

Court File No.



**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

AIR PASSENGER RIGHTS

Applicant

- and -

THE ATTORNEY GENERAL OF CANADA

Respondent

NOTICE OF APPLICATION

**Application under rule 14.05(3)(d), (g), (g.1),
and (h) of the *Rules of Civil Procedure***

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED BY the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION will come on for a hearing

- In person
- By telephone conference
- By video conference

at the following location

Ottawa Courthouse, via Zoom
161 Elgin Street, 2nd Floor
Ottawa, ON K2P 2K1

*Zoom connection information to be
provided by the court.*

on a date and time to be scheduled by the court.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant,

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and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: _____ Issued by: _____
Local registrar

Address of court office: Ottawa Courthouse
161 Elgin Street, 2nd Floor
Ottawa, ON K2P 2K1

TO: **The Attorney General of Canada**
Justice Building
284 Wellington Street
Ottawa, ON K1A 0H8
Email: AGC_PGC_OTTAWA@justice.gc.ca

Respondent

AND TO: **The Attorney General of Ontario**
Constitutional Law Branch
McMurtry-Scott Building
4th Floor, 720 Bay Street
Toronto, ON M7A 2S9
Email: clbsupport@ontario.ca

Notice as required by section 109 of the *Courts of Justice Act*

APPLICATION

The applicant makes application for:

1. A declaration, pursuant to section 52(1) of the *Canadian Charter of Rights and Freedoms* [**“Charter”**], reading down section 85.09(1) of the *Canada Transportation Act* [**“CTA”**] such that documents relied on by a Conflict Resolution Officer [**“CRO”**] to make a decision under section 85.07 of the *CTA* are subject to the open courts principle, and that the failure to make them available to the public violates section 2(b) of the *Charter* and cannot be saved by section 1;
2. A declaration that the failure to make public the decisions and orders of the CRO, including the reasons for decision, violates section 2(b) of the *Charter* and cannot be saved by section 1;
3. If necessary, an order granting public interest standing to the applicant Air Passenger Rights [**“Applicant”**] to bring the within application;
4. An order awarding the costs of this application to the Applicant; and
5. Such further and other relief as this court deems just.

The grounds for the application are:

A. The Applicant

6. The Applicant is a corporation incorporated under the *Canada Not-for-profit Corporations Act* with a registered office in Halifax, Nova Scotia. The Applicant advocates for the rights of Canadian air passengers.

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7. The Applicant provides information and resources to members of the public related to air passenger rights issues, rules, and legal processes. It advocates on behalf of the general public to improve air passenger rights and conditions for air travellers in Canada.

B. The Canadian Transportation Agency

8. The Canadian Transportation Agency [**“Agency”**] was established under the *CTA* with a broad mandate in respect of all transportation matters under the legislative authority of Parliament. Under the *CTA*, the Agency consists of the “not more than five members” appointed by the Governor in Council.

9. The Agency performs three key functions:

- a. as a quasi-judicial tribunal, the Agency resolves commercial and consumer transportation-related disputes;
- b. as a transportation regulator, the Agency ensures that carriers provide accessible and barrier-free transportation; and
- c. as an economic regulator, the Agency makes determinations and issues licenses and permits to carriers which function within the ambit of Parliament’s authority.

C. The Quasi-Judicial Process for Air Passenger Complaints

10. The *CTA* establishes a framework for air passenger complaints.

11. This framework includes the *Air Passenger Protection Regulations* [**“APPR”**], which sets out some minimum obligations that airlines operating in

Canada owe to passengers, including in respect of matters such as flight delays, cancellations, denials of boarding, and seat assignments.

12. Recourse is available to passengers where an airline has not fulfilled its obligations under the *APPR* or in respect of the contract of carriage with an airline (referred to as a tariff).

13. Section 85.04(1) of the *CTA* states that complaints from air passengers may be filed with the Agency. Complaints may allege, *inter alia*, a failure on the part of an airline to apply a fare, rate, charge, term or condition of carriage, including a breach of the *APPR*. A complainant can seek compensation.

14. Air passenger disputes brought to the Agency are determined by CROs. While CROs are to be appointed from among the members and staff of the Agency, sections 85.02 and 85.06(2) of the *CTA* provide for some nominal measures of adjudicative independence on the part of the CRO. These sections specify that:

- a. CRO decisions are *not* decisions of the Agency,
- b. CROs have the powers, duties, and functions of a CRO, and *not* of the Agency, and
- c. proceedings before a CRO are *not* proceedings before the Agency.

15. Section 85.06(1) specifies that if mediation of the complaint between the complainant and the airline does not resolve the matter, the CRO shall, within 60 days of the start of the mediation, make an order under section 85.07(1) or dismiss the complaint.

16. Section 85.07(3) provides that an order made by the CRO may be filed with the Agency and, at that time, becomes enforceable as if it were an order of the Agency. Section 33 states that orders of the Agency can be made an order of the Federal Court or of any superior court and be enforced in the same manner.

17. Notably, the Agency is not the only forum for adjudicating the claims of air passengers. Complaints can also be filed as civil proceedings in small claims courts.

D. Section 85.09(1) of the CTA and Refusal to Provide Documents

18. Section 85.09(1) of the *CTA* states:

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.

19. The Agency relies on this provision to refuse to disclose to members of the public the decisions and orders of CROs – as well as the documents relied on by CROs to make their decisions and orders – unless it has the consent of the parties to the given complaint.

20. On July 16, 2024, the Applicant made a request to the Agency for the CRO's decision and/or order, their reasons, and all documents relied on by the CRO in respect of 5 air passenger complaint files.

21. On August 9, 2024, the Secretariat of the Agency responded to the Applicant, denying access to the requested documents, relying on section 85.09(1) of the *CTA* as the basis for its refusal.

E. The Open Court Principle and Section 85.09

22. The open court principle is animated by the freedom of expression guaranteed by section 2(b) of the *Charter*.

23. Section 2(b) prohibits the state from interfering with an individual's ability to inspect and copy public records and documents, including judicial and quasi-judicial adjudicative records and documents. This right's association with freedom of expression flows from the importance of disseminating information to the public about judicial and quasi-judicial proceedings.

24. The principles governing the application of the open court principle in quasi-judicial forums include that:

- a. members of the public have a presumptive right to inspect and copy all documents that have been placed on the record that is or was before a court;
- b. public policy militates in favour of maximum accountability and accessibility in respect of both judicial and quasi-judicial matters; and
- c. the open court principle must extend to anything that has been made part of the record, subject to any specific order to the contrary.

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25. Tribunals presiding over adversarial proceedings are subject to the open court principle. The open court principle also applies to the air passenger dispute resolution proceedings of the Agency.

26. The open court principle has been endowed with protection under section 2(b) of the *Charter* in recognition that this principle is one of the hallmarks of a democratic society and inextricably tied to freedom of expression for that reason. Measures that prevent members of the public from access to the courts and the information contained in court files unduly restrict this constitutionally-guaranteed right.

27. Section 85.09(1) of the *CTA* infringes the constitutional guarantee of the right to freedom of expression. By acting as a statutory bar to the release of documents filed in air passenger complaint adjudication proceedings, absent the consent of parties, section 85.09(1) of the *CTA* violates the open court principle.

28. Section 85.09(1) violates the rights guaranteed by section 2(b) of the *Charter*. It does so both in purpose and effect. Because the section 2(b) right protects both the “speakers” and “receivers” of expression, the purpose of the statutory provision is to restrict members of the public from receiving information about air passenger dispute proceedings, orders, and decisions.

29. Section 85.09(1) also infringes the section 2(b) *Charter* right in effect by prohibiting members of the public from engaging with the social values underlying the right – namely meaningful participation in democratic institutions, legal processes, and social and political decision-making. It prohibits the

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Applicant, media, other organizations in society from having access to information to effectively communicate information about air passenger complaint proceedings, the effectiveness of the *APPR*, the work of the *CTA*, recourse available to aggrieved passengers, and related matters.

30. Moreover, section 85.09(1) violates the Applicant's guarantee of freedom of expression by removing the ability to engage in expressive activities about air passenger complaint proceedings, air passenger rights, and complaint processes. These expressive activities are central to the Applicant's mandates to provide information to the public about air passenger rights and to advance the legal rights of air passengers. The Applicant cannot engage in those activities meaningfully if it cannot access documents relating to those proceedings, share those documents with others, communicate about the contents of such documents with third parties, or use information from air passenger complaint proceedings to advocate for improved air passenger rights.

31. The infringement of section 2(b) cannot be reasonably justified under section 1 of the *Charter*. Importantly, the requirement for consent of the parties to the complaint proceeding before documents will be released is practically ineffective. It is an effective bar to the release of any meaningful information about disposition of air passenger complaints because the responding parties to most of these proceedings are a small number of corporations with an interest in preventing the release of CRO decisions and orders.

32. Consequently, section 85.09(1) of the *CTA* must be read down and limited in scope by the court such that it does not apply to the adjudication of air passenger complaints by CROs, the documents relied on the CRO in such proceedings, and the orders, decisions, and resulting reasons from such proceedings.

F. General Matters

33. The Applicant relies on:

- a. The *APPR* (SOR/2019-150);
- b. The *Charter* (Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [***Constitution Act***], including sections 1 and 2(b) thereof);
- c. The *Constitution Act* (including section 52(1) thereof);
- d. The *CTA* (S.C. 1996, c.10, including section 85.09 thereof);
- e. The *Rules of Civil Procedure* (R.R.O. 1990, Reg. 194); and
- f. The *Courts of Justice Act* (R.S.O. 1990, c. C.43).

The following documentary evidence will be used at the hearing:

34. The Affidavit of Dr. Gábor Lukács, affirmed May 28, 2025;

35. The Affidavit of Nancy Pierce, affirmed May 28, 2025; and

36. Such further and other materials as counsel may advise and this court permits.

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May 28, 2025

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Applicant *Respondent*

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**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding Commenced at Ottawa

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