SUBMISSION OF THE CANADIAN BAR ASSOCIATION (BC BRANCH)

TO THE

BRITISH COLUMBIA HUMAN RIGHTS TRIBUNAL

REGARDING CONSULTATION ON
COMPLAINT FILES
AND
FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY

Issued by:

Canadian Bar Association
British Columbia Branch
Freedom of Information
& Privacy Law Section
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PREFACE

Formed in 1896, the purpose of the Canadian Bar Association (British Columbia Branch) (the "CBABC") is to:

- Enhance the professional and commercial interests of our members;
- Provide personal and professional development and support for our members;
- Protect the independence of the judiciary and the Bar;
- Promote access to justice;
- Promote fair justice systems and practical and effective law reform; and
- Promote equality in the legal profession and eliminate discrimination.

The CBA nationally represents approximately 35,000 members and the British Columbia Branch itself has over 7,000 members. Our members practice law in many different areas. The CBABC has established 76 different sections to provide a focus for lawyers who practice in similar areas to participate in continuing legal education, research and law reform. The CBABC has also established standing committees and special committees from time to time.

This submission was prepared by a special committee of the CBABC Freedom of Information & Privacy Law Section (the “Section”). The Section provides a forum for the exchange of information, networking and education of lawyers practising or interested in the area of freedom of information and privacy law.

The Section was assisted by Stuart Rennie, CBABC Legislation and Law Reform Officer.

The CBABC Freedom of Information & Privacy Law Section’s submissions reflect the views of the members of the CBABC Freedom of Information & Privacy Law Section only and do not necessarily reflect the views of the CBABC as a whole.

EXECUTIVE SUMMARY

To protect both privacy and freedom of expression in relation to the Tribunal's complaint files, the Section makes 4 recommendations.

The Section recommends that:

1. The open court principle should continue to govern the Tribunal's hearing process and publication of decisions.

2. The parties should be required to seek an order limiting publication if any part of the pleadings, orders and/or decision are to be redacted or withheld from access.

3. The limitation of publication of personal information in a Tribunal decision should be the exception and not the rule.

4. The Tribunal could consider preparing a guidance document on the application process that addresses potential requests to limit publication of personal information.

SUBMISSIONS

The Section is pleased to be able to provide comments to the Tribunal regarding the Tribunal's request for input about how to protect both privacy and freedom of expression in relation to its complaint files.[1]

Tribunal's Process for Complaint Files

The Tribunal's practice is set out in Rule 5 of its Rules of Practice and Procedure, Complaint Process Privacy Policy, and Public Access & Media Policy (the "Tribunal's Rules").[2] In general, the Tribunal does not make information in complaint files available to the public with some exceptions. These exceptions are:

1. The Tribunal publishes decisions that contain information from complaint files. The Tribunal's decisions are available for free to the public in 2 places: from the Tribunal's website and Canadian Legal Information Institute's website.[3]

2. After a complaint is on the hearing list, certain documents are available to the public.

3. Hearings are open to the public.

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[1] Notice November 16, 2018, http://www.bchrt.bc.ca/tribunal/notices.htm (the "BCHRT's Notice").

[2] Effective January 15, 2016 (Amended November 27, 2018), http://www.bchrt.bc.ca/shareddocs/rules/RulesOfPracticeAndProcedure.pdf

[3] The Tribunal's decision website is available at: http://www.bchrt.bc.ca/law-library/decisions/index.htm. The Canadian Legal Information Institute's website is available at: https://www.canlii.org/en/bc/bchrt/

4. If there is a judicial review, material filed in court is available to the public (unless a party gets a court order).

5. Individuals can apply for access under the *Freedom of Information and Protection of Privacy Act* (FIPPA).

Open Court Principle

The Tribunal has consistently held that its proceedings should be guided by the "open court" principles set out by the Supreme Court of Canada, as noted in *Ogura v. Lisa's and Nat's Hair Design and Pasqua*, 2004 BCHRT 288 (CanLII), as follows:

> [12] In *Guzman v. T.* (1997)27 CHRR D/349, the Tribunal held that the Tribunal's proceedings are public, subject only to limited exceptions. More recently, in *Krantz v. Sojourn Housing Co-operative*, 2004 BCHRT 14 (CanLII), the Tribunal said that the party seeking to limit disclosure bears the burden of justifying the limitation. As well, the Tribunal has consistently held that it should be guided by the principles in *Dagenais*, as summarized in *R. v. Mentuck*, 2001 SCC 76 (CanLII), [2001] 3 S.C.R. 442:
>
> A publication ban should only be ordered when:
>
> (a) such an order is necessary 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 be free of expression, the right of the accused to a fair trail [sic], and the efficacy of the administration of justice. (at para. 32)[Internet links not included].[4]

The Section recommends that the open court principle should continue to govern the Tribunal's hearing process for the following, non-limited, reasons to:

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[4] See http://canlii.ca/t/h09rg

1. Protect and uphold the administration of justice.

2. Protect access to justice.

3. Protect freedom of information in accordance with FIPPA.

Application to Limit Publication of Personal Information

The Section agrees that there may be circumstances where privacy interests can and should override the open court principle. However, the Section recommends that the parties should be required to seek an order limiting publication.

Public Use of Personal Information

Courts and labour arbitration procedures generally operate by way of an express provision or deemed undertaking that the information produced in the relevant litigation can and should only be used for the purpose of the litigation and no other purpose. This principle generally protects material produced in the litigation from improperly being misused elsewhere. The Section understands that Rule 23.1 of the Tribunal's Rules is intended to be for the same purpose. Rule 23.1 provides that a participant must not use a document obtained through the disclosure process in Part 6 of the Rules for any purpose other than the complaint process in which they were disclosed with some exceptions. In the Section's view, Rule 23.1 adequately prevents parties from making improper use of documents disclosed in the Tribunal process.

In addition, Rule 5 provides that information in the Complaint file is not made available to the public unless a person makes a successful request under FIPPA or until the matter has been placed on the hearing list. In the Section's view, this Rule adequately

balances the privacy interests of Complainants and Respondents, while protecting the open court principle in relation to the hearing process.

These Rules does not expressly address the “right” to speak publicly about a complaint, including “reproduction of a complaint or response to complaint or making public any of the information in a complaint file including, for example, medical diagnosis or other highly personal information”.[5]

While individuals acting in their personal capacity are not governed by the British Columbia *Personal Information and Protection of Privacy Act* (“PIPA”) or FIPPA, organizations and public bodies are subject to the restrictions set out in those pieces of legislation.

The Section is of the view that those pieces of legislation provide adequate privacy protections while balancing an individual’s right to access. In other words, public bodies and organizations are already subject to restrictions on disclosure of personal information. Where an individual is acting in his or her personal capacity in the Tribunal’s complaint process and is not captured by either PIPA or FIPPA, the Section’s view is that the ability to apply for an order preventing the publication of personal information is sufficient to protect privacy interests.

In *Kennedy and Beaudoin v. Strata Corporation KAS 1310 and others*, 2005 BCHRT 87 (CanLII), the Tribunal noted that anonymity orders tend to be issued only in situations where the order serves to protect the identities of minor children, where the parties consent to the order, where it is necessary to protect the identity of witnesses, or when

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[5] BCHRT’s Notice.

allegations of sexual harassment/abuse are “flagrant and explicit”.[6] The Section agrees that orders for anonymity or other protection of personal information should be limited to situations where individuals are highly vulnerable.

As above, the Section recommends that the parties should also seek an order to protect that information and explain why protection of that information overrides the open court principle. Otherwise pleadings, orders and decisions should be available to the public just as they are in court processes. The public interest in ensuring openness and transparency of the Tribunal’s processes should only yield when there are strong grounds to override that public interest. The Section recommends that limitation of publication of personal information should be the exception and not the rule.

Amendment of Forms

The Tribunal has asked if its forms should be amended to allow a party to identify information they consider requires protection.[7] In the Section’s view, this will simply lead complainants to identify all personal information as deserving of protection and this will likely unnecessarily increase costs by requiring an increased number of applications at first instance. Instead, the Section recommends that the Tribunal could consider preparing a guidance document on the application process that addresses potential requests to limit publication of personal information.

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[6] See para. 57 and see also discussion at paras. 56-57, http://canlii.ca/t/h0891

[7] BCHRT’s Notice.

CONCLUSION

The Section is pleased to discuss our submissions further with the Tribunal, either in person or in writing, in order to provide any clarification or additional information that may be of assistance.

All of which is respectfully submitted.

Sincerely,

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