Access to Information in Administrative Tribunals:
Toronto Star Newspaper Ltd. v The Attorney General of Ontario

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> *On Monday, the Toronto Star launched a legal challenge aimed at ending blanket secrecy in the provincial tribunal system that shrouds public records — about alleged human rights abuses, police misconduct, environmental offences and landlord-tenant disputes — from the view of Ontarians.*
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> *We often can't tell you the stories that unfold in tribunal hearing rooms because journalists, researchers, lawyers, academics and the public are frequently denied access to tribunal records.*
>
> *The enshrined legal principle of openness in our courts — the hallmark of judicial proceedings — is a fiction when it comes to tribunals.*
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> -- Toronto Star, Editor's Note, February 7, 2017

On February 6, 2017, the Toronto Star launched a *Charter* challenge to the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). The Star argues that the application of FIPPA to administrative tribunals restricts access to tribunal adjudicative records, thereby undermining the open court principle and unjustifiably infringing s. 2(b) of the *Charter*. [1] In addition to seeking a declaration that FIPPA's application to administrative tribunals is unconstitutional, the Star seeks a declaration that administrative tribunals are subject to the open court principle, making their proceedings and records presumptively open to the public.[2]

The Star's application is scheduled to be heard by the Superior Court on April 4-6, 2018 and raises important implications for the functioning of administrative tribunals. In particular, as administrative tribunals come to occupy an ever-more dominant role in our justice system, this case asks how best we can maintain transparency and accountability in the administrative

[1] The Star specifically challenges the application of FIPPA to the following administrative tribunals: the Ontario Securities Commission, the Environmental Review Tribunal, the Ontario Civilian Police Commission, the Human Rights Tribunal of Ontario, the Ontario Municipal Board, the Financial Services Tribunal, the Health Professions Appeal and Review Board, the Landlord and Tenant Board, the Criminal Injuries Compensation Board, the License Appeal Tribunal, the Ontario Energy Board, the Workplace Safety and Insurance Appeals Tribunal, the Mining and Lands Commissioner, the Ontario Labour Relations Board, and the Pay Equity Hearings Tribunal.

[2] Note that the Star's challenge is about, and the remedial orders it seeks are limited to, the 15 administrative tribunals listed above.

justice system on the one hand, while ensuring that administrative tribunals continue to be able preserve the privacy interests of their participants on the other.

To date, only the Star's factum has been filed.

Background

At the factual centre of the Star's challenge are the accounts of two Star reporters, Michele Henry and Robert Cribb, when attempting to access records of proceedings before administrative tribunals (the Human Rights Tribunal of Ontario (the "HRTO") and the Ontario Labour Relations Board (the "OLRB"), respectively).

The experiences of both reporters can be summarized briefly.

In 2015, Michele Henry was investigating the prevalence of sexual harassment in Toronto restaurant kitchens, and sought information about a case that was currently before the HRTO. The case involved a sexual harassment claim filed by a female pastry chef against her three male superiors. Henry experienced numerous roadblocks in her efforts to obtain information about, and records related to, the proceeding. Specifically, according to the Star's factum, the HRTO refused to confirm the existence of the case or to provide her with the parties' pleadings. Rather, the HRTO informed Henry that she could file a freedom of information ("FOI") request to obtain the documents, but that "she wasn't going to get them".

Henry eventually learned the applicant's identity and the applicant shared her application directly with Henry. Upon learning Henry had obtained the application, the HRTO advised her that she could not use the application for journalistic or publication purposes. Despite this, Henry published articles about the case and, as the Star explains in its factum, "generated a nation-wide public discussion about the issue of sexual harassment in restaurant kitchens and spurred the Ontario government into addressing sexual harassment and violence in the hospitality industry."

Robert Cribb had a different experience. In 2014, Cribb was investigating alleged improprieties involving the Labourers' International Union of North America (LIUNA) and its Local 183. As part of his investigation, Cribb sought access to records of proceedings before the OLRB involving LIUNA. While initially the OLRB facilitated Cribb's access to the records, it denied Cribb's further request to review additional case files and explained that the previously disclosed records may have been released in error and in violation of FIPPA. The OLRB asked the Star to return and not use any previously released information.

The Star appealed both the OLRB's decision to refuse to provide further access to its records, and its "unprecedented request to return public hearing records" to the Information and Privacy Commissioner ("IPC"). In its submissions before the IPC, and despite its earlier decision to refuse access, the OLRB took the position that the records "were not under the custody or control of the Board as a FIPPA institution, but were under the exclusive jurisdiction of the Board acting as a tribunal", and that "FIPPA does not apply to the Board acting as tribunal." In light of the Board's position, the Star did not pursue its IPC appeal and instead decided to commence its "broad-based legal challenge to the application of FIPPA to Ontario tribunals."

To build its case, the Star sent reporters to a number of administrative tribunals in order to illustrate the obstacles and inconsistent practices reporters face when attempting to obtain information about tribunal cases. Reporters attempted to attend hearings and to access docket lists and adjudicative records and, according to the Star, "encountered a complex and incoherent system, rife with restrictions."

Legal arguments

A. Toronto Star's Argument

At the core of the Star's constitutional challenge to FIPPA is the premise that the open court principle should apply to administrative tribunals. As the Star argues, s. 2(b) affirms the common law principle of openness and "guarantees the freedom of Canadians to express ideas

and opinions about the operation of the courts, as well as the right of members of the public to obtain information about the courts in the first place." In the Star's view, s. 2(b) guarantees these same rights vis-à-vis administrative tribunals. By imposing limits on the public's ability to access information in the hands of administrative tribunals, the Star argues, FIPPA restricts the core values protected by s. 2(b).

In making this argument, the Star relies on the Supreme Court of Canada's decision in *Canadian Broadcasting Corporation v New Brunswick (Attorney General)*, [1996] 3 SCR 480, in which the SCC recognized that "[a]s a vehicle through which information pertaining to these courts is transmitted, the press must be guaranteed access to the courts in order to gather information." The Supreme Court explained:

> Measures that prevent the media from gathering that information, and from disseminating it to the public, restrict the freedom of the press. To the extent that such measures prohibit public access to the courts and to information about the courts, they may also be said to restrict freedom of expression insofar as it encompasses the freedom of listeners to obtain information that fosters public criticism of the courts.

Justice La Forest, writing for the court, made it clear that "freedom of the press is, and must be, largely unfettered."

The Star contends that the same principles of openness apply to tribunals exercising judicial functions. As the Star argues, as a result of the expansion of the administrative state, more and more administrative tribunals now resolve disputes that previously came within the purview of the courts. Administrative tribunals deal with matters that were once within the jurisdiction of courts or that would be within the jurisdiction of courts if the tribunal did not exist. Tribunals act judicially by conducting hearings, granting orders and making decisions affecting people's rights. As such, the openness principle should apply with equal force to their proceedings and records.

The Star asserts that FIPPA impairs the openness of administrative tribunals and the rights protected by s. 2(b) in the following ways (as summarized in its factum):

- despite holding hearings in public pursuant to the *Statutory Powers Procedure Act* ("SPPA"), the application of FIPPA to the Tribunals means that access to all adjudicative "records" – pleadings, exhibits, dockets and others – is only through the FIPPA process, resulting in delays and preventing timely and effective public scrutiny;

- the FOI process is lengthy, expensive, and often feels surreal, or Kafkaesque – "having a nightmarishly complex, bizarre, or illogical quality";

- if and when records are eventually disclosed, they are in redacted form, often heavily redacted, to prevent disclosure of identifying "personal" and third-party information pursuant to FIPPA. In short, "too little, too late"; and

- the integrity of the evidentiary process, and public scrutiny and accountability, fostered by openness is frustrated if the public (and its surrogate, the media) cannot know, or follow, which cases and litigants are engaged in the system. Effective public scrutiny is impossible.

In short, the Star argues that "FIPPA prevents public access to Tribunal adjudicative records altogether, or, if access is granted, it impairs timely, full, and meaningful access." In so doing, the Star claims, FIPPA "creates a fundamental infringement of s. 2(b) of the *Charter* because it seriously impairs the public's right to know and receive information about Tribunal adjudicative proceedings, where the impact of their decisions 'on the lives of individual Canadians is great and likely surpasses the direct impact of the judiciary.'"

Further, the application of FIPPA to administrative tribunals fails the *Oakes* test, the Star contends, and does not constitute a reasonable limit under s. 1 of the *Charter*. The Star claims that "[a] broad assertion of privacy protection and a blanket prohibition on personal information in the context of open judicial [decision]-making is simply incoherent and is not a pressing and substantial objective." Even accepting that there is a pressing and substantial objective and that FIPPA's application to tribunals is rationally connected to that objective, the

Star argues that FIPPA's application to tribunals does not minimally impair s. 2(b) and that the deleterious effects of its application outweigh any salutary benefits.

On the issue of proportionality, the Star asserts that "[t]he exemptions in FIPPA and the broad definition of 'personal information' are often used to resist, and even prevent, disclosure of tribunal adjudicative records." In the Star's view, without access to identifying information, the media's ability to follow a case and verify information is greatly impaired. This, in turn, limits the public's right to know what is happening in administrative tribunals. The delay and expense associated with the FOI process also erode transparency and accountability. The Star maintains that the deleterious effects of FIPPA's application to tribunals are "real and substantial" while the salutary benefits are "speculative". FIPPA, the Star argues, "is a blunt and unnecessary instrument that imposes an unworkable one-size-fits-all model" on tribunals, and prevents these quasi-judicial decision making bodies from deciding questions of openness and privacy for themselves on a case-by-case basis.

B. The Attorney General's Argument

To defeat the Star's application, the Attorney General of Ontario must establish that the Star has failed to prove any infringement of s. 2(b) or, in the alternative, that any infringement is justifiable under s. 1. While the Attorney General has not yet filed its factum, it is reasonable to expect that it will make a number of key arguments.

First, the Attorney General will likely assert that the constitutionally enshrined principle of open courts has limited application to administrative tribunals. Administrative tribunals are legally – and constitutionally – distinct from courts. They do not exercise the constitutionally independent powers of the judicial branch. Instead, they exercise delegated executive authority. The fact that, practically speaking, such tribunals exercise certain powers analogous to those exercised by courts does not – and should not – make their proceedings and records automatically subject to the same legal principles and standards as courts. Administrative tribunals are "designed to be less cumbersome, less expensive, less formal and less delayed"

than courts.[3] These distinctions, the Attorney General may argue, should make a difference with respect to the applicability of the open courts principle and FIPPA.

Second, it is reasonable to expect that the Attorney General will question the legal framework the Star proposes for the s. 2(b) analysis. In *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 SCR 815, the Supreme Court addressed whether certain limitations imposed by FIPPA breached s. 2(b) and dealt squarely with "whether s. 2(b) protects access to information and, if so, in what circumstances".[4] While the Star will seek to distinguish the case (arguing that it was about obtaining governing information, not tribunal records), the Supreme Court was clear that "[s]ection 2(b) guarantees freedom of expression, not access to information" (emphasis added). Rather, "[a]ccess is a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government." The Supreme Court adopted a two-step approach to determining whether s. 2(b) is engaged at all:

> To demonstrate that there is expressive content in accessing such documents, the claimant must establish that the denial of access effectively precludes meaningful commentary. If the claimant can show this, there is a *prima facie* case for the production of the documents in question. But even if this *prima facie* case is established, the claim may be defeated by factors that remove s. 2(*b*) protection, e.g. if the documents sought are protected by privilege or if production of the documents would interfere with the proper functioning of the governmental institution in question. If the claim survives this second step, then the claimant establishes that s. 2(*b*) is engaged. The only remaining question is whether the government action infringes that protection.

The Attorney General may well argue that this framework, rather than the analysis that flows from the presumptive application of the open court principle, should govern the outcome of the Toronto Star's application.

[3] *Rasanen v Rosemount Instruments Ltd.* (1994), 17 OR (3d) 267.
[4] *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 SCR 815, at para 30.

The Attorney General will also likely challenge the evidentiary foundation of the Star's claim that FIPPA's application to administrative tribunals has in fact infringed s. 2(b). In Schedule "C" of its factum, the Star outlines the practices and responses it encountered when it sent reporters to the 15 tribunals at issue in its application. In many cases, the Star faced few, if any, obstacles to access. All but one of the administrative tribunals at issue hold public hearings.[5] And the Star's reporters faced no obstacles in obtaining access to adjudicative records from the Ontario Securities Commission, the Environmental Review Tribunal, the Ontario Civilian Police Commission, the Ontario Municipal Board, the License Appeal Tribunal, the Ontario Energy Board and the Office of the Mining and Lands Commissioner. Most of these tribunals also publish their dockets on their website and make their decisions publicly available on their website and/or on CanLII.

Finally, in the event the court concludes that there has been an infringement of s. 2(b), the issue becomes whether the limits imposed by FIPPA ought to be upheld under s. 1. Presumably, the Attorney General will assert that FIPPA's application to administrative tribunals furthers the pressing and substantial objective of facilitating transparency while protecting privacy, and that the limitations FIPPA imposes satisfy the three-step proportionality test. The Attorney General may emphasize that administrative tribunals address matters involving heightened privacy interests and deal with vulnerable populations, who are often unrepresented and have limited financial means and may, therefore, not be in a position to ask for the privacy protections to which they may otherwise be entitled. The Attorney General will also likely rely on affidavit evidence that it says establishes that, without FIPPA's privacy protections, many would-be tribunal complainants will not come forward. Such a significant "chilling effect", the Attorney General may argue, risks undermining, rather than upholding, the integrity of the administration of justice in Ontario.

[5] The Workplace Safety and Insurance Appeals Tribunal is not subject to the SPPA and does not hold public hearings.

C. Interveners

A number of tribunals and organizations have intervened in the Star's application. The interveners include: the Workplace Safety and Insurance Appeals Tribunal; the Ontario Judicial Council; Justice for Children and Youth; LIUNA, Local 183; the Information and Privacy Commissioner of Ontario; ARCH Disability Law Centre; the HIV & AIDS Legal Clinic of Ontario; the Income Security Advocacy Centre; and Canadian Journalists for Free Expression. No intervener factums have yet been filed.

Implications

Leaving aside the specific factual and legal questions the court must answer in order to resolve the Toronto Star's application, more generally, the Star's application invites consideration of important and timely questions: as administrative tribunals come to occupy an ever-more dominant role in our justice system, how best can we maintain transparency and accountability? To what extent do the similarities and differences between courts and administrative tribunals affect the application of openness and other core *Charter* principles? What is the right balance between openness and privacy? Should the openness principle adapt to the new privacy risks of the internet-age (risks that were unimaginable when the principle was first formulated)? If so, how?

While we must wait to see how the court answers these questions, we will comment briefly on the themes they raise.

Transparency ensures the legitimacy and accountability of our justice system. As the Supreme Court recognized in *Re Vancouver Sun*, 2004 SCC 43, [2004] 2 SCR 332, at para 25:

> 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.

Administrative tribunals have come to occupy an increasingly significant role in the administration of justice in this country. Today, "[m]any more citizens have their rights determined by these tribunals than by courts."[6] As a result, the transparency of administrative tribunals shapes the integrity of the justice system more broadly and is therefore of tremendous importance in contemporary society.

It has always been the case, however, that transparency and openness in our justice system – whether in the courts or in tribunals – must be balanced against the privacy interests of litigants and witnesses. Courts have long recognized, for example, the overriding privacy interests of many young persons, sexual abuse complainants, and family dispute litigants.

Striking the right balance between openness and privacy is especially important in the 21st century. It used to be that the "practical obscurity" of paper-based records – accessible only by attending courthouses and digging through stacks of dusty boxes – favoured privacy protection. Only those with a particular interest in a case were committed enough to make the effort required to obtain information about it.[7] But that is no longer the case. As Patricia Kosseim, Senior General Counsel at the Office of the Privacy Commissioner of Canada, explains: "virtually everyone has rapid, pervasive, and persistent access to decisions literally at the tip of their fingers and from the cozy comfort of their couch – for just about any purpose, including the salacious curiosity of a neighbour, voyeurism, embarrassment of others, or even more insidious cases such as fraud, stalking, intimidation, extortion and so forth."[8]

Former Chief Justice Beverley McLachlin made a similar point in a 2003 speech: "the technological advances of recent decades have put new pressures on the open court principle

[6] *Cooper v Canada (Human Rights Commission)*, [1996] 2 SCR 854, at para 70.
[7] Remarks of Patricia Kosseim, Senior General Counsel at the Office of the Privacy Commissioner, "Balancing Transparency, Privacy and Expediency in Administrative Proceedings: Finding the Sweet Spot in a Digital Age", accessible at <https://www.priv.gc.ca/en/opc-news/speeches/2016/sp-d_20160204_pk/>.
[8] *Ibid*.

and have created new dilemmas for the courts, the media and the public."[9] Among those dilemmas is the "enormous loss of privacy" that can accompany the open court principle today. As Justice McLachlin explained:

> The right 'to be let alone' and to define a protected sphere of individual autonomy within which neither one's neighbours nor the state can intrude without permission, is an important aspect of fundamental human dignity. In Canada, as in other countries, we have come to recognise that the right to privacy has constitutional dimensions. The facility with which modern media and communication networks can intrude into people's lives has increased our awareness of the importance of our interest in privacy. In the past, technical barriers to the mass collection and distribution of information offered limited but effective protection of the privacy of participants in the justice system. Now that protection has disappeared.
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> In Bentham's day, the open court principle meant limited loss of privacy. In the era of 21st century technology, it can mean an enormous loss of privacy.[10]

The Canadian Judicial Council has likewise recognized the concerns that openness occasions in the era of 21st century technology. As the Council writes in its "Model Policy for Access to Court Records in Canada":

> The "practical obscurity" fostered by paper-based records has meant that records were difficult and costly to obtain, search and link with other documents. This has meant that purposes unconnected with the accountability of the judicial system, and which could have a serious negative impact on other constitutional values, have largely not been pursued by members of the public. However, the move toward a digital environment brings such possibilities to the fore. Furthermore, the digital environment permits the linking and aggregation of personal information, which can make privacy and security concerns stronger than in a paper-based environment.[11]

[9] Remarks of the Rt. Hon. Beverly McLachlin, P.C., "Courts, Transparency and Public Confidence – To The Better Administration of Justice", accessible at <http://www.austlii.edu.au/au/journals/DeakinLawRw/2003/1.html>.
[10] *Ibid*.
[11] Canadian Judicial Council, "Model Policy for Access to Court Records in Canada" (2005), at para 19, accessible at <https://www.cjc-ccm.gc.ca/cmslib/general/news_pub_techissues_AccessPolicy_2005_en.pdf>.

As the litigation of the Toronto Star's application will almost surely reveal, reconciling the competing interests of openness and privacy, especially in today's media landscape, is no straightforward task.

The Star's application invites us to consider whether these competing values should be reconciled any differently in the tribunal, rather than the court, context. Administrative tribunals resemble courts in some respects: they determine individuals' legal rights and duties by the application of statutory standards to the facts of a particular case and are bound by a code of procedure (the SPPA) that is for the most part a stripped-down version of court procedures. On the other hand, constitutionally, administrative tribunals form part of the executive, not the judicial branch, and some are much more policy-oriented than courts. They are also intended to be more accessible and informal, less expensive and speedier than courts.

Further, administrative tribunals are not all of a piece. Unlike courts, each was created and designed to adjudicate disputes arising from the implementation of a particular statutory scheme. While some administrative tribunals may address matters that engage comparatively insignificant privacy concerns, many others address intensely personal or private matters that engage heightened privacy interests. Some tribunals address matters that reveal parties' physical and mental health, gender identity, personal finances and socio-economic difficulties, experiences of abuse and/or harassment, home addresses and residential details and other deeply personal information, raising concerns about stigma, emotional harm and reputational damage. Still other tribunals may address disputes that, while not involving intimate personal details, if made publicly available today, might undermine the tribunal's ability to further core statutory and policy-oriented objectives, such as promoting labour relations harmony.

And while it is for the court to assess the strength of the Attorney General's evidence regarding the "chilling effect" open access would have on tribunal litigants, this concern deserves careful consideration. Echoing remarks by Privacy Commissioner Jennifer Stoddart in a 2011 talk, although advancing openness is intended to increase access to justice, it can have the "ironic

consequence of deterring participation in the justice system, which actually frustrates the objective of access."[12]

Of course, courts also address intensely personal and private matters between litigants and yet their proceedings and records are presumptively open and accessible. The courts have decided that a case-by-case application of the *Dagenais/Mentuck*[13] test represents the best way to reconcile openness with privacy. Whether this same approach should, as the Star proposes, apply equally to administrative tribunals or whether, instead, FIPPA marks the appropriate balance in the tribunal context is a matter for the Superior Court to decide.

It is worth returning to the Justice McLachlin's remarks on openness and privacy. As Justice McLachlin instructs:

> In an age of mass media, electronic filing, and online access to court documents, it is becoming ever more difficult to reconcile concerns for the privacy, reputation and the well-being of individuals engaged in the justice system, with the principle of the open and public administration of justice. If we are serious about peoples' private lives, we must preserve a modicum of privacy. Equally, if we are serious about our justice system, we must have open courts. The question is how to reconcile these dual imperatives in a fair and principled way.

Whatever the outcome of the Toronto Star's application, the court's decision will provide critical guidance to the press, parties, witnesses and the tribunals themselves about how best these dual imperatives are to be reconciled, and what application FIPPA has to administrative tribunals.

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[12] Remarks of Jennifer Stoddart, Privacy Commissioner of Canada, "Open Courts and Privacy Law in Canada", accessible at <https://www.priv.gc.ca/en/opc-news/speeches/2011/sp-d_20111109/>.

[13] The *Dagenais/Mentuck* test provides that restrictions on the open court principle may be ordered when: "(a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice": see *Dagenais v Canadian Broadcasting Corporation*, [1994] 3 SCR 835 and *R v Mentuck*, 2001 SCC 76, [2001] 3 SCR 442.