OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report P-2015-001

June 5, 2015

Labour Relations Board

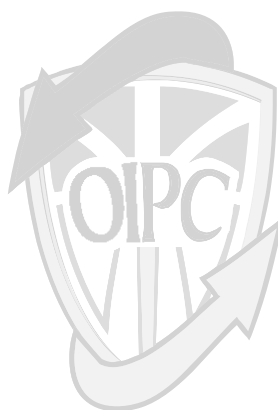
Summary: The Complainant submitted a privacy complaint under the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") alleging the Labour Relations Board inappropriately disclosed his personal information when it published a written decision containing his name. The Commissioner found that the Labour Relations Board failed to comply with sections 33 and 36 of the *ATIPPA* and made several recommendations to avoid such situations in the future.

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A-1.1, as amended, sections 33, 36, 38-40; *Labour Relations Act,* RSNL1990, chapter L-1; *Labour Relations Board Rules of Procedure*, Consolidated Newfoundland and Labrador Regulation 745/96, section 12; *Occupational Health and Safety Act,* RSNL1990, chapter O-3, section 51; *Occupational Health and Safety Regulations* Newfoundland and Labrador Regulations 5/12, section 7; section 486 of the Criminal Code.

Authorities Cited: Alberta OIPC Order F2013-14; PEI OIPC Order No. PP-10-001; National Commission for Data Processing and Liberties (France) Decision No. 01-057; R. v. *Sheppard*, 2002 SCC 26; *Vancouver International Airport Authority* v. *Public Service Alliance of Canada,* 2010 FCA 158; *Dagenais* v. *Canadian Broadcasting Corp*., 1994 CanLII 39 (SCC); R. v. *Mentuck*, 2001 SCC 76; *Toronto Star Newspapers Ltd.* v. *Ontario*, 2005 SCC 41; *Ocean Port Hotel Ltd.* v. *British Columbia (General Manager, Liquor Control and Licensing Branch*), 2001 SCC 52; *Bell Canada* v. *Canadian Telephone Employees Association*, 2003 SCC 36; *Godfrey* v. *Ontario Police Commission,* 1991 CanLII 7115 (ON SC); *Robertson* v. *Edmonton (City) Police Service (#10)*, 2004 ABQB 519; *IRAC* v. *Privacy Commissioner & D.B.S.*, 2012 PESC 25.

Other Resources Cited: Labour Relations Board website; Office of the Information and Privacy Commissioner of Saskatchewan's *Administrative Tribunals, Privacy and the Net*; Office of the Privacy Commissioner of Canada's *Electronic Disclosure of Personal Information in the Decisions of Administrative Tribunals*; Office of the Information and Privacy Commissioner of British Columbia's *Balancing Privacy and Openness: Guidelines on the Electronic Publication of Decisions of Administrative*

Tribunals; Canadian Judicial Council's *Model Policy for Access to Court Records in Canada;* Heads of Federal Administrative Tribunals Forum's *Use of personal information in decisions and posting of decisions on websites*; Canada Agricultural Review Tribunal website; Canadian Human Rights Tribunal website; Social Security Tribunal website; Public Service Labour Relations and Employment Board website; Saskatchewan Labour Relations Board website; Manitoba Labour Board website; CanLII website Privacy Policy.



I BACKGROUND

[1] On December 12, 2011, this Office received a privacy complaint against the Labour Relations Board (the "Board") regarding the disclosure of personal information, specifically the Complainant's name, in a published decision. While the Complainant understood that the Board would make details of his case public, he did not know his name would be disclosed. The complaint states, "Under recent Labour Relations Board decisions my name was disclosed. They have the right to publish the details of the case but do not have the right to disclose my name."

[2] According to its website, the Labour Relations Board is

> *…an independent, impartial tribunal that acts within its statutory authority. The objectives of the Board are to:*
>
> 1. *Process all applications efficiently and fairly.*
> 2. *Make decisions that are clear and consistent, based on sound legal principles and provide guidance to employers, employees, unions and the labour/management community.*
> 3. *Encourage settlement of disputes by the use of mediation and appropriate dispute resolution methods.*
> 4. *Inform the public about labour laws and the procedures of the Board.*

[3] While the Board's responsibilities are derived from various pieces of legislation, including the *Labour Relations Act*, this complaint stems from an application involving section 51 of the *Occupational Health and Safety Act*. Specifically, the application to the Board alleged that an employee was discriminated against when he was allegedly reprimanded for attempting to bring Occupational Health and Safety issues to the attention of a supervisor.

[4] While the Complainant and public body were cooperative during the informal resolution process, I decided to provide a written Report because of the contribution the Report may have on administrative tribunals struggling with this issue and the educative value for public bodies in general. As well, with hundreds of written decisions published, this issue is impacting more than the Complainant. It is important to understand that any time personal information is disclosed, it places individuals at a higher risk of identity theft, data profilers, discriminatory practices and various unintended uses of information.

II LABOUR RELATIONS BOARD SUBMISSION

[5] The Board's formal submission, received at this Office on November 27, 2014, referenced its submission during the informal resolution process, received at this Office on January 4, 2012. Both submissions provide detailed explanations of the Board's practice of publishing all written decisions, including the names of applicants.

[6] The Board's submission focused on its role in the judicial system. Board decisions may be appealed to the Trial Division of the Supreme Court of Newfoundland and Labrador, and from there to the Court of Appeal of Newfoundland and Labrador and on to the Supreme Court of Canada. The Board's hearings are open to the public and decisions are available to the public as a matter of public record.

[7] The Board's submission to this Office highlights the importance of writing reasons that sufficiently explain the decision of the Board. In addition to citing court cases, including *R.* v. *Sheppard* from the Supreme Court of Canada and *Vancouver International Airport Authority* v. *Public Service Alliance of Canada* from the Federal Court of Appeal, the submission comments:

> *Reasons for a decision which are deemed by the courts to be insufficient can result in appeals, often overturning a board or court's decision and resulting in further hearings. This does not serve the public, the individuals, or the interests of justice, as it results in inordinate prolongation of matters that should be dealt with more expeditiously and properly.*

[8] The Board explained that the evidence in this case before the Board was in the form of a sworn affidavit from their Applicant, therefore the identity of their Applicant was important because he swore the information he provided to the Board to be true. The Board stated that:

> *…the disclosure was made for the purpose for which it was obtained (to put on the record who was giving the evidence and what the evidence was) for the purpose of complying with the Labour Relations Act, the Occupational Health and Safety Act and the rules thereunder, which are Acts of the Province that authorize or require the disclosure.*

[9] The Board's formal submission also included correspondence in an Appendix that demonstrates that the Board raised concerns about its inclusion in the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") in April 2007 with the Minister of Justice at that time, as the Minister

responsible for the *ATIPPA*. While the Minister declined to exempt the Board from the *ATIPPA*, it referred the Board to the provincial Access to Information and Protection of Privacy (the "ATIPP") Office for guidance. The Board provided this Office with the written response from the ATIPP Office, received by the Board on October 19, 2007. The response highlighted section 39(1)(c), 39(1)(d), 39(1)(e) and 39(1)(r) of the *ATIPPA*, noting that "these four disclosure provisions appear to be broad in scope and likely address the main operating activities of the LRB, including but not limited to, the Board's administrative, investigative and adjudicative functions." The letter added, "In terms of any specific disclosures of personal information, however, you may wish to seek independent legal advice."

[10] Another appendix contained the Board's submission to the Cummings *ATIPPA* Review Committee from 2010, which again proposed exemption from the *ATIPPA*. The Board's submission specifically discussed publication of its decisions on the internet, noting,

> *Board decisions are appealable directly to the Supreme Court of Newfoundland and our decisions are published on the Labour Relations Boards website, CanLII, Canadian Labour Relations Board Reports, etc. This scheme is similar to how Court decisions are disseminated and reported.*

[11] This Office specifically asked the Board about the privacy notice that was in effect at the time the original application was filed with the Board. They note that there were "general and specific advisories as to the Board's process with respect to the sharing of information and the posting of its decisions to the website." The submission continued by providing a list of various resources, including the *Labour Relations Board Rules of Procedure*, their annual reports, the Policy Circular: Notice and Documents to Parties, and correspondence with the Complainant.

[12] The Board's submission notes that the *Labour Relations Board Rules of Procedure*, "…ensures that parties are aware of the requirements for various applications/complaints, how a file is processed, and the possible outcomes of decisions of the Board." In particular, the Board highlighted section 12 of the *Labour Relations Act,* which addresses distribution of the written decision and states:

> *12(1) In a matter that comes before it, the board and a panel shall give written reasons for its decision where requested to do so by the parties.*
>
> *(2) A set of reasons given by the board under subsection (1) shall be filed with the secretary of the board and copies shall be provided to the minister and each of the parties.*

[13] The Board also comments that their annual reports, which are available on its website, provide notice that its decisions are posted on its website. They provide as example the 2008-2009 Annual Report which states,

> *All Board decisions dating from 1975 have been made available to our clients via our website through an internet-based searchable database. The full text of board decisions are also available on QuickLaw and CanLII.*

In addition, the Chairperson's messages in the annual reports refer to the fact that the Board's reasons for decisions are posted on the Board's website.

[14] The submission also referred to the Board's Policy Circular: Notice and Documents to Parties, which is posted on its website. It reads:

> 1. *Upon receipt of an application, the Board will notify all named interested parties and/or any party the Board determines to be an interested party.*
> 2. *The interested party will be sent a copy of all documents in accordance with the Board's Rules of Procedure.*
> 3. *The Board will only send one copy of the documents and/or notices to the interested party or party's representative. The Board will not send copies to both the representative and the client.*
> 4. *In exceptional circumstances, as determined by the Board, copies may be made available to the interested party and/or the representatives*

[15] The Board submits that it "…advises parties in writing that information will be shared with the other parties and did so in this case in its letter of November 10th, 2010 when it acknowledged receipt of the application in question."

[16] The Board's submission indicates that the Complainant "had to be aware" that decisions of the Board included the names of parties, as previous decisions were provided by the first respondent as part of their response and copies of responses were shared with the Complainant.

[17] Since the Board relies heavily on the information on its website as the basis that decisions are published including the name of applicants, this Office asked the Board a number of questions regarding its website. Specifically:

While your website features decisions, individuals looking for "true copies" are directed to contact the Board directly. What is the difference between what is online and the "true copies", if anything? For example, decisions featured online do not contain a signature. What other edits, if any, occur?

The Board's response noted that it was unsure "…if our system now allows for the uploading of the signed Decision." It further indicates that the reference to "true copies" of decisions being available is a reflection of how important it is for researchers, including lawyers and members of the general public, to have access to accurate decisions. The submission states, "the official record of the Board includes the original decision and copies are available at all times in the event of any system being compromised or "hacked" or a decision being inappropriately altered." The submission further states, "Justice must not only be done, it must be seen to be done and in the case of the Labour Relations Boards, parties and members of the general public need to see well-reasoned decisions which will contain some limited personal information."

The identified purpose for the database is education and research. Have you ever discussed the minimum necessary information required to accomplish this purpose?

The Board's response indicates that decisions are based on research and that minor details may have a major impact on the decision. As an example, the Board notes that an individual's job classification could impact the outcome, as "similar behavior by people holding different positions could very easily affect the decision of the Labour Relations Board." The Board's submission notes,

> *In keeping with open court principles, the information and sources of information available to the Labour Relations Board are generally acknowledged in decisions as the decisions are subject to review through either a Request for Reconsideration or an Application for Judicial Review at the Trial Division of Supreme Court of Newfoundland.*

Are there any search parameters/restrictions in place on your database? For example, is your database searchable from a general search engine, such as Google, or is there coding in place that allows users to search only from the Board's site?

The Board confirmed that general search engines have access to crawl and search the website and decisions stored on a central directory.

Do you have any data available on the searches end users conduct? For example, do they search for cases by name, sections of Acts, etc? If you do have this data, please indicate this.

The Board's website does not save search parameters.

What safeguards, if any, do you have on your website? For example, does your website use CAPTCHA[1] verification? Is it blocking any IP address? Do you actively block searches/web crawlers from search engines such as Google?

The Board's site is part of the Government of Newfoundland and Labrador's site and is subject to its security controls and policies. The Board's site does not block IP addresses or use CAPTCHA verification.

Were you aware that the case in question is available through various search engines on a third party website (Canadian Case Law Globe24h)? Do you know if this information was pulled directly from your site or if perhaps it was pulled from a site you provide cases to, such as CanLII?

The Board's response to this question noted "…the Labour Relations Board does not post to any sites other than its own decision system and CanLII."

III APPLICANT'S SUBMISSION

[18] The applicant did not provide a written submission.

IV DISCUSSION

[19] The complaint in this case focuses on the publication of the Complainant's name in a written decision. The *ATIPPA* outlines expectations of public bodies when they collect information and allows for information to be used or disclosed for a purpose that is consistent with the purposes for which the information was collected. In order to be considered consistent, the use and disclosure

[1] According to www.captcha.net, CAPTCHA stands for Completely Automated Public Turing Test To Tell Computers and Humans Apart. It is a "program that protects websites against bots by generating and grading tests that humans can pass but current computer programs cannot." One of many applications of CAPTCHA is to assist in the prevention of search engine bots indexing a website.

must have a reasonable and direct connection to that purpose and be necessary for performing the statutory duties of the public body. The mandate of the Board includes a labour relations dispute resolution and research/education component; the information collected on application forms for the former activity is being used for the latter as well.

[20] Whenever personal information is disclosed, it poses potential harms to the individual. Disclosing personal information, especially disclosure on the internet, increases the risk of identity theft, data profilers and data miners. In the guidance document *Electronic Disclosure of Personal Information in the Decisions of Administrative Tribunals*, the Office of the Privacy Commissioner of Canada highlights possible unintended uses for information posted online, noting "…personal information can be taken out of context and used in illegitimate ways; and individuals lose control over personal information they may well have legitimately expected would be used for only limited purposes." To mitigate these concerns, the same document recommends that administrative tribunals, "consider and specifically identify the public interest in the electronic disclosure of the identities of parties or witnesses in each case."

[21] The issue of administrative tribunals including names in decisions which are then widely disclosed is one facing tribunals across Canada. As the balance between individual privacy and the open court principle is evolving, this Office decided to research trends and best practices across Canada. While this results in a longer discussion section, it provides a much more comprehensive overview of the issue.

Collection

[22] The *ATIPPA* outlines requirements when public bodies collect information. Section 33(2) of the *ATIPPA* states:

> *33(2) A public body shall tell an individual from whom it collects personal information*
>
> *(a) the purpose for collecting it;*
> *(b) the legal authority for collecting it; and*
> *(c) the title, business address and business telephone number of an officer or employee of the public body who can answer the individual's questions about the collection.*

[23] I cannot find evidence in any correspondence between the Board and the Complainant, nor in any of the resource documents mentioned by the Board, that demonstrates compliance with section 33(2). In addition, I cannot find evidence that the Complainant was directly informed that the written decision would contain his personal information. Further, while section 12 of the *Labour Relations Act* requires that copies of written decisions be provided to the Minister and the parties involved in the original application, I can find no evidence that the Complainant was directly informed that the decision would be published. Neither the *Labour Relations Act* nor the cited regulations specifically mention publication of decisions, i.e. legislation does not expressly require or prohibit decisions from being published. While the annual report does provide information on the publication of decisions and specifically mentions the internet publication of written decisions, I can find no evidence that the Board specifically referred the Complainant to the annual report or that the Complainant was provided with a copy.

[24] The Office of the Privacy Commissioner of Canada examined the issue of privacy notices when disclosing information in electronic format in a document entitled *Electronic Disclosure of Personal Information in the Decisions of Administrative Tribunals*. The document recommends that tribunals advise all parties of any policies, statutes and regulations that govern their information management, ensure they are informed about how personal information will be used and disclosed during preliminary investigation and formal hearings, and publish a written notice that includes:

> *(a) the type of information that is generally made available to the public via the Internet;*
> *(b) how decisions are published electronically;*
> *(c) whether and when personal identifiers are included in decisions published on the Internet; and*
> *(d) what procedures are available for parties and witnesses to make submissions about the electronic disclosure of personal information of particular concern.*

[25] While not in effect at the time of the original application to the Board, I must acknowledge quick action by the Board following the receipt of the privacy complaint at this Office. An information bulletin on the disclosure of personal information dated December 21, 2011, was posted to the Board's website that states as follows:

> *When filing any application with the Newfoundland and Labrador Labour Relations Board (the "Board"), all information included in the application is provided to the other party or parties as respondents or interested parties. Further, such information may be referred to in any order or*

> *reasons issued by the Board at the conclusion of the matter, on the Board's website and in print and online reporting services that may publish the Board's decision.*

[26] In addition, the forms and applications used by the Board now feature information regarding disclosure. For example, the Duty of Fair Representation Complaint Form that would be used for applications under section 51 of the *Occupational Health and Safety Act* reflects the same notice as above.

[27] While I am pleased the Board took such quick action to address an identified gap, I encourage the Board to reexamine the statement to ensure it is in compliance with section 33(2) of the *ATIPPA*. In addition, the Board should consider the fact that the information collected on the form will be used to make a decision on labour relations issues, but the stated purpose of publishing written decisions on its website is for education and research. It is not clear to me that both identified purposes require the same minimum information and the same disclosures. Further, do the requirements of section 12 of the *Labour Relations Act* establish that written decisions must be published and include the names of applicants?

Content and Importance of Written Decisions

[28] I must acknowledge the expertise of the Board with regard to the content of its written decisions, and its submission clearly outlined the implications if insufficient reasons were provided in support of its decision. In this case, the Complainant was aware that his name and other personal details were collected to make a determination on his application. In fact, legislation dictates some of the information that must be collected when making an application under section 51 of the *Occupational Health and Safety Act*. Section 7 of the *Occupational Health and Safety Regulations* states:

> *7. (1) An appeal under section 33 of the Act or an application under section 51 of the Act to the board shall contain:*
>
> *(a) the name and address of the person making the appeal or the application;*
> *(b) the names and addresses of all other parties involved in the appeal or application; and*
> *(c) a statement of the grounds on which the appeal or application is being made.*
>
> *(2) The board shall:*
>
> *(a) give notice of the appeal or application; and*

(b) send one or more copies of the appeal or application to all parties considered by the board to be affected by the appeal or application.

(3) The parties referred to in subsection (2) shall, within 14 calendar days of receiving a copy of the appeal or application, file a reply with the board.

[29] It should be noted that the legislation does not specify the information that must be disclosed in a written decision. I believe that it is possible to ensure that written decisions reflect sufficient reasons for a decision with a minimum amount of personal information, perhaps by replacing names with initials.

[30] The issue of administrative tribunals and privacy legislation is not a new one in Canada and various reports and guidance documents have been written. In particular, Order F2013-14, issued by the Office of the Information and Privacy Commissioner of Alberta, focused on the disclosure of personal information by an administrative tribunal. At paragraph 49, this Order recognizes that "tribunals are required to give reasons for a decision as a matter of fairness, and disposing of the issues included this obligation to give reasons for the decision." Tribunals are public bodies with quasi-judicial responsibilities, and must be transparent. At paragraph 30, the Order notes that "As a public body, the Board generally has an obligation to record and present to the public a coherent and understandable account of its proceedings." I submit that, in an attempt to be transparent and accountable to the public, administrative tribunals may be losing sight of the privacy rights of applicants. It is the tribunal that is accountable to the public, not the individual that has made the application. It is possible for the tribunal to be open and accountable while balancing the privacy rights of applicants by minimizing personal information, such as replacing names with initials.

Limiting Disclosure

[31] With regard to the use and disclosure of information, the *ATIPPA* states:

38. (1) A public body may use personal information only

(a) for the purpose for which that information was obtained or compiled, or for a use consistent with that purpose as described in section 40;
(b) where the individual the information is about has identified the information and has consented to the use, in the manner set by the minister responsible for this Act; or
(c) for a purpose for which that information may be disclosed to that public body under sections 39 to 42.

(2) The use of personal information by a public body shall be limited to the minimum amount of information necessary to accomplish the purpose for which it is used.

39. (1) A public body may disclose personal information only

(c) for the purpose for which it was obtained or compiled or for a use consistent with that purpose as described in section 40;
(d) for the purpose of complying with an Act or regulation of, or with a treaty, arrangement or agreement made under an Act or regulation of the province or Canada;
(e) for the purpose of complying with a subpoena, warrant or order issued or made by a court, person or body with jurisdiction to compel the production of information;
(r) in accordance with an Act of the province or Canada that authorizes or requires the disclosure;

(2) The disclosure of personal information by a public body shall be limited to the minimum amount of information necessary to accomplish the purpose for which it is disclosed.

40. A use of personal information is consistent under section 38 or 39 with the purposes for which the information was obtained or compiled where the use

(a) has a reasonable and direct connection to that purpose; and
(b) is necessary for performing the statutory duties of, or for operating a legally authorized program of, the public body that uses or discloses the information.

As a quasi-judicial body, the Labour Relations Board adheres to the open court principle. The Board's submission highlights the importance of providing sufficient reasons for decisions and of publishing the same. Again I must question if the name and other personal information regarding the applicant is critical for this role. It is interesting to note that the majority of the Board's decisions are not written. The Board indicates that they post reasons for decisions when requested to by one of the parties and/or a hearing has been conducted. Following are statistics on the numbers of orders issued versus the decisions produced and published on the Board's website, pulled from various annual reports:

Year	Number of Orders Issued and Communicated to Parties	Number of Reasons for Decisions Uploaded to the Board's Internet-based Decision System
2012-13	86	16
2011-12	73	13
2010-11	104	6
2009-10	164	13
2008-09	115	26
2007-08	106	17

The Board appears to have placed limitations on the open court principle by only providing written reasons for a decision upon request or if a hearing is conducted.

Open Court Principle

[32] To date, there has been limited discussion of the open court principle as it relates to the internet. Traditionally, the open court principle meant that court proceedings were public. This could mean that people could attend court, read decisions in libraries, etc. However, there have been limitations placed on this principle by the courts, for example family court decisions generally include initials rather than names. The internet created a new nuance; does the open court principle mean that court decisions are to be available to anyone, in any location, at any time of day, free of charge? Even when decisions were first published to the internet, they were only available to those who subscribed to a particular service, usually at a cost, and could not be widely searched. This has greatly changed the context of the open court principle. Before, a member of the public would usually have a sufficient interest in a matter before the court in order to attend a hearing or request documents in a court or tribunal file. Now, internet users are able to enter an individual's name into search engines and use the information found to make decisions in such important areas as employment status, benefit eligibility, or even relationship status.

[33] There have always been exceptions to and limitations on the open court principle. Section 486 of the *Criminal Code* addresses the open court principle and provides for the exclusion of public in certain cases. Reasons include special requests from witnesses, the age of witnesses, the mental capacity of the witnesses, and the type of crime. For example, victims of sexual assault may be especially sensitive about having their name published, so much so that they would rather not report the crime than to have anyone know. Publication bans have been used to ensure fair trials, to protect investigative methods and to protect the identity of victims. Publication bans can have various impacts, including preventing spectators from attending proceedings, preventing journalists from reporting on all or specific aspects of proceedings, and/or the ability to name witnesses and those accused; in some cases, a specific time limit may be imposed.

[34] Two Canadian cases have established the test used to determine the appropriateness of publication bans. The Dagenais/Mentuck test was established in the cases of *Dagenais v. Canadian*

Broadcasting Corp. and *R. v. Mentuck*. The test was summarized by the judge in *Toronto Star Newspapers Ltd. v. Ontario* in paragraph 26:

> *The Dagenais test was reaffirmed but somewhat reformulated in Mentuck, where the Crown sought a ban on publication of the names and identities of undercover officers and on the investigative techniques they had used. The Court held in that case that discretionary action to limit freedom of expression in relation to judicial proceedings encompasses a broad variety of interests and that a publication ban should only 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. [para. 32]*

[35] While the Board has indicated that it disseminates information using media similar to the Courts, including CanLII[2], there is no evidence that the Board considers withholding information in certain circumstances. As well, the difference between a court ordered publication ban and a decision by an administrative tribunal not to publish all details of a hearing online must be emphasized.

[36] The Courts have also examined the role of administrative tribunals and their relationship with the courts. The case of *Ocean Port Hotel Ltd*. v. *British Columbia (General Manager, Liquor Control and Licensing Branch*) provides some insight on the difference between courts and administrative tribunals. Lamer C.J.'s discussion of judicial independence in the Provincial Court Judges Reference was cited by the defense, and the Court made the following comment at paragraph 32:

> …*The classical division between court and state does not, however, compel the same conclusion in relation to the independence of administrative tribunals. As discussed, such tribunals span the constitutional divide between the judiciary and the executive. While they may possess adjudicative functions, they ultimately operate as part of the executive branch of government, under the mandate of the legislature. They are not courts, and do not occupy the same constitutional role as courts.*

[37] In *Bell Canada* v. *Canadian Telephone Employees Association*, the Supreme Court of Canada noted in paragraph 29 that "…As an administrative tribunal subject to the supervisory powers of s. 96 courts,

[2] CanLII is a non-profit organization managed by the Federation of Law Societies of Canada that provides access to court judgments, tribunal decisions, statutes and regulations.

the Tribunal does not have to replicate all features of a court…" in reference to the Canadian Human Rights Tribunal.

[38] In Canada, a number of court cases where decisions of administrative tribunals have been challenged in court involve tribunal decisions on the discipline of police officers. In the case of *Godfrey* v. *Ontario Police Commission*, the Courts commented on the nature of labour relations tribunals, noting on page 23,

> *In the traditional labour relations context, matters or issues of employee discipline are essentially of a private nature between the parties, employer and employee, and the prerogative of management, subject to review in accordance with any agreement, collective or otherwise, that may be in force between the parties or their representatives. Although there is a public aspect to policing which mandates a disciplinary procedure somewhat different from that found in the traditional private employment context, disciplinary proceedings remain, nonetheless, essentially a matter of labour relations within the police force, an internal disciplinary procedure between the officer (employee) and his or her superior (employer). . . .That the disciplinary procedure is mandated by regulations passed pursuant to a public statute does not alter the fundamentally private and internal nature of the disciplinary process. The difference is procedural, not substantive.*

[39] In another example, in the case of *Robertson v. Edmonton (City) Police Service (#10)*, the Court commented in paragraph 207 "…it cannot be assumed that an administrative tribunal is subject to a constitutional requirement to have the same degree of openness as a court…." However, it also recognized that a police officer is a public official and there may be heightened public interest in the case for this reason.

[40] Minimizing information prior to publication on the internet is a common practice in some jurisdictions. For example, in France, Decision No. 01-057 of 29 November 2001 *Adopting a Recommendation Concerning the Publication of Personal Data on the Internet in Case Law Databases*, recommends on page 8, under the heading "What is to be made anonymous?"

> *The names and addresses of the parties and the witnesses in all decisions that are freely available on the Internet, regardless of the judicial system involved (civil or administrative courts), of the level of jurisdiction, or the nature of the disputes, but only these."*

The Decision also questions limitations on the open court principle, noting on page 6

> *As a matter of fact, it should not necessarily be assumed that, on the unique ground that judicial decisions must be made public, a legal decision mentioning the names of the parties and which is*

> *incorporated into a database may be made digital and made available to everyone for an indefinite period of time.*

[41] The French Decision recommends that publishers of decisions should remove certain information, such as the names and addresses of parties, prior to internet publication. It also acknowledges the technical literacy level of most individuals, noting that most users are able to find the information without searching by name. The Decision indicates on page 11 that it would be desirable for, "…the publishers of case law databases which can be freely accessed on Websites [to] refrain from mentioning the names and addresses of parties to proceedings or witnesses therein…." and that "…in future the publishers of case law databases that can be accessed either via the internet against subscription or bond payment or by CD-ROM should refrain from mentioning the addresses of parties to proceedings or witnesses therein."

Practices of Administrative Tribunals in Canada

[42] As this is an evolving issue, my Office elected to review the practices of other administrative tribunals in Canada in January 2015. Although each tribunal has its own unique legislation and mandate, different from the Labour Relations Board in this province, they also face the challenge of balancing the open court principle with privacy expectations of applicants. At both the federal and provincial levels, there are mixed practices. Some tribunals have comprehensive privacy notices, while others do not. Some tribunals publish its decisions on its website, others refer users to CanLII. The following paragraphs highlight some of the more noteworthy practices of select tribunals.

[43] At the federal level, the Administrative Tribunals Support Service of Canada (ATSSC) was created in 2014 under the *Administrative Tribunals Support Service of Canada Act*. According to its website, this organization provides support services to 11 federal administrative tribunals, including corporate services, registry services and core mandate services. At this time, it is unknown what impact this organization will have on the privacy statements and practices of federal administrative tribunals, which are currently quite varied, however it could develop unifying practices for the 11 tribunals under its jurisdiction. This may assist the Labour Relations Board in keeping abreast of best practices.

[44] Some tribunals establish clear expectations of privacy for applicants from the outset. For example, the Canada Agricultural Review Tribunal has posted *Practice Note #3 – Open Court Principle and Privacy Concerns*, on its website. Rule 7 of the *Rules of the Review Tribunal (Agriculture and Agri-Food)* SOR/99-451 states:

> *(1) A document filed with the Tribunal by a party to a review must be treated as a public document unless the party requests that the document be treated as confidential.*
>
> *(2) Reasons must be given for the request that a document be given confidential treatment and, if it is alleged that disclosure would cause harm to the party, the reasons must include details of the nature and extent of the harm.*

The Tribunal also notes that it uses a web exclusion protocol. According to a paper written by then Information and Privacy Commissioner of Saskatchewan Gary Dickson, *Administrative Tribunals, Privacy and the Net*, this protocol "…is a practice to prevent cooperating web spiders and other robots from accessing part of a website that is publicly available." This protects court documents placed on the internet from search engines using scans of web pages; for example, a tribunal decision posted online would not appear in the results page of a Google search by name if the site uses this protocol appropriately. Individuals entering a name into a general search engine would not get the tribunal's decision in their search results; individuals entering a name into the Tribunal's search engine would locate the case quickly. The Tribunal's Practice Note explains the rationale for this approach:

> *The installation of this instrument onto the Tribunal Web site represents an acceptable technical means for providing fair protection to personal information contained in the decisions posted on the Tribunal's Web site while respecting the common law "open court principle".*

[45] The Canadian Human Rights Tribunal's Privacy Notice indicates that it has similar technical safeguards in place. In addition, this Tribunal has, in at least one instance (*A.B. v. Eazy Express Inc.*), included initials rather than names in its written decision. The decision comments at paragraph 5 "According to the Commission, personal matters, which do not deal with the issue of discrimination, were discussed during the hearing and will cause undue hardship to the persons involved in the events should they be made public." At paragraph 7, it notes

> *I agree that some personal matters were discussed during the hearing that could potentially be harmful to the Complainant and another witness should they be disclosed publicly in this decision. As much as*

possible, I have anonymized this information in this decision. In fact, I did not find it necessary to refer to the other two individuals named during the hearing that the Commission and Complainant had concerns about. However, given the nature of the personal information disclosed during these proceedings, I will use the initials A.B. to identify the Complainant and C.D. to identify one of the witnesses.

[46] The Social Security Tribunal only places select decisions on the internet. The decisions are hosted on CanLII and feature initials rather than names. With regard to the internet posting of decisions, the Tribunal's decisions page states as follows:

These decisions were chosen to represent the various legal issues addressed by the Tribunal. The number of decisions posted will increase over time, and the selection will be based on whether the decision meets one or more of the following criteria:

- *interprets or explains an area of law;*
- *raises a new or interesting point of law;*
- *explains a new departure in case law; or*
- *has unusual facts.*

[47] The Public Service Labour Relations and Employment Board uses a web robot exclusion protocol as part of its technical safeguards. In addition, at least one of its decisions, *Nicol v. Treasury Board (Service Canada)*, uses the *Dagenais/Mentuck* test to determine what information should be excluded from written decisions. Following are excerpts from the Tribunal's Policy on Openness and Privacy, as featured on its website

…Parties that engage the Board's services should be aware that they are embarking on a process that presumes a public airing of the dispute between them, including the public availability of decisions. Parties and their witnesses are subject to public scrutiny when giving evidence before the Board, and they are more likely to be truthful if their identities are known. Board decisions identify parties and their witnesses by name and may set out information about them that is relevant and necessary to the determination of the dispute.

At the same time, the Board acknowledges that in some instances mentioning an individual's personal information during a hearing or in a written decision may affect that person's life. Privacy concerns arise most frequently when some identifying aspects of a person's life become public. These include information about an individual's home address, personal email address, personal phone number, date of birth, financial details, SIN, driver's licence number, or credit card or passport details. The Board endeavours to include such information only to the extent that is relevant and necessary for the determination of the dispute.

With advances in technology and the possibility of posting material electronically — including Board decisions — the Board recognizes that in some instances it may be appropriate to limit the concept of

openness as it relates to the circumstances of individuals who are parties or witnesses in proceedings before it.

In exceptional circumstances, the Board departs from its open justice principles, and in doing so, the Board may grant requests to maintain the confidentiality of specific evidence and tailor its decisions to accommodate the protection of an individual's privacy (including holding a hearing in private, sealing exhibits containing sensitive medical or personal information or protecting the identities of witnesses or third parties). The Board may grant such requests when they accord with applicable recognized legal principles….

…Board decisions are available electronically on its website. In an effort to establish a balance between public access to its decisions and privacy concerns, the Board has taken measures to prevent Internet searches of full-text versions of decisions posted on its website. This was accomplished by using the "web robot exclusion protocol,"which is recognized by Internet search engines (e.g., Google and Yahoo). As a result, an Internet search of a person's name will not yield any information from the full-text versions of decisions posted on the Board's website…

[48] In Saskatchewan, the Labour Relations Board's Privacy Policy breaks personal information and personal health information into three categories. The third category includes "Personal information and personal health information about parties before the Board and others collected as evidence in the course of the Board's adjudicative processes." The policy further states that, with regard to personal information and personal health information, decisions about collection, use and disclosure of category 3 information, including disclosure in written decisions, "will be made by the panel of the Board adjudicating the particular Board proceeding at issue."

[49] While the Manitoba Labour Board has a privacy notice similar to the Newfoundland and Labrador Labour Relations Board, its *Written Reasons for Decision & Substantive Orders* page contains the following disclaimer:

These are electronic copies of the Written Reasons for Decision and Substantive Orders issued by the Manitoba Labour Board. These Written Reasons and Substantive Orders have been edited to protect the personal information of individuals by removing personal identifiers.

When this Office examined a selection of decisions on the Manitoba board's site, no names were found.

Other Stakeholders

[50] Several privacy commissioners have also developed material to help administrative tribunals in their respective jurisdictions find a balance. The Privacy Commissioner of British Columbia released *Balancing Privacy and Openness: Guidelines on the Electronic Publication of Decisions of Administrative Tribunals* in July 2011. The document reminds tribunals to "write decisions to reflect the fact that the internet provides access to tribunals' decisions to unlimited persons for unlimited uses." It also recommends considering the benefits and risks of disclosing personal information in the absence of a "clearly identified public interest for the disclosure." The examples provided for public interest in a disclosure include protecting the public from fraud, physical harm or professional misconduct, as well as the promotion of deterrence. The document provides a list of other factors that should be considered starting on page 2, including:

- *The sensitivity, accuracy and level of detail of the personal information;*
- *The context in which the personal information was collected;*
- *The specific public policy objectives and mandate of the tribunal;*
- *The expectations of any individual who may be affected;*
- *The possibility that an individual to whom the information relates may be unfairly exposed to monetary, reputational or other harm as a result of disclosure;*
- *The gravity of any harm that could come to an individual affected as a result of the disclosure of personal information;*
- *The public interest in the proceeding and its outcome;*
- *The finality of the tribunal's decision and the availability of a right of appeal or review; and*
- *Any circumstances or privacy interests specific to individual cases.*

[51] If administrative tribunals publish decisions online, the BC OIPC recommends a variety of considerations, including whether all decisions or merely leading decisions or summaries should be posted. Further, decision-writing policies should be developed that may include using initials or pseudonyms instead of names, among other considerations. In many cases, the use of initials would not diminish the educational and research value of the online document.

[52] The OIPC for Prince Edward Island issued Order No. PP-10-001, *Re: Island Regulatory and Appeals Commission*, in June 2010; this Report also addressed a privacy complaint stemming from the online publication of an order naming the complainant by a public body that is a quasi-judicial tribunal. While the Commissioner found that there was no expectation of privacy for a person that

appears before the tribunal, the privacy notice in place at the time stated "…all materials submitted and Orders of the Commission will be made public." As the Commissioner made recommendations that the Commission felt were not directly related to the complaint being investigated, the Commissioner's findings were appealed to the Supreme Court of Prince Edward Island. In the case of *IRAC v. The Office of the Information and Privacy Commissioner for Prince Edward Island and D.B.S* , the Honourable Justice Taylor noted on page 11,

> *I note in passing there are ways a Board can make its decisions available online through its home site, and only searchable through its home site. That might avoid the random discovery which happens when everything is put directly online while still making the information available to those who wish to search IRAC decisions*

I agree that technical safeguards that focus online searches provide a good balance between open court and privacy expectations.

[53] Canadian special interest groups have also examined the interaction of the open court principle with privacy concerns. The Canadian Judicial Council (CJC) was established under the *Judges Act* to "promote efficiency, uniformity, and accountability, and to improve the quality of judicial service in the superior courts of Canada." In 2003, the CJC released its *Model Policy for Access to Court Records in Canada*, which notes:

> *With regard to the availability of search functions for judgments, it is recommended that courts provide the most powerful search functions available including, whenever possible, field search (e.g. by docket number, by date of judgment, by case name, etc.) and full text search. However, if the judgments are posted on the internet, it is a good practice to prevent indexing and cache storage from web robots or "spiders". Such indexation and cache storage of court information makes this information available even when the purpose of the search is not to find court records, as any judgment could be found unintentionally using popular search engines like Google or Yahoo. Moreover, when the judgment is cache stored by the search engine, it is available to internet users even if the court decides to withdraw the judgment from public access. To prevent such problems, very simple technical standards can be implemented (for further information, see the Robots exclusion protocol and the Robot Meta tag standard, online: <http://www.robotstxt.org/wc/exclusion.html>).*

[54] The CJC document also acknowledges the potential that court decisions will be used for "improper purposes such as commercial data mining, identity theft, stalking, harassment and discrimination." The decisions have been posted online in the spirit of the open court principle,

however an inadvertent result is the ability to enter an individual's name into a search engine and discover interactions they have had with courts and tribunals if web exclusion protocols are not in place. This type of function creep is an unintended use.

[55] In 2009, the Heads of Federal Administrative Tribunals Forum (HFATF) adopted a statement called *Use of personal information in decisions and posting of decisions on websites*. The statement was later adopted by the Council of Canadian Administrative Tribunals (CCAT) as well. The statement recommends that tribunals that publish material online consider implementing some or all of the following:

- *referring its website, by hyperlink, to this statement on the Forum's website and to the CJC Protocol posted on the Canadian Judicial Council's website;*
- *adopting the CJC Protocol;*
- *making the CJC Protocol part of any training program offered to its decision makers;*
- *applying the "web robot exclusion protocol" to all full-text decisions containing personal information posted on its website;*
- *giving notice to individuals availing themselves of their rights before it (e.g. on its website, in its administrative letters opening case files and on the forms that parties must complete to initiate proceedings) that it posts its decisions in full on its website.*

Safeguards

[56] Aside from issues about inclusion of personal information in its decisions (and therefore disclosure of personal information), the Labour Relations Board, like any public body, has an obligation to safeguard the information in its custody and control. Section 36 of the *ATIPPA* states:

> *36. The head of a public body shall protect personal information by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or disposal.*

[57] At the time of the complaint, the Complainant's case was on the Board's recent decisions page and on its decisions search page, which are both searchable using common search engines such as Google, Bing or Yahoo. Search engines use computer programs and web crawlers to search the internet for appropriate content in response to keywords entered by the user. Search engines are able to index and copy information retrieved in their cache memory in many formats. For example, even PDFs, which publish text as an image, are subject to indexing.

[58] As the Board provides a copy of its decisions to CanLII, my Office examined the safeguards in place on that site. The CanLII website Privacy Policy states, in part:

> ***Indexing of Decisions by External Search Engines***
>
> *15. Through application of recognized web robot exclusion protocols and by restricting indexing activities in its terms of use, CanLII prohibits external search engines from indexing the text and case name of decisions published on its website, except for Supreme Court of Canada decisions. When indexing prohibitions in robot exclusion protocols are complied with, searching for the name of an individual using an Internet search engine does not return decisions published on CanLII. However, when a third party links to a CanLII decision on a web page that is not under CanLII's control, names that are included in this page or in the link's text might still be indexed by external search engines. Neither CanLII nor its partners represent or guarantee that the technological and legal measures taken to prevent external indexing will be respected or be free of mistakes or malfunctions.*

This is in line with 2003 recommendations made by the CJC and adopted by the HFATF and CCAT.

[59] During the course of this investigation, it came to my attention that this particular case is also featured on a third party website hosted in Constanta, Romania called *Canadian Case Law Globe24h*. While the Board's submission indicates that they did not provide the information to the third party website, the situation highlights the lack of control one has over material once it is published on the internet.

V CONCLUSION

[60] At the time of the original collection, there was no privacy notice that would meet the requirements of section 33 of the *ATIPPA*. In addition, I cannot find evidence that the Complainant was directly informed that the written decision, featuring his name and other personal information, would be placed on the Board's internet site and be accessible through general search engines. The Board's website states that decisions "can be accessed using the search engine below", omitting the fact that they can be found using any search engine. I do not believe it is reasonable to expect an applicant to piece together a privacy notice from various sources, including a document such as an annual report. Even if the Complainant was aware that decisions of the Board included

names of parties, this does not mean he was aware of exactly how decisions are disseminated, especially that they are searchable by name on the internet.

[61] In addition, the Board's assumption is based on implied consent; this style of implied consent is not reasonable in this situation. An individual should not have to choose between their right to privacy and their right to a written decision. The fact that the names would be included in the written decision which would then be posted online and available to anyone with an internet connection should have been stated when the request for a written decision was made. As such, I find that the Board is not in compliance with section 33 of the *ATIPPA*.

[62] The use of some personal information in written decisions is a consistent use under section 40 of the *ATIPPA*. The written decision provides the applicant with the reasons for its conclusions and is therefore a consistent use. Although they are a consistent use, there is still the matter of ensuring that the minimum necessary personal information is included in the written decision to accomplish their identified purpose.

[63] In addition, the publication of the decision, including the applicant's name, through such media as the internet is a different matter. The Board's Decision System, on its website states, "This information is provided as a public service for reference or educational purposes." While I recognize the importance of open court and of having tribunals that are transparent and accountable for their actions, research and education are not consistent uses as per section 40. The information was collected to make a decision on an application under the *Occupational Health and Safety Act*. While I recognize the value in providing access to written decisions of the Board for reference and educational purposes, these are not directly related to the reason the information was initially collected. I see no reason why the Board could not accomplish these purposes through the use of initials. Further, I do not accept the argument that personal information needs to be included because not everyone is able to file an application with the Board; I assume that, if the Board issues a written decision, they have conducted due diligence on their jurisdiction as part of the process.

[64] In addition, section 12 of the *Labour Relations Board Rules of Procedure* should not be interpreted so broadly as to allow publication of the written decision, including the applicant's name. In a 2010 speech to the Labour Relations Agencies in 2010, then Federal Privacy Commissioner Jennifer

Stoddart stated, "My Office, however, takes the view that disclosure must be *explicitly authorized* – it is not enough if the disclosure is merely *not prohibited*, or if the statute or regulation is silent on the matter." This is especially true when names are to be included.

[65] Given that courts have observed that tribunals do not have the same requirement to adhere to the open court principle as the courts, we cannot accept at face value that this is a rationale in itself. This Office asserts that the purpose of education and research could be accomplished by removing names and replacing them with pseudonyms, as is done by Manitoba's Labour Board. In a criminal court context, the open court principle is important because it is largely in the interest of the public to know when someone has been convicted of a crime. However, administrative tribunals deal largely with private matters, such as employment disputes. The Board acts as a neutral third party in these disputes; it is the tribunal that must be accountable and not the individuals whose applications are being reviewed.

[66] As the Board has none of the safeguards in place recommended by its own industry associations, such as the CCAT, the Board has also violated section 36 of the *ATIPPA* and failed to ensure reasonable safeguards were in place to protect information in its custody and control. While it is unknown if the Board information on the third party website was copied from the Board's decision page, there are no safeguards in place we are aware of to prevent such an activity from occurring. At a minimum, the Board should adhere to best practice in terms of technical safeguards.

VI RECOMMENDATIONS

[67] The following are my recommendations:

1. The Labour Relations Board should develop a comprehensive privacy notice that meets the criteria established in section 33 of the *ATIPPA*. The privacy notice should consider the recommendations of the Office of the Privacy Commissioner of Canada in its publication *Electronic Disclosure of Personal Information in the Decisions of Administrative Tribunals*. A good example of a privacy notice is the *Policy on Openness and Privacy* on the Public Service Labour

Relations and Employment Board's website. Once finalized, this privacy notice should be prominently displayed and referenced on all application forms.

2. The Board should re-examine the information it will disclose in decisions, including what, if anything, will be posted online; corresponding procedures reflecting the decisions should then be developed. To begin this task, I recommend that the Board complete a review of best practices across Canada at both the provincial and federal level and review the documentation on administrative tribunals released by the OIPC BC. The Board should then use this information to make an informed decision on the balance between the open court principle and privacy and develop a procedure regarding the internet publication of decisions. The procedure should document what changes, if any, will be made to written decisions prior to their publication online and who will be responsible for making any changes.

3. The Board should immediately investigate and implement appropriate technical safeguards on its recent decisions page, as well as the decisions system page. The investigative process should examine if other technical safeguards should be implemented for the website as a whole.

4. As this issue has been much discussed and technology is constantly evolving, I recommend that the Board remain current in best practices in this area.

5. In the future, when the Board decides to change the way its business is conducted or implement a new electronic system, I recommend that it considers completing a Privacy Impact Assessment. Such a document will proactively identify risks and suggest mitigation activities.

Dated at St. John's, in the Province of Newfoundland and Labrador, this 5 day of June 2015.

E. P. Ring
Information and Privacy Commissioner
Newfoundland and Labrador