

**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*

MOTION RECORD

October 3, 2025

CHARTER ADVOCATES CANADA

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M5T 1X5

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

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

NOTICE OF MOTION

The moving party, Charter Advocates Canada (“CAC”), will make a motion to the court at 10 am on Thursday, December 18, 2025.

PROPOSED METHOD OF HEARING: The motion is to be heard by videoconference at the following location: Ottawa Courthouse, 161 Elgin Street, Ottawa, ON, K2P 2K1.

THE MOTION IS FOR:

1. an order, 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;
2. an order granting CAC leave to file a factum of up to 12 pages in length;
3. an order granting CAC leave to make oral submissions on the application for up to 15 minutes;

4. an order that no costs be awarded to or against CAC on this motion or on the application; and
5. such further and other orders as counsel may request and the Court may consider appropriate.

THE GROUNDS FOR THE MOTION ARE:

1. CAC is a federal not-for-profit corporation and a charity registered with the Canada Revenue Agency;
2. CAC is registered with the Law Society of Ontario as a Civil Society Organization to provide *pro bono* legal services to the public;
3. as set out in its Certificate of Amendment, dated December 15, 2023 (a copy of which is attached hereto as **Exhibit “A”**), CAC’s relevant purposes are as follows:

To uphold the enforcement of the Constitution of Canada and other existing laws of Canada and the provinces and territories thereof, as they relate to constitutional freedoms, civil rights, human rights, and other protections under the Constitution of Canada, by facilitating legal advice and representation before government, administrative tribunals, and the courts, where there is need.

4. a primary focus of CAC is to uphold Canadians’ *Charter*-protected fundamental freedoms, including the freedoms of thought, opinion, belief and expression (including freedom of the press and other media of communication) protected under s. 2(b);
5. this application engages the s. 2(b) freedoms of not only air passengers involved in the resolution process set out at ss. 85.02-85.16 of the *Canada Transportation Act*, SC 1996, c. 10 (the “*Act*”), but also of all Canadians who would seek to obtain, share, discuss or criticize decisions made by complaint resolution officers under the *Act*;

6. in furtherance of its mandate, CAC has an interest in intervening in this proceeding to provide submissions on the broader impact of s. 85.09(1) of the *Act* on the s. 2(b) freedoms and interests of Canadians who are not directly involved in the conflict resolution procedure under the *Act*. Section 85.09(1) implicates the freedoms of thought, belief, opinion, and expression which entail the freedom of Canadians to scrutinize, discuss, and potentially criticize decisions of the conflict resolution officers. CAC's perspective is that this negatively impacts transparency, accountability, and hampers political engagement;

7. increasing numbers of disputes in Canada are legislatively required to be determined before administrative decision makers. CAC regularly represents clients who appear before government decision makers. The resolution of disputes before both courts and administrative decision makers in Canada often involve private information which a party may want to keep confidential. However, CAC believes that government rules which generally make decisions by government decision makers confidential undermine transparency, accountability and the rule of law;

8. CAC has an interest in making submissions on the broader considerations engaged in the s. 1 proportionality analysis, namely the importance of transparency, accountability and the rule of law in decisions made by government decision makers. Section 1 of the *Charter* provides that rights are “*subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*” CAC has an interest in contributing to the development of s. 1 jurisprudence to advocate for an analysis which promotes “*a free and democratic society*” by prioritizing transparency and accountability for government actors;

9. CAC receives and reviews hundreds of requests for legal help from citizens across Canada each year, concerned about the violation of their constitutional, civil, and human rights. CAC regularly sends letters to government entities, outlining their legal and constitutional duties;

10. CAC further provides legal representation in dozens of active cases before tribunals and at all levels of court across Canada;

11. CAC's cases seek to uphold the rule of law and the principles underlying Canada's free and democratic society. The majority of CAC's cases involve challenging government infringements of Canadians' rights and freedoms under ss. 2(a), 2(b), 2(c), 2(d), 7, 8 and 15(1) of the *Canadian Charter of Rights and Freedoms*;

12. CAC has eight lawyers and four paralegals who devote the entirety of their practice to working with CAC to defend the constitutional, civil and human rights of Canadians. CAC's lawyers possess decades of experience in constitutional law and litigation, along with significant experience in administrative law. CAC also regularly retains other lawyers and experts on its cases;

13. although CAC has not previously applied for leave to intervene in a case, CAC's lawyers have successfully represented intervenors in more than a dozen cases before courts in Ontario, Saskatchewan, British Columbia, Newfoundland, Nova Scotia and New Brunswick. Further, CAC's cases regularly attract intervenors, granting CAC lawyers additional significant experience in dealing with interventions;

14. CAC will assist the Court with submissions that extend beyond the immediate interests of the parties. CAC's perspective can assist the Court's analysis about the broader impact on freedoms of thought, belief, opinion, and expression caused by s. 85.09(1) of the *Canada Transportation Act*, and considerations to balance under s. 1 of the *Charter*, including transparency and accountability in a free and democratic society;

15. for the reasons set out in its supporting affidavit and factum filed on this motion, CAC has a genuine interest in the appeal, and its submissions would be relevant, useful, and different from those of the parties;

16. if granted leave to intervene as a friend of the Court, CAC would make the following legal submissions:

a) section 85.09(1) of the *Canada Transportation Act* infringes s. 2(b) of the *Charter* by limiting the freedoms of thought, opinion, belief and expression of Canadians 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 assess the extent to which a government limit on *Charter* rights undermines these goals at the proportionality stage of the *Oakes* test. Limits on *Charter* rights are less demonstrably justifiable to the extent that they undermine transparency and accountability;

17. CAC will take no position on the disposition of the application;

18. 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 or add to the application record;

b) will not seek costs associated with its intervention;

c) will not expand the issues raised on the application;

d) will not 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;
19. Rule 13.02 of the *Rules of Civil Procedure*; and
20. such further and other grounds as counsel may advise and the Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. the Affidavit of Marty Moore sworn September 26, 2025; and
2. the draft factum on which CAC intends to rely if granted leave to intervene.

Dated this 3rd day of October, 2025



Hatim Kheir

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**Counsel for the Respondent,
Attorney General of Canada**

**AIR PASSENGER RIGHTS
APPLICANT**

-and-

**THE ATTORNEY GENERAL OF CANADA
RESPONDENT**

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

ONTARIO SUPERIOR COURT OF JUSTICE
At Ottawa

NOTICE OF MOTION

CHARTER ADVOCATES CANADA
180 John Street, Office 513
Toronto, ON M5T 1X5

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Respondent

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

AFFIDAVIT OF MARTY MOORE SWORN SEPTEMBER 26, 2025

I, MARTY MOORE, of the City of Calgary in the Province of Alberta, MAKE OATH AND SAY:

1. I am the Litigation Director of Charter Advocates Canada (“CAC”), a proposed intervenor in this matter and, as such, have personal knowledge of the facts herein deposed, except where based on information and belief, in which case I state the source and believe the same to be true.
2. I swear this affidavit in support of CAC’s motion for leave to intervene in this application.

Charter Advocates Canada

3. CAC is a federal not-for-profit corporation and a charity registered with the Canada Revenue Agency.
4. CAC is registered with the Law Society of Ontario as a Civil Society Organization to provide *pro bono* legal services to the public.
5. CAC’s relevant purposes are as follows:

To uphold the enforcement of the Constitution of Canada and other existing laws of Canada and the provinces and territories thereof, as they relate to constitutional freedoms, civil rights, human rights, and other protections under the Constitution of Canada, by facilitating legal advice and representation before government, administrative tribunals, and the courts, where there is need.

CAC's purposes are set out in its Certificate of Amendment, dated December 15, 2023, a copy of which is attached hereto as **Exhibit "A"**,

6. CAC receives and reviews hundreds of requests for legal help from citizens across Canada each year, concerned about the violation of their constitutional, civil, and human rights. CAC regularly sends letters to government entities, outlining their legal and constitutional duties.

7. CAC further provides legal representation in dozens of active cases before tribunals and at all levels of court across Canada. CAC's cases seek to uphold the rule of law and the principles underlying Canada's free and democratic society. The majority of CAC's cases involve challenging government infringements of Canadians' rights and freedoms under sections 2(a), 2(b), 2(c), 2(d), 7, 8 and 15(1) of the *Canadian Charter of Rights and Freedoms*.

8. CAC has eight lawyers, one student-at-law and four paralegals who devote the entirety of their practice to working with CAC to defend the constitutional, civil and human rights of Canadians. CAC's lawyers possess decades of experience in constitutional law and litigation, along with significant experience in administrative law. CAC also regularly retains other lawyers and experts on its cases.

9. CAC has brought a motion for leave to intervene before the Court of Appeal for Ontario, though a decision has not yet been rendered. Further, CAC's lawyers, including myself, have successfully represented intervenors in more than a dozen cases before courts in Ontario, Saskatchewan, British Columbia, Newfoundland, Nova Scotia and New Brunswick. Further, CAC cases regularly attract intervenors, granting CAC lawyers additional significant experience in dealing with interventions.

Charter Advocates Canada's Interest in this Litigation

10. A primary focus of CAC is to uphold Canadians' *Charter*-protected fundamental freedoms, including the freedoms of thought, opinion, belief and expression, including freedom of the press and other media of communication protected under s. 2(b). This application engages the s. 2(b) rights not only of air passengers involved in the resolution process, but also of all Canadians who would seek to obtain, share, discuss or criticize decisions made by complaint resolution officers under the *Canada Transportation Act*. In furtherance of its mandate, CAC has an interest in intervening to provide submissions on the broader impact of s. 85.09(1) on the s. 2(b) rights and interests of Canadians who are not directly involved in the conflict resolution procedure under the *Act*. Section 85.09(1) implicates the freedom of the press and other media of communication and the freedom of Canadians to scrutinize, discuss, and potentially criticize decisions of the conflict resolution officers. CAC's perspective is that this negatively impacts transparency, accountability, and hampers political engagement.

11. Increasing numbers of disputes in Canada are legislatively required to be determined before administrative decision makers. CAC regularly represents clients who appear before government decision makers. The resolution of disputes before both courts and administrative decision makers in Canada often involve private information which a party may want to keep confidential. However, CAC believes that government rules which generally make decisions by government decision makers confidential undermine transparency, accountability and the rule of law.

12. CAC has an interest in making submissions on the broader considerations engaged in the s. 1 proportionality analysis, namely the importance of transparency, accountability and the rule of law in decisions made by government decision makers. Section 1 provides that rights are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and

democratic society.” CAC has an interest in contributing to the development of s. 1 jurisprudence to advocate for an analysis which promotes “a free and democratic society” by prioritizing transparency and accountability for government actors.

Submissions of Charter Advocates Canada

13. CAC seeks to contribute to this application by providing the Court with submissions on the value of transparency and accountability through open public debate at both stages of the analysis: s. 2(b) and s. 1.

14. First, with respect to the s. 2(b) analysis, CAC intends to make submissions on the impact of s. 85.09(1) on the freedoms of thought, belief, opinion, and expression of Canadians who desire to obtain decisions made by conflict resolution officers for the purpose of disseminating them discussing them and potentially criticizing them as a way to hold government decision makers accountable to the public.

15. Second, with respect to the *Oakes* test under s. 1, CAC intends to make submissions about the role that s. 85.09(1)’s effect on transparency and accountability ought to have on the proportionality analysis. Section 1 of the *Charter* requires that limits on protected rights be “demonstrably justified in a free and democratic society.” CAC would argue that certain limits on rights are less acceptable in a “free and democratic society.” In particular, limits that undermine government transparency and accountability are contrary to free and democratic government and should be less justifiable. CAC would submit that this is appropriately weighed at the final step of the *Oakes* test – the proportionality analysis.

16. Accordingly, if granted leave to intervene as a friend of the Court, CAC would make the following legal submissions:

- a) section 85.09(1) of the *Canada Transportation Act* limits the s. 2(b) *Charter* freedoms of Canadians 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” governed by the rule of law, courts should assess the extent to which a government limit on *Charter* rights undermines these goals at the proportionality stage of the *Oakes* test. Limits on *Charter* rights are less demonstrably justifiable to the extent that they undermine transparency and accountability.

Different Submissions

- 17. If granted leave to intervene, CAC’s submissions would be different than those of the parties or other groups that have applied for intervenor status.
- 18. Unlike the parties, CAC does not have an interest in the specific outcome of this matter. Rather, CAC is interested in the broader impact s. 85.09(1) of the *Canada Transportation Act* and of the *Charter* s. 1 proportionality analysis to be conducted in this matter.
- 19. CAC’s interest is in protecting Canadians’ *Charter* s. 2(b) freedoms of thought, belief, opinion, and expression as broadly as possible, as well as government transparency, accountability and the rule of law. CAC’s submissions will reflect its unique experience providing *pro bono* legal advice and representation to Canadians before tribunals and courts across Canada.

No Prejudice to the Parties

- 20. CAC will take no position on the disposition of the application.
- 21. I do not believe that CAC’s proposed intervention will cause any injustice to the parties or otherwise prejudice their interests because CAC:

This is **Exhibit “A”** referred to in the Affidavit
of **Marty Moore** sworn before me this 26th
day of September, 2025.

A handwritten signature in black ink, reading "Hatim Kheir", written over a horizontal line.

Hatim Kheir
Barrister & Solicitor



Innovation, Science and
Economic Development Canada
Corporations Canada

Innovation, Sciences et
Développement économique Canada
Corporations Canada

Certificate of Amendment

Canada Not-for-profit Corporations Act

Certificat de modification

*Loi canadienne sur les organisations à but non
lucratif*

Charter Advocates Canada

Corporate name / Dénomination de l'organisation

1451705-9

Corporation number / Numéro de
l'organisation

I HEREBY CERTIFY that the articles of the
above-named corporation are amended under
section 201 of the *Canada Not-for-profit
Corporations Act*, as set out in the attached
articles of amendment.

JE CERTIFIE que les statuts de l'organisation
susmentionnée sont modifiés aux termes de
l'article 201 de la *Loi canadienne sur les
organisations à but non lucratif*, tel qu'il est
indiqué dans les clauses modificatrices ci-
jointes.

Hantz Prosper

Director / Directeur

2023-12-15

Date of amendment (YYYY-MM-DD)
Date de modification (AAAA-MM-JJ)



Innovation, Science and
Economic Development Canada
Corporations Canada

Innovation, Sciences et
Développement économique Canada
Corporations Canada

Form 4004
Articles of Amendment
*Canada Not-for-profit Corporations
Act*

Formulaire 4004
Clauses modificatrices
*Loi canadienne sur les organisations à
but non lucratif*

1 Current corporate name
Dénomination actuelle de l'organisation
Charter Advocates Canada

2 Corporation number
Numéro d'organisation
1451705-9

3 The articles are amended as follows:
Les statuts sont modifiés comme suit :

See attached schedule / Voir l'annexe ci-jointe

4 Declaration: I hereby certify that I am a director or an authorized officer of the corporation.
Déclaration : J'atteste que je suis un administrateur ou un dirigeant autorisé de l'organisation.

Original signed by / Original signé par
Marty Moore
Marty Moore
587-998-1806

A person who makes, or assists in making, a false or misleading statement is guilty of an offence and liable on summary conviction to a fine of not more than \$5,000 or to imprisonment for a term of not more than six months or to both (subsection 262(2) of the Canada Not-for-profit Corporations Act (NFP Act)).

La personne qui fait une déclaration fautive ou trompeuse, ou qui aide une personne à faire une telle déclaration, commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire, une amende maximale de 5 000 \$ et un emprisonnement maximal de six mois ou l'une de ces peines (paragraphe 262(2) de la Loi canadienne sur les organisations à but non lucratif (Loi BNL)).

You are providing information required by the NFP Act. Note that both the NFP Act and the Privacy Act allow this information to be disclosed to the public. It will be stored in personal information bank number IC/PPU-049

Vous fournissez des renseignements exigés par la Loi BNL. Il est à noter que la Loi BNL et la Loi sur les renseignements personnels permettent que de tels renseignements soient divulgués au public. Ils seront stockés dans la banque de renseignements personnels numéro IC/PPU-049.

Schedule / Annexe
Amendment Schedules / Annexes - Modification

The statement of purposes contained in the Corporation's Certificate and Articles of Incorporation dated November 9, 2022 and in the Corporation's Certificate and Articles of Amendment dated March 20, 2023 are deleted in their entirety and replaced with the following:

1. To uphold the enforcement of the Constitution of Canada and other existing laws of Canada and the provinces and territories thereof, as they relate to constitutional freedoms, civil rights, human rights, and other protections under the Constitution of Canada, by facilitating legal advice and representation before government, administrative tribunals, and the courts, where there is need.
2. To receive and maintain a fund or funds and to apply all or part of the principal and income therefrom, from time to time, to qualified donees as defined in subsection 149.1(1) of the Income Tax Act (Canada).

**AIR PASSENGER RIGHTS
APPLICANT**

-and-

**THE ATTORNEY GENERAL OF CANADA
RESPONDENT**

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

ONTARIO SUPERIOR COURT OF JUSTICE
At Ottawa

AFFIDAVIT OF MARTY MOORE

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**ONTARIO
SUPERIOR COURT OF JUSTICE**

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CHARTER ADVOCATES CANADA

Intervenor

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

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

October 3, 2025

CHARTER ADVOCATES CANADA

513-180 John Street
Toronto, ON
M5T 1X5

Hatim Kheir (LSO No.: 79576J)

T. (289) 925-4687

E. hkheir@charteradvocates.ca

**Counsel for the Intervenor
Charter Advocates Canada**

I. OVERVIEW

1. The intervenor, Charter Advocates Canada (“CAC”), intervenes to make two main submissions. **First**, CAC submits that government transparency and accountability play a vital role in the Canadian constitutional order, facilitating a robust interaction between the freedoms of thought, belief, opinion, and expression and the democratic process. Government transparency provides the information necessary for the public to engage in informed debate about government action. That public debate, in turn, shapes public opinion as expressed through the democratic process, which holds political actors accountable.

2. The importance of transparency for government accountability has been recognized by the Supreme Court of Canada in its *Charter* s. 2(b) jurisprudence on the right to information from government bodies.. Without government transparency, the public is left starved of the information it needs to form political opinions. Accordingly, the confidentiality requirement contained in s. 85.09(1) of the *Canada Transportation Act*, S.C. 1996, c. 10 (the “*Act*”) constitutes a particularly serious limitation on the right to freedom of expression.

3. **Second**, CAC submits that in light of the high importance of transparency and accountability to the proper functioning of Canadian government, these values should be given particular weight in the s. 1 analysis when they are engaged.. Foundational s. 1 jurisprudence directs that the *Oakes* analysis should be guided by the values of a free and democratic society. CAC proposes that such values must include the factors necessary for the existence of such a society, and the elements which give it its free and democratic character. Transparency and accountability are particularly important to freedom and democracy because they both make democratic decision-making possible and are marks of a government which is beholden to the public.

4. Transparency and accountability are particularly relevant to the first and fourth steps of the *Oakes* analysis. At the first step, objectives proffered by the government should not be found to be pressing and substantial if they are fundamentally repugnant to the notion that transparency promotes good government by enabling government accountability. At the fourth step, the proportionality analysis, transparency and accountability should be used to assess the weight of the salutary and deleterious effects of legislation. On the one hand, a purported benefit should be rejected as illegitimate if it is contrary to the key role transparency and accountability play in democratic government. On the other hand, impacts on transparency and accountability should be regarded as particularly serious.

II. SECTION 2(B): GOVERNMENT TRANSPARENCY AS A MEANS TO ACCOUNTABILITY

5. CAC's first main submission is that transparency and accountability are vital to the rights to freedom of thought, belief, opinion, and expression because they are necessary for the public to meaningfully engage in the democratic process. Accordingly, the confidentiality mandated by s. 85.09(1) of the *Act* infringes freedom of expression in a particularly significant manner.

A. Governing Principles

6. The connection between transparency, accountability, and freedom of expression is well established in Canadian constitutional jurisprudence. Transparency enables the public to engage in criticism and that criticism, in turn, holds the government accountable to the public.

7. The ability of the public to criticize government is essential to the function of democratic process as a means of holding the government accountable. Almost 90 years ago, the Supreme Court affirmed that democratic "institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and

administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals.”¹ Rand J. described the Canadian form of government as “the will of the majority expressed directly or indirectly through popular assemblies.”² Rand J. specified that the expression of the will of the majority means “government by the free public opinion of an open society” which requires “the condition of a virtually unobstructed access to and diffusion of ideas.”³

8. Since the advent of the *Charter*, the connection between freedom of expression and the democratic process in the jurisprudence has become even clearer. The Supreme Court affirmed that it “is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed, a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions.”⁴

9. Given the importance of criticism to the functioning of the democratic process, the Supreme Court has identified political speech as “the single most important and protected type of expression.”⁵ In particular, the Court described the “connection between freedom of expression and the political process” as “the linchpin of the s. 2(b) guarantee.”⁶

10. Government transparency is essential for the public to meaningfully criticize political institutions because the right to receive information is necessary to lend substance to public debate. Such a right to information is well founded in Supreme Court jurisprudence. The right to freedom

¹ *Reference Re Alberta Statutes - The Bank Taxation Act; The Credit of Alberta Regulation Act; and the Accurate News and Information Act*, [1938 CanLII 1 \(SCC\)](#), [\[1938\] SCR 100](#) at p. 132 per Duff C.J.

² *Switzman v. Elbling and A.G. of Quebec*, [1957 CanLII 2 \(SCC\)](#), [\[1957\] SCR 285](#) at p. 306, per Rand J.

³ *Ibid.*

⁴ *Edmonton Journal v. Alberta (Attorney General)*, [1989 CanLII 20 \(SCC\)](#), [\[1989\] 2 SCR 1326](#) at p. 1336 [*Edmonton Journal*].

⁵ *Harper v. Canada (Attorney General)*, [2004 SCC 33](#) at para. 11.

⁶ *Ibid* at para. 84, cit’g *R. v. Keegstra*, [1990 CanLII 24 \(SCC\)](#), [\[1990\] 3 SCR 697](#) at pp. 763-64.

of expression protects listeners as well as speakers.⁷ The principle extends to the right of the public to obtain “information pertaining to public institutions and particularly the courts.”⁸ The right to access government information also extends beyond the courts. Section 2(b) includes a qualified right to access information as a “derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government.”⁹

11. The rationale that runs through over seven decades of jurisprudence is that free expression, which permits for the criticism of public institutions, is a pre-condition for a functioning democracy. The right to access information is an extension of this logic. If democratic accountability depends on the ability of the public to freely criticize government, then the public must have access to information about what the government is doing. Though less developed in the jurisprudence, the rights to freedom of thought, belief, and opinion also depend on transparency and accountability. The public must know what the government is doing to be free to think about it, and form beliefs and opinions about whether it is true, good, and just. Government secrecy short-circuits the logic of democratic accountability by depriving the public of the information necessary to form opinions and direct criticism.

B. Principles Applied

12. Section 85.09(1) of the *Act* 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

⁷ *Ford v. Quebec (Attorney General)*, 1988 CanLII 19 (SCC), [1988] 2 SCR 712 at p. 767.

⁸ *Edmonton Journal*, *supra* note 4, at p. 1339.

⁹ *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 at para. 30.

¹⁰ *Canada Transportation Act*, S.C. 1996, c. 10, s. 85.09(1).

13. The broad confidentiality requirement prohibits complainants from sharing a complaint resolution officer's ("CRO") reasons for decision. This, in turn, limits the public's access to the reasons of CROs, which undermines the ability of the public to hold CROs accountable through publicity and criticism.

14. Section 85.09(1) shields the decisions of CROs from accountability behind a veil of secrecy. It deprives the public of the information needed to engage in meaningful expression. Therefore, it infringes s. 2(b) of the *Charter*. The infringement is particularly serious because it undermines the key values of transparency and accountability which permit the right of freedom of expression to achieve one of its underlying purposes; namely, political engagement.¹¹

III. SECTION 1: TRANSPARENCY, ACCOUNTABILITY, AND THE VALUES OF A FREE AND DEMOCRATIC SOCIETY

15. CAC's second main submission is that limits on *Charter* rights that undermine transparency and accountability ought to be particularly difficult to justify. Section 1 requires that limits be justified with regard to a "free and democratic society." Transparency and accountability are necessary preconditions for a free and democratic society and so they should guide courts' determination of whether an objective is truly pressing and substantial and evaluation of the weight to be given to an impugned provision's deleterious impacts and purported salutary effects.

C. Limits must accord with the preconditions of a "free and democratic society"

16. In *R. v. Oakes*, the Supreme Court established the governing test for determining if limits were "demonstrably justified." The Court held that the words "free and democratic society" are

¹¹ See *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989 CanLII 87 \(SCC\)](#), [\[1989\] 1 SCR 927](#) at p. 976

included in s. 1 as the “final standard of justification” because they embody the fundamental purpose of the *Charter*.¹² The Supreme Court added:

The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few...faith in social and political institutions which enhance the participation of individuals and groups in society. **The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified** [emphasis added].¹³

17. In *Black v. Law Society of Alberta*, a decision released shortly after *Oakes*, the Alberta Court of Appeal was tasked with giving effect to s. 1. The Court held that limitations to *Charter* rights must be based on the values of a free and democratic society. Accordingly, whether a particular limit is justified must always be determined with reference to whether it promotes or undermines a free and democratic society.¹⁴

18. Building on the discussion of the values underlying s. 1, in *R. v. Keegstra*, Dickson C.J. explained that the values of a free and democratic society provide both the basis for the rights enumerated in the *Charter* and the justification of limits thereto.¹⁵ Since the protection of constitutional rights depends on a free and democratic society, the essential elements of such a society provide a logical limit to the guarantee of those rights.

19. The Court in *Oakes* provided a non-exhaustive list of values “essential to a free and democratic society” which guide the application of s. 1. If these values are to guide s. 1, the courts must have a means of determining whether a particular value is essential to a free and democratic

¹² *R. v. Oakes*, [1986 CanLII 46 \(SCC\)](#), [1986] 1 SCR 103 at para. 64 [*Oakes*].

¹³ *Ibid.*

¹⁴ *Black v. Law Society of Alberta*, [1986 ABCA 68 \(CanLII\)](#) at paras. 60-61, per Kerans J. concurring, *aff'd* 1989 CanLII 132 (SCC), [\[1989\] 1 SCR 591](#).

¹⁵ *R. v. Keegstra*, [1990 CanLII 24 \(SCC\)](#), [\[1990\] 3 SCR 697](#) at pp. 735-37, *cit'g Slaight Communications Inc. v. Davidson*, [1989 CanLII 92 \(SCC\)](#), [\[1989\] 1 S.C.R. 1038](#), at p. 1056.

society. CAC submits that Supreme Court jurisprudence and the textual history of s. 1 suggest that the relevant values are the constitutive elements of a free and democratic society and the conditions that make its existence possible.

20. **First**, the list in *Oakes* is instructive. The elements listed by Dickson C.J., which include values such as human dignity and the accommodation of a wide variety of beliefs, are constitutive elements of a free and democratic society. Without these values, a society would not be truly free or democratic. Accordingly, limits may be justifiably placed on rights to further promote these values.

21. **Second**, the textual history of the phrase “free and democratic society” provides an additional aid to interpretation. In *R. v. Big M Drug Mart Ltd.*, Dickson C.J. held that the *Charter* must be interpreted in its “proper linguistic, philosophic and historical contexts.”¹⁶ Professor Hogg writes that the limitation clause in s. 1 mirrors “international human rights instruments, and especially the *European Convention on Human Rights* and the *International Covenant on Civil and Political Rights*” which use “terms quite similar to Canada’s s. 1.”¹⁷ CAC submits that those documents provide helpful context to the manner in which the democratic nature of society impacts the s. 1 analysis.

22. Articles 21 and 22 of the *International Covenant on Civil and Political Rights* (the “ICCPR”) provides that the rights contained therein may be subject to restrictions “which are necessary in a democratic society in the interests of national security or public safety, public order

¹⁶ *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 SCR 295 at para. 117 [*Big M*].

¹⁷ Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed (Scarborough: Thomson Carswell, 2007) at s. 38:1

(ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.”¹⁸

23. The *European Convention on Human Rights* (the “ECHR”) uses similar language. For example, Article 10 guarantees the right to freedom of expression. Subsection 2 provides:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.¹⁹

24. Both the ICCPR and the ECHR provide definite lists of justifiable reasons for limiting rights. Many reasons are shared between both documents, such as national security, public safety, protection of health and morals, and the protection of others’ rights. Conceptually, these justifications can all be understood as preconditions to a functioning democratic society. This is consonant with the Supreme Court’s explanation that a “free and democratic society” is both the source and limit of constitutional rights. If rights find their source in a free and democratic society, then the necessary antecedents of a free and democratic society provide a logical limit to those rights. Were it not the case, rights would be self-destructive.

25. The historical source for the phrase “free and democratic society” can shed light on its meaning. Taken together with the values listed in *Oakes*, the justifications contained in the ICCPR and ECHR suggest an approach to give full effect to the phrase “free and democratic society” in s. 1. Whereas the justifications listed in the ICCPR and ECHR are examples of the practical

¹⁸ *International Covenant on Civil and Political Rights*, [16 December 1966, 999 UNTS 171](#) arts. 21-22 (entered into force 23 March 1976, ratified by Canada 19 May 1976).

¹⁹ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, [4 November 1950, 213 UNTS 221](#) (entered into force 3 September 1953), art. 10(2).

elements which make a democratic society possible, the values listed in *Oakes* comprise the values that constitute its free and democratic nature. Taken together, the valid justifications for a limit on *Charter* protected rights flow from the values essential to free and democratic society, both the values that make it possible and the values that give it its free and democratic identity. Since the protection of constitutional rights depends on a free and democratic society, the preconditions of such a society provide a logical limit to the guarantee of those rights. For similar reasons, limitations of rights that undermine these preconditions ought to be particularly difficult to justify.

D. Transparency and accountability in the Section 1 analysis

i) Transparency and accountability are preconditions to a free and democratic society

26. CAC submits that transparency and accountability should be considered values essential to a free and democratic society. Indeed, among such values, they are particularly important because they both make such a society possible and are vital to its free and democratic character. Transparency and accountability are related concepts that work together to foster democratic engagement. As argued in Part II of this factum, above, transparency provides the information which can become the subject of debate. That debate can, in turn, move public opinion which, by the democratic process, can hold government institutions accountable.

27. Transparency and accountability are necessary to the functioning of a free and democratic society. They both make it possible and are essential to its character. First, transparency must necessarily be present to enable the democratic process to hold political institutions accountable. Without knowing what government actors are doing, the electorate is deprived of the information they need to choose between political parties and platforms. Second, transparency and accountability are essential to the free and democratic character of our society. A democratic

government is one that serves the public and is, therefore, beholden to them. The public can only exercise that supervisory function over the government if it knows what is doing.

28. Transparency and accountability also fit within the list of values provided in *Oakes*. Specifically, they foster “faith in social and political institutions which enhance the participation of individuals and groups in society.”²⁰ Transparency increases faith in social and political institutions. Trust is fostered by openness. Further, political institutions enhance participation when the public can learn what those institutions are doing and engage in public debate about it.

29. Transparency and accountability are not only two values among many essential to a free and democratic society. Rather, they are of vital importance because they are key to the functioning of democratic institutions. An informed public renders democratic decision making meaningless.

ii) Transparency and accountability in the *Oakes* test

30. In cases that engage the issues of transparency and accountability, these values should guide the application of s. 1 and the determination of whether a particular limit has been “demonstrably justified in a free and democratic society.” With respect to the *Oakes* test, these values are of critical importance to the issues of whether the limit in question furthers a pressing and substantial objective and whether its salutary effects outweigh its deleterious effects.

31. First, the values of transparency and accountability should guide the assessment of whether the government’s objective is pressing and substantial. Some justifications are so at odds with the nature of a free and democratic society that they do not justify limiting constitutional rights. For example, in *Big M*, the Supreme Court held that “not every government interest or policy objective is entitled to s. 1 consideration.”²¹ In that decision, the Court identified two reasons provided to

²⁰ *Oakes*, *supra* note 12 at para. 64.

²¹ *Big M*, *supra* note 16, at para. 139.

justify the impugned legislation. The Court rejected one of the justifications because it was “fundamentally repugnant because it would justify the law upon the very basis upon which it is attacked for violating s. 2(a).”²²

32. Applying this principle to the present matter, if the government actor attempts to justify a limit on transparency by arguing that accountability to the public would itself interfere with the function of the institution involved, such an argument ought to be dismissed as “fundamentally repugnant” for rejecting the philosophical basis for a free and democratic society. This is not to say that there may not be valid purposes that can justify limits on transparency – especially competing values of a free and democratic society, such as national security. Rather, avoidance of public criticism cannot *per se* be a justification for limiting transparency.

33. Second, the values of transparency and accountability ought to govern the Court’s assessment of the overall proportionality of impugned legislation. Both sides of the scale should be assessed through the lens of transparency and accountability.

34. With respect to salutary effect, where a purported benefit is contrary to the notion of a transparent government held accountable by public criticism, it is illegitimate and ought to be afforded minimal weight. For example, in *Big M*, the establishment of a religious practice, such as a uniform religious day of rest, was not found to be a legitimate salutary effect. Similarly, if the purported benefit of a statute that limits transparency is that it prevents criticism of a government institution or government actors, it is incompatible with the values of a free and democratic society and is unjustifiable.

35. With respect to deleterious effects, their magnitude must be measured by the impact on transparency and accountability. Limitations on transparency – and thereby accountability – should

²² *Ibid.* at para. [140](#).

be regarded as particularly serious and should weigh heavily in the proportionality analysis. Where a statute imposes a restriction on the fundamental values of transparency and accountability, the courts should require an equally significant competing value of a free and democratic society, such as national security, to outweigh the deleterious impact.

36. The section 1 analysis is not value neutral. Rather, it must be guided by the values of a free and democratic society. Transparency and accountability are of vital importance to freedom and democracy and so, ought to guide the application of the *Oakes* test when engaged.

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