

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

AIR PASSENGER RIGHTS

Applicant

-and-

THE ATTORNEY GENERAL OF CANADA

Respondent

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

**FACTUM OF THE PROPOSED INTERVENOR,
CHARTER ADVOCATES CANADA**

October 3, 2025

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I. OVERVIEW

1. Charter Advocates Canada (“CAC”) seeks leave to intervene as a friend of the Court. CAC is a federal not-for-profit corporation and registered charity which provides *pro bono* legal services to the public with the goal of upholding *Charter*-protected fundamental freedoms.

2. If granted leave, CAC intends to make two submissions:

a) section 85.09(1) of the *Canada Transportation Act*, SC 1996, c. 10 (the “*Act*”) limits Canadians’ s. 2(b) *Charter* freedoms of thought, opinion, belief and expression by preventing the dissemination, discussion, and potential criticism of conflict resolution decisions; and

b) given that government transparency and accountability are essential to a “free and democratic society” courts should take particular care at the proportionality stage of the *Oakes* analysis to ensure that a government limit on *Charter* rights does not undermine these two fundamental principles. Limits on *Charter* rights are always less demonstrably justifiable when they undermine government transparency and accountability.

3. CAC ought to be granted leave to intervene for the following reasons. **First**, this application is public in nature because it involves a constitutional dispute against the state. Moreover, the issues raised are public given that this is a *Charter* challenge to federal legislation. Freedoms of thought, opinion, believe and expression under s. 2(b) of the *Charter* are at issue on this application, and so is the justificatory analysis under s. 1. **Second**, CAC seeks to assist the Court with submissions informed by its substantial experience in *Charter* litigation. CAC’s submissions on transparency and accountability, which are applicable to both the s. 2(b) and s. 1 analyses, will provide a unique perspective and will not duplicate the submissions of the parties. CAC’s intervention would not cause any injustice to the parties because it is not raising any new

issues, will not expand the record on the Application, and will comply with any conditions imposed by the Court.

II. EVIDENCE IN SUPPORT OF CAC’S POSITION ON THIS MOTION

4. CAC relies on the evidence in the Affidavit of Marty Moore, sworn on September 26, 2025, in support of its position on this motion for leave to intervene. The Moore Affidavit is found at tab 2 of CAC’s motion record.¹ Portions of the Moore Affidavit are referred to below, in the course of CAC’s argument. CAC also relies on its draft factum included at tab 3 of CAC’s motion record.²

III. ISSUES AND LAW

5. The sole issue on this motion is whether CAC ought to be permitted to intervene as a friend of the court on this Application.

A. Governing Principles

6. This motion is governed by Rule 13.02 of the *Rules of Civil Procedure*.³ The test for intervention on appeal as friend of the court is well-established. The matters to be considered are (a) the nature of the case; (b) the issues which arise; and (c) the likelihood of the proposed intervenor being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.⁴

¹ Affidavit of Marty Moore, sworn on XXXX, Moving Party’s Motion Record, Tab 2 [the “Moore Affidavit”].

² Draft Factum on Intervention, Moving Paty’s Motion Record, Tab 3.

³ *Rules of Civil Procedure*, [RRO 1990, Reg. 194](#), Rule [13.02](#).

⁴ *Foster v. West*, [2021 ONCA 263](#) at para. [10](#) [*Foster*].

7. **First**, the nature of the case is an important factor. Where intervention is sought in a private dispute, as opposed to one involving the state, the standard to be met by a proposed intervenor is “more onerous or more stringently applied”.⁵

8. **Second**, the issues that arise in a case involving private litigation fall along a continuum. Some have no implications beyond their idiosyncratic facts and occupy the interest of none save the immediate parties. Others transcend the dispute between the immediate parties and have broader implications, for example, the construction of a legislative enactment or the interpretation of the common law.⁶

9. **Third**, another important factor in the decision about intervention is the likelihood that the proposed intervention will be of assistance to the court in the resolution of the appeal. The likelihood of assistance is a function of many variables, including, but not only, the experience and expertise of the proposed intervenor.⁷

10. To permit intervention in private litigation may cause injustice to the original litigants. Injustice may result from the timing of the proposed intervention. Injustice may also ensue in cases where the proposed intervenor seeks to augment the record established by the parties to the appeal, rather than to accept the record as established in accordance with the general rule.⁸

11. In the end, the proposed intervenor must have more to offer than mere repetition of the position advanced by a party. The “me too” intervention provides no assistance.⁹

⁵ *Jones v. Tsige*, [2011 CanLII 99894 \(ONCA\)](#) at para. [23](#) [*Jones*]; see also *Foster*, *supra* note 4, at para. [11](#).

⁶ *Jones*, *supra* note 5, at para. [24](#).

⁷ *Ibid.* at para. [25](#).

⁸ *Ibid.* at para. [26](#).

⁹ *Ibid.* at para. [29](#).

B. Principles Applied

12. CAC submits that all three factors weigh in favour of granting its request for leave to intervene as a friend of the court.

i) This case is public in nature

13. This application is fundamentally a public matter. It is a dispute by a litigant against the state. Specifically, it is a *Charter* application engaging issues of constitutional interpretation and the justification and validity of an impugned statute. This case is a quintessentially public case.

ii) This Application raises public issues

14. Similarly, the issues that arise are public. In this application, the Court is being asked to determine the constitutional validity of a provision of federal legislation. The result will affect the public at large. Further, in rendering its decision, the Court will have to determine whether the impugned provision violates s. 2(b) of the *Charter* and, if so, whether it is justified under s. 1. Both questions involve the interpretation of constitutional provisions which can have an impact beyond the four corners of this case. On the continuum referenced by the Court of Appeal, this case falls squarely on the public end.¹⁰ The issues are particularly amenable to input from public interest groups.

iii) CAC will make a useful contribution without doing injustice to the parties

15. CAC possesses relevant experience that will allow it to make a useful contribution the resolution of this Application. CAC exists for the purpose of providing *pro bono* legal services on cases that raise constitutional issues.¹¹ To that end, the majority of CAC's cases involve making

¹⁰ *Ibid.* at para. 24.

¹¹ Moore Affidavit at paras. 4-5.

arguments related to ss. 2(a), 2(b), 2(c), 2(d), 7, 8 and 15(1) of the *Charter*.¹² Institutionally, CAC possesses decades of lawyer-years of experience in constitutional law between its nine lawyers.¹³

16. While CAC has not previously moved for leave to intervene, its lawyers have successfully represented intervenors in more than a dozen cases before courts across the country.¹⁴ This experience is bolstered through CAC's lawyers' experience with other organizations' interventions in its own matters.¹⁵ If granted leave to intervene, CAC will bring that experience in conducting interventions to bear on its conduct in this matter.

17. CAC's unique perspective and experience makes it well-equipped to provide useful submissions to the Court. The applicant has pleaded that s. 85.09(1) of the *Canada Transportation Act* infringes s. 2(b) of the *Charter* and is not saved under s. 1. CAC's experience with the legal issues arising under both ss. 1 and 2(b) will enable it to assist the Court with submissions. In particular, CAC's focus on civil liberties and good government inform its perspective on the importance of transparency and accountability in understanding the impact of s. 85.09(1).

18. If granted leave to intervene, CAC will make two submissions:

- a) section 85.09(1) of the *Act* limits Canadian's s. 2(b) *Charter* freedoms of thought, opinion, belief and expression by preventing the dissemination, discussion, and potential criticism of conflict resolution decisions; and
- b) given that government transparency and accountability are essential to a "free and democratic society" that is governed by the rule of law, courts should take particular care, at the proportionality stage of the *Oakes* analysis, to ensure that a government limit on *Charter* rights does not fundamentally important principles. Limits on *Charter* rights are

¹² *Ibid.* at para. 7.

¹³ *Ibid.* at para. 8.

¹⁴ *Ibid.* at para. 9.

¹⁵ *Ibid.*

always less demonstrably justifiable when they undermine transparency and accountability.¹⁶

19. CAC's submissions will not duplicate the applicant's submissions. While not raising any additional issues, CAC intends to make arguments approaching the issues of freedom of expression and s. 1 justification from its unique perspective. Namely, CAC will provide submissions on the impact of s. 85.09(1) on government transparency, public criticism of government institutions, and democratic accountability and how these values affect the analyses under ss. 1 and 2(b).

20. CAC's intervention will not cause an injustice to the parties. Unlike the parties, CAC does not take a position on the specific outcome of this matter and makes no submissions on the ultimate conclusion to the s. 1 analysis. Rather, CAC's interest is in promoting transparency and accountability for government actors more broadly.

21. CAC's proposed intervention will not cause any injustice to the parties or otherwise prejudice their interests because CAC:

- a) will not file any additional evidence;
- b) will not seek costs associated with its intervention;
- c) will not expand the issues raised on the application;
- d) will not lengthen or delay the hearing of the application;
- e) will work with the parties and any other intervenors to avoid duplicative submissions; and
- f) will comply with any terms and conditions imposed by the Court.¹⁷

¹⁶ *Ibid.* at para. 16.

¹⁷ *Ibid.* at para. 21.

22. While CAC's submissions may align with the applicant's position, "intervenor need not be disinterested in the outcome of the case."¹⁸ CAC's submissions are legal arguments which are properly the subject of an intervention.

IV. SUBMISSIONS ON COSTS

23. CAC requests that no costs be awarded for or against it on this motion or on the Application.

V. ORDER REQUESTED

24. CAC requests that this Court make an order:

- a) pursuant to Rule 13.02 of the *Rules of Civil Procedure*, granting CAC leave to intervene in this application as a friend of the court;
- b) granting CAC leave to file a factum of up to 12 pages in length;
- c) granting CAC leave to make oral submissions on the Application for up to 15 minutes;
- d) that no costs be awarded to or against CAC on this motion or on the Application; and
- e) such further and other orders as counsel may request and the Court may consider appropriate.

Dated this 3rd day of October, 2025

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¹⁸ *Dorsey v. Canada (Attorney General)*, [2023 ONCA 64](#) at paras. [43-44](#).

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Court File No.: CV-25-00100065-0000

ONTARIO SUPERIOR COURT OF JUSTICE
At Ottawa

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