

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

FACTUM OF THE RESPONDENT

ATTORNEY GENERAL OF CANADA

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OVERVIEW

1. The open court principle protected by s.2(b) of the *Canadian Charter of Rights and Freedoms*, which presumes public access to records, only applies to courts and administrative decision-making processes that are adjudicative in nature.¹
2. The paper-based complaint process available to air passengers who seek compensation under an air carrier's tariff under the *Canada Transportation Act*, which is overseen by complaint resolution officers, is not adjudicative in nature, but primarily a dispute resolution mechanism. Any decisions are based on untested information within a narrow scope of decision-making, and officers have no discretion over the quantum of compensation.
3. Because the open court principle does not apply to the complaint process, the confidentiality provision in s.85.09(1) of the *Canada Transportation Act* that protects certain information provided by passengers and air carriers does not contravene s.2(b) of the *Charter*.²
4. In the alternative, if the open court principle did apply, s.85.09(1) would be justified under s.1 of the *Charter*. It is a proportionate measure that supports effective mediation while also ensuring that key information that could influence or be used in other air passengers' complaints is made public. The application should be dismissed.

¹ *Canadian Broadcasting Corporation v. Parole Board of Canada*, [2023 FCA 166](#) [CBC]; *Fraser v Canada (Public Safety and Emergency Preparedness)*, [2023 FCA 167](#) [Fraser].

² *Canada Transportation Act*, SC 1996, c 10, [s. 85.09\(1\)](#) [CTA]; *The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK)*, 1982, c 11, [s. 2\(b\)](#) [Charter].

PART I – FACTS

A) The Statutory and Regulatory Schemes

5. The impugned provision, s.85.09(1) of the *Canada Transportation Act (CTA)*, protects the confidentiality of both passengers and air carriers in the context of the statutory air passenger complaints process overseen by complaint resolution officers (the CRO complaint process).³ The CRO complaint process was given effect by recent amendments to the *CTA* that moved the handling of the majority of air passenger complaints away from the Canadian Transportation Agency (the Agency), which is a quasi-judicial tribunal with the powers of a superior court.⁴

i. The Canadian Transportation Agency

6. The *CTA* is part of a broader statutory scheme that, alongside the *Aeronautics Act*, governs the aviation industry in Canada.⁵ The statute also includes the National Transportation Policy, which guides Transport Canada and the Agency.⁶

7. The Agency independently regulates the Canadian transportation system.⁷ It is comprised of five permanent Governor-in-Council (GIC) appointed members and up to three temporary members.⁸ They are experts with a high degree of specialized knowledge and make a wide range of decisions and determinations in the air, rail and marine transportation sectors.⁹

³ *CTA*, [s. 85.09](#).

⁴ Affidavit of Vincent Millette, affirmed August 29, 2025, Respondent's Application Record at Tab 1, at para 3 [Millette Affidavit].

⁵ Millette Affidavit at para 8.

⁶ *CTA*, [s. 5](#)

⁷ Millette Affidavit at para 4.

⁸ Millette Affidavit at para 4.

⁹ Millette Affidavit at paras 6 and 14.

8. Specifically with respect to the air sector, the Agency's functions include, *inter alia*: ensuring air carrier terms and conditions of carriage (i.e. tariffs) are reasonable and follow Canada's rules and international agreements; administering and enforcing the *Air Passenger Protection Regulations* (the *APPR*); and helping to resolve certain air travel complaints.¹⁰

ii. The Air Passenger Protection Regulations

9. The obligations of air carriers are set out in a detailed contract between the carrier and the passenger called a "tariff."¹¹ Pursuant to s.86.11(4) of the *CTA*, the *APPR* forms part of the carrier's tariff to the extent that the carrier's tariff does not provide for more advantageous terms and conditions.¹² As a result, the *APPR* is relevant in almost all cases of air passenger complaints under a carrier's tariff related to flights to, from and within Canada.

10. The *APPR* was developed in 2019 with the objective of creating a more predictable and balanced approach to the air travel complaint process.¹³ It addresses carriers' obligations relating to matters such as flight delays and cancellations, denied boarding, lost luggage, and certain seat assignments.¹⁴ It also includes compensation levels for certain events within a carrier's control.

11. From 2019-2023, the Agency was directly responsible for final determinations of air passenger complaints.¹⁵ The process was time and resource intensive, and consisted of three

¹⁰ [Air Passenger Protection Regulations](#), SOR/2019-150 [*APPR*]; Millette Affidavit at paras 6-14.

¹¹ Guideline on the Canadian Transportation Agency's Complaint Resolution Office air travel complaints process at Millette Affidavit Exhibit A [Guideline].

¹² *CTA*, s. 86.11(4).

¹³ Millette Affidavit at para 12.

¹⁴ *APPR*, ss 8-24.

¹⁵ Millette Affidavit at paras 12 and 13.

phases: facilitation, mediation, and adjudication, with resolution taking an average of 373 days.¹⁶ By 2023, there were 32,700 complaints awaiting determination.¹⁷

12. In 2023, the *CTA* was amended to address concerns about this backlog.¹⁸ The amendments included two significant changes aimed at creating a more streamlined complaint process:

- a) the initial three-stage dispute resolution process was synthesized into a mediation-style approach; and
- b) tariff-related complaints where a complainant sought compensation or refund, including those under the *APPR*, were no longer to be heard by Agency members, but rather CROs.¹⁹ CROs are public servants and not GIC appointees.²⁰

13. As a result, the Agency is no longer directly involved in deciding the outcome of most air passenger complaints.²¹ Agency members can still have complex complaints referred to them, and can also continue to hear air passenger complaints outside of the jurisdiction of CROs as outlined in s.85.04 of the *CTA* (e.g.: complaints from passengers that do not seek compensation).²²

iii. The Role of a Complaint Resolution Officer

14. Section 85.04 of the *CTA* gives CROs authority over complaints seeking compensation or a refund because of an air carrier's failure to apply fares, rates, charges, or terms/conditions in its tariff, including the *APPR*.²³ Before initiating the CRO complaint process, a passenger must first contact the air carrier with their complaint. If it remains unresolved after 30 days, a passenger can

¹⁶ Millette Affidavit at para 14.

¹⁷ Millette Affidavit at para 24.

¹⁸ Millette Affidavit at para 22.

¹⁹ *CTA*, s. 85.04; Millette Affidavit at paras 22, 24, and 25.

²⁰ Millette Affidavit at para 25.

²¹ Millette Affidavit at para 24.

²² *CTA*, s. 85.13, 85.04; *APPR*, s. 3(3).

²³ *CTA*, s. 86.11(4); Millette Affidavit at paras 24, 27, Exhibit A - Complaints are resolved according to the *CTA*, the *APPR* and the Guidelines.

then proceed to submit their complaint under the *CTA* and the complaint is then assigned to a CRO.²⁴ Complaints are processed pursuant to the Agency's Guideline.²⁵

15. The CRO complaint process is conducted entirely in writing.²⁶ Both the passenger and the air carrier provide information regarding the complaint to the CRO once, at the beginning of the process.²⁷ The passenger provides information supporting their complaint, the carrier responds, and the passenger has the ability to reply.²⁸ This information is used by the CRO for their initial assessment of a complaint's eligibility, for mediation and, if mediation fails, for the final decision. Neither the parties nor the CRO can test the reliability or authenticity of the information provided. The CRO cannot issue summons, examine witnesses, or admit or reject evidence.²⁹

iv. Eligibility Assessment and Mediation

16. After receiving information from the parties, the CRO must conduct an initial eligibility assessment.³⁰ A complaint will be found ineligible if the passenger: does not allege a failure by the air carrier to apply its tariff; is not adversely affected by such a failure; does not seek compensation or a refund; or has not made a written request to the carrier or has done so and the issue has remained unresolved after 30 days. A complaint is also ineligible if it is clear the carrier has complied with its tariff, or if the complaint is vexatious or made in bad faith.³¹

²⁴ Millette Affidavit at para 24; *CTA*, [s. 85.04\(1\)](#).

²⁵ Millette Affidavit at para 27 and Exhibit A.

²⁶ Millette Affidavit at para 28.

²⁷ Millette Affidavit at Exhibit A.

²⁸ Millette Affidavit at Exhibit A.

²⁹ Millette Affidavit at para 29.

³⁰ *CTA*, [s. 85.04\(2\)](#).

³¹ *CTA*, [s. 85.04\(1\)](#), [\(2\)](#); Millette Affidavit at Exhibit A.

17. Pursuant to the *CTA*, eligible complaints must first be mediated by CROs. In practice, mediation can only proceed if both parties agree.³² The CRO facilitates this process by providing information about mediation, how to engage in settlement discussions, any issues that require a decision from the CRO, and any statutory or tariff obligations that apply to the complaint.³³

v. Final Decision under the CRO complaint process

18. If there is no agreement regarding mediation, or mediation fails, the CRO must then make a final decision that is binding.³⁴ At this stage, the CRO does not collect any additional information from either the passenger or the air carrier.³⁵

19. The scope of CRO decision making as to whether compensation is warranted is narrow. CROs take the information provided by the parties and apply it to a circumscribed set of criteria under the *APPR*, directed by the *CTA* and the Guideline.³⁶ Compensation amounts are fixed, and the CRO has no discretion as to these amounts.³⁷

B) Confidentiality under the *CTA*

20. Section 85.09(1) of the *CTA* stipulates that all information and documents related to the CRO complaint process are confidential unless both the complainant and carrier agree otherwise in writing.³⁸ Because parties only provide information to the CRO once, at the beginning of the process, this confidentiality applies to both the mediation and decision-making stages of the

³² *CTA*, [ss. 85.05-85.06](#); Millette Affidavit at para 35; Millette Affidavit at Exhibit A.

³³ Millette Affidavit at Exhibit A.

³⁴ Millette Affidavit at Exhibit A.

³⁵ Millette Affidavit at Exhibit A.

³⁶ Millette Affidavit at paras 27-29.

³⁷ *CTA*, [s. 85.07](#); Millette Affidavit at paras 30-32.

³⁸ *CTA*, [s. 85.09](#).

process. The purpose is to encourage frank and open mediation discussions and protect personal and sensitive information of passengers and carriers.³⁹

21. However, the *CTA* does not make all aspects of the CRO complaint process confidential. Paragraph 85.14(1)(a) requires the Agency to publish summaries of all CRO orders.⁴⁰ These summaries are intended to provide transparency and help other passengers assess their potential entitlement to compensation.⁴¹ They are to include: a) the flight number; b) the date of departure on the passenger's ticket; c) any decision regarding whether the delay, cancellation or denial of boarding was within the carrier's control, as within the carrier's control but was required for safety reasons or was outside the carrier's control; and d) whether compensation was ordered.⁴² Moreover, the entire order of any complaint deemed sufficiently complex to be referred to a panel for final decision is made public.⁴³

PART II – ISSUES

22. The issues in this application are:

- a) Does the open court principle protected by s.2(b) of the *Charter* apply to the CRO complaint process in the *CTA*?
- b) If so, is s.85.09(1) of the *CTA* a reasonable limit on the open court principle pursuant to s. 1 of the *Charter*?

³⁹ Millette Affidavit at para 39.

⁴⁰ *CTA*, [s. 85.14\(1\)\(a\)](#).

⁴¹ Millette Affidavit at paras 42-44.

⁴² *CTA*, [s. 85.14](#).

⁴³ *CTA*, [ss. 85.13\(1\)](#), [85.14\(1\)\(b\)](#).

PART III – ARGUMENT

A) The Applicant does not have standing to assert an infringement of individual expressive rights

23. In addition to asserting its own claim, the Applicant raises arguments relating to the freedom of expression of other individuals who have been parties to the CRO complaint process, including Ms. Pierce.⁴⁴ This is inappropriate given how the Applicant has framed its application. The Applicant was not a party to a complaint; it has sought documents related to others' complaints. A third party's right to access adjudicative documents under the open court principle is a different issue than the right of a party to discuss a process in which they took part.

24. To challenge s.85.09(1) of the *CTA* on the basis of an infringement of the s.2(b) expression rights of parties to the complaint process, the Applicant would be required to seek public interest standing. It has not done so. In any case, even if sought, public interest standing should not be granted given, in particular, that this application is not a reasonable and efficient means of bringing the issue before the Court.⁴⁵ The Applicant has not provided any evidence indicating the inability for individual complainants to bring forward their own claim.⁴⁶ Indeed, there is no explanation why Ms. Pierce, who was an affiant, could not bring her own application or be added to this one.

25. Moreover, any s.2(b) argument related to the alleged violation of the expressive rights of an individual participating in the CRO complaint process is fundamentally different to that of the

⁴⁴ Applicant's Factum at paras 26-27, 42.

⁴⁵ *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at paras 37–52 [*Downtown Eastside*].

⁴⁶ *Downtown Eastside* at para 51.

question of whether the right of access to documents under open court principle applies, and would be subject to a different analytical framework.⁴⁷ Similarly, the Agency's actions in enforcing s.85.09(1) are not relevant in an application seeking constitutional relief under s.52(1).⁴⁸ There is no efficiency in deciding these issues at the same time as the issues that have been properly raised.

B) The open court principle does not apply to the CRO complaint process

26. The confidentiality requirements of s.85.09(1) do not infringe s.2(b) of the *Charter* because the CRO complaint process is not an adjudicative proceeding to which the open court principle applies.⁴⁹ The process does not involve determinations made in an adversarial setting and does not bear the hallmarks of an adjudicative proceeding such as oral hearings, the weighing of evidence, or the exercise of wide discretion in decision making.

i. Subsection 2(b) only applies to adjudicative tribunals

27. The open court principle, an aspect of the expressive rights under s. 2(b) of the *Charter*, allows members of the public and the press to attend hearings, consult court files, and inquire and comment on the workings of courts.⁵⁰ Its aim is to make the justice system fair and accountable.⁵¹

28. In addition to traditional courts, the open court principle applies to some, but not all, administrative tribunals. While the Applicant appears to have framed his argument based on the assumption that the open court principle applies to the CRO complaint process, this is not a *fait accompli*. In order to discern whether s.85.09(1) violates s.2(b), this Court must first determine

⁴⁷ See e.g. *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927.

⁴⁸ *The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK)*, 1982, c 11, s. 52(1).

⁴⁹ *CTA*, s. 85.09.

⁵⁰ *Sherman Estate v Donovan*, 2021 SCC 25 at para 1 [*Sherman Estate*].

⁵¹ *Sherman Estate* at para 1.

whether the CRO complaint process is an administrative decision-making process to which the open court principle applies.

29. While past jurisprudence with respect to the application of the open court principle to administrative decision makers relied on analyzing whether a tribunal acted in a ‘quasi-judicial’ capacity, the Federal Court of Appeal (FCA) recently concluded in *CBC* that this distinction had “outlived its usefulness” because it focused on a tribunal’s formal characteristics, rather than its function.⁵² Citing language used by this Court in *AG Ontario*, the FCA preferred an analysis that determined whether the decision maker was an “adjudicative tribunal” that presides over adversarial proceedings and “decides questions of rights and duties as between citizens and as between citizens and the state.”⁵³

30. In applying this analysis, the FCA held that the Parole Board of Canada (PBC) is not an adjudicative tribunal to which the open court principle applies.⁵⁴ In coming to this determination, the Court noted that the PBC had in past been found to be inquisitorial, not adversarial in nature.⁵⁵ Its main function is to assess risk in a process where both the offender and the Correctional Service of Canada provide information, but the offender is not opposed by a representative from the state.⁵⁶ The FCA also noted that the PBC “act[s] on information” as opposed to “hear[ing] and assess[ing]

⁵² *CBC* at [paras. 48, 52-53](#).

⁵³ *CBC* at [para 48](#); see also [paras 43-47](#), and [53](#) where the Court cites to *Toronto Star Newspapers Ltd v Ontario (Attorney General)*, [2018 ONSC 2586](#) [*AG Ontario*].

⁵⁴ *CBC* at [paras 54, 56](#), aff’ing in part [2021 FC 821](#) at [para 85](#). See *Mooring v Canada (National Parole Board)*, [\[1996\] 1 SCR 75](#) at [paras 25–26](#) [*Mooring*].

⁵⁵ *CBC* at [paras 42-53](#).

⁵⁶ *CBC* at [para 54](#).

evidence” and does not apply the traditional rules of proof and evidence, such as requiring that evidence be presented under oath.⁵⁷

31. Thus, to determine whether a tribunal is adjudicative in nature, the focus of the analysis must be on its function. While the FCA advocated for a shift from focusing purely on a tribunal’s “quasi-judicial” form, prior jurisprudence about what makes a tribunal quasi-judicial can still be useful in determining what hallmarks will be indicative of a tribunal functioning in an adjudicative manner.

32. For example, in *D’Arthenay*, the Divisional Court distinguished between two administrative processes by which a chief of police could resolve a misconduct complaint: a formal hearing procedure which the Court found to be quasi-judicial, and an informal resolution procedure which was not.⁵⁸ The informal procedure involved the chief of police receiving a complaint and providing information concerning the matter to the police officer who is the subject of the complaint, who then had an opportunity to reply, orally or in writing.⁵⁹ The complainant’s consent to the resolution could also be sought, but was not required.⁶⁰ The Court found that this differed from the quasi-judicial nature of the formal hearing procedure, which more resembled a court proceeding.⁶¹

⁵⁷ *CBC* at [paras 54, 56](#), aff’ing in part [2021 FC 821](#) at [para 85](#); *Mooring* at [paras 25–26](#).

⁵⁸ *D’Arthenay v Ontario Provincial Police*, [2024 ONSC 4773](#) at [para 4](#) [*D’Arthenay*].

⁵⁹ *Police Services Act, RSO 1990, c P.15, ss 66(10), 68(6)–(7)* [*Police Services Act*].

⁶⁰ *Police Services Act, ss 66(8), 68(7); D’Arthenay* at [para 15](#).

⁶¹ The hearing procedure entails the designation of a prosecutor, participatory rights for the police officer and the complainant including the right to be represented, the examination of evidence prior to the oral hearing, the possibility to testify orally, significantly more serious penalties, and decisions made publicly available: *Police Services Act, ss 82(1), 83(1), (3)–(6), (10), 84(1), 85, 86(1)*.

33. In *Michalski*, the Divisional Court found that the decision-making process involved in a university's refusal of COVID-19 vaccine mandate exemptions, where staff were required to evaluate creed-based requests for exemption based on a set of assessment guidelines, was not quasi-judicial.⁶²

34. By contrast, in *Baharloo*, the Supreme Court of British Columbia found that a university's Senate Committee on Student Appeals was quasi-judicial given just how much its process resembled that of a court.⁶³ It characterized the process as "adversarial" given the oral hearing involved the assessment of the credibility of witnesses called by the student and the faculty.⁶⁴

35. The combination of the analysis in *CBC* and past jurisprudence demonstrates that adjudicative tribunals are more likely to be those that have processes that resemble court-like, adversarial, proceedings where the decision maker is resolving competing legal interests, as opposed to simply applying information to a statutory scheme.

36. The CRO complaint process does not resemble the proceedings of a court, and the function of a CRO is not to preside over adversarial matters. Properly understood, the CRO complaint process provides a dispute resolution mechanism between passengers and carriers and then, if necessary, a final determination. If a CRO is called upon to make a decision, they do not serve an

⁶² *Michalski v McMaster University*, [2022 ONSC 2625](#) at [paras 22, 29-31, 80](#) [*Michalski*].

⁶³ *Baharloo v University of British Columbia*, [2014 BCSC 762](#) at [para 82](#) [*Baharloo BCSC*], [aff'd 2016 BCCA 277](#) at [para 65](#), in which the Supreme Court highlighted the Senate Committee's process, which included written evidence and submissions from the student and faculty, an oral hearing with opening and closing statements, with testimony and cross-examinations, and the possibility of being represented by counsel.

⁶⁴ *Baharloo BCSC* at [para 7](#), citing *Baharloo v University of British Columbia*, [2014 BCSC 272](#) at [para 20](#).

adjudicative function. Rather CROs take untested information provided by the parties and make limited findings of fact on whether compensation is owed under the tariff. If a passenger is successful in their complaint, the CRO has no discretion in the monetary amount awarded.

a. The CRO complaint process is non-adversarial

37. The information-gathering aspect of the CRO complaint process fosters the non-adversarial taking of positions.⁶⁵ The differences between a court's process and the CRO complaint process also highlights that their functions are different.

38. To file a complaint, a complainant has no particular burden to meet, but rather need only feel like they are entitled to compensation under the carrier's tariff. Once the complaint is filed, the air carrier provides documents and explains what category of compensation, if any, should apply in the situation. The complainant has an opportunity to explain whether they agree or disagree with the carrier's answer. This process is focused on eliciting information about the circumstances, not pitting two opposing legal positions against one another.⁶⁶ The CRO then applies this information to a narrow set of criteria to determine whether compensation is warranted under the tariff.

39. Moreover, the participatory and time constraints on the process suggest that it is meant to act as an informal, resolution based process.⁶⁷ There is no oral hearing, which is often a hallmark of an adversarial process.⁶⁸ The Guideline imposes short deadlines and word limits on the air carrier's submissions and the complainant's reply.⁶⁹ Additionally, the *CTA* makes CRO facilitated

⁶⁵ Millette Affidavit at Exhibit A.

⁶⁶ Guideline at Millette Affidavit, Exhibit A.

⁶⁷ Millette Affidavit at Exhibit A; *CTA*, [ss 85.05\(1\)](#), [85.06\(1\)](#).

⁶⁸ *Baharloo BCSC* at [para 82](#).

⁶⁹ Guideline at Millette Affidavit, Exhibit A.

mediation mandatory within 30 days of a complaint being filed, if both parties agree to it.⁷⁰ The CRO's decision, if necessary, is required within 60 days after the start of mediation.⁷¹

b. The CROs' function is to apply the tariff

40. If a CRO is called upon to make a final decision and order under the complaint process, their function is not to determine legal rights based on competing interests, but rather to apply the applicable tariff based on the information provided to them by the parties. In doing so, the CRO does not have the powers of the Agency but rather is statutorily required to follow the procedure outlined in the Guideline.⁷² CROs make limited findings of fact about whether compensation is owed under the tariff and have no discretion in the monetary amount awarded.⁷³

41. The only substantive issues a CRO can determine are: 1) the refusal to deal with a complaint,⁷⁴ and 2) whether a carrier failed to apply a fare, rate, charge or term of condition of carriage set out in the carrier's tariffs.⁷⁵ The determination of eligibility is made using a circumscribed set of criteria.⁷⁶ Then, for complaints related to flight delays and cancellations, the CRO need only determine whether the passenger's flight was in fact disrupted, and whether the carrier has discharged its burden of showing that the disruption was either for safety reasons or out of its control and/or whether the carrier discharged any applicable standard of treatment (e.g.

⁷⁰ *CTA*, [s. 85.05](#).

⁷¹ *CTA*, [s. 85.06](#)

⁷² *CTA*, [s 85.12\(1\)-\(2\)](#), [s. 85.1](#); Millette Affidavit at Exhibit A.

⁷³ *APPR*, [ss 10\(3\)](#), [11\(3\)-\(5\)](#), [12\(2\)-\(4\)](#), [17\(2\)](#), [18\(1.3\)](#), [18.1](#), [19\(1\)](#), [20\(1\)](#).

⁷⁴ *CTA*, [s 85.04\(2\)](#).

⁷⁵ *CTA*, [s 85.07](#).

⁷⁶ *CTA*, [s 85.04\(2\)](#).

provision of a hotel room or alternate travel arrangements).⁷⁷ For all other complaints under the tariff, the CRO need only determine whether the passenger has made out the fact that they should be awarded compensation (e.g.: was their luggage lost and for how long). Amounts for compensation for inconvenience are dictated by the tariff.⁷⁸

42. The CRO's narrow decision making task is similar to the discrete task of the exemptions team in *Michalski* to evaluate vaccine exemption requests.⁷⁹ Similarly, in *Craft*, the Divisional Court found that the narrow nature of the determination that a tribunal was called upon to make was a factor in favour of finding that its function was inquisitorial as opposed to adjudicative.⁸⁰

43. Additionally, the CRO only exercises a receiving function with respect to information. While parties to the CRO complaint process can provide information and documents, these cannot be tested by the other party or the CRO by way of cross-examination.⁸¹ The CRO has no ability to call into question the authenticity or credibility of the information and documents. To the extent that the CRO receives information and documents from both parties, the CRO simply considers what is before them and makes a finding of fact on a balance of probabilities.

44. The CROs' limitations regarding the information provided fall in favour of a non-adjudicative function. The PBC was found to be of an inquisitorial rather than adjudicative nature in part because it "act[ed] on information" rather than "hear[ing] and assess[ing] the evidence"

⁷⁷ *CTA*, s 85.07; Millette Affidavit at paras 30-33.

⁷⁸ *APPR*, ss 10(3), 11(3)-(5), 12(2)-(4), 17(2), 18(1.3), 18.1, 19(1), 20(1).

⁷⁹ *Michalski* at paras 22, 29-31.

⁸⁰ *Craft v City of Toronto*, 2019 ONSC 3636 at paras 10, 114.

⁸¹ Millette Affidavit at para 29.

and that it did not apply the traditional rules of proof and evidence.⁸² Similarly, the exemptions team in *Michalski* could receive supporting documents from the students, but did not have the ability to test this information.⁸³

C) In the alternative, section 85.09(1) of the CTA is a reasonable limit on the open court principle, pursuant to s. 1 of the Charter

45. In the alternative, should this Court find that the CRO complaint process engages the open court principle, s.85.09(1) of the *CTA* is a reasonable limit prescribed by law that is demonstrably justified in a free and democratic society.

46. The Respondent does not dispute that if this Court were to find the CRO complaint process engages the open court principle protected by s.2(b), then s.85.09(1) of the *CTA* constitutes a non-discretionary limit on that principle. The Supreme Court of Canada has held that automatic statutory limitations on court openness require justification under s.1 of the *Charter*, as opposed to an analysis under the *Dagenais/Mentuck* test, which is reserved for discretionary limits.⁸⁴

47. There is no dispute between the parties that, in being a statutory provision, s.85.09(1) is “prescribed by law” as contemplated by s.1.⁸⁵ The *Oakes* test dictates that an infringement of the *Charter* is justified under s.1 where the limit prescribed by law has a pressing and substantial object and the means chosen are proportional to that object.⁸⁶ A law is proportionate where the means adopted are (1) rationally connected to the law’s objective, (2) minimally impairing of the

⁸² *Mooring* at [paras 25–26](#).

⁸³ *Michalski* at [paras 22, 29–31](#).

⁸⁴ *Toronto Star Newspapers Ltd v Canada*, [2010 SCC 21](#) at [para 18](#) [*Toronto Star*].

⁸⁵ *R v Therens*, [\[1985\] 1 SCR 613](#) at [para 60](#).

⁸⁶ *Carter v Canada (Attorney General)*, [2015 SCC 5](#) at [para 94](#). [*Carter*]

right in question, and (3) the law’s salutary effects outweigh its deleterious effects. Courts must assess “whether there is proportionality between the effects of the measure that limits the right and the law’s objective” in terms of the greater public good.⁸⁷ The onus is on the government to establish that the law is saved by s.1.⁸⁸

i. The objective of section 85.09(1) is pressing and substantial

48. The objective of s.85.09(1) is to support the dispute resolution model of the CRO complaint process under the *CTA*. This model is aimed at ensuring that air passengers gain meaningful ability to access their entitlements under an air carrier’s tariff. This is pressing and substantial because it gives effect to the consumer protection aims of the National Transportation Policy.⁸⁹

49. In evaluating whether the objective is pressing and substantial, it is important to analyze s.85.09(1) in the context of the broader scheme of amendments to which it was a part.⁹⁰ The reasons for the informal dispute resolution model and the confidentiality requirements are inextricably linked and must be considered together.⁹¹

50. The 2023 amendments to the *CTA* were meant to move certain low dollar-value, high volume air passenger disputes away from the quasi-judicial tribunal setting of the Agency, to a more informal, collaborative resolution dispute model.⁹² The prior model of sending every complaint through a lengthy three-step adjudication process by GIC appointed Agency members was causing

⁸⁷ *Carter* at [para. 122](#); *Canada (Attorney General) v JTI-Macdonald Corp*, [2007 SCC 30](#) at [para 45](#).

⁸⁸ *R v Safarzadeh-Markhali*, [2016 SCC 14](#) at [para. 58](#).

⁸⁹ Millette Affidavit at para 9.

⁹⁰ *Toronto Star* at [para 21](#).

⁹¹ *Toronto Star* at [paras 20-24](#).

⁹² Millette Affidavit at paras 37-41.

significant backlogs.⁹³ This was inconsistent with the aim of effective consumer protection under the National Transportation Policy, enshrined in s.5 of the *CTA*.⁹⁴

51. The resolution dispute model of the CRO complaint process was one measure aimed at reducing these backlogs and fulfilling the statutory objective. CROs were primarily meant to mediate disputes where parties could not resolve them on their own, with the CRO making a final decision only if the parties could not agree.⁹⁵ The confidentiality requirements of s.85.09(1) are an integral part of this model. Effective mediation cannot be achieved without the assurance of confidentiality, as it encourages frank, open discussion amongst the parties. Also, carriers may be more incentivized to settle disputes knowing that the proceedings are confidential.⁹⁶

ii. The confidentiality provisions of s.85.09(1) are a proportional means to achieve the objective

52. *Rational Connection*: There is a rational connection between the objective of supporting the dispute resolution model of the CRO complaint process under the *CTA* and the confidentiality requirements of s.85.09(1). As previously discussed, confidentiality is a key aspect of the mediation process. Without it, there is no incentive to mediate.⁹⁷

53. In establishing rational connection, the government need only show that it is “reasonable to suppose” that the confidentiality measures “may further the goal, not that it will do so.”⁹⁸ Thus,

⁹³ Millette Affidavit at paras 16-21.

⁹⁴ *CTA*, [s. 5](#); Millette Affidavit at para 37.

⁹⁵ Millette Affidavit at para 39.

⁹⁶ Millette Affidavit at paras 39-40.

⁹⁷ Millette Affidavit at paras 39-40.

⁹⁸ *Alberta v Hutterian Brethren of Wilson Colony*, [2009 SCC 37](#) at [para. 48](#) [*Hutterian Brethren*]; *Mounted Police Association of Ontario v Canada (Attorney General)*, [2015 SCC 1](#) at [para 143](#).

the fact that air passengers and carriers may choose not to participate in mediation, and instead opt for the CRO to exercise their very circumscribed decision making powers, does not negate the rational connection.

54. Further, and contrary to the submissions of the Applicant, the decision-making stage cannot be divorced from the mediation stage. They are both part of the continuum of the CRO complaint process. The entire purpose of this model is to make the process as accessible and streamlined as possible in order to enhance air passengers' access to their entitlements under a carrier's tariff. As part of this, air passenger complainants and air carrier respondents need only provide the information on which they intend to rely *once*, at the beginning of the complaint process.⁹⁹ This information is then used to inform the CRO's decision on eligibility, mediation (if it occurs), and the CRO's final decision (if necessary).¹⁰⁰ A bifurcated process, where parties provide one set of information for mediation, but then must make submissions about redactions to information for the decision making stage, would create the exact type of process that Parliament chose to abandon with the 2023 amendments to the *CTA*.

55. Given the interconnected nature of the mediation and final decision processes, the confidentiality measures are rationally connected to the entire resolution dispute model, including the CRO decision stage.

56. *Minimal Impairment*: Section 85.09(1) is minimally impairing to the open court principle because the objective of supporting the resolution dispute model of the CRO complaint process

⁹⁹ Guideline at Millette Affidavit, Exhibit A.

¹⁰⁰ Guideline at Millette Affidavit, Exhibit A.

can only reasonably be accomplished by ensuring that the information provided to the CRO is confidential.¹⁰¹ There are no alternative less infringing means of achieving the same objective of supporting the aims of the process.¹⁰² The Applicant concedes that confidentiality is important to informal dispute resolution and as previously discussed, the final decision stage of the process cannot be divorced from the mediation stage.¹⁰³

57. It is important to note that s.85.09(1) is not a “blanket” confidentiality provision.¹⁰⁴ Section 85.14 of the *CTA* requires that the Agency shall make public key information about a CRO’s order, including the number of the flight to which the order relates, the date of departure on the ticket, any decision about whether a delay, denial of boarding or flight cancellation was in the carrier’s control, and any compensation ordered under the tariff as a refund or as compensation for expenses incurred.¹⁰⁵ This allows for meaningful access to the outcomes of the process by both the public, and potential claimants. Moreover, the entire order of any complaint deemed sufficiently complex to be referred to a panel for final decision is made public.¹⁰⁶

58. *Final balancing*: The final balancing stage of the analysis considers the practical implications of the law where the severity of the deleterious effects of the confidentiality provisions on the open court principle can be considered.¹⁰⁷

¹⁰¹ *Hutterian Brethren* at [para 53](#).

¹⁰² *Hutterian Brethren* at [para 55](#).

¹⁰³ Applicant’s Factum at para 102.

¹⁰⁴ Contrary to the submissions of the Applicant at para 66.

¹⁰⁵ *CTA*, [s. 85.14](#).

¹⁰⁶ *CTA*, [ss. 85.13\(1\), 85.14\(1\)\(b\)](#).

¹⁰⁷ *Toronto Star* at [para 50](#); *Hutterian Brethren* at [para 76](#).

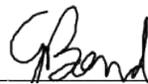
59. As the Respondent's evidence shows, information other than that which is made public by virtue of s.85.14 will be of little assistance to a potential air passenger complainant. The evaluation of a passenger's entitlements under a carrier's tariff is often fact specific to a passenger's circumstances.¹⁰⁸ The information made publicly available by the Agency about other CRO decisions is the extent of the information that may be helpful to a complainant, for example in the case of a delayed or cancelled flight.¹⁰⁹ Further, s.85.09(1) does not prevent the Applicant's public criticism of the CRO complaint process, or the individual orders of a CRO.¹¹⁰ Justice continues to proceed in public view.¹¹¹ Thus, the hallmarks of the open court principle are maintained, while also ensuring the required confidentiality for the process to operate effectively.

PART V – ORDER SOUGHT

60. The Respondent requests that the application be dismissed, with costs.

61. The Respondent also requests, if necessary, leave of the Court to exceed the page limit on submissions in order to address the Applicant's submissions, which were also over the page limit.

Submitted at Ottawa, this 27th day of February, 2026



Per: **Jennifer S. Bond (LSO# 83657R)**

Per: **Alex Dalcourt (LSO# 86546B)**

Counsel for the Respondent
The Attorney General of Canada

¹⁰⁸ Millette Affidavit at paras 33, 43.

¹⁰⁹ CTA, [s. 85.14](#)

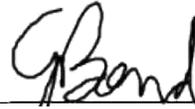
¹¹⁰ Affidavit of Dr. Gábor Lukács at paras 41-43, affirmed May 28, 2025, Applicant's Record at Tab 3.

¹¹¹ *Sherman Estate* at [para 30](#).

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 27th day of February, 2026.

A handwritten signature in black ink, appearing to read "J. Bond", is written above a horizontal line.

Per: **Jennifer S. Bond (LSO# 83657R)**

Per: **Alex Dalcourt (LSO# 86546B)**

PART V – LIST OF AUTHORITIES

Legislation

[*Air Passenger Protection Regulations*](#), SOR/2019-150

[*Canada Transportation Act*](#), SC 1996, c 10

[*Police Services Act*](#), RSO 1990, c P.15

[*The Constitution Act, 1982, Schedule B to the Canada Act 1982 \(UK\)*](#), 1982, c 11

Cases

Alberta v Hutterian Brethren of Wilson Colony, [2009 SCC 37](#)

Baharloo v University of British Columbia, [2014 BCSC 272](#)

Baharloo v University of British Columbia, [2014 BCSC 762](#)

Baharloo v University of British Columbia, [2016 BCCA 277](#)

Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society, [2012 SCC 45](#)

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

Canadian Broadcasting Corporation v. Parole Board of Canada, [2023 FCA 166](#)

Carter v Canada (Attorney General), [2015 SCC 5](#)

Craft v City of Toronto, [2019 ONSC 3636](#)

D'Arthenay v Ontario Provincial Police, [2024 ONSC 4773](#)

Fraser v Canada (Public Safety and Emergency Preparedness), [2021 FC 821](#)

Fraser v Canada (Public Safety and Emergency Preparedness), [2023 FCA 167](#)

Irwin Toy Ltd. v Quebec (Attorney General), [\[1989\] 1 SCR 927](#)

Michalski v McMaster University, [2022 ONSC 2625](#)

Mooring v Canada (National Parole Board), [\[1996\] 1 SCR 75](#)

Mounted Police Association of Ontario v Canada (Attorney General), [2015 SCC 1](#)

R v Safarzadeh-Markhali, [2016 SCC 14](#)

R v Therens, [\[1985\] 1 SCR 613](#)

Sherman Estate v Donovan, [2021 SCC 25](#)

Toronto Star Newspapers Ltd v Ontario (Attorney General), [2018 ONSC 2586](#)

Toronto Star Newspapers Ltd v Canada, [2010 SCC 21](#)

AIR PASSENGER RIGHTS

Applicant

AND

THE ATTORNEY GENERAL OF CANADA

Respondent

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding Commenced at
Ottawa, Ontario

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