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By email

Re: Bill C-47 Amendments to *Canada Transportation Act*

Division 23 of this year's *Budget Implementation Act* (C-47) would make several amendments to the *Canada Transportation Act*, the goal of which is "to strengthen Canada's passenger rights regime, streamline the processes for administering air travel complaints before the Canadian Transportation Agency (Agency), and increase air carriers' accountability". Two aspects of the new regime are quite surprising.

First, proceedings before the Agency will be confidential:

> 85.09 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.

This is a breach of the open justice principle, with the effect that proceedings before the Agency will be conducted in secret. Perhaps the rationale here is that the complaints resolution officers (82.01(1)) engage in mediation (85.01) which is best conducted in private. But the confidentiality clause sweeps beyond the mediation stage to encompass the entirety of air passenger proceedings

before the Agency, including those that are quasi-judicial in nature. It is difficult to see how this clause would survive constitutional challenge based on the open justice principle grounded in s. 2(b) of the *Charter of Rights and Freedoms*. (No *Charter* statement has been published yet for Bill C-47).

Even decisions of the Agency on air passenger matters will not necessarily be published. Although there is a presumption of publication of an entire order when the order is made by a panel (85.13) there is a much more limited presumption when the order is made by a complaints resolution officer. And in both instances, "The Agency may, at the request of a complainant or carrier, decide to keep confidential any part of an order…", save for the flight number, date of departure, decision about whether the delay was in the airline's control and a statement as to the outcome (85.14(2)). Whether the Agency could exercise this discretion to systematically not publish decisions is doubtful, as the power has to be exercised in accordance with the *Charter* and conform to the open justice principle. Indeed, as I remarked a few years ago on a controversy involving the social security tribunal, systematic non-publication violates procedural fairness:

> Fairness is imperilled by selective publication in at least two ways. First, government agencies are repeat players before the tribunals and will have access internally to large banks of decisions. This creates an *inégalité des armes* between the government and the individual (especially if the individual is self-represented). Second, the tribunal members will presumably try to achieve some sort of consistency in their own decision-making and in doing so take 'official notice' of their past decisions. Doing so without revealing these decisions to the parties concerned is unfair.

Second, the Agency may make binding guidelines (85.12(3)) "respecting the manner of and procedures for dealing with complaints" (which is sensible) and "setting out the extent to which and the manner in which, in the Agency's opinion, any provision of the regulations applies with regard to complaints" (85.12(1)). Such guidelines, although binding on complaints resolution officers, are not subject to the *Statutory Instruments Act* and are thus not required to be tabled in Parliament (85.12(4)). Instead, they are to be "be published in any manner that the Agency considers appropriate" (85.12(3)).

Guidelines can, of course, provide useful flexibility to administrative decision-makers and the content of guidelines may legitimately influence the interpretation and application of binding law (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36; *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61). But neither *Agraira* nor *Kanthasamy* addressed a situation where a decision-maker could make *binding* guidelines. A *binding* guideline is a command from a hierarchical superior, not an interpretive tool. It is a form of hard law rather than soft law. It has the pathologies of soft law but not its benefits.

Taken together, these provisions would create mechanisms for binding mediation and adjudication that would operate largely in secret. Decision-making would be done in the shadows, on the basis of past decisions and guidelines that have only seen the light of day to the extent the Agency chooses. Open justice should be the default principle but it does not have much purchase in Bill C-47..

Yours faithfully,