

CITATION: Air Passenger Rights v. The Attorney General of Canada, 2026 ONSC 3983
COURT FILE NO.: CV-25-100065
DATE: 2026/07/08

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Air Passenger Rights, Applicants

AND

The Attorney General of Canada, Respondent

COUNSEL: Douglas W. Judson, counsel for the Applicant

Alex Dalcourt and Taylor Andrews, Counsel for the Respondent

Sean Moreman, Counsel for Canadian Broadcasting Corporation (Intervenor)

HEARD: April 24, 2026

REASONS FOR DECISION

JUSTICE C.T. HACKLAND

OVERVIEW

[1] The Applicant, Air Passenger Rights is a federal not for profit corporation which provides information and resources to members of the public relating 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 travelers in Canada. In this proceeding the Applicant seeks a declaration, pursuant to section 52(1) of the *Constitution Act, 1982*, that subsection 85.09(1) of the *Canada Transportation Act*, S.C. 1996, c. 10 (the “CTA”) violates the right to freedom of expression guaranteed by section 2(b) of the Canadian Charter of Rights and Freedoms (the “*Charter*”) and cannot be reasonably justified by section 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 (the “Agency”). This new process is for passengers with claims that airlines failed to fulfill tariff conditions or to pay required compensation under the Air Passenger

Protection Regulations (“APPR”). The decision-makers in this new tribunal are called Complaint Resolution Officers (“CROs”). They are appointed from among the staff of the Agency.

[3] At this time the Agency continues to serve as a quasi judicial tribunal to resolve commercial and certain consumer transportation related disputes and as a transportation regulator to ensure carriers provide accessible and barrier free transportation to passengers. The Agency also serves as an economic regulator to make determinations and issue licenses and permits to carriers of goods and passengers that fall within the ambit of Parliament's authority.

2023 Legislative Enactments (the “CRO Process”)

[4] In 2023, new sections of the *CTA* were enacted that diverted most air passenger complaints from the previous 2014 Rules to the “CRO process”. These complaints now follow the process set out in sections 85.04 to 85.12 of the *CTA*. 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. To access the CRO process the complainant must have first made a written request to the relevant airline that was not resolved within 30 days.

[5] Air passenger disputes brought to the Agency are determined by CROs. The *CTA* 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 before the Agency.

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

[7] The *CTA* prescribes the types of remedies that the CRO can order following an adjudication of the complaint. 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. It is not disputed that CRO orders become public upon such enforcement.

[8] Air passengers may also pursue compensation in provincial Small Claims Courts. Air passenger complaints relating to the issue of accessibility continue to be governed by the previous 2014 rules, which are subject to the open court principle. Adjudications in Small Claims Court are of course also subject to the open courts principle.

Subsection 85.09(1) of the CTA

[9] The Applicant challenges the constitutionality of section 85.09(1) of the *CTA*, alleging it imposes a “closed court” adjudicative process, in contravention of the open court principle and the closely related *Charter* guarantee of freedom of expression. Section 85.09(1) of the *CTA* provides:

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.

[10] The Applicant submits the requirement that all matters related to the process of dealing with a complaint shall be kept confidential and all information provided to the resolution officer for the purpose of complaint resolution must also be kept confidential is in violation of section 2(b) of the *Charter* and of the open courts principle. The Applicant further submits that section 85.09(1) of the *CTA* does not constitute a reasonable limit on the open court principle under section 1 of the *Charter*.

[11] The Applicant, if successful, requests an order:

- a. 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;

Issues

[12] Does subsection 85.09 (1) of the *CTA* infringe section 2(b) of the *Charter* in prohibiting access to and communicating information about CRO decisions, orders, and related adjudicative records and, if section 2(b) is infringed by subsection 85.09(1) of the *CTA*, is the infringement justified under section 1 of the *Charter*?

Applicant's Position

[13] The Applicant's position is that the expressive activity in question is constitutionally protected 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 such as the CRO decisions.

Respondent's Position

[14] The position of the Respondent, The Attorney General of Canada, is the open court principle does not apply to the CRO complaint process because subsection 2(b) of the *Charter* only applies to adjudicative tribunals whereas the CRO complaint process is non-adversarial, merely requiring the CRO to apply the tariff. Alternatively, the Respondent argues that section 85.09(1) of the *CTA* is a reasonable limit on the open court principle, under Section 1 of the *Charter*. This is because the purpose of this section is pressing and substantial and the confidentiality provisions are a proportional means to achieve the objective of the legislation.

Intervenor's Position

[15] The CBC says the 2023 amendments to the *CTA* were enacted to make secret the entire complaints procedure as a result of which there is virtually "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". The CBC

supports the Applicant's position that section 85.09 of the *CTA* violates the open court principle and section 2(b) of the Charter of Rights and Freedoms and the provision cannot be justified by section 1 of the *Charter*.

Discussion

[16] The court would observe that the Respondent also raised in its factum the issue of the Applicant's standing to bring this application, although the point was not pressed in argument. The court is of the view that this is a clear case of entitlement to public interest standing given the nature of the issue, being one of significant public interest to the airline industry and to the flying public and considering also the Applicant's significant experience in public interest advocacy on behalf of airline passengers in Canada. The Applicant is granted standing to bring this application.

[17] The law is well settled in Canada that members of the public have a right to information pertaining to public institutions, see *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 S.C.R. 1326. The Ontario Court of Appeal has also recognized the role of the media in informing the public of decisions made by those institutions so that members of the public 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. (*S.E.C. v. M.P.*, 2023 ONCA 821 at para 48).

[18] The Supreme Court of Canada has also observed in *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, 1996 CanLII 184 (SCC), [1996] 3 SCR 480, "[T]he freedom to disseminate information would be of little value if the freedom under section 2(b) did not also encompass the right to gather news and other information without undue governmental interference."

[19] Section 85.09 of the *CTA* establishes a blanket confidentiality requirement covering "all matters" related to the process of dealing with a complaint and respecting information provided by

either the complainant or the carrier to the CRO (unless the parties agree otherwise). This confidentiality requirement includes the CRO's decision with regard to the complaint. As noted, the Applicant contends section 85.09 is a clear contravention of the open court principle and subsection 2(b) of the *Charter*.

[20] In response, the Respondent argues the open court principle (and subsection 2(b) of the *Charter*) does not apply to the CRO complaint process because the open court principle only applies to “adjudicative tribunals”. The court accepts the primary issue arising on this application is whether the CRO Complaint process is properly characterized as an adjudicative tribunal.

Is the CRO Complaint Process an Adjudicative Tribunal?

[21] The Respondent argues that the 2023 amendments to the *CTA*, creating the CRO Complaint process, introduced a “mediation-style” complaint resolution process”. At the time these amendments were introduced there were some 32,700 complainants awaiting determination, with a resolution time taking an average of 373 days. The need for a more efficient process was evident. According to the Respondent's evidence, two significant changes were 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 by CROs. CROs are public servants and not Governor-in Council appointees.

[22] The role of a CRO and the process followed is accurately summarized at paragraphs 14 and 15 of the Respondent's factum:

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*. 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 then proceed to submit their complaint

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

15. The CRO complaint process is conducted entirely in writing. Both the passenger and the air carrier provide information regarding the complaint to the CRO once, at the beginning of the process. The passenger provides information supporting their complaint, the carrier responds, and the passenger has the ability to reply. 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.

[23] The CRO carries out an eligibility assessment (a screening process) and conducts a mediation if both parties agree to mediate, as explained at paragraphs. 16 and 17 of the Respondent's factum:

16. After receiving information from the parties, the CRO must conduct an initial eligibility assessment. 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.

17. Pursuant to the *CTA*, eligible complaints must first be mediated by CROs. In practice, mediation can only proceed if both parties agree. 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.

[24] The final decision under the CRO process is explained at paragraphs 18 and 19 of the Respondent's factum:

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

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. Compensation amounts are fixed, and the CRO has no discretion as to these amounts.

[25] Finally, concerning the challenged confidentiality requirements, as noted previously, 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. The Respondent explains that 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 process.

[26] The intended purpose of the confidentiality requirement is to encourage frank and open mediation discussions and to protect personal and sensitive information of passengers and carriers. I would note the Applicant does not challenge the confidentiality requirement in relation to mediated resolution of complaints, when that occurs, because the case law is clear that a negotiation privilege exists in regard to mediations for strong policy reasons including those noted above.

[27] Certain limited information is released to the public concerning CRO orders, as explained at paragraph 21 of the Respondent's factum:

21. ...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. These summaries are intended to provide transparency and help other passengers assess their potential entitlement to compensation. 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, or within the carrier's control but was required for safety reasons or was outside the carrier's control; and d) whether compensation was ordered. Moreover, the entire order of any complaint deemed sufficiently complex to be referred to a panel for final decision is made public.

Is the CRO Complaint Process an Administrative Decision-Making Process to Which the Open Court Principle Applies?

[28] The open court principle, an aspect of expressive rights protected by section 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. This principle applies to regular courts and to certain administrative tribunals.

[29] The Respondent submits this court should follow a recent decision of the Federal Court of Appeal in *Canadian Broadcasting Corporation v. Canada (Parole Board)* 2023 FCA 166 (the “CBC decision”) which holds that although past jurisprudence with respect to the application of the open court principle to administrative decision makers focused on an analysis of whether a tribunal acted in a ‘quasi-judicial’ capacity, this distinction had “outlived its usefulness” because it focused on a tribunal’s formal characteristics, rather than its function. The proper approach (per Pelletier J.A.) is to determine 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”.

[30] In *CBC*, the Court held the Parole Board of Canada is not an adjudicative tribunal to which the open court principle applies. In coming to this determination, the Court noted that the Parol Board had in past decisions been found to be inquisitorial, not adversarial in nature. 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.

[31] The Respondent submits, and I agree, that to determine whether a tribunal is adjudicative in nature, the focus of the analysis should be on its function. However, while the court in *CBC* advocated 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, see *D’Arthenay v Ontario Provincial Police*, 2024 ONSC 4773 and *Michalski v McMaster University*, 2022 ONSC 2625.

[32] Applying the *CBC* decision, which this court finds to be the appropriate analysis, it is necessary to draw a conclusion as to whether the CRO process involves presiding over an “adversarial proceeding” to decide questions of rights and duties as between citizens and the state. It is evident that the CRO process, when introduced in 2023, was designed to move away from a strictly adversarial quasi-judicial process that had been in place (and where the open court principle clearly applied) in favour of a more mediation-oriented process, utilizing CROs who would

supervise the complaint adjudication process from inception to conclusion. The primary goal, as the Respondent contends, was to achieve more efficiency and to speed up the process.

[33] To that end many of the common trappings of an adjudicative process were dispensed with, in person hearings were dispensed with, no rules of evidence were required, less discretion, shorter deadlines and a simplified decision making structure was adopted. According to the Respondent it was designed to be “an informal, resolution-based process” designed to resolve narrow and discreet issues. However, while the process was designed to achieve efficiencies and to speed up the resolution of complaints in the interests of the air travelling public, there was no evidence provided to this court that the efficiency goal is being achieved.

[34] While this was not discussed at any length in argument of this application, according to public statements from members of cabinet, featured regularly in the media at the present time, the current backlog of complaints from the air travelling public before this tribunal has recently approached 100,000 resulting in a new process about to be announced by the federal government, which among other things will attempt to further simplify and expedite the system.

[35] The CBC, as intervenor, complains that the media is severely constrained in performing its function to report on these issues given their inability to access relevant information due to the present confidentiality requirements. The Applicant’s submission is to the same effect. In contrast the airlines do possess their relevant data about the air travel complaints they receive and can analyze this data as they may require, perhaps utilizing AI and such other technology as may be available to them. Arguably, due to the confidentiality requirements in section 85.09(1) of the CTA public interest groups such as the Applicant and the media are precluded from effectively scrutinizing and analyzing these complaints to inform the public of systemic issues contributing to delay and inefficiency, and to promote discussion of or participate in the search for solutions.

[36] In any event the present CRO complaint resolution process, in the court’s view, engages the CRO in a number of what are clearly adjudicative steps, including:

1. engaging in statutory interpretation (sometimes of a complex nature)

2. making findings of fact (such as whether an air carrier has complied with its' tariff obligations or with APPR obligations owed to air travel travelers).
3. determining jurisdictional issues
4. rendering written decisions in non-mediated matters
5. administering procedural issues prescribed in the Agency "Guidelines"
6. determining a complainant's entitlement to compensation from the airline
7. as a final step CRO's orders can be taken out as orders of the Agency and subsequently enforced as orders of the Federal Court or a Superior Court.

[37] In summary, this court is of the view that notwithstanding the 2023 amendments to the *CTA* to design a less adversarial and more settlement or mediation oriented process to adjudicate air traveller complaints, the process does continue to fall within the requirements of the open court principle. It remains in substance an adversarial process (except for mediated outcomes) designed to adjudicate disputes between air traveling members of the public and airlines under a government created scheme. As such, this court concludes on the balance of probabilities, the Applicant has succeeded in establishing the CRO complaint process must meet the requirements of the open court principle and must not violate section 2(b) of the *Charter*.

[38] Furthermore, assuming the applicability of the open court principle, in the court's opinion the Agency, through its enforcement of the confidentiality provision, section 85.09(1) of the *CTA*, when it refuses to release decisions, orders and other CRO documents to the Applicant or to the media upon request, infringes the expressive rights of these parties and is thereby in contravention of the open court principle and sec 2(b) of the *Charter*.

Section 85.09(1) of the *CTA* is not a reasonable limit on section 2(b) of the *Charter* (or on the open court principle), pursuant to section 1 of the *Charter*.

[39] Given the court's finding the confidentiality provision (sec 85.09(1) of the *CTA*) does implicate and contravene the open court principle, is the provision saved by sec 1 of The *Charter*?

Section 85.09(1) of the *CTA* imposes a broad based mandatory limitation on expression. The Applicant correctly observes that legislative enactments that automatically limit court openness require justification under section 1 of the *Charter*, following the *Oakes* test (*R.v. Oakes*, [1986] 1 SCR 103).

[40] Under *Oakes*, when a protected right is infringed, the government has the burden to 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.

[41] It is not disputed that in all section 1 cases the burden of proof is with the government to show on a balance of probabilities that the violation is justifiable, see *Egan v. Canada*, [1995] 2 S.C.R. 513 at page 605.

[42] The Applicant argues there is no evidence of a pressing and substantial objective adduced by the Respondent to justify the blanket non-discretionary confidentiality regime imposed by subsection 85.09(1) of the *CTA*.

[43] The Respondent argues 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”. The prior model of sending every complaint through a lengthy three-step adjudication process by GIC appointed

Agency members was causing significant backlogs. This was argued to be inconsistent with the aim of effective consumer protection (a goal of the National Transportation Policy).

[44] The Respondent submits 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. The confidentiality requirements of section 85.09(1) are said to be “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, it was suggested carriers may be more incentivized to settle disputes knowing that the proceedings are confidential. Accordingly, there is a rational connection between the confidentiality requirement and the CRO process, according to the Respondent.

[45] The Respondent also contends, the decision-making stage cannot be divorced from the mediation stage. According to the Respondent they are both part of the “continuum of the CRO complaint process”. The Respondent’s factum explains:

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. 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). 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*. 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.

[46] However, there is no evidence before the court that the CRO process is primarily mediation based and indeed it appears to be the case that most outcomes are adjudications of CROs. Complainants and air carriers can decline to mediate and the process is structured so that the CRO is then set up to adjudicate the complaint immediately on the same documentary record. The

default step in the process is not mediation; it is adjudication by the CRO. In any event the Applicant in the present matter and indeed the media are not seeking access to information about any complaint that is a product of mediated resolution. The complaints sought to be accessed openly or reported on are complaints which have been adjudicated. These appear to be the vast majority of the complaints.

[47] Returning to the *Oakes* test for the application of section 1 of the *Charter*, the question arises as to whether the confidentiality requirement, viewed as part of the adjudication process, can be said to be in pursuit of a pressing and substantial purpose. The purpose of the legislative scheme is to facilitate the efficient adjudication of the rights of the air travelling public in relation to the airline tariffs and the airlines' APPR obligations. Accepting that this is a pressing and substantial purpose can it be said that the blanket, non-discretionary, confidentiality requirements of subsection 85.09(1) constitute a reasonable limitation on the open court principle and section 2(b) of the *Charter* ?

[48] In the courts opinion there is no persuasive evidence that this broad confidentiality requirement is necessary or required to achieve efficiency in the adjudication process or to prevent the release of confidential information. Indeed, so far as evidence before this court is concerned there is a real question as to the utility of the provision in connection with efficiency. Further there is no clear or persuasive justification for the breadth and mandatory (as opposed to discretionary) application of the provision.

[49] This court finds the Respondent has failed to justify subsection 85.09(1) of the *CTA* under section 1 of the *Charter*. In particular, the confidentiality requirement in the subsection is overly broad and non- discretionary and unduly restricts the open court principle, in an apparent effort to promote the goal of efficiency.

Disposition

[50] The court grants an order reading down subsection 85.09(1) of the *CTA* such that the confidentiality requirements therein 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. The order will be stayed for a period of 90 days from the release of these

reasons, to permit the Respondent to facilitate such administrative arrangements as may be required to implement this order.

[51] The Applicant is awarded its costs of this application. Unless the issue of costs are resolved with the Respondent, the Applicant is to provide to the court a concise written submission within 30 days of the release of these reasons and the Respondent may reply within 30 days of receiving the Applicants submission.

Justice Charles T. Hackland

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REASONS FOR DECISION

Justice Charles T. Hackland

Released: July 8, 2026