CITATION: Toronto Star v Attorney General of Ontario, 2017 ONSC 7525
COURT FILE NO.: CV-17-569061
DATE: 20171218

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Toronto Star Newspapers Ltd., Applicant

– AND –

The Attorney General of Ontario and The Workplace Safety and Insurance Appeals Tribunal, Respondents

BEFORE: EM Morgan J.

COUNSEL: *Paul Schabas, Iris Fischer and Jessica Lam*, for the Applicant

Daniel Guttman and Yashoda Ranganathan, for the Attorney General of Ontario

Daniel Rosenbluth, for The Workplace Safety and Insurance Appeals Tribunal

Mary Birdsell, for Justice for Children and Youth

Jonathan Ho, for Advocacy Centre for Tenants Ontario

Jeffrey Pariag and John Bartolomeo, for Workers' Health and Safety Legal Clinic and Ontario Network of Injured Workers' Groups

William Challis, for the Information and Privacy Commissioner

Julia Lefebre and Bersenas Jacobsen, for Canadian Journalists for Free Expression

Andrew Lokan, for Ontario Judicial Council

Tyler Boggs, for Laborers' International Union of North America and LIUNA Local 183

Niiti Simmonds, Mariam Shanouda, and Khalid Janmohamed, for HIV and AIDS Legal Clinic Ontario, ARCH Disability Law Centre, and Income Security Advocacy Centre

HEARD: December 15, 2017

MOTIONS FOR LEAVE TO INTERVENE

[1] This Application involves a *Charter* challenge to the application of the *Freedom of Information and Protection of Privacy Act* ("FIPPA") to various administrative and quasi-judicial tribunals in Ontario and the resulting restrictions on public and media access to documents filed in

their proceedings. It raises issues of freedom of expression, freedom of the press, and the principle of open courts.

[2] A number of public interest groups, advocacy bodies, and community and professional organizations have sought leave to intervene as friends of the court under Rule 13.02 of the *Rules of Civil Procedure*. Of those, several are consented to by the parties (collectively, the "Consent Intervenors"). They are:

- ARCH Disability Law Centre, HIV & AIDS Legal Clinic Ontario, and Income Security Advocacy Centre ("ARCH")
- Laborers' International Union of North America and LIUNA Local 183 ("LIUNA")
- Information and Privacy Commissioner of Ontario ("IPCO")
- Canadian Journalists for Free Expression ("CJFE")

[3] I understand why the parties have consented to intervention by these organizations. I do not need to rule on their motions here as I have already signed Orders setting out the terms of their respective interventions. I will simply say that considering the nature of the case, the issues that it raises, and the likelihood that they will make a useful contribution to the matter, all of Consent Intervenors meet the test: *Peel (Regional Municipality) v Great Atlantic and Pacific Co of Canada Ltd.* (1990), 74 OR (2d) 164 (CA).

[4] At the hearing I asked counsel for each of the Consent Intervenors to identify which side of the Application they generally support. Not surprisingly, counsel for ARCH and counsel for LIUNA indicated that they support the Attorney General of Ontario in seeking to preserve confidentiality for administrative tribunals. Equally unsurprisingly, counsel for CJFE indicated that her client supports the Applicant in advocating for increased access to tribunal records by the press. As for the IPCO, its counsel stated that his client was somewhere in between the two sides, and has a nuanced position on the complex policy issues around privacy and access to information.

[5] I would also point out that The Workplace Safety and Insurance Appeals Tribunal ("WSIAT") is a named party, but is in a similar position as an intervenor. That is, it is not responsible for the legislation being challenged the way the Attorney General is, but rather is a representative tribunal governed by the challenged policy. It has expertise and a distinctive viewpoint that it will bring to bear on this case in much the same way as an intervenor does. It supports the position of its co-Respondent, the Attorney General of Ontario.

[6] I turn now to the proposed intervenors to which the parties do not consent, or, more accurately, to which the Applicant does not consent. Counsel for the Attorney General raises no objection to their participation. They are:

- Advocacy Centre for Tenants Ontario ("ACTO")
- Workers' Health and Safety Legal Clinic and Ontario Network of Injured Workers' Group ("WHSLC")

- Ontario Judicial Counsel ("OJC")
- Justice for Children and Youth ("JCY")

[7] Each of these must be addressed in turn. However, as a general rule, and in addition to the test set out in *Peel v Great Atlantic, supra*, it is helpful to recall the guidance provided by the Court of Appeal in *Bedford v Canada (Attorney General)* (2009), 98 OR (3d) 792, at para 2:

> Where the intervention is in a *Charter* case, usually at least one of three criteria is met by the intervenor: it has a real substantial and identifiable interest in the subject matter of the proceedings; it has an important perspective distinct from the immediate parties; or it is a well-recognized group with a special expertise and a broadly identifiable membership base.

[8] Accordingly, in constitutional litigation there is a somewhat relaxed standard when it comes to interventions by public interest groups. This approach "ensures that the court will have the benefit of various perspectives of the historical and sociological context, as well as policy and other considerations that bear on the validity of legislation": *Authorson (Litigation Guardian of) v Canada (Attorney General)* (2001), 147 OAC 355, at para 7 (CA).

[9] That said, it is worth noting the gloss placed on this in *Trinity Western University v Law Society of Upper Canada*, 2014 ONSC 5541. Nordheimer J. (as he then was) explained, at para 6, that "if the criteria in *Bedford* were to be read literally…an organization that was, for example, a well-recognized group with a special expertise and broadly identifiable membership base would gain status as an intervener even though they did not offer a perspective different from that of the parties." Citing *R v Finta*, [1993] 1 SCR 1138, he concluded, at para 7, that no matter what their credentials as an organization, "a proposed intervener must still satisfy the basic requirement that their participation will result in them making a useful and distinct contribution not otherwise offered by the parties."

[10] Justice Nordheimer further admonished against the piling-on effect of multiple intervenors stacked up on one side of the case. He indicated that, "the court should take into account the general desire that there should, in the end result, be some balance between the positions to be advocated when granting intervener status": *Trinity Western, supra*, at para 10. The point of the exercise is not just to hear numerous societal voices, but to ensure the usefulness, distinctiveness and balance of those voices. The expertise and experience of proposed intervenor groups is important in a *Charter* case, as long as each makes a useful contribution that is not repetitive of the party they support or the other intervenors on their side.

[11] Of the parties whose intervention is contested, ACTO and WHSLC are the closest to each other and to WSIAT and two of the Consent Intervenors. Like ARCH and LIUNA, these two proposed intervenors represent the advocacy interests of identifiable constituencies who are impacted by the work of the tribunals in issue. Much like the people served by ARCH, those served by ACTO are particularly sensitive to the disclosure of personally confidential information. While ACTO's constituency of tenants and ARCH's constituency of disabled, HIV positive, and low-income people are defined with different parameters, they all represent disadvantaged and vulnerable groups of Ontarians.

[12] ACTO is most concerned about the stigma associated with public disclosure of personal information for a tenant who is fighting a landlord. Counsel for ACTO submits that issues of tenant blacklisting and the overall chilling effect of public disclosure via the press are within its areas of experience and its contribution to this case will reflect that experience. In much the same way, ARCH is highly concerned with the stigma associated with public disclosure of medical and financial records of its membership. Counsel for ARCH will make submissions at the hearing along the same lines as those proposed by counsel for ACTO – that is, outlining the stigmatization and chilling effect that comes from being identified in the press as a member of the several groups that have formed this intervention coalition.

[13] In addition, it has been pointed out to me that the affidavit materials filed by the Attorney General already contain an affidavit describing the practice of tenant blacklisting in New York, where the kind of transparency sought by the Applicant apparently already exists. ACTO's response is to advise the court that it will be able to talk about a case of Ontario blacklisting that is similar to the incidents described in the Attorney General's materials. That is, the Attorney General will be able to discuss the policy ramifications of increased media access in terms of tenant blacklisting, and ACTO will likewise be able to discuss the policy ramifications of increased media access in terms of tenant blacklisting. While the Attorney General has collected evidence to support this submission from a jurisdiction where the blacklisting phenomenon is prevalent, ACTO proposes to discuss this by bringing an example from Ontario.

[14] This is all very interesting since the Application will require the court to weigh competing policy concerns, particularly under section 1 of the *Charter*. Given, however, that none of this arises in the course of an actual blacklisting case, ACTO's proposed addition to the position taken by the Attorney General amounts to a distinction without a difference. The policy challenges presented by this case can be illustrated in various factual contexts and across jurisdictions. The value added by each intervenor is to expand and deepen the policy debate, not just to provide one more factual context in which the points that have already been made can be further illustrated.

[15] The same may be said when comparing LIUNA with WHSLC. They both reflect the apprehensiveness of workers to the possibility of increased public disclosure of personal information and workplace disputes. Again, while the constituencies are defined differently and no doubt have factually distinctive concerns – LIUNA represents unionized workers while WHSLC represents non-unionized workers – the principles that they embrace are virtually the same. Their worker constituencies fear blacklisting and the potential for being rendered unemployable if their employment grievances and disputes identify them personally in the press. Like WSIAT, which as indicated is a full party to this Application, they also have concerns about confidentiality of health and family information that may be part of the record in workplace-oriented administrative tribunals.

[16] The concerns raised by ACTO and WHSLC are legitimate concerns. However, as a matter of principle they are not really different from those raised by other parties or intervenors who are already in the case. The factual differences between the various constituencies represented by these proposed intervenors do not add up to differences in position or principle. The point is perhaps best illustrated by the ARCH coalition that is one of the Consent Intervenors. An HIV clinic has teamed up with a disabilities advocacy group and an Income Security clinic because their very different constituencies have the same interests in principle. It could also be said that a tenants'

advocacy clinic is in the same principled boat. Likewise, the unionized employees in LIUNA and the non-unionized employees in WHSLC are divergent constituencies who here express overlapping matters of concern. Their differences are marked when it comes to actual cases of employment and labour law, but they seem to share far more than they diverge when it comes to the principles they bring to bear on the issues in present Application.

[17] I am concerned that the list of intervenors is somewhat lopsided against the Applicant. They will be compelled to respond to intervenors' factums whose arguments may be repetitive but whose factual scenarios will be sufficiently different that counsel for the Applicant will not be in a position to let them go unanswered.

[18] As indicated at the outset, all of the proposed interveners are seeking status under Rule 13.02 as friends of the court. Accordingly, none of them will be adding to the factual record. With that in mind, I am inclined to limit the number of intervening groups whose distinction from each other is primarily factual. There are already a number of groups, including both of the Respondents, who will be arguing about concerns of personal information and confidentiality, chilling effect, and blacklisting. It does not appear to me that any more are required to make that point in this Application.

[19] As for the other two proposed intervenors – OJC and JCY – they each strike me as quite different from the parties and the Consent Intervenors. Each in their own way promises to bring a distinctive perspective that may be missing from the arguments if they are not permitted to play a role.

[20] The OJC is in the interesting position that in designing its own procedures around confidentiality it has grappled with the very issues at stake in this Application. Its counsel points out that unlike the other intervenors who are focused on and have experience with specific clinics listed in the Schedule to the Notice of Application, the OJC is not subject to FIPPA. It therefore has no direct interest in this case. Rather, its value added is that it has had to think through the issues of privacy and open adjudications from first principles. In that respect, it has much to offer in terms of expertise and uniqueness of contribution. It is not one more interest group with a factually unique constituency but with a set of concerns that are in principle the same as other groups; it is a genuine expert with a unique experience in respect of the policy issues that confront the court here.

[21] As for JCY, it is, of course, a group defined by a specific constituency. What is unique about JCY, however, is its vast experience with virtually every corner of the Ontario legal system. Of the tribunals listed in the Notice of Application, JCY is particularly experienced in dealing with young persons involved with the Human Rights Tribunal, the Criminal Injuries Compensation Board, and the Landlord Tenant Board. But the privacy concerns of children are uniquely spread across society; they are not analogous to the more narrowly defined contexts of workers and tenants.

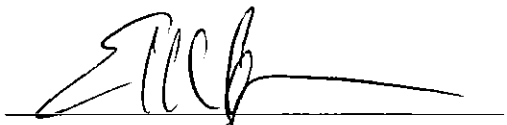
[22] Most importantly, as the country's leading youth advocacy organization JCY's concern with confidentiality is at the core of its mission. While confidentiality is an important consideration for all of the other community advocacy organizations represented in this motion, it is an aid to their rights advocacy rather than its central focus. For JCY, on the other hand, it is at the heart of

its mandate. They very essence of JCY's advocacy is to ensure that youth do not suffer from public disclosure of their legal and other problems. I can think of no group more versed in issues of privacy and access to information. I consider JCY's expertise and experience with these issues to be so extensive as to render it uniquely situated to make a useful contribution to the arguments in this case.

[23] OJC and JCY are granted leave to intervene as friends of the court.

[24] ACTO and WHSLC are denied leave to intervene.

[25] OJC and JCY will each be permitted to file a factum of no more than 20 pages. They will also each be permitted to make oral submissions at the hearing of the Application limited to 20 minutes. They will neither seek costs nor will costs be awarded against them in this Application.



Morgan J.

Date: December 18, 2017