Open Court and Confidentiality: Can there be a Balance in Light of our New Media Age?

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Introduction

The protected ground of 'disability' was cited by applicants in 57% of the Applications made to the Human Rights Tribunal of Ontario (HRTO) during the 2012 – 2013 fiscal year.[1] As the majority of applications deal with disability, issues around confidentiality for the applicant with a disability throughout the Tribunal's process becomes an ever increasing concern; one that can become itself a deterrent to filing and accessing the Tribunal's process.

Maintaining the confidentiality of persons with disabilities requesting disability-related accommodations is an understood principle in human rights law. The Ontario Human Rights Commission's [OHRC] *Disability - Workplace roles and responsibilities (fact sheet)*[2] stipulates that, "[e]mployers are required to maintain the confidentiality of persons with disabilities".

Outside of the employment context, maintaining the confidentiality of persons with disabilities is an equally important principle. OHRC guidelines on accessible education[3] state that the accommodation process in the educational institution should respect confidentiality.

In ARCH's experience working with clients with disabilities, the policies and procedures for accommodating the needs of persons with disabilities that are applied by employers, educational institutions and other service providers recognize the importance of maintaining confidentiality. In many instances serious attempts are made to respect confidentiality throughout the accommodation process. Ensuring a successful accommodation process includes assurances and safeguards to maintain confidentiality.

When accommodation providers fail to appropriately accommodate, persons with disabilities are faced with having to enforce their *Code* rights before the HRTO which presents its own very real and serious concerns regarding confidentiality. When individuals seek redress before the HRTO, it is likely that confidentiality will not be maintained and intimate details about their disability will not only be revealed through the public hearing process but will then also be posted on a publicly accessible website, i.e. CanLii. Ironically, this is the case even when the HRTO adjudicator has found that the discrimination has occurred as a result of a breach of confidentiality.

In this paper, we will examine the current HRTO procedures and the high threshold that the HRTO applies in requests for anonymizing or redacting HRTO

[1] HRTO Statistics, 2012-2013 Fiscal Year http://www.hrto.ca/hrto/index.php?q=en/node/203
[2] See more at: http://www.ohrc.on.ca/en/disability-workplace-roles-and-responsibilities-fact-sheet#sthash.u6ovzebP.dpuf
[3] http://www.ohrc.on.ca/sites/default/files/attachments/Guidelines_on_accessible_education.pdf

decisions. The HRTO procedures are contrasted with those in some other Canadian jurisdictions and of some other Ontario tribunals. We also raise questions about the HRTO's application of the open courts principle. We consider whether the open court principle is meant to apply for public online access to decisions and whether its application needs to be reconsidered in the digital age.

In order to attempt to reduce a further exposure of personal information, the authors have decided to reference decisions by their citation and exclude the names of the parties in the reference. Where more than one decisions is referenced in a footnote we have identified each case with initials for clarity.

Current HRTO Practices and Policies

Interim and final HRTO decisions are published on the publicly accessible CanLii website. Should a person with a disability obtain legal advice in advance of filing an application to the HRTO, she might be advised about the publication of HRTO decisions on CanLii. An applicant, who is represented from the beginning stages of the application, may receive advice on the potential for obtaining an anonymization order at the HRTO. However, most applicants are not represented when they commence an application before the Tribunal (78%[4]) and may be completely unaware of the CanLii postings.

In the signature section of the HRTO Application Form it states, "I understand that information about my Application can become public at a hearing, in a written decision, or in other ways determined by Tribunal policies."

The authors could not locate any HRTO policy on the publication of its decisions. When one accesses the information under the HRTO decisions' section of the HRTO website, it says, "Decisions of the Human Rights Tribunal of Ontario are available from a number of sources: Decisions released after January 1, 2000 can be accessed free of charge through the Canadian Legal Information Institute."[5]

The Applicant's Guide[6] states, "[a]ll of the HRTO's decisions are available free of charge on the Canadian Legal Information Institute website." The Applicant's Guide does not discuss the use of initials or anonymization of HRTO decisions or how one might make a request to anonymize.

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[4] Supra note 1.
[5] Human Rights Tribunal Ontario, HRTO Decisions http://www.hrto.ca/hrto/index.php?q=en/node/50
[6] Human Rights Tribunal Ontario , HRTO Applicant's Guide p 23: http://hrto.ca/hrto/sites/default/files/New%20Applications1/ApplicantsGuide.pdf

There is no information easily available to parties that would clearly inform them that all decisions are posted on CanLii or that the parties' consent is not requested before posting.

Disability and Issues of Confidentiality

The discrimination experienced by people living with disabilities and in particular, mental health and addiction disabilities continues to be pervasive. In September 2012, the Ontario Human Rights Commission released, "Minds that Matter, Report on the consultation on human rights, mental health and addictions".[7] In this report, the OHRC states that "Throughout the consultation, we heard significant concerns about the discrimination and harassment facing people with mental health disabilities or addictions in many aspects of their lives … [S]tereotypes result in widespread discrimination in housing, employment and services, and are deeply embedded in legislation, institutional policies and practices of institutions and individual attitudes."[8]

In 2009, the Mental Health Commission of Canada, launched "Opening Minds", the "largest systematic effort in Canadian history … [seeking to] change Canadians' behaviours and attitudes toward people living with mental illness to ensure they are treated fairly and as full citizens with opportunities to contribute to society like anyone else."[9]

As a result of their experiences of discrimination, many people choose not to disclose their disability publicly. Some potential applicants may choose not to file an application once they learn that all Tribunal decisions are posted on a publicly accessible website. In his 2012, *Report of the Human Rights Review*, Andrew Pinto acknowledge that "applicants fear pursuing an application, not because their complaint has no merit, but because of the stigma attached to others knowing about their condition or circumstances through the public nature of the Tribunal's decisions."[10]

People fear that future employers may gain information about their disability and that this information will impact hiring decisions.

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[7] Minds that Matter: Report on the consultation on human rights, mental health and addictions http://www.ohrc.on.ca/en/minds-matter-report-consultation-human-rights-mental-health-and-addictions

[8] Ibid executive summary

[9] Canadian Mental Health Commission, Open Minds, Interim report. http://www.mentalhealthcommission.ca/English/initiatives-and-projects/opening-minds/opening-minds-interim-report?routetoken=a6ce4bb588744b19ed9290e9fda6ac79&terminitial=211

[10] Andrew Pinto, *Report of the Ontario Human Rights Review* 2012 at 68-70.

Microsoft commissioned a study of hiring personnel from four countries to gain an understanding of the use of online personal information in hiring decisions.[11] Seventy-five percent of the 275 U.S. recruiters interviewed report that their companies had formal policies which required online searches and 79 percent indicated that they search online reputational data of job candidates.[12] Seventy percent had rejected one or more candidates because of information found online.[13]

At ARCH, we hear from many employees with disabilities that they fear disclosing their disability and exercising their right to have their disability-related needs accommodated out of concern that they will loose their job or be stigmatized in the workplace as a result.

We have been advised by law school and graduate school students who are seeking advice on the schools' obligations to accommodate their disability-related needs that they would not file an HRTO application out of fear that the fact of their disability could be accessed by law firms, fellow students or school department heads. Often their biggest concern in seeking accommodations of their needs is that their confidentiality will be breached.

HRTO Rules and the SPPA

For the purpose of this paper, the terms anonymization or anonymity are used to describe situations where a party or witness is not identified in a written decision. Generally the term publication ban is used when a court or tribunal orders that certain information in a court or tribunal proceeding cannot be published. Anonymization orders do not restrict what others can publish. The terms publication ban and anonymization have been used interchangeably by the HRTO in some circumstances.[14]

The Tribunal could also order a closed hearing in which the public would have no access to the hearing process or the resulting decisions.

The HRTO Rules of Procedure and the *Statutory Powers Procedure Act* address the Tribunal's discretion to protect confidentiality:

HRTO Rules of Procedure[15]

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[11] "Online Reputation in a Connected World" (2010), online: http://executivecareerbrand.com/microsoft-study-finds-online-reputation-management-not-optional/.
[12] *Ibid* at 6.
[13] *Ibid* at 3.
[14] 2012 HRTO 810 at para 13. [*H*]; 2012 HRTO 1839 [*S.S.*]
[15] *Human Rights Tribunal Ontario, Rules of Procedure* [Rules of Procedure] http://www.hrto.ca.wsd16.korax.net/hrto/sites/default/files/About/HRTO%20Amended%20Rules%20of%20Procedure.pdf

Public Proceedings

3.10 The Tribunal's hearings are open to the public, except when the Tribunal determines otherwise.

3.11 The Tribunal may make an order to protect the confidentiality of personal or sensitive information where it considers it appropriate to do so.

3.11.1 Unless otherwise ordered, the Tribunal will use initials in its decisions to identify children under age 18 and the next friend of children under 18. It may use initials to identify other participants in the proceeding if necessary to protect the identity of children.

3.12 All written decisions of the Tribunal are available to the public.

Section 9(1) of the *Statutory Powers Procedure Act* states:

Hearings to be public, exceptions

9.(1)An oral hearing shall be open to the public except where the tribunal is of the opinion that,

(a) matters involving public security may be disclosed; or

(b) intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public,

in which case the tribunal may hold the hearing in the absence of the public. [16]

Ontario Human Rights Tribunal: The Test for Anonymity

The HRTO has taken the position that requests to anonymize its decisions or keep other information confidential should only be granted in exceptional circumstance. The HRTO maintains that, as a general principle, it must promote an open justice system and therefore it should only anonymize its decisions if the need to do so outweighs the Tribunal's interest in its processes being open and transparent". [17]

[16] *Statutory Powers Procedure Act*, RSO 1990, c S.22 ss. 9(1). [*SPPA*]
[17] 2012 HRTO 1011 at para 15.

The party making the request for anonymization bears the onus of "proving there is a real and substantial risk that would justify that level of confidentiality".[18] The burden for a request for anonymization is "less onerous" than for a publication ban which "places restrictions on what others may do and directly infringes their expressive freedom".[19]

The HRTO's adjudicators often cite the following passage when deciding whether or not to issue an order for anonymity.[20]

> An open justice system is a fundamental principle of a free and democratic society, so that the actions of those responsible for interpreting and enforcing the law may be subject to public scrutiny. Moreover, the principles enshrined in the *Code* are quasi-constitutional rights which are recognized as particularly significant in Canadian society. It is important for there to be public scrutiny when respondents [are] found to have violated these rights and also when accusations of discrimination are made by applicants but not upheld. I agree with the respondents that it is a serious matter to be accused of breaching the *Code*, which may also cause stress and stigma. Without good reasons for doing so, parties should not make or defend allegations from behind a veil of anonymity, assured that they will not be identified if they are found not credible, their allegations are rejected or they are held to have violated the *Code*. Effective public scrutiny of this human rights system depends, in part, upon knowing how the Tribunal addresses the particular parties before it. Openness and free expression are of fundamental importance in our legal and human rights systems. (emphasis added)[21]

Apparent Exception to the Principle of Openness

According to HRTO Rule 3.11.1,[22] initials are automatically used for the names of children and of their next friends or guardians unless the Tribunal orders otherwise. The Rule also states, "It may use initials to identify other participants in the proceeding if necessary to protect the identity of children."

From our review of the HRTO decisions in which anonymization was requested or ordered, the HRTO has ordered anonymization of its decisions in applications that involve issues of gender identity[23] or sexual orientation.[24]

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[18] *H, supra* note 14 at para 13.
[19] 2009 HRTO 735 at para 25.
[20] 2011 HRTO 1234 [*W*]; 2013 HRTO 1393 [*D*]; *supra* note 17.
[21] *supra* note 19 at para 20.
[22] *Rules of Procedure, supra* note 15, Rule 3.1.11.
[23] 2012 HRTO 1505 *[K.M.*].; 2010 HRTO 1906 [XY];
[24] 2003 HRTO 25

The HRTO has also used initials rather than full names of applicant where sexual harassment is alleged. Some of these cases involved minors[25] and in another initials were used to due to issues around confidentiality of gender identity.[26] In deciding to protect the identity of an applicant who alleges she had experienced sexual harassment, Vice-Chair Flaherty decided that if applicants were not protected "in proceedings of such a personal and intimate nature, they may be less willing to pursue allegations of sexual harassment in such circumstances".[27] She determined that that this result could be "inconsistent with the purpose of the Code".[28] Vice-Chair Flaherty also thought that since the hearing was still open and the decision would be publicly available there was a balance between individual's right to protection and public access[29]. It cannot be concluded, however, that an in applications involving issues of sexual harassment anonymization requests will be granted. [30]

Disability[31]

Anonymity is not ordered in all disability cases. It was granted in cases where the applicant had been diagnosed with HIV.[32] In one case the respondents consented and the applicant raised arguments regarding the "heavy burden of stigma and discrimination" faced by individuals who are HIV positive as well as how disclosure could result in "significant negative consequences in his life".[33]

Anonymity was ordered on a motion of the Vice-Chair[34] in a case that detailed how police brought the applicant to the hospital because of a mental health crisis and she was treated as a "psychiatric out-patient".[35] Anonymization was ordered in another *case*[36] when the applicant alleged that medical personnel had discriminated against her based on her mental health disability. The applicant requested anonymization and a form of a publication ban. She argued that the stigma of being labelled as "mentally ill" and "disclosure of her mental health records would pose a real and substantial risk to her dignity and privacy rights."[37] The applicant also argued that her future healthcare could be

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[25] 2011 HRTO 1575 [SH.], 2011 HRTO 1574. [*E.H.*], 2011 HRTO 1644 [B.C.].
[26] *K.M. supra* note 23.
[27] 2012 HRTO 1839 para 43

[29] *Ibid* at para 44.
[30] 2012 HRTO 212 at para 39
[31] Note that the review of HRTO cases in this section relies heavily on primary research conducted in Natalie MacDonnell, *Disability disclosure in the digital age: Why the Human Rights Tribunal of Ontario should reform its approach to anonymized decisions* (2014) [unpublished]
[32] 2009 HRTO 1407 [B.A.S.]; 2013 HRTO 1034 [D.M.].
[33] *B.A.S., ibid* at para 3.
[34] 2010 HRTO 1653 at para 6.
[35] *Ibid*; see also *supra* note 17 at para 18.
[36] 2010 HRTO 633.
[37] *Ibid* at para 22.

negatively impacted.[38] In this application, the adjudicator decided that the open justice principles would not be compromised because the case would be adjudicated in an open hearing.[39] In another application when an interim decision described the applicant's depression and suicidal ideation, anonymity was granted for the interim decision with the possibility that the issue of anonymity would be revisited at a later date.[40]

The use of initials only was ordered in a case which "alleged discriminatory disclosure of highly personal information" occurred in the execution of police reference checks related to the *Mental Health Act*.[41]

The HRTO did not order anonymity when an applicant was concerned that disclosure of his disability would impact his future employment prospects.[42] In this case Vice-Chair Overend stated

> the applicant notes that there is "a potential risk to his ability to secure future employment if it becomes known that he is disabled." Again, despite the fact that many of the applications to this Tribunal involve applicants with disabilities, the Tribunal has not anonymized their identity, even though many of them would be seeking future employment. The risk identified by the applicant is too speculative and does not outweigh the principle of openness that governs this Tribunal.[43]

Of note in this interim decision is the fact that the Vice-Chair did not disclose the nature of the applicant's disability.

In most cases in which a person with a disability is denied an order of anonymization the reason given by the adjudicator is that the application in not like the exceptional case such as that in which a person has experienced a mental health crisis.[44] Three recent cases have cited a similar justification for refusing to order anonymity including one of the most recent HRTO cases on anonymity. The Tribunal has taken the following position in all three cases.[45]

> The details disclosed about the applicant's medical condition are not of the nature or degree of private or intimate information present in those cases where bans/anonymity have been ordered. Almost all disability human rights cases involve some disclosure of personal information surrounding an applicant's disability, or the basis for the perceived disability, in order to meet the definition in section 10 of the *Code* and establish that there is a *Code*-protected ground. The

[38] *Ibid*.
[39] *Ibid* at para 23.
[40] 2013 HRTO 1388 at para 5.
[41] 2008 HRTO 437 at paras 1-2.
[42] 2011 HRTO 1298.
[43] *Ibid* at para 10.
[44] *Supra* note 17.
[45] 2011 HRTO 1230 [V] at para 11. See also 2012 HRTO 2304 [H] at para 7; at 2013 HRTO [MM] 974 para 6.

> applicant did not articulate any unique concerns or issues of confidentiality surrounding her condition that necessitate special protection.[46]

This reasoning is consistent with other HRTO jurisprudence which asserts that there has been no "blanket rule ordering any type of confidentiality for applicants with disabilities".[47] The same is true for individuals with mental health disabilities as a

> general claim that there is still a stigma associated with mental illness is insufficient. Human rights proceedings are often difficult for all involved, most particularly applicants… It is also routine that some evidence of the emotional consequences of alleged discrimination is heard, indeed the Code calls for such evidence when determining the appropriate remedy when it speaks of damages for injury to dignity, feelings and self-respect in section 45.2 (1).[48]

In May 2014 the HRTO released a "Practice Direction on the Anonymization of HRTO Decisions".[49] The Practice Direction notes that anonymization would only be granted in exceptional circumstances. The statement made in *C.M.* [50] is referenced as guidance on determining exceptional circumstances. The Practice Direction also states, "The HRTO has granted a request for anonymization where there were specific threats to personal safety, where there were parallel criminal proceedings arising from the same facts and relating to an alleged sexual assault, and where there was **highly sensitive medical information** or particularly sensitive information relating to an acute mental health crisis."[51] No mention is made of other previously accepted exceptions such as HIV positive status, gender identity, sexual orientation or cases of sexual harassment not involving a criminal proceeding.

Practice in Other Jurisdictions

British Columbia Human Rights Tribunal

It would appear that the British Columbia Human Rights Tribunal [BCHRT] grants request for anonymization much more readily than the Human Rights Tribunal of Ontario.

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[46] *V, ibid* at paras 11.
[47] 2009 HRTO 1198 at para 12.
[48] 2014 HRTO 136 at paras 9-10.
[49] Practice Direction on Anonymization of HRTO Decisions (effective April 2014)": http://www.hrto.ca/hrto/index.php?q=en/node/251
[50] *C.M. supra* note 19.
[51] *Supra* note 49.

Anonymization requests at the BCHRT are made under Rule 6.5 of the Tribunal's Rules of Procedure:

> A participant who wants the tribunal to make an order limiting public disclosure of personal information must apply to the tribunal under rule 24 setting out the reasons why that participant's privacy interests outweigh the public interest in access to the tribunal's proceedings.

A search of BCHRT decisions released since January 2012 in which requests for anonymization were made in applications involving the ground of disability produces 35 decisions.[52]

Of these 35 decisions, requests were declined in only four instances.[53] However, in only one of these decisions to deny the request did the applicant raise concern about the harm caused by the stigma of having a disability.[54] In the other three, the applicants raised other issues such as retaliation and reprisal.[55]

In some of the decisions, the anonymization was ordered on the Tribunal's own motion.[56]

In one BCHRT decision, the adjudicator granted the request for anonymization after concluding, "The reason for this application is the recognized and well publicized social stigma regarding mental disabilities. The publication of [the applicant's] name will affect future employment, rental ability, etc."[57]

In addition, the BCHRT would appear to have a fairly common practice of using the initials of individually-named respondents when the application is dismissed.[58]

The BCHRT may have a different concept of the interest served and the meaning of an open public hearing than that expressed in the often quoted the *C.M* decision of the HRTO. The BCHRT appears to be less concerned with the importance of "public scrutiny when respondents [are] found to have violated these rights and also when accusations of discrimination are made by applicants but not upheld."[59] This is demonstrated in the following statement:

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[52] For a list of these decisions see: http://www.canlii.org/en/bc/bchrt/#search/type=decision&ccId=bchrt&startDate=2012-01-01&endDate=2014-05-01&text=anonymiz*%20disability

[53] 2013 BCHRT 145 [ST], 2012 BCHRT 310 [R], 2012 BCHRT 202 [G] and 2013 BCHRT 238 [WA].

[54] ST *ibid.*

[55] WA *supra* note 53.

[56] 2014 BCHRT 66 [UL], 2012 BCHRT 276 [ES].

[57] 2012 BCHRT 107 para 26.

[58] For examples see: 2014 BCHRT 34 [MK], 2013 BCHRT 99 [RO], 2012 BCHRT 281 [SP] and 2012 BCHRT 432 [RU].

[59] *C.M. supra* note 19.

> I am satisfied that the Individual Respondents' and the Complainant's privacy interests, for the purposes of this decision, outweigh the public interest in access to the Tribunal's proceedings respecting the anonymization of certain identities. I have decided to anonymize the names of the Individual Respondents, the Complainant "W", the names of W's treating and monitoring physicians and the names of the communities where W worked and/or resides. .
>
> I have taken note that the Individual Respondents, all of whom are employed in the PSA Disability Management Program, state that trust is an essential component of their work in assisting employees with their rehabilitation needs and that an unfounded allegation of discrimination could jeopardize their credibility with those they seek to assist.
>
> In addition, I have considered the personal nature of the information provided about W, that, in the normal course, she is employed in small communities, and that I am dismissing her complaint.
>
> The Tribunal has held that privacy interests are heightened when a party's livelihood could reasonably be affected: … 2009 BCHRT 60, para. 69. I find that there is a risk of a negative impact on the livelihood of the Individual Respondents and for W in identifying them in this decision.
>
> In addition, the public interest will be met by publication of this decision, with the anonymizations I have set out, as the decision will convey the nature of the complaint, the background information considered, and the reasoning in the application to dismiss.
>
> These factors, and the outcome of this application, in which the complaint was found to have no reasonable prospect of success, have satisfied me that the privacy interests of the parties outweigh the public interest in access to their identity.[60]

The BCHRT's opinion that the interest of a public is served when the decision becomes public after anonymization is again expressed in *2*013 BCHRT 233:

> I acknowledge that there is a strong public interest in the Tribunal maintaining open and public processes in order to promote awareness about the *Code,* education about its application, and access to its processes. Exceptions to this process have only been made for reasons the Tribunal has held outweigh this public interest: … 2006 BCHRT 391.

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[60] 2010 BCHRT 201 (CanLII) [W] para 73-78, see also: 2012 BCHRT 41 (CanLII) [K] para 6-7 and 2012 BCHRT 95 (CanLII) [C] at para 8-10

…

> Here, Mr. K has expressed a concern that identifying him may impact his future chances of successful employment. While the District points out that he is currently employed, those circumstances may change and he may be adversely impacted by the publication of the details in his complaint. On balancing the interests advanced, it appears that the public's interest in access to the Tribunal proceedings can be preserved in this case by publishing this decision without identifying Mr. K or the Respondents, and without publishing details which would identify any of them to persons not already familiar with the circumstances. Further, K's medical privacy can be preserved, while enabling public scrutiny of the nature of the materials before the Tribunal on the application to dismiss, and the Tribunal's reasons for dismissing the complaint.
>
> Accordingly, I have referred to all the parties and other participants by initials, and I have omitted details that would identify any of them. I also order that names and identifying details be removed from any other material related to this case made public by the Tribunal after the date of this decision. [61]

Canadian Human Rights Tribunal

Section 52(1) of the *Canadian Human Rights Act*[62] reads:

Hearing in public subject to confidentiality order

> **52.** (1) An inquiry shall be conducted in public, but the member or panel conducting the inquiry may, on application, take any measures and make any order that the member or panel considers necessary to ensure the confidentiality of the inquiry if the member or panel is satisfied, during the inquiry or as a result of the inquiry being conducted in public, that
>
> > (*a*) there is a real and substantial risk that matters involving public security will be disclosed;
> >
> > (*b*) there is a real and substantial risk to the fairness of the inquiry such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public;
> >
> > (*c*) there is a real and substantial risk that the disclosure of personal or other matters will cause undue hardship to the persons involved

[61] *2*013 BCHRT 233 (CanLII), paras 11, 15-16
[62] *Canadian Human Rights Act*, R.S.C., 1985, c. H-6

such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public; or

(*d*) there is a serious possibility that the life, liberty or security of a person will be endangered.

Confidentiality of application

(2) If the member or panel considers it appropriate, the member or panel may take any measures and make any order that the member or panel considers necessary to ensure the confidentiality of a hearing held in respect of an application under subsection (1).

The authors were only able to locate one Canadian Human Rights Tribunal [CHRT] decision that addressed issues of a confidentiality orders. In that decision it is stated:[63]

> Secondly, the *Canadian Human Rights Act* provides the authority to order a publication ban or confidentiality orders in the appropriate circumstances. Section 52(1)(c) of the *Act* stipulates that the Tribunal may take any measures and make any order necessary to ensure the confidentiality of the inquiry if the Tribunal is satisfied that there is a real and substantial risk that the disclosure of matters will cause undue hardship to the persons involved and that this outweighs the societal interest in a public hearing. Section 52(1)(d) provides for confidentiality orders where the life, liberty or security of a person will be endangered. The Tribunal has ordered a publication ban pursuant to s. 52 of the *Act* under the appropriate circumstances.

The authors' searches of CHRT decisions did not locate any other decisions in which initials were used or another form of a confidentiality order was granted.

Open Courts Principle: Does it Mean Open to the World?

When we consider that the concept "open court" first arose at a time prior to the Norman Conquest, it is obvious that no contemplation of the extent to which the public now has an ease of access to information could have been given at that time. The open court principle is based on an understanding that the fair administration of justice is promoted through public access to court and tribunal proceedings and publicly available decisions. The objectives of the principle include ensuring that decision-makers act fairly and make determinations that are in line with current social values, and allowing the public to gain an understanding of the workings of our justice system and an understanding of how laws may impact individuals. Previously, those who wanted to learn about a

[63] 2006 CHRT 23 para 24

particular court or tribunal proceeding had to attend at the hearing or the office to obtain information. Privacy was fairly protected by the "practical obscurity"[64] of having to attend at each court or administrative tribunal. This protection is lost, when information can be accessed online from anywhere in the world. As Chief Justice Beverley McLachlin recently stated during her address at the Annual International Rule of Law Lecture, advances in technology have made it necessary for us to reconsider the strict application of the open court principle:

> We must recognize that the open court principle may conflict with other important values, such as privacy or national security. These interests are important to the administration of justice, and only the rash would say that such interests must always yield to the fundamental principle of openness.
>
> The result, as I suggested at the outset, is that as a society – and as a profession – we find ourselves engaged in a new and complicated exercise of line-drawing. No longer can we say that the open court principle prevails, unless the case falls within a handful of circumscribed exceptions."[65]

There has been a great deal of discussion about the need to balance the amount of private personal information that courts and tribunals make publicly available with the open court principle. A number of privacy commissioners have cautioned tribunals about the potential breaches of privacy legislation that may result from the posting of personal information on publicly accessible sites such as CanLii.

Several years ago, Canada's Privacy Commissioner, Jennifer Stoddart, acknowledged the importance of the open courts principle for our legal system. In considering the principle in light of the fact that "decisions containing highly sensitive personal information are made available to anyone with an Internet connection," she remarked, "I am not convinced that the broad public needs to know the names of individuals involved or requires access to intimate personal details through decisions posted widely on the Internet. ... I don"t believe we would take away from the educational value of these decisions by replacing names with initials, for example."[66]

The HRTO has a Privacy Policy which states, "(the Tribunal) is committed to respecting your privacy and protecting your personal information." The policy explains that if a person uses the Tribunal website to make an application

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[64] Madame Justice Bielby, [2000] A.J. No. 358.

[65] OPENNESS AND THE RULE OF LAW, Remarks of the Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada at the Annual International Rule of Law Lecture, London, United Kingdom January 8, 2014 page 25. http://www.barcouncil.org.uk/media/270848/jan_8__2014_-_12_pt.__rule_of_law_-_annual_international_rule_of_law_lecture.pdf

[66] R. Gary Dickson, "Administrative Tribunals, Privacy and the Net" (2009) at 5 , online: <http://www.oipc.sk.ca at page 3

"personal information, including your name, may become public in a final or interim decision of the Tribunal."[67] There is no mention that all Tribunal decisions are posted on a publicly accessible website, whether you apply online or otherwise.

In one decision HRTO Vice-chair, Mark Hart stated that the Tribunal "does recognize the sensitive nature of some of the medical evidence provided in its cases, and [its] decisions strive to minimize unnecessary disclosure of such evidence".[68] However, many of the Tribunal's decisions, including the few described below, raise questions of whether the amount of personal information that is included in decisions is necessary. Should adjudicators be minimizing disclosure to a much greater extent particularly in light of the fact that the HRTO makes its decisions available on CanLii without redaction? Should HRTO decisions be redacted before they are posted on CanLii?

In one decision[69], the applicant is a person with an addiction. He was employed as a salesperson in a small centre. The decision describes extensive details about his addiction and his lifestyle. A founder of the business where the applicant had been employed had emailed fellow employees and many people on the applicant's contacts list. The email describes the applicant's addiction, his alleged fraudulent behaviours, his relapses and his alleged physical threats. The decision also states, "I accept that after approximately two decades of addiction to crack cocaine, relapses and participation in numerous treatment programs, the applicant suffers from an addiction which amounts to a physical and/or mental disability under section 10 of the Code."[70]

The decision describes the impact the founder's actions had on the applicant's ability to conduct his sales business recognizing that success in such a business depends greatly on contacts and one's reputation. The adjudicator emphasizes the particular impact on the applicant because he lives and works in a small centre. It would appear however; that the Tribunal did not consider the further potential damage to the applicant's reputation that would occur once this decision was posted on CanLii. The applicant's name would likely be known to most members of his small community and his name and the name of the business where he worked would likely be known by members of neighbouring communities and potential future employers. If one were to search the applicant's name on CanIli without even narrowing the search to HRTO decisions, you would find15 Ontario cases with same or similar names. If one were to search the name of the respondent business only the decisions in this application would be found. Anyone with access to an internet connection would find terms such as "crack-head", "chronic addict for 23 years," "relapses", "crack-houses", "crack-heads are

[67] Human Rights Tribunal Ontario, Privacy Policy http://www.hrto.ca/hrto/?q=en/node/66
[68] 2010 HRTO 1909 at para 19.
[69] 2013 HRTO 583
[70] ibid para 76.

thieves" in relation to the Applicant. It is of interest to note that in this application the respondents did not even show up to the hearing.

In another application,[71] the Tribunal concluded that "the posting of confidential medical information about an applicant [in a place of employment] was discriminatory because it stigmatized her and poisoned her work environment." [72] The breach of confidence occurred when a notice was posted on a bulletin board of a members' club. The notice began with the heading, "Attention members". The notice describes the physical and mental health disabilities of the applicant and the fact the "insurance company will not cover any employee who does not have complete medical clearance to work"[73].

Despite the conclusion that the applicant experience discrimination as a result of the breach of her confidential medical information in the posting, the Tribunal decision repeats the contents of the notice verbatim. In addition, the Tribunal decision describes how the applicant's friend and co-worker, who was a witness at the hearing, was having difficulties with her pregnancy and personal life. The decision details the diagnosis of her baby's disability and the fact that the child's father would not take responsibility for the pregnancy as well as other details about the witness' family life. Inputting the applicant's name as a search term in CanLii Ontario, results in only decisions on this application. The respondent members club is located in a fairly small centre. A news article about the respondent club mentioned a Human Rights Tribunal complaint but did not mention an applicant's name. If one "googles" "where do I find human rights Ontario decisions" it takes you right to CanLii.

One also might consider whether it is necessary to provide details about personal information in the Tribunal's interim decisions. In one summary dismissal decision[74] the HRTO included details about an applicant's mental health disability including the fact that he had disappeared and had not contacted his family for several days, found himself in another city and had suicidal ideations in its reasons for finding that the application did have a reasonable prospect of success.

Does the open court principle need to be interpreted to mean that the HRTO's decisions are to be posted on publicly available online sites without any redaction?

The Supreme Court's Chief Justice thinks we need to reconsider the strict application of the open courts principle. Canada's former Privacy Commissioner claims that "administrative tribunals *can* remain transparent and open about their

[71] 2011 HRTO 1032
[72] Ibid para 143
[73] ibid para 49
[74] 2012 HRTO 1736

functioning *without* disclosing personal information in their reasons for decision. This can be done by omitting the names of the parties or by removing personal details."[75]

Alberta Court of Queen's Bench recently changed its practice of publishing certain types of judgments on the Court's website, including decisions under the *Child Welfare Act*, the *Dependent Adults Act*, the *Divorce Act*, the *Domestic Relations Act*, and the *Matrimonial Property Act*.[76] Court hearings remain open and decisions are available upon request at the Court's offices.

In June 2008, the Saskatchewan Automobile Injury Appeal Commission adopted a new policy to use only initials of appellants in the current and archived reports published on its website and through Canlii. The non-redacted reports are still available to the public in the office of the Commission.[77]

The Canadian Judicial Council has published a number of documents addressing the balancing of the open court principle and the need to protect privacy with advances in technology and public openness.[78]

In his 2008 address to the Canadian Bar Association, David Loukidelis, Information and Privacy Commissioner for British Columbia stated:

> To address privacy considerations, an administrative tribunal's reasons for decision should exclude personal information unless the reasons would not be adequate without that information. After drafting their reasons, decision makers should evaluate, as part of the process of revision and editing, whether individuals are identifiable and whether the information that identifies them is necessary for explaining the reasons for a decision. Properly implemented, this approach will protect privacy of parties and witnesses while preserving intelligibility and adhering to the principle of openness.[79]

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[75] Remarks at the Supreme Court of British Columbia Education Seminar, November 9, 2011, Vancouver, British Columbia Address by Jennifer Stoddart, Privacy Commissioner of Canada http://www.priv.gc.ca/media/sp-d/2011/sp-d_20111109_e.asp

[76] R. Gary Dickson, "Administrative Tribunals, Privacy and the Net" (2009) at 5 , online: http://www.oipc.sk.ca at page 8

[77] Ibid p 15

[78] See for example, *Open Courts, Electronic Access to Court Records and Privacy :* http://www.cjc-ccm.gc.ca/english/news_en.asp?selMenu=news_pub_techissues_en.asp. Others can be accessed on the Canadian Judicial Counsel website http://www.cjc-ccm.gc.ca/english/news_en.asp?selMenu=news_pub_techissues_en.asp

[79] David Loukidelis, Information and Privacy Commissioner for British Columbia, "Beyond the Horizon: The Expanding and Overlapping Jurisdiction of Arbitrators & Tribunals", Canadian Bar Association, National Administrative Law & Labour and Employment Law CLE Conference, November 22, 2008, Fairmont Château Laurier Hotel, Ottawa, Ontario Page 15-16

Practice at other Tribunals within the Social Justice Tribunals Ontario

All Tribunals, other than the HRTO, that are part of the Social Justice Tribunals Ontario[80] cluster take steps to anonymize decisions.

According to an October 2013 Communiqué of the Social Benefits Tribunal, "Publication of [Social Benefits]Tribunal decisions will occur after the decision has been issued to the parties and following the removal of personal information. All proceedings before the Tribunal are private and the Tribunal will ensure that decisions are anonymized before they are forwarded for publication." [81]

The Landlord and Tenant Board makes a selection of its decisions available on CanLii. All personal identifiers for the tenant and the landlord are removed from published decisions. Information on the Board's website states, "The Board's redacted orders comply with the provisions of the Freedom of Information and Protection of Privacy Act."[82]

Workplace Safety and Insurance Appeals Tribunal

A notice found on the website[83] of the Workplace Safety and Insurance Appeals Tribunal reads:

> **Protecting Worker and Employer Privacy**
> **Removing names and personal identification from decisions**
>
> The Tribunal generally anonymizes the names of parties and witnesses, as well as names of coworkers and supervisors. Information that could indirectly reveal the identity of parties and witnesses is also anonymized e.g. names of small towns, names of family, and friends. WSIAT and WSIB claim numbers are also anonymized.
>
> **Providing decisions (case law) for the community**
>
> The Tribunal provides an accessible appeal system and easy access to information about compensation law.
> The Tribunal maintains a database of all its decisions on the internet in accordance with these guiding principles.

[80] Social Justice Tribunals (SJTOs) in Ontario consist of the Child and Family Services Review Board (CFSRB), Custody Review Board (CRB), HRTO, Landlord and Tenant Board, Ontario Special Education Tribunals for both English and French and the Social Benefits Tribunal. See Social Justice Tribunals Ontario, "About Us" online: http://www.sjto.gov.on.ca/english/default.html
[81] Social Benefits Tribunal, Communiqué http://www.sbt.gov.on.ca/Page16.aspx
[82] Landlord and Tenant Board, Redacted Orders http://www.ltb.gov.on.ca/en/Law/251048.html
[83] Workplace Safety and Insurance Appeals Tribunal, Protecting Worker and Employer Privacy http://www.wsiat.on.ca/english/appeal/protectPrivacy.htm

The identity of the employer or worker is not necessary for ensuring that the public understands the reasons for Tribunal decisions and the principles of Workplace Safety and Insurance law.

Law

The Tribunal is subject to confidentiality provisions in Workplace Safety and Insurance Act (WSIA).

The Tribunal is subject to the Freedom of Information and Protection of Privacy Act (FIPPA). Under this legislation, personal information, defined as information about an identifiable individual, can only be released to the public in limited circumstances.

Might this Become a Choice of Forum Issue?

Choice of forum and issue estoppel considerations under section 45.1 of the Code are discussed in a paper prepared for this Human Rights Update. Another choice of forum issue that you may need to discuss with clients is around maintaining privacy. Take for example, a client with a disability who receives income from the Ontario Disability Support Plan and who has been cut-off from this income because she did not provide all the information that was demanded through an annual update. The client has a mental health disability and the lack of support and communication from the ODSP office created barriers for her to access and provide this information. The client may have an option of raising the human rights arguments at the Social Benefits Tribunal where her private information will remain confidential. However, she may wish to pursue some systemic public interest remedies through an HRTO application. However, in doing so she would risk a breach of her privacy even if only interim decision were released on her application and the application then settled.

The same dilemma could arise for a tenant who is alleging a breach of his Code protected-rights by his landlord or an injured worker alleging a breach by his employer if they were to consider filing an HRTO application.

When the authors have discussed the issues that we raise in this paper with others, many are intrigued and admit that they have not really thought that much about this. Perhaps the same is true of the Associate Chair and Vice-Chairs at the HRTO. However, when adjudicators are deciding that respondents have breached the Code in failing to maintain the privacy of persons with disabilities, should they not have an obligation to consider whether the public release of their own decisions further breach the rights of parties and witnesses and infringe Ontario's protection of privacy laws?