

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

AIR PASSENGER RIGHTS

Applicant /
Responding Party

- and -

THE ATTORNEY GENERAL OF CANADA

Respondent /
Responding Party

- and -

CANADIAN BROADCASTING CORPORATION

Intervenor

FACTUM OF THE INTERVENOR

March 12, 2026

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There is no dispute that the media plays an important role in disseminating information to the public and thereby fostering freedom of expression¹

Part I -Overview

1. Canadian Broadcasting Corporation is Canada's national public broadcaster. Part of its mandate pursuant to the *Broadcasting Act* is to inform Canadians on matters of public interest, including the proper administration of public service agencies like the Canada Transportation Agency ("CTA").
2. In 2018, CTA undertook a process to develop a series of regulations designed to protect passengers from abusive conduct on behalf of Canadian airlines by proscribing mandatory remedies arising from a series of events as set out in the *Airline Passenger Protection Regulations* ("APPR"). The APPR also specify situations in which no remedies are available when the impugned situation was beyond the airline's control, or was within the airline's control but was required for safety purposes. This latter exception has been acknowledged as a "grey area", with airlines sometimes relying on the exception improperly to refuse compensation including where their own staffing errors, or errors made by staff (such as incorrect fueling calculations made by pilots), had led to delays.²
3. Prior to 2023, decisions of the CTA outlining fully what was alleged by the airline in any given case as having resulted in the impugned situation, and whether the conduct was found to fall within the exception, were made available for public inspection³. However, in 2023, the *Canada Transportation Act* ("CTAct") was amended to make secret the entire complaint procedure; only a vague finding of whether unparticularized circumstances were within the airlines control and/or were required for safety purposes on a specific flight is made public. As a result, there is no information made available to the media, and therefore no means for members of the public to receive information from the media to help them assess whether the APPR are in fact being applied correctly or consistently.

¹ *CTV v. Attorney General of Canada*, 2015 BCPC 65 at para 9.

² [Schieffe, P. "Strengthening Air Passenger Rights in Canada: Report of the Standing Committee on Transport, Infrastructure and Communities", 44th Parliament 1st Session \(April, 2023\)](#), p. 12.

³ Affidavit of Nancy Pierce, Para. 13 and Ex. G, Applicant's Record, p. 92 and 125.

Part II - Issues

4. The present application seeks a declaration that the confidentiality provisions set out in s. 85.09 of the CTAct violate section 2(b) of the *Charter of Rights and Freedoms*, and that they cannot be saved by s.1. CBC seeks to provide clarity on how this Court should approach this issue. Firstly, it shall re-frame the issue that is before the Court as being two distinct questions; and secondly, it will address the constitutionality of the confidentiality provisions of the CTAct from the media perspective.

Part III – Argument

The Applicant has Raised Two Distinct Questions

5. At paragraphs 1 and 2 of its Notice of Application, the Applicant seeks a declaration that the documents relied upon to decide a matter under the CTA complaint process are subject to the open court principle, and that the confidentiality provisions that prohibit their dissemination are an unjustifiable infringement of s. 2(b) of the *Charter*. However, it is unclear from that Notice or the Applicant's written submission if it is arguing it is *because* the CTA complaints process would otherwise be subject to the open court principle that the infringement occurs.

6. To the extent it has, CBC submits that approach places the cart before the horse, and is the wrong order in which to address the issue that is now before the Court:

To consider mandatory bans unconstitutional because the circumstances in which they apply cannot be scrutinized in a *Dagenais* analysis would be to turn the rule on its head.⁴

This is also true of the alternative raised in the Applicant's reply materials relying on the test in *Criminal Lawyers* for access to "documents in government hands."

7. As noted by the Supreme Court of Canada, where a statute prohibits access to a particular record or information, the impugned enactment is subject to a standard *Oakes* analysis: "If legislation requires a judge to order a publication ban, then any objection to that ban should be framed as a *Charter* challenge to the legislation itself" [emphasis in original].⁵

⁴ *Toronto Star Newspapers Ltd. v. Canada*, 2010 SCC 21 [at para 18](#).

⁵ *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 SCR 835 [at 874](#).

8. As a result, CBC submits the Application raises two distinct, and hierarchical questions. First, the Court must decide whether to remove the barrier to access imposed by the confidentiality provisions in the CTAAct (the "Infringement Question"); and only then ask by what means the documents can be accessed (the "Access Question"). CBC has been granted leave to intervene on the Infringement Question.

B) The Confidentiality Provisions are an Unjustified Infringement of Freedom of Expression
The Infringement

9. The Supreme Court of Canada has repeatedly reinforced that Canadians have a right to be informed about their public institutions. This right is not limited to court reporting and exists more broadly to a right to receive information about all bodies that serve a public purpose: "[M]embers of the public have a right to information pertaining to public institutions."⁶

10. The Court of Appeal has also recognized the role of the media in informing the public of decisions made by those institutions so that they can know how they might be treated by that system if they ever find themselves before it:

[T]he open court presumption advances values of particular importance in cases dealing with vulnerable parties: that judges are seen to be acting fairly and in a manner consistent with societal values; that similarly situated people can gain an understanding of how they may be treated by the judicial process; and that the public may learn more about the place of the courts in a democracy generally.⁷

11. While the Court of Appeal in that instance was addressing a particular proceeding under the Rules of Civile Procedure, CBC submits the sentiment expressed applies equally to any agency tasked with mediating the rights of Canadians, such as the CTA in administration of the APPR.

12. The Supreme Court of Canada has noted the importance of the media's access to information in our democratic society:

The full and fair discussion of public institutions, which is vital to any democracy, is the *raison d'être* of the s. 2(b) guarantees. Debate in the public domain is predicated on an informed public.... Essential to the freedom of the

⁶ *Edmonton Journal v. Alberta (Attorney General)*, 1989 CanLII 20 (SCC).

⁷ *S.E.C. v. M.P.*, 2023 ONCA 821 at para. 48.

press to provide information to the public is the ability of the press to have access to this information.⁸

13. The Court has found further that freedom of expression and freedom of the press would be significantly impaired if the media is hampered from obtaining information that is in the public interest:

[T]he freedom to disseminate information would be of little value if the freedom under s. 2(b) did not also encompass the right to gather news and other information without undue governmental interference.

However, the case at bar presents such interference.

14. On cross-examination, Mr. Millette (being offered as the only witness on behalf of the Attorney General) confirmed that the exception to the confidentiality provisions serves to provide only sufficient information to passengers on the same flight over which a complaint has been filed to know whether they should file their own complaint.⁹ Put differently, the confidentiality provisions, by design, are meant to shield information about the complaints process from the public at large.

15. The confidentiality provisions contained in the CTAct bar the media from obtaining information about the CTA complaints process, and the result is that Canadians cannot know whether the APPR is being applied fairly or consistently. Consequently, CBC submits there can be no serious debate that the confidentiality provisions in the CTAct constitute an infringement of both its freedom of expression and freedom of the press. This infringement cannot be justified under s. 1 of the *Charter*.

The Oakes Test

16. The test to be applied to determine if an infringement of a *Charter* right can be justified in a free and democratic society is well known:

In order to justify the infringement ... under s.1 of the *Charter*, Canada must show that the law has a pressing and substantial object and that the means chosen are proportional to that object. A law is proportionate if (1) the means adopted are rationally connected to that objective; (2) it is minimally impairing of the right in question; and (3) there is proportionality between the deleterious and salutary effects of the law.¹⁰

⁸ *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, 1996 CanLII 184 [at para. 23](#).

⁹ Cross-Examination of Vincent Millette, Ex. W, Applicant's Record, p. 235 Answer 75 and p. 253, Answer 141

¹⁰ *Carter v. Canada (Attorney General)*, 2015 SCC 5 [at para. 94](#).

In these submissions, CBC shall focus on the first and third step of the proportionality analysis.

Rational Connection and Overbreadth

17. At the first step of the analysis, it is incumbent on the Attorney General to show that the confidentiality provisions contained in the CTAAct are logically connected to the objective they are said to achieve:

To establish a rational connection, the government need only show that there is a causal connection between the infringement and the benefit sought “on the basis of reason or logic”.¹¹

18. In his affidavit, Mr. Millette sets out two distinct purposes for the confidentiality provisions: firstly, he asserts they are necessary “to incentivize air carriers to participate in the mediation process”;¹² and secondly, they are required to protect against disclosure of sensitive personal information that was provided by complainants, “seemingly unaware it would become part of the public record.”¹³ On cross-examination, Mr. Millette conceded these stated purposes were in fact just a means to a “more efficient and streamlined [complaints] process”.¹⁴

19. While it may appear the confidentiality provisions logically support those purposes, it is settled law that an enactment that limits a constitutional right in order to serve a valid government purpose but that also limits *Charter* rights in a manner entirely divorced from that purpose cannot be justified under s. 1 of the *Charter*:

The overbreadth inquiry asks whether a law that takes away rights in a way that generally supports the object of the law, goes too far by denying the rights of some individuals in a way that bears no relation to the object.¹⁵

20. The Supreme Court of Canada further elaborated on that analysis:

As noted above, the root question is whether the law is inherently bad because there is *no connection*, in whole or in part, between its effects and its purpose... the evidence may, as in *Chaoulli*, show that there is simply no connection on the facts between the effect and the objective, and the effect is therefore “unnecessary”.¹⁶

¹¹ *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 99.

¹² Affidavit of Vincent Millette, Ex. V, Applicant's Record, p. 213 Para. 40.

¹³ Affidavit of Vincent Millette, Ex. V, Applicant's Record, p. 214 Para. 41.

¹⁴ Cross-examination of Vincent Millette, Ex. W, Applicant's Record, p. 235 Answer 72.

¹⁵ *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 85.

¹⁶ *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 119.

21. The Court has further stated that where this result is the byproduct of the desire for an efficient application of the law, the infringement is even more problematic:

[W]here a law is drawn broadly and targets some conduct that bears no relation to its purpose in order to make enforcement more practical, there is still no connection between the purpose of the law and its effect on the *specific individual*.¹⁷

22. CBC submits that is precisely what has happened with the confidentiality provisions contained in the CTAAct; the solution provided by the confidentiality provisions goes way beyond what is required to encourage mediation or to remove the requirement of redacting personal information from documents provided by complainants- all in the name of increased efficiency of the process.

23. The confidentiality provisions contained in the CTAAct cover *all* records produced throughout the *entire* complaint process - including records created or produced after mediation efforts have failed, as well as records that are produced by the CTA itself, including its final decision rendered in a complaint file. CBC submits this is a textbook example of overbreadth in that the confidentiality provisions capture any number of records which cannot reasonably be connected to the stated objectives of encouraging mediation and protecting information contained in records provided by complainants to the CTA.

24. This overbreadth of the legislation was admitted in part on cross-examination by Mr. Millette:

Q. That's what this says, yes. Okay. Thank you for that. So, paragraph 40 of your affidavit, you specify that the confidentiality provisions were implemented for several reasons, one of which was, was that a tenet of mediation is that it remains confidential. So, again, I just want to clarify though that the entire process of the C.R.O. is not mediation, correct?

A. Mediation is part of the process.

Q. It's part of the process if the party agrees to mediate, but it's not the entire process, correct?

A. That's correct.

Q. And so, essentially what you're stating here is that this premise from mediation is being applied to non-mediation proceedings?

A. Sure.¹⁸

¹⁷ *Canada (Attorney General) v. Bedford*, 2013 SCC 72 [at para. 113](#).

¹⁸ Cross-Examination of Vincent Millette, Ex. W, Applicant's Record, p. 255-256, Questions 146-148.

25. Whereas the scope of the confidentiality provisions clearly has no connection whatsoever to the stated objectives of the legislation as framed by Mr. Millette, the resultant infringement on freedom of expression and freedom of the press must be found to fail the *Oakes* test.

Proportionality

26. In the event the Court disagrees with CBC's position regarding the overbreadth of the confidentiality provisions, CBC submits those provisions also fail the *Oakes* test at the proportionality phase, since their deleterious effects clearly outweigh their benefits.

27. As noted by the Supreme Court of Canada, the starting point of the proportionality analysis is to assess the degree to which the Charter right is adversely affected:

The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.¹⁹

28. In the context of an infringement on free expression such as the case at bar, that analysis looks at the relative value of the speech in question:

One cannot determine whether an infringement of a right is justified without examining the seriousness of the infringement. Our jurisprudence on the guarantee of the freedom of expression establishes that some types of expression are more important and hence more deserving of protection than others.²⁰

29. Canadian courts have variously referred to the media as the "eyes and ears of a wider public,"²¹ as well as being the "watchdog of democracy".²² The Supreme Court of Canada has recently reaffirmed the importance of the media's role in this regard:

It is only the presence of free, robust and independent news media that actually enables the public to understand and form an opinion on the justice system, to hold it accountable and to have confidence in it.²³

30. And while the Court there was discussing the media's role in reporting in court proceedings, CBC submits the sentiment applies equally to any agency charged with mediating the right of Canadians, such as CTA in its application of the APPR.

¹⁹ *R. v Oakes*, 1986 CanLII 46 [at para. 71](#).

²⁰ *Harper v. Canada (Attorney General)*, 2004 SCC 33 [at para. 10](#).

²¹ *Donovan v. Sherman Estate*, 2021 SCC 25 [at para. 30](#).

²² *Pacific Press Ltd. v. Vickers*, 1985 CanLII 347 [at para. 22](#).

²³ *Canadian Broadcasting Corp. v. Named Person*, 2024 SCC 21 [at para. 31](#).

30.1 As a result, the confidentiality provisions which blind the media - and consequently the public - almost entirely from observing, understanding and commenting on the CTA complaints process are a significant impairment on freedom of expression and freedom of the press which weighs very heavily against a finding of justification of those provisions under s. 1.

31. On the other side of the scale, this Court must then consider the benefits the confidentiality provisions are said to achieve. As noted above, the only witness proffered in this regard sets out two rationales for confidentiality: encouraging mediation; and eliminating the need to redact documents to remove the personal information of complainants. When pressed, Mr. Millette confirmed these rationales were in essence simply to ease the burden on the CTA and to make the complaints process more efficient.

32. The Supreme Court of Canada has weighed in on similar arguments where government has tried to justify *Charter* infringements in the name of efficiency:

The result of all this, it seems to me, is that courts will continue to look with strong scepticism at attempts to justify infringements of *Charter* rights on the basis of budgetary constraints. To do otherwise would devalue the *Charter* because there are *always* budgetary constraints and there are *always* other pressing government priorities.²⁴

33. CBC submits there is little to no difference between an infringement in the name of cost-efficiency and one made in the name of operational efficiency. As a result of the caution outlined above about the validity of such claims, CBC submits that the “scepticism” called for by the Court of any benefits said to be brought about for that purpose by the confidentiality provision militates in favour of giving it very little weight in the balancing exercise. These purported benefits should be discounted even further when they are not properly grounded in evidence: “As with any matter that must be approached with close attention to context, the evidence led in support of a s. 1 justification is very important to the outcome.”²⁵

34. In the present matter, there is zero evidence that the confidentiality provisions have in fact made the APPR complaints process more efficient in any way whatsoever. In fact, the evidence of Mr. Millette seems to suggest quite the opposite: “[D]espite having implemented

²⁴ *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66 [at para. 72.](#)

²⁵ *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66 [at para. 55.](#)

these changes to the Agency's resolution process under the CTA, the backlog continues to grow."²⁶

35. As a result, CBC submits it is clear the infringement on freedom of expression and freedom of the press created by the confidentiality provisions cannot be justified at this stage of the analysis. They create a nearly absolute bar to the media to report on, and consequently for the public to receive information about, the application of the APPR. As noted above, this impairment is a significant infringement of those rights. On the other hand, the Attorney General has offered only aspirational benefits that the provisions are hoped to bring without any evidence that they in fact do so.

Remedies

36. What is clear from the above is that the confidentiality provisions are overbroad on their face in that they capture more records than are necessary to achieve their stated objectives. The Applicants have asked this Court to read down the confidentiality provisions in the CTAct to apply only to "non-adjudicative records". While CBC takes no position in the proposed remedy *per se*, it does offer the following considerations.

36.1 The Supreme Court of Canada has recently revisited its long-standing jurisprudence on constitutional remedies, including the test to be applied in determining if reading down the offending legislation is appropriate:

Schachter cautioned that tailored remedies should only be granted where it can be fairly assumed that "the legislature would have passed the constitutionally sound part of the scheme without the unsound part" and where it is possible to precisely define the unconstitutional aspect of the law.²⁷

37. On the one hand, it seems the government would prefer to maintain at least part of the confidentiality scheme while mediation of a complaint is still being contemplated to encourage participation in that process. That factor appears to militate in favour of the remedy proposed by the Applicant. On the other hand, the Court must consider the strength of the evidentiary record before it to determine if it is sufficient to enable it to identify which classes of documents should be captured by the confidentiality provisions as being "adjudicative", and which are not.

²⁶ Affidavit of Vincent Millette, Ex. V, Applicant's Record, p. 215, para. 45.

²⁷ *Ontario (Attorney General) v. G*, 2020 SCC 38 [at para. 114](#)

38. If such a distinction is not readily apparent, then the Court should consider another remedy, such as striking down the confidentiality provisions in their entirety. Declaring the confidentiality provisions of no force and effect in their entirety may be a more appropriate remedy given it is clear that the stated objective of merely promoting efficiency of the complaints process is likely insufficient to justify *any* infringement of freedom of expression and freedom of the press.

39. Irrespective of the remedy chosen by the Court, CBC submits it should have immediate effect based on the Supreme Court's guidance on that issue:

[T]he effect of a declaration should not be suspended unless the government demonstrates that an immediately effective declaration would endanger a compelling public interest that outweighs the importance of immediate constitutional compliance and an immediately effective remedy for those whose *Charter* rights will be violated.²⁸

40. As noted above, there is no evidence that the confidentiality provisions have actually done anything to accelerate or render the APPR complaints process more efficient. As a result, removing them now will not cause any harm to the CTA's operations, never mind undermine the complaints process to a sufficient degree that meets this test. As a result, CBC submits a remedy with immediate application is appropriate to give full effect to the rights of the media and the public that has thus far been unjustifiably impaired by the confidentiality provisions.

Part IV - Relief Sought

41. As a friend of the Court, CBC is not a party to this litigation and is therefore not seeking any particular relief, *per se*. In these submissions, however, we believe we have provided the Court with an alternate path to the one set out by the Applicant toward granting its Application and declaring s. 85.09 of the CTAct an unconstitutional infringement of freedom of expression.

²⁸ *Ontario (Attorney General) v. G*, 2020 SCC 38 [at para. 139](#).

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 12 day of March, 2026.

A handwritten signature in black ink, appearing to read "Sean A. Moreman", written over a horizontal line.

Sean A. Moreman
Canadian Broadcasting Corporation
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LIST OF CITED AUTHORITIES

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