



The Open Court Principle and NDAs in Air Passenger Complaints

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Air Passenger Rights

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Background

Who is Who

- CTA – Canadian Transportation Agency
 - Economic regulator of the airline industry
 - Adjudicates consumer disputes between passengers and airlines
 - A (very stubby) arm's-length from Transport Canada
- Dany Ross – Government of Canada Employee at the CTA
 - Acting Director General, Dispute Resolution Branch
- Tim Rodger – Passenger
 - Won his complaint against WestJet (Jun. 19, 2024)
 - Posted the CTA's Complaint Resolution Officer's ruling in our Air Passenger Rights (Canada) Facebook group

Background

The Phone Call from Dany Ross (Jul. 4, 2024) – Tim Rodger's Summary

I was driving in downtown Chicago when it [the call] came in.

He [Dany Ross] was very polite, introduced himself and said that it had been brought to his attention that I had posted the decision online. I told him that I had posted it on a private group. He said that it was confidential and as such, I was not to be sharing it.

I was afraid that I might get in a load of trouble, so I politely told him that I was not aware that it was confidential and that I could not share it, and [said] that I would have it removed within 5 minutes.

Background

The Email from Dany Ross to Yours Truly (Jul. 9, 2024)

It was brought to our attention that a recently issued confidential air travel complaint decision was posted in its entirety on your Air Passenger Rights (APR) Facebook group page. The decision was posted in the group by one of the passengers involved in the decision, who has since removed the post at our request.

As per the *Canada Transportation Act* (the Act), the Canadian Transportation Agency publishes on its website information relating to the outcome of air travel complaints. Decisions issued by an Agency complaint Resolution Officer are otherwise confidential, unless all involved parties agree to the contrary.

We would appreciate your collaboration in preventing future public sharing of confidential information.

Thank you for your collaboration.

Background

Subsection 85.09(1) of the *Canada Transportation Act* – as of September 2023

In September 2023, certain amendments came into force:

Canada Transportation Act (since Sep. 2023)

85.09 (1) 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.

Background

January 2025: CTA Proposes to Fine People Who Violate s. 85.09(1)

From the CTA's website:

“There are 22 provisions of the *Canada Transportation Act* (Act) to be designated under the *Canadian Transportation Agency Designated Provisions Regulations* (DPR). The DPR consists of a list of sections of the Act or the regulations that may be enforced by way of administrative monetary penalties (AMP). [...]

Provisions to be designated under the DPR

1. Items relating to air transportation

[...]

Air travel complaints resolution process [...] Subsection 85.09(1)”

<https://otc-cta.gc.ca/eng/consultation/proposed-amendments-canadian-transportation-agency-designated-provisions-regulations>

Background

May 2025: APR Launches Constitutional Challenge

Air Passenger Rights commenced an application in the Ontario Superior Court of Justice 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;

The Open Court Principle

- Substance – information about court proceedings
 - Public's access to information
 - Media's right to gather information
 - Media's right to publish or broadcast information
 - Listeners'/viewers' right to receive information from media
- Scope – public and media access
(*R. v. CBC*, [2010 ONCA 726 at para. 31](#))
 - court hearings; and
 - exhibits.
- Exceptions – serious risk to an important public interest
(*Sherman Estate v. Donovan*, [2021 SCC 25](#))
 - Protecting the identity of young persons or victims
 - Protecting an accused's rights to a fair trial (before trial)
 - National security

The Open Court Principle – History

Scott v. Scott, [1913] A.C. 417

The issues before the House of Lords:

- validity of an order directing that an embarrassing divorce case be heard in camera; and
- whether parties were required to keep details of the hearing in secret after the trial.

Held:

- Viscount Haldane L.C.:
to justify an order for hearing in camera it must be shewn that the paramount object of securing that justice is done would really be rendered doubtful of attainment if the order were not made.
- Earl Loreburn:
It is not that a Court ought to refrain from exercising its power in such a way. It is that the Court does not possess such a power.

The Open Court Principle – History

Scott v. Scott, [1913] A.C. 417 (continued)

- Lord Shaw of Dunfermline cited Jeremy Bentham with approval:
 - “In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice.”
 - “Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.”
 - “The security of securities is publicity.”

The Open Court Principle – Prior to the *Charter*

Nova Scotia (AG) v. MacIntyre, [1982] 1 SCR 175

Many times it has been urged that the ‘privacy’ of litigants requires that the public be excluded from court proceedings. It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings.

[...]

In my view, curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. One of these is the protection of the innocent.

The Open Court Principle – Under the *Charter*

CBC v. New Brunswick (AG), [1996] 3 S.C.R. 480

The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.

The Open Court Principle – Under the *Charter*

Vancouver Sun (Re), 2004 SCC 43

25 Public access to the courts guarantees the integrity of judicial processes by demonstrating “that justice is administered in a non-arbitrary manner, according to the rule of law”: [...]. Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public’s understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts.

26 [...] The freedom of the press to report on judicial proceedings is a core value. Equally, the right of the public to receive information is also protected by the constitutional guarantee of freedom of expression: [...]. Consequently, the open court principle, to put it mildly, is not to be lightly interfered with.

The Open Court Principle – Exceptions

Dagenais, Mentuck, Sierra Club, and Sherman

Section 1 of the *Charter*

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

- *Oakes* test (*R. v. Oakes*, [1986] 1 SCR 103)

Framework for deciding whether government action or legislation that infringes a *Charter* right is justified under s. 1.

- *Dagenais, Mentuck, Sierra Club, and Sherman* tests

Tests to balance freedom of expression and other important rights and interests, thereby incorporating the essence of the balancing of the *Oakes* test.

The Open Court Principle – Discretionary Exception

Sherman Estate v. Donovan, 2021 SCC 25

A person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

- 1** court openness poses a serious risk to an important public interest;
- 2** the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
- 3** as a matter of proportionality, the benefits of the order outweigh its negative effects.

Openness of Quasi-Judicial Proceedings

When is a body acting in a quasi-judicial capacity?

Min. of National Revenue v. Coopers and Lybrand, [1979] 1 SCR 495

- 1 Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that a hearing is contemplated before a decision is reached?
- 2 Does the decision or order directly or indirectly affect the rights and obligations of persons?
- 3 Is the adversary process involved?
- 4 Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?

Openness of Quasi-Judicial Proceedings

Southam Inc. v. Canada (Minister of Employment and Immigration),
[1987] 3 F.C. 329

9 I am satisfied that these tests [for acting in a quasi-judicial capacity] in the case at bar have been met and it is not at all unreasonable to extend to proceedings of such decision-makers the application of this principle of public accessibility. After all, statutory tribunals exercising judicial or quasi-judicial functions involving adversarial-type processes which result in decisions affecting rights truly constitute part of the “administration of justice”. The legitimacy of such tribunals’ authority requires that confidence in their integrity and understanding of their operations be maintained, and this can be effected only if their proceedings are open to the public.

Openness of Quasi-Judicial Proceedings

Germain v. Saskatchewan (Automobile Injury Appeal Commission), 2009 SKQB 106

103 The interplay between privacy and public access to judicial records is best summed up by *The Attorney General of Nova Scotia and Ernest Harold Grainger v. Linden MacIntyre, et al*, [1982] 1 S.C.R. 175 where Dickson J. stated at pp. 185-187: [...]

104 These dicta are still the law in Canada and in my view apply to adjudicative tribunals which although not courts, have a quasi-judicial function. The Commission is such a tribunal because it makes decisions based on Germain's legal rights under the AAIA. Germain's claim to privacy regarding publication on the net cannot withstand the force of the open courts principle. She has the onus of demonstrating limitations on public accessibility [*sic*] and I agree with the Commission in this case that she has not proven societal values of superordinate importance nor any other exceptional circumstance which would warrant a limit. She has not met this onus.

Openness of Quasi-Judicial Proceedings

The Canadian Transportation Agency (CTA) – before September 2023

- Established by the *Canada Transportation Act*
- Consists of:
 - Staff – who are necessary for the proper conduct of business, and conduct facilitation and mediation of complaints (ss. 19 and 85.1)
 - Members – who make orders, decisions, rules, and regulations (ss. 7 and 16-17)

Lukács v. Canada (Transportation Agency), 2014 FCA 76

[50] [...] The Agency performs two key functions.

[51] First, in its role as a quasi-judicial tribunal, it resolves commercial and consumer transportation-related disputes. Its mandate was increased to include resolving accessibility issues for persons with disabilities.

Openness of Quasi-Judicial Proceedings

The Canadian Transportation Agency (CTA) – before September 2023

Old Rules of Procedure (SOR/2005-35)

23. (1) The Agency shall place on its public record any document filed with it in respect of any proceeding unless the person filing the document makes a claim for its confidentiality in accordance with this section.

New Rules of Procedure (SOR/2014-104)

7. (1) Any document filed under these Rules must be filed with the Secretary of the Agency.

(2) All filed documents are placed on the Agency's public record unless the person filing the document files, at the same time, a request for confidentiality under section 31 in respect of the document.

Openness of Quasi-Judicial Proceedings

March 2014: The CTA's refusal to comply

- February 14, 2014: Yours truly requested to view the public documents in a file that was decided by the CTA, clearly indicating s. 2(b) of the *Charter* as the legal basis
- March 19, 2024: CTA Staff provided documents with the following redacted:
 - name and/or work email address of counsel acting for Air Canada in the proceeding
 - names of Air Canada employees involved
 - substantial portions of submissions and evidence
- March 24, 2014: Yours truly makes a final demand for unredacted documents

Openness of Quasi-Judicial Proceedings

March 2014: CTA's refusal to comply (cont.) – final response (Mar. 26, 2014)

“[...] Section 8 of the [*Privacy Act*] is clear that, except for specific exceptions found in that section, personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by that institution. [...]

Although Agency case files are available to the public for consultation in accordance with the open court principle, personal information contained in the files such as an individual's home address, personal email address, personal phone number, date of birth, financial details, social insurance number, driver's license number, or credit card or passport details, is not available for consultation.

The file you requested has such sensitive personal information and it has therefore been removed by the Agency as is required under the Act.”

Openness of Quasi-Judicial Proceedings

No legal requirement to make an *ATIA* request

- April 22, 2014: Application for judicial review is filed in FCA (not in FC, as per [s. 28\(1\)\(k\)](#) of the *Federal Courts Act*)
- July 31, 2014: CTA brings motion to quash the application on the basis that the requirements of the *Access to Information Act* were not met.
- September 19, 2014: Webb, J.A. dismisses the motion to quash

Lukács v. Canadian Transportation Agency, 2014 FCA 205

[13] [...] The Agency did not refer to any provision of the *Access to Information Act* that provides that the only right to obtain information from the Agency is by submitting a request under that *Act*.

Openness of Quasi-Judicial Proceedings

Refusing public access to documents on public record is “impermissible”

Lukács v. Canada (Transport, Infrastructure and Communities), 2015 FCA 140

[80] In conclusion, it is my view that once the Agency placed the documents in the Cancun Matter on its Public Record, as required by subsection 23(1) of the Old Rules, those documents became Publicly Available. As such, the limitation on their disclosure, contained in subsection 8(1) of the *Privacy Act*, was no longer applicable by virtue of subsection 69(2) of the *Privacy Act*. Accordingly, Dr. Lukács was entitled to receive the documents that he requested and the Agency's refusal to provide them to him was impermissible.

Openness of Quasi-Judicial Proceedings

Ontario Tribunals: *Toronto Star v. AG Ontario*, 2018 ONSC 2586

The issue before the Court:

- Constitutional validity of Ontario's *Freedom of Information and Protection of Privacy Act* [*FIPPA*] that purports to prohibit access to personal information in adjudicative records of tribunals.

Held (declared):

- Application of s. 21(1) to (3) and related sections of *FIPPA* pertaining to the presumption of non-disclosure of “personal information” to Adjudicative Records held by certain Ontario tribunals infringes s. 2(b) of the *Charter* and is not justified under s. 1. It is therefore of no force or effect.

Aftermath:

- [*Tribunal Adjudicative Records Act, 2019*](#), SO 2019, c. 7, Sch. 60

Non-Disclosure Agreements in Consumer Disputes

- Non-Disclosure Agreement (NDA) / Confidentiality Clause
 - An agreement or a clause in an agreement requiring the parties to keep certain information confidential.

Non-Disclosure Agreements in Consumer Disputes

- Non-Disclosure Agreement (NDA) / Confidentiality Clause
 - An agreement or a clause in an agreement requiring the parties to keep certain information confidential.
- Origin and examples of legitimate use of NDA
 - Intellectual property – discussions between inventor and evaluator/investor (proprietary algorithms, design or concept details)
 - Mergers, acquisitions, or joint ventures – exchange of sensitive business and financial information
 - Employment contracts – protecting trade secrets, financial data, customer lists and client data

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 - Mergers, acquisitions, or joint ventures – exchange of sensitive business and financial information
 - Employment contracts – protecting trade secrets, financial data, customer lists and client data
- Misuse of NDA – covering up shabby corporate conduct (see: Canadian Bar Association's [Resolution No. 23-05-A](#))
 - Workplace harassment
 - Abuse in schools, youth clubs, universities, religious institutions

Non-Disclosure Agreements in Consumer Disputes

Common Myths

Myths Used to Mislead Consumers

- An NDA is part of a standard form of full and final release
 - by agreeing to sign a release, you agreed to the NDA too
 - you have to sign an NDA as part of a settlement
- The law requires you to keep the terms of the settlement and/or the settlement negotiations confidential
 - “Settlement privilege” requires you to do so
- It is unreasonable to reject an offer to settle because of an NDA
 - it is reasonable to insist on an NDA as a condition for settlement

Non-Disclosure Agreements in Consumer Disputes

Myths vs. the Law

Myth

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Non-Disclosure Agreements in Consumer Disputes

Myths vs. the Law

Myth

- An NDA is part of a standard form of full and final release
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 - you have to sign an NDA as part of a settlement

The Law

- NDA is optional element of a full and final release
- NDA is not implied, but must be expressly sought

Lukacs v. Dell Canada Inc., 2017 NSSM 6 at para. 29

A confidentiality clause is a significant burden on a party. It represents a restriction of his or her freedom of speech. A party may agree to such a clause, but he or she must be asked for it.

Non-Disclosure Agreements in Consumer Disputes

Myths vs. the Law

Myth

- The law requires you to keep the terms of the settlement and/or the settlement negotiations confidential
 - “Settlement privilege” requires you to do so

Non-Disclosure Agreements in Consumer Disputes

Myths vs. the Law

Myth

- The law requires you to keep the terms of the settlement and/or the settlement negotiations confidential
- “Settlement privilege” requires you to do so

The Law

- “Settlement privilege” **is not** an NDA, but an evidentiary rule: settlement discussions usually cannot be used as evidence

Union Carbide Canada Inc. v. Bombardier Inc., 2014 SCC 35

[45] The common law settlement privilege and confidentiality in the mediation context are often conflated. [...] settlement privilege and a confidentiality clause are not the same, and they may in some circumstances conflict. One is a rule of evidence, while the other is a binding agreement; they do not afford the same protection, nor are the consequences for breaching them necessarily the same.

Non-Disclosure Agreements in Consumer Disputes

Myths vs. the Law

Myth

- It is unreasonable to reject an offer to settle because of an NDA
- it is reasonable to insist on an NDA as a condition for settlement

Non-Disclosure Agreements in Consumer Disputes

Myths vs. the Law

Myth

- It is unreasonable to reject an offer to settle because of an NDA
- it is reasonable to insist on an NDA as a condition for settlement

The Law

- It is **not unreasonable** to reject an offer to settle that requires you to sign an NDA

Tichopad v. One West Auto Ltd., 2024 BCSC 579 at para. 56

[...] the defendant's offer required the plaintiff to execute a general release, a non-disclosure agreement, and a non-disparagement agreement. Given those terms, it was not unreasonable for the plaintiff to refuse the defendant's offer.

Non-Disclosure Agreements in Consumer Disputes

Myths vs. the Law

The Law (continued)

- It is unreasonable to insist on an NDA as a condition for settlement

Douglas v. WestJet Airlines Ltd., File No.: SC-22-00161182-0000
(Decision on Costs dated March 3, 2025)

13. [...] the inclusion of a term in the defendant's offer that this court cannot order (i.e. a confidentiality clause) is problematic. This relief was not claimed in the defence filed. Further, this Court's jurisdiction is statutory: it could not order a non-disclosure agreement.

26. Courts cannot condone hardball tactics between litigants, especially in circumstances where there is a power imbalance between a corporate litigant (here the second largest airline in Canada) and an individual.

Non-Disclosure Agreements in Consumer Disputes

Myths vs. the Law

The Law (continued)

- It is unreasonable to insist on an NDA as a condition for settlement

Douglas v. WestJet Airlines Ltd., File No.: SC-22-00161182-0000
(Decision on Costs dated March 3, 2025)

27. While I do note the defendant made an offer to settle the week before trial, that offer had a serious defect: it did not allow for Mr. Douglas to receive his long-overdue refund without other strings attached.

28. I find the defendant's withholding of monies it admitted it owed a 72 year old plaintiff for more than 2 years and 7 months after the commencement of litigation to be an unreasonable action within the remaining [sic] of Rule 19.06.

Non-Disclosure Agreements in Consumer Disputes

Myths vs. the Law

The Law (continued)

- It is unreasonable to insist on an NDA as a condition for settlement

Douglas v. WestJet Airlines Ltd., File No.: SC-22-00161182-0000
(Decision on Costs dated March 3, 2025)

29. I find that, in these circumstances, it is reasonable to impose a costs penalty under Rule 19.06. In assessing a fair and reasonable penalty, I take judicial notice of the headlines of a record number of complaints over the past two years by Canadians to the Canadian Transportation Agency and the current backlog of roughly 71,000 cases.

The Complaint Resolution Officer (CRO) Process

Since September 2023

- Airline complaints are handled by Complaint Resolution Officers (CRO), who are CTA staff, not Members (s. [85.02\(1\)](#))
- CRO do mediation-adjudication (ss. [85.05-85.07](#))
- “Proceedings before a complaint resolution officer are not proceedings before the Agency.” (s. [85.02\(3\)](#))
 - Attempt to avoid existing openness and public access obligations

The Complaint Resolution Officer (CRO) Process

Since September 2023 (continued)

- Decisions, reasons, and evidence are **no longer** accessible to passengers, the media, or the public – but only to a handful of airlines and their lawyers that are frequent respondents to complaints (ss. [85.09\(1\)](#) and [85.14](#))
 - The skeletal information published is of no use
- Passengers, reporters, NGOs, and members of the public who publicly discuss decisions, reasons, or evidence about airline complaints could face reprisal
 - January 2025: the CTA proposed to impose fines

Cui bono?