regime imposed by subsection 85.09(1) of the *CTA*. To establish a pressing and substantial objective, the legislative provision must be neither "trivial" nor "discordant with the principles integral to a free and democratic society."[117]

62. To be sure, Hansard discloses no legislative intention relating to subsection 85.09(1), so

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[111] *Charter* at ss. 2(b) and 15; *Keegstra* at 763-764.
[112] *Vriend v. Alberta*, 1998 CanLII 816 (S.C.C.) ["***Vriend***"], at para. 108.
[113] *Oakes* at para. 66.
[114] *R. v. Mentuck*, 2001 SCC 76, at para. 27; *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (S.C.C.).
[115] *Toronto Star Newspapers Ltd. v. Canada*, 2010 SCC 21 ["***TorStar 2010***"], at paras. 18-19.
[116] *Egan v. Canada*, [1995] 2 S.C.R. 513 at 605 (emphasis added), cited in *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (S.C.C.) ["***Eldridge***"], at para. 84 and *Vriend* at para. 108; *TorStar 2010* at para. 20.
[117] *Figueroa v. Canada (Attorney General),* 2003 SCC 37, at para. 59, citing *Oakes* at para. 69.

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we are left to distill Parliament's objective from the face of the statute itself. On its face, subsection 85.09(1) impairs the availability of adjudicative records, contrary to the open court principle, which is "one of the hallmarks of a democratic society."[118] As this court has stated, "[t]he *Charter* requires public access to Adjudicative Records".[119]

63. The only objective that emerges from the Respondent's evidence is that of promoting informality and efficiency in the CRO process.[120] The witness described growth in the number of air passenger complaints, delay in processing complaints, the disproportionate use of governor-in-council ["**GIC**"] appointed Agency members for routine, low-value complaints, and a need to streamline and simplify the process.[121] But he could point to no industry demands for secrecy (he denied such existed), no evidence that public access to adjudicative records from CROs cause harm, had no information about the number of requests for access to adjudicative records, and offered no indication that transparency would negatively impact the disposition of complaints or create unworkable privacy or security issues.[122]

64. None of these operational considerations meets the threshold for a pressing and substantial objective. And this is not a novel proposition: as this court has stated, "the reasons for overriding the openness principle must pose a serious risk, and not just an inconvenience to the parties or the adjudicative body."[123] Moreover – writing in reference to the *Dagenais/Mentuck* test, which applies more flexibly and contextually in respect of discretionary restrictions on expression and is less exacting – the court stated that "it is the openness of the system, and not the privacy or other concerns of law enforcement, regulators, or innocent parties, that takes primacy in this balance."[124] Yet under subsection 85.09(1) of the *CTA*, there is no balancing at all.

65. In the face of this high burden, the Respondent's witness offers just three boutique justifications in support of the "efficiency" objective. None are sufficiently serious to override the openness principle entirely.

66. First, the witness said the confidentiality requirement was crucial to the mediation stage of the CRO's process.[125] But he also conceded (and the Agency's own published materials reflect) that mediation is merely *optional* – meaning that the default and required for all complaints is

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[118] *CBC 1996* at headnote, cited in *AG Ontario* at paras. 54.
[119] *AG Ontario* at para. 107 (emphasis added).
[120] Millette Affidavit at paras. 13-45.
[121] Millette Transcript at qq. 71-72, 76-79, and 86.
[122] Millette Transcript at qq. 55-56 and 73.
[123] *AG Ontario* at para. 90.
[124] *AG Ontario* at para. 91.
[125] Millette Affidavit at para. 40; Millette Transcript at qq. 146-152.

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adjudicative.[126] Even if mediation was compulsory, this only supports confidentiality over 'without prejudice' materials, and certainly not over final decisions and orders of the CRO. This also does not explain why adjudicative outcomes must also be subject to the blanket confidentiality provision, particularly when other forums that routinely hear the same disputes with the same type of evidence – such as small claims courts – are presumptively open to the public.[127]

67. Second, the Respondent's witness suggested that publishing detailed, bilingual decisions was resource intensive. But this falsely equates openness with publication. The proactive publication of decisions from courts and tribunals is not at issue – nor is there any indication that section 2(b) requires it. This application is about a right of access, not publication.

68. Third, the witness suggested that there were privacy concerns under the prior complaint framework, as passengers often disclose personal information in their materials. The witness's affidavit states that Agency staff were proactively engaging in redactions of private information under the previous complaint framework.[128] If true – as pointed out during the examination – that is offside the Agency's own regulated process around record sealing and redaction.[129] This practice was also struck down as impermissible.[130]

69. Successive versions of the Agency's regulations are clear that confidentiality must be requested and justified against a legal test.[131] It is not automatic. Regardless, courts and tribunals are equipped to manage this problem without completely closing proceedings. In fact, the Federal Court of Appeal has acknowledged that the Agency's own rules presumptively preserve public access in accordance with the open court principle, while exceptionally permitting confidentiality, in a similar manner to judicial proceedings.[132]

70. What remains true is that the overriding statutory objective of the 2023 enactments in the *CTA* was to create a fair adjudicative forum for air passenger complaints against airlines. This is a laudable pursuit. But subsection 85.09(1) of the *CTA* undermines the entire scheme because its alleged bid to promote efficiency advantages one group of parties to these proceedings. The reality is that many statutory tribunals are struggling with volume, and yet the court has maintained

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[126] Millette Transcript at q. 49; Lukács Reply Affidavit at paras. 19-21 and Ex. "B", RAR at Tabs 5 and 5-B.
[127] It is noted that in *Geddes v. Air Canada*, 2021 NSSM 27, at para. 3 – in which the Applicant's president acted as agent for the claimant – the Nova Scotia Small Claims Court observed that close to 1,000 pages of material were filed in relation to the $400 claim. All of those documents remain on the public record.
[128] Millette Affidavit at para. 41.
[129] Millette Transcript at qq. 35-36 and 142-145; Lukács Reply Affidavit at paras. 22-25, RAR at Tab 5; 2005 Rules at s. 23; 2014 Rules at ss. 7 and 31.
[130] *Lukács* at paras. 9-10 and 62.
[131] 2005 Rules at s. 23; 2014 Rules at ss. 7 and 31; Lukács Reply Affidavit at paras. 27 and 31-32 and Exs. "C" to "E", RAR at Tabs 5 and 5-C to 5-E.
[132] *Lukács* at para. 79.

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that their adjudicative records remain subject to the *Charter*-protected open court principle.[133]

71. Consequently, the Respondent's "efficiency" claims cannot satisfy a pressing and substantial objective. Improving efficiency of an adjudicative forum like a court or tribunal is not dependent on imposing blanket secrecy over its work.

2. Not Reasonably and Demonstrably Justifiable

72. Subsection 85.09(1) of the *CTA* impairs the section 2(b) *Charter* right, which cannot be reasonable and demonstrably justified in a free and democratic society, because (i) it is not rationally connected to any pressing and substantial objective, (ii) it does not minimally impair the expressive right at issue, and (iii) there is no proportionality between the deleterious and salutary effects of the impugned provisions of the *CTA*.[134]

i. Rational Connection

73. To satisfy the rational connection requirement, the Respondent must demonstrate that the impugned provision logically advances the identified objective.[135]

74. The Respondent's evidence establishes a pressing concern about delay, backlog, and proportionality in resolving air passenger complaints.[136] But legislating the wholesale confidentiality of adjudicative records is not rationally connected to the objective of efficient complaint resolution. The Supreme Court has been clear that absolute prohibitions on *Charter* rights will fail to satisfy the rational connection test.[137]

75. Efficiency concerns are dependent on procedure, not publicity or public access. Delay and backlog – in any court or tribunal – arise from the volume of proceedings, staffing constraints, and multi-stage procedures. The Respondent's witness conceded that part of the delay in processing air passenger complaints relates to the complexity of the *APPR*.[138] These are not transparency burdens, but the consequence of resources and the *inefficient* content of the *APPR* and the *CTA* provisions Parliament enacted. We see this evident in four respects.

76. First, the Respondent's witness attributed the delay problem under the prior model to the three-stage panel process, the use of GIC-appointed members, and need for lengthy reasons on

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[133] *AG Ontario* at paras. 55 and 90.
[134] *Vriend* at para. 108; *Eldridge* at para. 84.
[135] *Vriend* at para. 118; *Carter v. Canada (Attorney General)*, 2015 SCC 5 ["***Carter***"], at para. 99; *Hillier v. Ontario*, 2025 ONCA 259, at para. 50.
[136] Millette Affidavit at paras. 13-45.
[137] *Carter* at para. 101 and 121.
[138] Millette Transcript at qq. 86-87.

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each complaint.[139] He did not depose that public access itself caused or contributed to delay. The evidence identifies the decision-maker, the process, and the way decisions were conveyed as the source of inefficiency, not the fact of the records being open to the public.

77. Second, the secrecy of decisions, orders, and the documents relied on to make decisions and orders does not change how quickly the matter is heard or the decision is written, does not reduce the number of new proceedings, and does not simplify the substantive legal analysis on each complaint. A CRO who is seized of a complaint must still assess eligibility, make findings of fact, apply the law under the *APPR* or tariff, and then make an order. Confidentiality does not shorten these tasks. A decision written in private takes no less time to write than a decision written for public release. There is also no evidence that the CROs responsible for those tasks would be the same individuals mandated to facilitate public access to adjudicative records and files.

78. Third, the confidentiality rationale collapses once the CRO's optional mediation ends or a party to the complaint refuses mediation. Even if confidentiality provides an environment for mediation, that does not justify the blanket secrecy over the adjudicative stage of the process.

79. Finally, the confidentiality rationale is internally inconsistent. The *CTA* is clear that CRO decisions and orders are confidential internally, yet also enforceable as Agency orders, which, in-turn, can be filed and enforced as court orders.[140] The Respondent's witness conceded this.[141] If publicity truly undermined efficiency or integrity of this process, presumably the *CTA* would not permit court enforcement to render CRO orders public. The resulting scheme is one that facilitates CRO records becoming matters of public record, despite subsection 85.09(1).

80. In sum, the Respondent's evidence, at its best, establishes a need for procedural streamlining over an unworkable *APPR*.[142] It does not establish that suppressing expression about adjudicative records and outcomes of the CRO's process advances that objective. The link between secrecy and efficiency is asserted, but not demonstrated in any material respect.

ii. Minimal Impairment

81. Even where a pressing and substantial objective is established and a rational connection shown, the Respondent must demonstrate that the impugned measure impairs the protected right as little as reasonably possible. [143] To further the goal of the pressing and substantial objective of

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[139] Millette Affidavit at paras. 14 and 19; Lukács Reply Affidavit at paras. 5-6, RAR at Tab 5.
[140] *CTA* at ss. 33 and 85.07(3). See also s. 85.05(2), which allows mediation outcomes to be enforced as orders.
[141] Millette Transcript at qq. 61-64.
[142] Under examination, the witness indicated that it takes a CRO, on average, 1 day to adjudicate a single complaint: Millette Transcript at q. 139.
[143] *Oakes* at para. 70.

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the law, it must be "carefully tailored to avoid excessive impairment of the right, and productive of benefits that outweigh the detriment to freedom of expression."[144] The Respondent must show that less-impairing alternatives were not available.

82. In *Sharpe*, the Supreme Court of Canada stated that a law will not minimally impair freedom of expression if the law is drafted in a way that unnecessarily catches material that has nothing to do with its pressing and substantial objective – that the statutory provision must reflect a "measured and appropriate" response to the harm it addresses.[145]

83. Legislatures are not to be held to the standard of perfection in their drafting.[146] Similarly, while Parliament has no duty to adopt the least restrictive means of achieving its end, the laws it enacts must reflect some reasonable "tailoring" to respect *Charter* rights.[147] But here, the impugned subsection betrays *no effort* at moderating the adverse impacts on the open court principle protected by section 2(b). Subsection 85.09(1) instead sets out a wide-reaching prohibition that intends – and is enforced – to impose a secret, closed tribunal for very ordinary civil disputes. The failure to minimally impair this right is evident in several respects.

84. First, courts and tribunals have developed numerous discretionary mechanisms and tests to ensure that, when appropriate, sensitive information can be kept from public view while maintaining the integrity of an open court process;[148] yet the *CTA* adapts none of these for the CRO's adjudicative records. It applies confidentiality to "all matters", regardless of the nature of the issue, whether personal or private information could be readily redacted, the type of document, or whether there is any public interest in the disclosure. Subsection 85.09(1) shrouds adjudicative records entirely from public view.

85. Subsection 85.09(1) confers no discretion and provides no mechanism for partial disclosure (aside from inadequate information in the Agency's public database and annual report[149]) and contains no public interest override. Confidentiality is the rule; transparency is permitted only if both parties consent, effectively granting an exception by default to repeat airline respondents to this process. None of this even approaches an attempt at minimally impairing the *Charter*-protected presumption of open access to courts and tribunals. This regime is not narrowly

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[144] *R. v. Sharpe*, 2001 SCC 2 ["***Sharpe***"], at para. 78.
[145] *Sharpe* at para. 95; citing *Keegstra* at 771.
[146] *Sharpe* at para. 95, citing *Irwin Toy*.
[147] *Sharpe* at para. 96.
[148] *Sherman Estate v. Donovan*, 2021 SCC 25, at para. 30: "Limits on openness in service of other public interests have been recognized, but sparingly and always with an eye to preserving a strong presumption that justice should proceed in public view […] The test for discretionary limits on court openness is directed at maintaining this presumption while offering sufficient flexibility for courts to protect these other public interests where they arise[.]"
[149] *CTA* at ss. 85.14 and 85.15; Pierce Affidavit at paras. 14-15 and Ex. "H", AR at Tabs 4 and 4-H.

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'tailored' at all. It is a paradigmatic example of overbreadth.

86. Second, a 'less-impairing' model already existed, and continues to exist, under the auspices of the Agency. The Respondent's own evidence establishes that, prior to the 2023 amendments, air passenger complaints were resolved under the 2014 Rules, which distinguished between confidential mediation and open adjudication and where adjudicated proceedings resulted in published reasons.[150] The 2014 Rules (and its 2005 predecessor[151]) contain provisions for parties to apply for redaction of truly sensitive, confidential information. This has been recognized by an appellate court.[152] This framework continues to apply to air passenger complaints related to accessibility.[153] Consequently, the 2023 amendments partially replaced an existing, less rights-impairing framework with a more restrictive one, without evidence that the prior approach was unworkable or constitutionally deficient.

87. Third, the Respondent has led no evidence that even the most basic measures were considered to provide meaningful access to this crucial expressive activity. The Respondent led no evidence that alternate measures were considered and rejected, nor that common confidentiality practices would be ineffective in the CRO context. Administrative convenience cannot justify a wholesale suppression of expression.

88. Fourth, the sole statutory mechanism for disclosure under subsection 85.09(1) is illusory – which does not satisfy minimal impairment. The Respondent's evidence establishes that the vast majority of complaints involve a small number of large air carriers, who are repeat participants in the process and possess extensive private collections of CRO decisions.[154] Individual passengers, by contrast, are one-time participants with no leverage to secure consent. The result is a structural veto over disclosure exercised by institutional respondents. A measure like this one, that conditions transparency on the acquiescence of the party most likely to oppose it, cannot be said to minimally impair expressive rights.

89. In summary, the Respondent has demonstrated a need to streamline procedures and reallocate adjudicative resources. It has not demonstrated that achieving those goals required the categorical suppression of expression about adjudicative outcomes or the materials relied on to reach them.

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[150] 2014 Rules; Lukács Reply Affidavit at paras. 10-12, RAR at Tab 5.
[151] 2005 Rules at s. 23; 2014 Rules at ss. 7 and 31; Lukács Reply Affidavit at paras. 22-35 and Exs. "C" to "F", RAR at Tabs 5 and 5-C to 5-F.
[152] *Lukács* at paras. 79-80.
[153] Milette Transcript at q. 32; *CTA* at ss. 85.04 and 172-172.1.
[154] Millette Transcript at qq. 37-42.

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iii. Proportionality

90. The final step of the *Oakes* framework is to consider whether there is proportionality between the deleterious and salutary effects of the legislation that offends section 2(b) of the *Charter*.[155] Even if the Respondent were able to demonstrate a pressing objective and a rational connection – which it cannot – subsection 85.09(1) of the *CTA* fails the final stage of the *Oakes* analysis. The deleterious effects of imposing blanket confidentiality over adjudicative records substantially outweigh any speculative benefits associated with administrative efficiency.

91. The impugned provision suppresses expression at the heart of democratic accountability and public confidence in the administration of justice. By prohibiting access to, and communication about, CRO decisions and orders, subsection 85.09(1) prevents the public, the media, and affected passengers from understanding how statutory rights are interpreted and enforced. It forecloses meaningful commentary on the administration of justice and relevant law and policy, inhibits scrutiny of consistency and fairness, and impedes the development of public knowledge about the operation of the *APPR* regime.

92. The deleterious effects of the complete bar to disclosure of adjudicative records from air passenger complaint proceedings is real and substantial, which undermines the democratic values protected by open access to adjudicative records. This court has acknowledged the wider, negative impacts of a lack of access to tribunal records and processes:

> As counsel for the Toronto Star points out, emphasizing privacy over openness not only has a negative impact on the press but also affects other stakeholders. Regulators have no way of identifying chronic offenders, reference checks on tenants and others who come before the various tribunals are impossible to carry out. Problematic landlords, police and other actors, including repeat human rights offenders, vexatious litigants and the like cannot be discovered by members of the public who have to engage with them. The public cannot know about upcoming hearings for a number of the tribunals, and the media are unable to engage public debate about cases which they do not know are forthcoming and so do not attend or cover.[156]

93. This expressive harm is not abstract. CRO decisions are binding, determinative of statutory entitlements, and enforceable as orders of the Agency and of the court.[157] Secrecy over such outcomes transforms routine civil adjudication into a closed process, shielding patterns of decision-making from public view and entrenching information asymmetries between repeat institutional actors and individual complainants. This is a profound departure from the constitutional baseline of transparent adjudication. In more general terms, the secrecy surrounding

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[155] *AG Ontario* at para. 111.
[156] *AG Ontario* at para. 111.
[157] *CTA* at ss. 33, 85.05(2), and 85.07(3).

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air passenger complaint proceedings raises similar policy considerations concerning "repeat offenders", patterns of airline misconduct, and the inability to review and comment on findings of fact about the parties' conduct in any particular case.

94. At the same time, the secrecy created by subsection 85.09(1) ices out the public from scrutinizing the CRO's process. It is arguable that the public oversight – through an open court – is even more essential in this forum than others given that the CROs clearly do not enjoy substantive independence from their government employer.

95. The deleterious effects are compounded by the scale of the regime. Tens of thousands of complaints are resolved annually through the CRO process, the overwhelming majority involving a small number of large air carriers. Subsection 85.09(1) of the *CTA* therefore suppresses expression not in isolated cases, but across an entire category of adjudicative decisions in a high-volume quasi-judicial forum that directly affects the public.

96. By contrast, the salutary effects asserted by the Respondent are limited and speculative. The evidence does not demonstrate that suppressing access to adjudicative outcomes materially improves efficiency, increases settlement rates, or enhances consumer protection. To the extent that confidentiality promotes frank discussion in mediation, those benefits can be fully realized without extending secrecy to decisions and orders. The wholesale suppression of adjudicative records sacrifices transparency entirely in order to avoid manageable administrative burdens. Administrative convenience cannot justify such a significant infringement of expressive freedom.

97. When weighed against the substantial expressive harm caused by subsection 85.09(1), any marginal efficiency gains are insufficient to uphold the provision. The balance struck by Parliament prioritizes institutional convenience over constitutional accountability.

98. For these reasons, subsection 85.09(1) cannot be justified under section 1 of the *Charter*.

D. Reading Down Subsection 85.09(1) is the Appropriate Remedy

99. Section 52 of the *Constitution Act, 1982*, is the primacy clause. It provides:

> 52 (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.[158]

100. The Supreme Court of Canada stated in *G* that:

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[158] *Constitution Act* at s. 52(1) (emphasis added).

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> As our jurisprudence demonstrates, and the language of s. 52(1) directs, the first step in crafting an appropriate s. 52(1) remedy in a given case is determining the extent of the legislation's inconsistency with the Constitution. Courts should bear in mind both "the manner in which the law violates the *Charter* and the manner in which it fails to be justified under s. 1" (*Schachter*, at p. 702) in crafting tailored remedies. […] The nature and extent of the underlying *Charter* violation lays the foundation for the remedial analysis because the breadth of the remedy ultimately granted will reflect at least the extent of the breach.[159]

101. The Supreme Court acknowledged that section 52(1) remedies reach beyond those directly affected by ensuring the law is cured of all of its constitutional defects.[160] At the same time, the remedy should "preserve the constitutional aspects of the law".[161] 'Reading down' accomplishes this by limiting the reach of legislation by declaring it to be of no force and effect to a precisely defined extent. Reading down is an appropriate remedy when the offending portion of a statute can be defined in a limited manner.[162]

102. In this case, subsection 85.09(1) of the *CTA* is constitutionally valid insofar as it protects the confidentiality of mediation communications and settlement discussions in the CRO process. The Applicant does not challenge the legitimacy of confidentiality at the mediation stage.

103. The constitutional infirmity arises from the extension of that confidentiality to final adjudicative decisions and orders, the reasons for those decisions, as well as the materials relied on to reach those decisions. To that extent, subsection 85.09(1) suppresses expression about binding quasi-judicial decision-making in a manner inconsistent with section 2(b) of the *Charter*.

104. The appropriate remedy is therefore to read down subsection 85.09(1) so that it does not apply to final decisions and orders issued by CROs, including the material relied on to make those decisions and orders, while continuing to apply to information and communications exchanged for the purpose of mediation or settlement.

105. This remedy preserves the core of Parliament's legislative scheme. It maintains confidentiality where it serves its intended function (encouraging settlement) while restoring transparency at the adjudicative stage, where openness is constitutionally required.

106. This approach is also consistent with the structure of the CRO process. Mediation and adjudication are conceptually and functionally distinct stages. Reading down subsection 85.09(1) to reflect that distinction aligns the statutory scheme with long-standing principles governing dispute resolution in courts and tribunals. A reading-down remedy also restores continuity with the Agency's pre-2023 complaint resolution framework, under which mediation was confidential but

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[159] *Ontario (Attorney General) v. G*, 2020 SCC 38 ["***G***"], at para. 108.
[160] *G* at para. 109.
[161] *G* at para. 111-112.
[162] *G* at para. 113.

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adjudicative decisions were published, subject to redaction of sensitive personal information.

107. In the alternative, if the court concludes that reading down is not available, the Applicant seeks a declaration that subsection 85.09(1) of the *CTA* is struck as being of no force or effect.

PART V – ORDER REQUESTED

108. For all of the above reasons, the Applicant requests:

a. An order reading down subsection 85.09(1) of the *CTA* such that the confidentiality provisions only apply in respect of records provided in the optional mediation steps in the proceeding and not to adjudicative records, including the decisions and orders of the CRO; or

b. In the alternative, an order striking subsection 85.09(1) of the *CTA* as being of no force and effect; and

c. An order awarding the costs of this application to the Applicant.

109. If necessary, the Applicant requests leave of the court for moderately exceeding the permitted factum length in order to provide comprehensive citations to the law and evidence.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of January, 2026.

Douglas W. Judson
Judson Howie LLP

Lawyers for the Applicant

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LAWYER'S CERTIFICATE

In accordance with rule 4.06.1 of the *Rules of Civil Procedure*, the undersigned is satisfied as to the authenticity of every authority cited herein.

DATED this 23rd day of January, 2026.

Douglas W. Judson [LSO No. 70019H]
Judson Howie LLP

Lawyers for the Applicant

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SCHEDULE "A" – LIST OF CITED AUTHORITIES

A. Statutes

Budget Implementation Act, 2023, No. 1, S.C. 2023, c. 26

Canada Transportation Act, S.C. 1996, c. 10

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11

Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11

Courts of Justice Act, R.S.O. 1990, c. C.43

B. Regulations

Air Passenger Protection Regulations, SOR/2019-150

Canadian Transportation Agency Designated Provisions Regulations, SOR/99-244

Canadian Transportation Agency General Rules, SOR/2005-35 (repealed)

Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings), SOR/2014-104

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

C. Jurisprudence

Canada (Attorney General) v. JTI-Macdonald Corp., 2007 SCC 30

Canadian Broadcasting Corp. v. New Brunswick (Attorney General), 1996 CanLII 184 (S.C.C.)

Canadian Broadcasting Corp. v. Canada (Attorney General), 2011 SCC 2

Canadian Broadcasting Corp. v. The Queen, 2011 SCC 3

Carter v. Canada (Attorney General), 2015 SCC 5

Complaint Resolution Officer Decision 389952-CO-224, dated September 10, 2024

Dagenais v. Canadian Broadcasting Corp., 1994 CanLII 39 (S.C.C.)

Doré v. Barreau du Québec, 2012 SCC 12

Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326

Egan v. Canada, [1995] 2 S.C.R. 513

Eldridge v. British Columbia (Attorney General), 1997 CanLII 327 (S.C.C.)

Figueroa v. Canada (Attorney General), 2003 SCC 37

Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712

Geddes v. Air Canada, 2021 NSSM 27

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SCHEDULE "B" – EXCERPTS FROM RELEVANT STATUTES AND REGULATIONS

A. *Canada Transportation Act*

ADMINISTRATION

[…]

Enforcement of decision or order

33 (1) A decision or order of the Agency may be made an order of the Federal Court or of any superior court and is enforceable in the same manner as such an order.

[…]

AIR TRAVEL COMPLAINTS

Complaint resolution officers

85.02 (1) The Chairperson, or a person designated by the Chairperson, shall designate, from among the members and staff of the Agency, persons to act as complaint resolution officers for the purpose of sections 85.04 to 85.12.

Limits on powers and duties

(2) A member of the Agency or its staff who acts as a complaint resolution officer has the powers, duties and functions of a complaint resolution officer and not of the Agency.

Clarification — proceedings

(3) Proceedings before a complaint resolution officer are not proceedings before the Agency.

Non-application of certain provisions

85.03 Sections 17, 25 and 36.1 do not apply in respect of any matter that may be dealt with under sections 85.04 to 85.12.

Complaints related to tariffs

85.04 (1) A person may file a complaint in writing with the Agency if

> (a) the person alleges that a carrier failed to apply a fare, rate, charge or term or condition of carriage applicable to the air service it offers that is set out in its tariffs;
>
> (b) the person is adversely affected by the failure to apply that fare, rate, charge or term or condition of carriage;
>
> (c) the person seeks compensation or a refund as set out in the carrier's tariffs or compensation for expenses incurred as a result of that failure; and
>
> (d) the person made a written request to the carrier to resolve the matters to which the complaint relates but they were not resolved within 30 days after the day on which the request was made.

Refusal to deal with complaint

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(2) A complaint resolution officer may refuse to deal with a complaint or, at any time, cease dealing with it if they are of the opinion that

(a) the criteria set out in subsection (1) have not been met;

(b) it is clear on the face of the complaint that the carrier has complied with the obligations set out in its tariffs; or

(c) the complaint is vexatious or made in bad faith.

Mediation

85.05 (1) If the complaint resolution officer does not refuse under subsection 85.04(2) to deal with a complaint, they shall mediate the complaint and start the mediation no later than the 30th day after the day on which the complaint is filed.

Filing of mediation agreement

(2) An agreement that is reached as a result of mediation may be filed with the Agency and, after filing, is enforceable as if it were an order of the Agency.

Mediation

85.05 (1) If the complaint resolution officer does not refuse under subsection 85.04(2) to deal with a complaint, they shall mediate the complaint and start the mediation no later than the 30th day after the day on which the complaint is filed.

Filing of mediation agreement

(2) An agreement that is reached as a result of mediation may be filed with the Agency and, after filing, is enforceable as if it were an order of the Agency.

Decision on complaint

85.06 (1) If no agreement is reached as a result of mediation, and the complaint resolution officer does not cease dealing with the complaint under subsection 85.04(2), the complaint resolution officer shall, no later than the 60th day after the day on which the mediation started, and based on the information provided by the complainant and the carrier,

(a) make an order under subsection 85.07(1); or

(b) make an order dismissing the complaint.

Status of order

(2) An order referred to in subsection (1) is not an order or decision of the Agency.

Order related to tariffs

85.07 (1) If the complaint resolution officer finds that the carrier that is the subject of the complaint has failed to apply a fare, rate, charge or term or condition of carriage applicable to the air service it offers that is set out in its tariffs, the complaint resolution officer may order the carrier to

(a) apply a fare, rate, charge or term or condition of carriage that is set out in its tariffs; and

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(b) compensate the complainant for any expenses they incurred as a result of the carrier's failure to apply a fare, rate, charge or term or condition of carriage that is set out in its tariffs.

Onus

(2) If a complaint raises an issue as to whether a flight delay, flight cancellation or denial of boarding is within a carrier's control, is within a carrier's control but is required for safety reasons or is outside a carrier's control, it is presumed to be within the carrier's control and not required for safety reasons unless the carrier proves the contrary.

Filing of order and enforcement

(3) An order made under subsection (1) may be filed with the Agency and, after filing, is enforceable as if it were an order of the Agency.

Prior decisions to be taken into account

85.08 In regards to the issue of whether a flight delay, flight cancellation or denial of boarding is within a carrier's control, is within a carrier's control but is required for safety reasons or is outside a carrier's control, a complaint resolution officer who is dealing with a complaint in respect of a flight shall take into account any prior decision on that issue that is contained in an order made by a complaint resolution officer in respect of that flight.

Confidentiality of information

85.09 (1) All matters related to the process of dealing with a complaint shall be kept confidential, unless the complainant and the carrier otherwise agree, and information provided by the complainant or the carrier to the complaint resolution officer for the purpose of the complaint resolution officer dealing with the complaint shall not be used for any other purpose without the consent of the one who provided it.

Communication of information

(2) Subsection (1) does not apply so as to prohibit

(a) the communication of information to the Agency;

(b) the communication of information to complaint resolution officers for the purpose of assisting them in the exercise of their powers or the performance of their duties and functions; or

(c) the making public by the Agency of information under sections 85.14 and 85.15.

Procedure

85.10 Subject to the procedure set out in the guidelines referred to in section 85.12, a complaint resolution officer shall deal with complaints in the manner that they consider appropriate in the circumstances.

Assistance by Agency

85.11 The Agency may, at a complaint resolution officer's request, provide administrative, technical and legal assistance to the complaint resolution officer.

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Guidelines

85.12 (1) The Agency may issue guidelines

(a) respecting the manner of and procedures for dealing with complaints filed under subsection 85.04(1); and

(b) setting out the extent to which and the manner in which, in the Agency's opinion, any provision of the regulations applies with regard to complaints.

Guidelines binding

(2) A guideline is, until it is revoked or modified, binding on any complaint resolution officer dealing with a complaint filed under subsection 85.04(1).

Publication

(3) Each guideline shall be published on the Agency's website, in the Canada Gazette and in any other manner that the Agency considers appropriate.

Statutory Instruments Act

(4) The Statutory Instruments Act does not apply to the guideline.

Referral to panel

85.13 (1) If no agreement is reached as a result of the mediation of a complaint under section 85.05, the Chairperson or a person designated by them may, at the request of the complaint resolution officer who conducted the mediation, and if the Chairperson or person designated by them, as the case may be, considers that the complexity of the complaint requires it, refer the complaint to a panel of at least two members. Those members, none of whom is to be the complaint resolution officer who conducted the mediation, shall act as the complaint resolution officers in respect of the complaint for the purposes of sections 85.06 to 85.12.

Clarification – panels

(2) A reference in subsections 85.02(2) and (3) and sections 85.06 to 85.12 to a complaint resolution officer is considered to include a reference to a panel.

Publication — order or summary of order

85.14 (1) The Agency shall make public

(a) in the case of an order made by a single complaint resolution officer

(i) the number of the flight to which the order relates,

(ii) the date of departure of the flight that is indicated on the complainant's ticket,

(iii) any decision contained in the order in regards to the issue of whether any flight delay, flight cancellation or denial of boarding was within the carrier's control, was within the carrier's control but was required for safety reasons or was outside the carrier's control, and

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(iv) a statement as to whether or not the complaint resolution officer ordered the carrier to provide compensation or a refund as set out in the carrier's tariffs or compensation for expenses incurred; and

(b) subject to subsection (2), in the case of an order made by a panel, the entire order.

Exception

(2) The Agency may, at the request of a complainant or carrier, decide to keep confidential any part of an order, other than the information referred to in subparagraphs (1)(a)(i) to (iv).

Part of annual report

85.15 The Agency shall, as part of its annual report, indicate the number and nature of the complaints filed under subsection 85.04(1), the names of the carriers against whom the complaints were made, the number of complaints for which an order was made under subsection 85.07(1) and the systemic trends observed.

Fees and charges

85.16 (1) The Agency shall establish fees or charges for the purpose of recovering all or a portion of the costs that the Agency determines to be related to the process of dealing with complaints — other than complaints disposed of under subsection 85.04(2) — under sections 85.05 to 85.12.

Carrier's liability

(2) The carriers that are the subject of complaints — other than complaints disposed of under subsection 85.04(2) — are liable for the payment of the fees or charges.

[…]

TRANSPORTATION OF PERSONS WITH DISABILITIES

[…]

Inquiry — barriers to mobility

172 (1) The Agency may, on application, inquire into a matter in relation to which a regulation could be made under subsection 170(1), regardless of whether such a regulation has been made, in order to determine whether there is an undue barrier to the mobility of persons with disabilities.

Remedies

(2) On determining that there is an undue barrier to the mobility of persons with disabilities, the Agency may do one or more of the following:

(a) require the taking of appropriate corrective measures;

(b) direct that compensation be paid for any expense incurred by a person with a disability arising out of the barrier, including for any costs of obtaining alternative goods, services or accommodation;

(c) direct that compensation be paid for any wages that a person with a disability was deprived of as a result of the barrier;

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(d) direct that compensation be paid up to a maximum amount of — subject to the annual adjustments made under section 172.2 — $20,000, for any pain and suffering experienced by a person with a disability arising out of the barrier;

(e) direct that compensation be paid up to a maximum amount of — subject to the annual adjustments made under section 172.2 — $20,000, if the Agency determines that the barrier is the result of a wilful or reckless practice.

Compliance with regulations

(3) If the Agency is satisfied that regulations made under subsection 170(1) that are applicable in relation to a matter have been complied with or have not been contravened, the Agency may determine that there is an undue barrier in relation to that matter but if it does so, it may only require the taking of appropriate corrective measures.

Inquiry — subsection 170(1)

172.1 (1) The Agency may, on application, inquire into a matter concerning any regulations made under subsection 170(1) to determine if the applicant has suffered physical or psychological harm, property damage or economic loss arising out of — or has otherwise been adversely affected by — a contravention of any provision of those regulations.

Remedies

(2) On determining that an applicant has suffered physical or psychological harm, property damage or economic loss arising out of — or has otherwise been adversely affected by — a contravention referred to in subsection (1), the Agency may do one or more of the following:

(a) require the taking of appropriate corrective measures;

(b) direct that compensation be paid to the applicant for any expense incurred by them arising out of the contravention, including for any costs of obtaining alternative goods, services or accommodation;

(c) direct that compensation be paid to the applicant for any wages that they were deprived of as a result of the contravention;

(d) direct that compensation be paid to the applicant up to a maximum amount of — subject to the annual adjustments made under section 172.2 — $20,000, for any pain and suffering experienced by them arising out of the contravention;

(e) direct that compensation be paid to the applicant up to a maximum amount of — subject to the annual adjustments made under section 172.2 — $20,000, if the Agency determines that the contravention is the result of a wilful or reckless practice.

B. ***Canadian Charter of Rights and Freedoms***

GUARANTEE OF RIGHTS AND FREEDOMS

Rights and freedoms in Canada

1 The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

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Fundamental Freedoms

2 Everyone has the following fundamental freedoms: […]

> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication […]

C. ***Constitution Act, 1982***

GENERAL

Primacy of Constitution of Canada

52 (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

D. ***Courts of Justice Act***

COMMON LAW AND EQUITY

[…]

Declaratory orders

97 The Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may make binding declarations of right, whether or not any consequential relief is or could be claimed.

E. ***Rules of Civil Procedure***

RULE 14: ORIGINATING PROCESS

[…]

Applications – By Notice of Application or Application for Certificate

14.05 … (2) A proceeding may be commenced by an application to the Superior Court of Justice or to a judge of that court, if a statute so authorizes.

Application under Rules

(3) A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is,

> […]
>
> (d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution;
>
> […]
>
> (g) an injunction, mandatory order or declaration or the appointment of a receiver or other consequential relief when ancillary to relief claimed in a proceeding properly commenced by a notice of application;

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(g.1) for a remedy under the *Canadian Charter of Rights and Freedoms*; or

(h) in respect of any matter where it is unlikely that there will be any material facts in dispute requiring a trial.

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AIR PASSENGER RIGHTS *Applicant*	v.	THE ATTORNEY GENERAL OF CANADA *Respondent*	Court File No. CV-25-00100065-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding Commenced at Ottawa

FACTUM OF THE APPLICANT

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