ONTARIO

Superior Court of Justice – Central South Region

ENDORSEMENT SHEET FOR CIVIL MOTION/APPLICATION

SHORT TITLE OF PROCEEDINGS: AIR PASSENGER RIGHTS v. ATTORNEY GENERAL (CANADA)

COURT FILE NO.: CV-25-00100065-0000

BEFORE: **WILLIAMS J.**

HEARD ON: IN WRITING, ON MARCH 12 AND 13, 2026

COUNSEL:

CLAY HUNTER and ALISON DUDU for the moving parties (NACC, AC, AT, JAL and W – "the airlines")
DOUGLAS JUDSON for respondent (APR)
HELENE ROBERTSON and ALEX DALCOURT (AG)

RELIEF REQUESTED: An order granting leave to intervene as a party in the proceeding. Alternatively, an order granting leave to intervene as a friend of the court, including leave to deliver a factum of not more than 15 pages in length and leave to make oral submissions of not more than 20 minutes.

ENDORSEMENT:

Overview

This is a motion in writing brought on an urgent basis with leave from the Local Administrative Judge, Civil, in Ottawa, Kaufman, J.

The moving parties are The National Airlines Council of Canada, Air Canada, Air Transat, Jazz Aviation LP and Westjet ("the airlines.")

The airlines seek an order granting leave to intervene as parties to an application scheduled to be heard March 17, 2026.[1] Alternatively, the airlines seek an order granting leave to intervene as a friend of the court, with leave to deliver a factum of not more than 15 pages and to make oral submissions of not more than 20 minutes.

The application scheduled to be heard on March 17, 2026 was brought by Air Passenger Rights ("APR.") In its application, APR argues that s. 85.09(1) of the *Canada Transportation Act* is contrary to s. 2(b) of the *Canadian Charter of Rights and Freedoms.* APR seeks a declaration that would read down s. 85.09(1) of the *CTA* so that the documents relied upon by a Conflict

[1] Although this motion was not assigned to a judge until March 12, 2026, the airlines had filed their request for the motion to be heard on an urgent basis on January 22, 2026, and the parties had filed their materials by February 6, 2026.

Resolution Officer in a complaints procedure would be subject to the open courts principle and available to the public.

The position of the parties to the application

In a letter to the court dated February 5, 2026, the respondent, Attorney General (Canada) ('the AG") advised that it does not oppose the motion.

On February 6, 2026, APR filed a motion record and factum in response to the motion. APR opposes the airlines' motion and asks that it be dismissed. Alternatively, APR argues the airlines should be granted leave to intervene only as a friend of the court, on the same terms as the other intervenor, CBC. In the further alternative, APR says that if the airlines are granted leave to intervene as parties, the issues they may address should be limited, they should not be permitted to conduct cross-examinations, and APR should be awarded costs associated with the preparation of an amended factum and the revision of any prepared oral submissions.

Analysis and conclusion

I have reviewed the motion records and factums of the airlines and of APR. I note the airlines included in their motion record a draft of the submissions they would make at the hearing of the application if their motion to intervene is successful.

The airlines seek leave to intervene to make submissions with respect to why, in the event that s. 85.09(1) of the *CTA* is found to violate the *Charter*, it should be saved under s. 1 of the *Charter*. (Airlines' factum, para. 5.)

Rule 13 of the *Rules of Civil Procedure* sets out the test for leave to intervene as a party and as a friend of the court:

> **Leave to Intervene as Added Party**
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> **13.01** (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,
>
> (a) an interest in the subject matter of the proceeding;
>
> (b) that the person may be adversely affected by a judgment in the proceeding; *or* (emphasis added)
>
> (c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding. R.R.O. 1990, Reg. 194, r. 13.01 (1).
>
> (2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.
>
> **Leave to Intervene as Friend of the Court**
>
> **13.02** Any person may, with leave of a judge or at the invitation of the presiding judge or associate judge, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

In *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.* (CA), 1990 CanLII 6886 (ON CA), the Court of Appeal said that when considering whether an application for intervention should be granted, in the end, the matters to be considered are: 1) the nature of the case; 2) the issues which arise; and 3) the likelihood of the applicant being able to make a useful contribution to the resolution of the [case] without causing injustice to the immediate parties.

In *Bedford v. Canada (Attorney General*), 2009 ONCA 669, at para. 2, the Court of Appeal said that when seeking leave to intervene under rule 13.02, and the proceeding is constitutional in nature, the proposed intervenor must meet one of the following criteria: (a) it has a real, substantial and identifiable interest in the subject matter of the proceedings; (b) it has an important perspective distinct from the immediate parties; *or* (emphasis added) (c) it is a well-recognized group with special expertise and a broadly identifiable membership base.

However, the Court of Appeal for Ontario recently noted that the presence or absence of the three factors from the jurisprudence, including *Bedford*, is not determinative. The court said they are non-exclusive factors in the service of answering the ultimate question: will the applicant likely make a useful contribution. (*Fair Voting BC v. Canada (Attorney General)*, 2024 ONCA 619, at para. 11.)

I am mindful that when a proceeding involves public policy or public interest issues, such as the one before me, the standard to be met by the proposed intervenor is less onerous than when only issues of a private nature are at stake. (*Jones v. Tsige* 2011 CanLII 99894 (ON CA).)

Although I understand that the airlines were not entitled to confidentiality over their documents before s. 85.09(1) was enacted in 2023, I nonetheless accept that the airlines have an interest in the subject matter of the proceeding. The airlines say that when responding to complaints under the *CTA*, they are frequently required to produce confidential internal documents. They say these documents may contain commercially sensitive or proprietary information. They say they would be adversely affected if the court hearing the application were to conclude that these documents must be made public. They wish to argue that s. 85.09(1) imposes a reasonable limit on s. 2(b) *Charter* rights.

I am, however, troubled by the submissions the airlines propose to make if they are granted leave to intervene in the application.

In the draft submissions included in their motion record, the airlines refer to the first branch of the *Oakes*[2] test, and say that two central criteria must be satisfied; (i) Is the legislative goal pressing and substantial? and (ii) Is there proportionality between the objective and the means to achieve it?

The airlines then refer to what they say is the goal or objective of the section s. 85.09(1):

[2] 1986 CanLII46 (SCC), at para. 69 – 71.

> 10. Parliament's legislative goal in creating the Air Travel Complaints process was to provide a streamlined process by which to resolve Air Travel Complaints; it is meant to be less onerous *on the parties* (emphasis added), so that decisions can occur more rapidly and efficiently. This same legislative goal drives the inclusion of s. 85.09(1) of the Act.

What I find troubling is that the airlines' statement of the goal or objective of s. 85.09(1) is different from that of the respondent to the application, the AG. While the airlines intend to argue that the objective of s. 85.09(1) is further to a complaints process that is less onerous for "the parties", plural, referring to both passengers and airlines, the AG says the objective is to assist passengers and enhance consumer protection. In its factum, at para. 48, the AG says that 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* (emphasis added.) This is pressing and substantial because it gives effect to the *consumer protection aims* (emphasis added) of the National Transportation Policy."

I am persuaded by the arguments set out in APR's factum at paras. 66 to 72 to the effect that a proposed intervenor is not entitled to reframe the arguments of the parties to the application nor may a proposed intervenor attempt to defend legislation on a basis other than the basis relied upon by the government that enacted it.

I consider the proposed submissions of the airlines to be duplicative of the position of the AG, in that both intend to argue that if s. 85.09(1) of the *CTA* violates the *Charter*, it should be saved under s. 1 of the *Charter*. More significantly, I agree with APR's submission that, to the extent that the airlines' proposed submissions are not duplicative, the airlines intend to base their s. 1 argument on a legislative objective other than the one advanced by the AG and one for which there is no foundation in the record. This is impermissible. Further, in my view, rather than assisting the court, the airlines' proposed submissions would muddy the waters and detract from the arguments of the parties.

For these reasons, in response to the "ultimate question" posed in the *Fair Voting BC* case, I conclude that the airlines' proposed contribution would not be useful, as added parties or as friends of the court.

Disposition

The airlines' motion to intervene is dismissed.

[Continued on next page.]

Costs

If APR and the airlines are unable to agree on costs of the motion, they may deliver brief written costs submissions, including costs outlines of both parties, on or before April 2, 2026 by filing them in the usual manner and sending them by email to my attention at scj.assistants@ontario.ca.

Date: March 13, 2026

"H. J. Williams, J."
Justice Williams.