

2016

Disability Disclosure in the Digital Age: Why the Human Rights Tribunal of Ontario Should Reform its Approach to Anonymized Decisions

Natalie A. MacDonnell

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/jlsp>

Citation Information

MacDonnell, Natalie A.. "Disability Disclosure in the Digital Age: Why the Human Rights Tribunal of Ontario Should Reform its Approach to Anonymized Decisions." *Journal of Law and Social Policy* 25. (2016): 109-149.
<http://digitalcommons.osgoode.yorku.ca/jlsp/vol25/iss1/5>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Journal of Law and Social Policy by an authorized editor of Osgoode Digital Commons.

Disability Disclosure in the Digital Age: Why the Human Rights Tribunal of Ontario Should Reform its Approach to Anonymized Decisions

NATALIE A MACDONNELL*

Cet article présente une critique de l'approche du Tribunal des droits de la personne de l'Ontario (TDPO) relativement à l'anonymisation des requêtes fondées sur le handicap. Premièrement, j'examine le critère d'obtention d'une ordonnance d'anonymat et l'application de ce critère par le TDPO. Le TDPO a établi uniformément que, dans les cas de divulgation d'un handicap dans une décision publique, l'importance de la transparence de la justice l'emporte sur les préoccupations d'un individu relativement à la vie privée, et ce, en l'absence de circonstances « uniques » ou « exceptionnelles ». Je traite de la preuve relevant des sciences sociales relative à la divulgation d'un handicap et de l'impact dissuasif potentiel de l'approche actuelle du TDPO en matière d'anonymisation sur les requérants handicapés. J'avance que le TDPO devrait ordonner l'anonymisation dans tous les cas fondés sur le handicap lorsque le requérant ou la requérante ne souhaite pas que son handicap soit révélé dans une décision du TDPO. J'esquisse la raison pour laquelle l'application actuelle du principe de transparence de la justice par le TDPO est mal adaptée à l'ère numérique. Je démontre également que ma proposition de réforme n'est pas déconnectée des pratiques courantes d'autres tribunaux ayant des mandats semblables, de tribunaux des droits de la personne d'autres juridictions, et d'une décision récente de la Cour suprême du Canada. Finalement, j'explore différentes options de réforme ainsi que les répercussions possibles de celles-ci.

This paper provides a critique of the Human Rights Tribunal of Ontario's (HRTO) approach to the anonymization of applications brought on the ground of disability. First, I examine the test for obtaining an order for anonymity and the application of this test by the HRTO. The HRTO has consistently held that the importance of open justice outweighs an individual's privacy concerns about disclosure of disability in a public decision unless there are "unique" or "exceptional" circumstances. I discuss social science evidence related to disclosure of disability and the potential deterring impact of the HRTO's current approach to anonymization on applicants with disabilities. I argue that the HRTO should order anonymization in all cases advanced on the ground of disability when the applicant does not wish to disclose her/his disability in an HRTO decision. I outline why the HRTO's current application of the open justice principle is

*Natalie MacDonnell is a Staff Lawyer with Halton Community Legal Services where she practices in the areas of tenant rights, human rights, workers' rights and social assistance. She completed the Joint Master of Environmental Studies and Juris Doctor Program at Osgoode Hall Law School with a focus on climate justice, environmental law and labour and employment law and articulated with the Ministry of the Environment and Climate Change. She is a Co-Investigator on the Social Science and Humanities Research Council of Canada Partnership Grant: Adapting Canadian Work and Workplaces to Respond to Climate Change. Note that this article represents the personal views of Natalie MacDonnell, and not the opinions of her current or previous employers.

ill-suited for the digital age and demonstrate that my proposal for reform is not so disconnected from current practices used by other tribunals with similar mandates, human rights tribunals in other jurisdictions and a recent Supreme Court of Canada case. Finally, I discuss various options for reform as well as potential repercussions of these options.

IMAGINE THAT YOU HAVE A VERY PRIVATE medical condition or disability. Maybe you have not even told some of your closest friends or family about it. You need accommodation at work or at school or from your landlord. When you obtain legal advice you are told you can ask your employer, your school, or your landlord for the accommodation you require and you have your doctor provide a letter outlining your limitations and restrictions. You are told that you do not have to tell your landlord, your employer, or your school about your diagnosis and that your landlord, employer, or school must keep the information about your disability private. For whatever reason you are denied the accommodation you require or you endure other discriminatory treatment related to your disability. You are told that you can fill out a human rights application. You ask if you can remain anonymous. You are advised that it is very difficult to access anonymous and redacted processes and that if you go forward with the application and the Human Rights Tribunal of Ontario makes a written decision, there is a very high chance that the decision will reveal information about your disability and that the decision will not be anonymized. The written decision will be posted online on CanLII: a public database. What this means is that anyone can search your name in this database and learn about your disability. Do you decide to file the human rights application? Or do your concerns about disclosing your disability in the process outweigh the monetary or public interest remedies that you could obtain as a result?

The issue of anonymity in human rights applications was discussed in the *Report of the Ontario Human Rights Review 2012*.¹ Andrew Pinto, Chair of the Review, brought attention to a concern raised by disability advocates that the “very high bar set for anonymous and redacted processes” by the Human Rights Tribunal of Ontario (HRTO) system operates as a barrier to access for some individuals with disabilities, including mental health conditions.² As Pinto notes, individuals with disabilities may choose not to pursue a human rights claim because they fear the stigma or negative consequences, which could result from a public decision disclosing their disability. As we shall see, the HRTO does protect the anonymity of applicants in some circumstances, such as in the case of minors. However, as Pinto points out, protecting anonymity routinely on the basis of some grounds protected by the *Human Rights Code (Code)*, but only exceptionally where other grounds are in play, operates to create a hierarchy of protection.³ At the same time Pinto acknowledges that anonymization could feed “into the very stigma that the applicant is trying to avoid.”⁴

In this article, I examine the test for obtaining an order for anonymity and how it has been applied by the HRTO. In the context of claims grounded in disability, the HRTO routinely holds

¹ Ontario, Ministry of the Attorney General, *Report of the Ontario Human Rights Review 2012*, by Andrew Pinto (Toronto: Queen’s Printer for Ontario, 2012).

² *Ibid* at 68.

³ *Ibid* at 70.

⁴ *Ibid*.

that the importance of open justice outweighs an individual's privacy concerns about disclosure of disability in a public decision. I discuss social science evidence pertaining to the disclosure of disability and the potential deterrent impact of the HRTO's current approach to anonymization of applicants in cases where the alleged ground is that of disability. I argue that the HRTO should order anonymization in all cases advanced on the ground of disability when the applicant does not wish to disclose her/his disability in a public decision published online on CanLII. My argument applies to all individuals with disabilities but may be especially relevant in cases of non-evident/invisible disabilities such as mental health or invisible physical disabilities where individuals make decisions to disclose their disabilities based on a variety of factors. This topic is especially relevant given the increasing importance of one's online reputation in hiring decisions and the fact that human rights decisions can be accessed online. I outline why the HRTO's current application of the open justice principle is ill-suited for the digital age. I demonstrate that my proposal for reform is not so disconnected from current practices used by other tribunals with similar mandates and human rights tribunals in other jurisdictions and a recent Supreme Court of Canada case. Finally, I discuss various options for reform as well as potential repercussions of these options. This article focuses on anonymity in human rights applications brought on the ground of disability. In my analysis I look at HRTO decisions related to all *Code* grounds and analyze the rationales provided by the HRTO for anonymizing or refusing to anonymize the identities of the applicants. My final recommendations, however, are intended to relate solely to the ground of disability. I leave the question of whether similar recommendations should be made in regards to other grounds protected under the *Code* to further research. I do not discuss whether or not anonymity should be granted when discrimination based on other grounds has a negative impact on an applicant's mental or physical health. I also do not address the question of whether individualized medical documentation of disabilities should be privately disclosed to respondents.⁵

I. DIVERSITY WITHIN DISABILITY AND THE SOCIAL MODEL OF DISABILITY

By pursuing this topic I am by no means suggesting that applicants should conceal or should want to conceal their disabilities or that applicants should feel stigmatized as a result of their disabilities. However, I do think that it is important for applicants with disabilities to have a choice to remain anonymous so that they retain control over the disclosure of their disabilities. I recognize that experiences of disability vary from individual to individual depending on a variety of factors and cannot be generalized. Factors may include when the disability was acquired and intersectionalities related to socio-economic status, education, gender, and race. The nature of the disability and whether it is an evident/visible or non-evident/invisible disability may also play a role in disclosure. Anonymity may be completely inappropriate for some applicants who may see disclosure of their disability in a written decision as an important part of combating stereotypes and discrimination. The experience of public disclosure could also be empowering for applicants

⁵ See e.g. Teri Hibbs & Dianne Pothier, "Post-Secondary Education and Disabled Students: Mining a Level Playing Field or Playing in a Minefield?" in Dianne Pothier & Richard Devlin, eds, *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law* (Vancouver: UBC Press, 2006) 195.

in some circumstances. This is why I advocate for a choice to disclose. I am motivated to write this article because I know that at least some individuals with disabilities experience difficulties in disclosing their disabilities, but this is not representative of all individuals with disabilities.

I use the term “disability” and the phrase “person/individual with a disability” in this article. However, I recognize that “disability” is difficult to define and that there are differing opinions regarding which language is most appropriate to use to describe individuals with disabilities.⁶ The social model of disability, which highlights how structural barriers in society “disable” individuals, informs my understanding of disability. The social model of disability stands in contrast to the “orthodox personal tragedy view of disability,” in which individuals with disabilities are seen as “victims” of tragedies whose “individual medical impairments” are the cause of their “social and economic marginalization.”⁷ The argument I advance in this article is cognizant of the “structural forces, economic, political and cultural, that have created and continue to sustain disability.”⁸ It is my view that the difficulties that some individuals with disabilities experience with disclosure of their disabilities stem from the same “disabling” economic, political, cultural and structural forces that “sustain disability” in the first place.⁹

II. RESEARCH METHODOLOGY

As a part of my research I read all seventy-two HRTO decisions which include the terms “anonymity or anonymization” and which were decided between 13 May 2011 and 1 August 2013. The purpose of this search strategy was to determine the general trends (over approximately the last two year period when the research was conducted) in issuing orders for anonymity for all grounds. I also read all HRTO decisions that use the terms “anonymization or anonymity and disability” (no date restriction) in order to examine trends in anonymity related to disability specifically which is the focus of this article. This search was current as of 11 March 2014.¹⁰ I noted that the terms anonymity and anonymization did not narrow in on all cases related to anonymity and I broadened my search to include three separate searches (with no date restrictions). These three searches were current as of 1 August 2013. A search of “publication ban” yielded forty-two results. I then read all decisions citing Rule “3.11” or Rule “3.12” of the HRTO’s *Rules of Procedure*. The two searches on 3.11 and 3.12 identified only one new case. Other cases that were not identified directly through these five search strategies are also

⁶ ARCH Disability Law Centre, “The Law As it Affects Persons With Disabilities” (1 September 2009) at 2–5, online: <archdisabilitylaw.ca/?q=law-it-affects-persons-disabilities> [perma.cc/D5TE-LY9E]; Lennard J Davis, ed, *The Disability Studies Reader*, 4th ed (New York: Routledge, 2013); Corbett Joan O’Toole, “Disclosing Our Relationships to Disabilities: An Invitation for Disability Studies Scholars” (2013) 33:2 *Disability Studies Q*, online: <dsq-sds.org/article/view/3708/3226> [perma.cc/KDA3-9LUW]; Richard Devlin & Dianne Pothier, “Introduction: Toward a Critical Theory of Dis-Citizenship” in Dianne Pothier & Richard Devlin, eds, *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law* (Vancouver: UBC Press, 2006) at 3 [“Introduction”]; Michael Oliver & Colin Barnes, *The New Politics of Disablement* (Basingstoke: Palgrave Macmillan, 2012) at 15; Nicola Martin, “Disability Identity – disability pride” (2014) 16:1 *Perspectives* 14.

⁷ Oliver & Barnes, *supra* note 6 at 15, 51; Martin, *supra* note 6.

⁸ Oliver & Barnes, *supra* note 6 at 15.

⁹ *Ibid.*

¹⁰ I extended the time period for this search from 1 August 2013 to 11 March 2014 to determine if the HRTO’s treatment of anonymity and disability issues had evolved over time.

referenced throughout the article.¹¹ A point of further research would have been to use the search terms “confidentiality and disability” to further broaden the search, but this was beyond the parameters of this article given the 248 hits that this search generated as of 1 August 2013.

Of the twenty-seven cases which were brought on the ground of disability (more than one ground may have been identified) that I identified through these searches, full or partial anonymity was granted in fourteen cases. The twenty-seven cases include only those where a decision was made on the issue of anonymization in an interim decision or final decision about the applicant’s human rights application. This number does not include the two cases I found where applicants tried to redact information contained in HRTO decisions after the fact, through requests for Reconsideration or for Order During Proceeding (wherein both cases the respondents did not make submissions on anonymization). Out of the fourteen cases where anonymity was granted, respondents opposed anonymity in two cases and consented to anonymity in seven cases. Of the thirteen cases in which anonymity was not granted, the respondents opposed anonymity in five cases. In the remainder of cases no submissions were made, the respondent did not object to anonymization, or information about the respondent’s position was not included in the decision.

The research I conducted in relation to the practice of other tribunals and human rights tribunals in other jurisdictions was conducted by looking at tribunal websites and rules, and by conducting a high level analysis of the relevant Tribunals’ decisions.¹² In order to remain consistent with the recommendations of this article, I have anonymized the names of applicants in all citations in this article which are not already anonymized.

My analysis is also informed by my experience working at the Human Rights Legal Support Centre (HRLSC) as a part of Osgoode Hall Law School’s Anti-Discrimination Intensive Program (ADIP) in 2013. Conversations during the course of the Intensive program with colleagues, including lawyers, staff and other ADIP students have informed the views I take here. My article also contains information learned through conversations with Laurie Letheren in the course of collaborating together on this topic.¹³ At the time Letheren was a staff lawyer with ARCH Disability Law Centre (ARCH)

III. IMPORTANT TERMS EXPLAINED

For the purpose of this article, the term anonymization or anonymity is used in circumstances where the applicant is not identified in a written court or tribunal decision. This may involve using a pseudonym or the initials of the applicant in the written decision and avoiding the use of other identifying information. HRTO jurisprudence surrounding anonymization, partial publication bans, and publication bans overlap as they seek to address similar privacy concerns.¹⁴

¹¹ These cases include those which were referenced in the HRTO decisions that were captured by my search strategy. One case was brought to my attention by a staff member at the HRLSC.

¹² The anonymization trends of other tribunals remain an area for further research.

¹³ Laurie Letheren, personal communications (2013-2014). Letheren and I co-authored a paper on this subject for the Ontario Bar Association entitled: “Open Court and Confidentiality: Can there be a Balance in Light of our New Media Age?” in 2014. That paper cited an earlier unpublished version of this article.

¹⁴ *August v Richland Marketing Inc*, 2003 CanLII 25 (HRTO) [*August*]; *H v O*, 2003 CanLII 6 at para 2 (HRTO) [*H v O*]; *V v E*, 2011 CanLII 1230 at para 10 (HRTO) [*V v E*].

A publication ban is when a court or tribunal orders that certain information in a court or tribunal proceeding cannot be published, “curtail[ing] the freedom of expression of third parties.”¹⁵ A partial publication ban on an applicant’s identity “restrict[s] the publication of the applicant’s name by anyone in attendance at a hearing or with knowledge of the matter.”¹⁶ It is a partial publication ban because it only bans the publication of the applicant’s identity. Anonymization orders do not restrict what others can publish.¹⁷ Notwithstanding their distinct meaning, on occasion the terms publication ban and anonymization have been used interchangeably by the HRTO.¹⁸

The highest level of secrecy, available in rare circumstances, is a closed hearing. HRTO hearings are open to the public unless the HRTO is,

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

or there are issues of public security.¹⁹

IV. HUMAN RIGHTS TRIBUNAL: THE TEST FOR ANONYMITY

According to Rule 3.11 of the HRTO’s *Rules of Procedure*, the Tribunal “may make an order to protect the confidentiality of personal or sensitive information where it considers it appropriate to do so.”²⁰ The HRTO’s practice is to,

consider any request to keep the name of a party or other information confidential as an exception to the general principle that the Tribunal’s process should be open and transparent in accordance with the province’s legal system. The Tribunal therefore needs to be satisfied that the applicant’s request to anonymize [his or her] identity outweighs the Tribunal’s interest in its processes being open and transparent.²¹

The HRTO’s rationale in *CM v York Region* has been continually cited in the HRTO jurisprudence when determining whether or not to order anonymity.²²

¹⁵ *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at 879.

¹⁶ *CM v York Region District School Board*, 2009 CanLII 735 at para 19 (OHRT) [*CM*].

¹⁷ *Ibid.*

¹⁸ *H v N*, 2012 CanLII 810 at para 13 (HRTO) [*H v N*]; *SS v Taylor*, 2012 CanLII 1839 (HRTO) [*SS*].

¹⁹ *Statutory Powers Procedure Act*, RSO 1990, c S-22, s 9(1).

²⁰ *Human Rights Code Rules of Procedure*, RSO 1990, c H-19, s 3.11 [*Rules of Procedure*].

²¹ *V v V*, 2012 CanLII 1011 at para 15 (HRTO) [*V v V*].

²² *W v C*, 2011 CanLII 1234 (HRTO); *D v H*, 2013 CanLII 1393 (HRTO) [*D v H*]; *V v V*, *supra* note 21.

An open justice system is a fundamental principle of a free and democratic society, so that the actions of those responsible for interpreting and enforcing the law may be subject to public scrutiny. Moreover, the principles enshrined in the *Code* are quasi-constitutional rights which are recognized as particularly significant in Canadian society. It is important for there to be public scrutiny when respondents [are] found to have violated these rights and also when accusations of discrimination are made by applicants but not upheld. I agree with the respondents that it is a serious matter to be accused of breaching the *Code*, which may also cause stress and stigma. Without good reasons for doing so, parties should not make or defend allegations from behind a veil of anonymity, assured that they will not be identified if they are found not credible, their allegations are rejected or they are held to have violated the *Code*. Effective public scrutiny of this human rights system depends, in part, upon knowing how the Tribunal addresses the particular parties before it. Openness and free expression are of fundamental importance in our legal and human rights systems.²³

The test to decide whether or not to issue an order for anonymity involves balancing the interest in an open justice system (as laid out in *CM v York Region*) and the applicant's reasons for requesting anonymity on a case-by-case basis. Parties seeking publication bans or anonymization have the onus of "proving there is a real and substantial risk that would justify that level of confidentiality."²⁴ The onus on an applicant requesting anonymization is "less onerous" than for a publication ban which "places restrictions on what others may do and directly infringes their expressive freedom."²⁵ The HRTO has held that it "does recognize the sensitive nature of some of the medical evidence provided in its cases, and [its] decisions strive to minimize unnecessary disclosure of such evidence."²⁶

V. THE APPLICATION OF THE TEST IN ONTARIO

My review of the case law reveals that the HRTO routinely orders anonymity in cases for applicants who are minors, and that the HRTO has been sympathetic to arguments asking for anonymization of the applicant (or partial publication bans) when the case relates to sexual harassment, gender identity, or sexual orientation. The HRTO is reluctant to order anonymity or partial publication bans in other circumstances.

A. MINORS

Anonymity was ordered for all cases involving minors or cases consolidated with the application of a minor.²⁷ This is in accordance with Rule 3.11.1 of the HRTO's *Rules of Procedure* where

²³ *CM* supra note 16 at para 20.

²⁴ *H v N*, supra note 18 at para 13.

²⁵ *CM*, supra note 16 at para 25.

²⁶ *L v O*, 2010 CanLII 1909 at para 19 (HRTO) [*L v O*].

²⁷ *TB v Halton District School Board*, 2013 CanLII HRTO 304 (HRTO); *AG v Taylor Statten Camp Company Ltd*, 2012 CanLII 1449 (HRTO); *NM v Ottawa-Carleton District School Board*, 2012 CanLII 282 (HRTO); *AW v Ottawa International Soccer Club*, 2011 CanLII 915 (HRTO); *BC v London Police Services Board*, 2011 CanLII 1644

cases involving minors are presumed to require an order for anonymity unless ordered otherwise.²⁸

B. SEXUAL HARASSMENT

The HRTO ordered anonymity in six of seven cases of sexual harassment in the past two years in the period of my research. Three of seven were cases involving minors and decided on that basis.²⁹ Another was decided on the basis of gender.³⁰ Of the three remaining cases, anonymity was ordered in two.³¹ *GG* involved a parallel criminal trial for sexual assault.³² In *SS v Taylor*, the applicant argued that,

... her privacy and dignity interests favour the requested anonymization ... that the highly graphic, explicit and personal comments at issue are particularly humiliating and have on-going repercussions for her self-confidence, her sense of self-worth, and her relationships with others. To disclose her name or other identifying information ... would further victimize her and cause her additional and on-going pain and humiliation.³³

In this case the HRTO was satisfied that this was an important objective.³⁴ Adjudicator Flaherty ruled that if, “the Tribunal did not protect the identity of applicants in proceedings of such a personal and intimate nature, they may be less willing to pursue allegations of sexual harassment in such circumstances.”³⁵ This result, she concluded, would be inconsistent with the purpose of the *Code*.³⁶ As the applicant requested anonymity and did not request a private hearing or that the decision itself not be accessible to the public, adjudicator Flaherty decided that a partial publication ban “appropriately balance[d] the salutary and deleterious effects of anonymization.”³⁷

The HRTO has left open the possibility that there would be circumstances in which it would not order anonymity in cases of sexual harassment.³⁸ *B v H* was brought on the grounds of sex, reprisal, and threat of reprisal. The applicant also argued that the matter related to “serious allegations of sexual harassment.”³⁹ Vice-Chair Doyle held that, “while the Tribunal has

(HRTO) [BC]; *SR v Drewlo Holdings*, 2011 CanLII 2003 (HRTO); *AD v Club Cranberry Vacations Inc*, 2011 CanLII 2134 (HRTO); *SH v Subway 2185559 Ontario Inc*, 2011 CanLII 1575 (HRTO) [S.H.]; *EH v Subway 2185559 Ontario Inc*, 2011 CanLII 1574 (HRTO) [E.H].

²⁸ *Rules of Procedure*, *supra* note 20, s 3.11.1.

²⁹ *SH*, *supra* note 27; *EH*, *supra* note 27; *BC*, *supra* note 27.

³⁰ *KM v Sunnybrook Health Sciences Centre*, 2012 CanLII 1505 (HRTO) [KM].

³¹ *GG v 1489024 Ontario Ltd*, 2012 CanLII 824 (HRTO) [GG]; *SS*, *supra* note 18; *KM*, *supra* note 30; *B v H*, 2012 CanLII 212 (HRTO) [B v H].

³² *Supra* note 31.

³³ *Supra* note 18 at para 41.

³⁴ *Ibid* at para 43.

³⁵ *Ibid*.

³⁶ *Ibid* at para 44.

³⁷ *Ibid*.

³⁸ *GG*, *supra* note 31 at para 8; *B v H*, *supra* note 31 at para 1.

³⁹ *B v H*, *supra* note 31 at para 34.

anonymized certain decisions in matters where there are allegations of sexual harassment, not every decision involving such allegations has been anonymized. The mere fact, then, that this Application alleges sexual harassment does not automatically trigger anonymization.”⁴⁰ In this case Vice-Chair Doyle held that there were not special circumstances which outweighed the importance of the openness of the HRTO process.⁴¹

Although the HRTO has not issued orders for anonymity in all cases of sexual harassment, HRTO jurisprudence constantly references sexual harassment cases as examples of cases which warrant an exception to the open justice principle. This is demonstrated through the often cited passage from *V v E*: “Publication bans and anonymization orders have been issued in certain types of human rights cases, such as those involving minors or highly personal or sensitive information, for example in sexual harassment complaints.”⁴²

C. SEXUAL ORIENTATION

A partial publication ban was ordered in a case where an individual bringing a sexual harassment case did not want to disclose her or her partner’s sexual orientation.⁴³ The HRTO held that the “nature of sexual harassment cases, which is compounded by the societal stigma attached to same-gender relationships arguably, put the Complainant’s dignity and privacy interests directly at stake if her identity and her partner’s identity [were] divulged.”⁴⁴

D. GENDER IDENTITY

Anonymity was ordered in *KM v Sunnybrook Health Sciences Centre* where the applicant was transgendered, as “should the applicant be publically identified as a transsexual that would significantly compromise his ability to live as a man and could expose him to ‘social stigma and prejudice in our society.’”⁴⁵ The *KM* decision cited the *XY* decision from 2010, a case in which a partial publications ban had been ordered where the applicant was transgendered.⁴⁶ An interim partial publication ban was also granted to one member of a group who brought an application against the Ministry of Health and Long Term Care for termination of OHIP services because they were receiving, “medical treatment towards gender transformation.”⁴⁷

E. RELATED CRIMINAL TRIAL

⁴⁰ *Ibid* at para 39.

⁴¹ *Ibid*.

⁴² *Supra* note 14 at para 10. See also *H v N*, *supra* note 18 at para 13, *H v R*, 2012 CanLII 2304 at para 6 (HRTO) [*H v R*], *M v N*, 2013 CanLII 974 at para 5 (HRTO) [*M v N*].

⁴³ *August*, *supra* note 14.

⁴⁴ *Ibid* at para 11.

⁴⁵ *Supra* note 30 at para 8.

⁴⁶ *XY v Ontario (Government and Consumer Services)*, 2010 CanLII 1906 (HRTO) [*XY*].

⁴⁷ *H v O*, *supra* note 14 at para 2.

Forms of anonymity were ordered for all cases in which there was a related criminal trial and anonymity had been ordered at the criminal trial.⁴⁸ Anonymity was also ordered in one sexual harassment case where the related criminal decision for sexual assault suggested that there would be a “risk of disclosure of highly sensitive information.”⁴⁹

F. RACE/ ETHNIC ORIGIN/ COLOUR/ ANCESTRY/ CITIZENSHIP/ CREED/ PLACE OF ORIGIN/ REPRISAL

In instances where applicants alleged the grounds of race, ethnic origin, creed, place of origin or ethnic origin, or raised reprisal, the HRTO cited the open justice principle as outweighing the individual’s interest in anonymity or a publication ban.⁵⁰ Among these cases is one where an applicant raised concerns about his personal safety and reprisal for making a complaint against a provincial jail on the grounds of “race, colour, ancestry, place of origin, citizenship and ethnic origin.”⁵¹ The applicant grounded these concerns in the institutional culture of Ontario’s prison facilities, a culture which he asserted was “intolerant of Black inmates and employees, especially those that complain of racism.”⁵² Yet, Vice-Chair Bhabha concluded that on a balance of probabilities, the applicant would not face reprisal without a publication ban.⁵³

G. DISABILITY

The HRTO does not order anonymity in all cases related to disability. Anonymity was granted in two cases where the applicants brought applications because they had faced discrimination due to their HIV positive status.⁵⁴ In *BAS* the respondents consented to anonymity. In *BAS* the applicant made arguments regarding the “heavy burden of stigma and discrimination” experienced by individuals who have been diagnosed with HIV. In *BAS*, the applicant also raised how disclosure could cause “significant negative consequences in his life.”⁵⁵ In the *DM* case the respondent consented to the applicant’s request to be identified in the decision by a pseudonym and a limited publication ban but the HRTO did not provide a rationale for its decision to order anonymity aside from referencing the *XY* case discussed in the above section on gender identity.⁵⁶

Anonymity was ordered in *SD v Grand River Hospital* on the motion of Vice-Chair Bhattacharjee.⁵⁷ The respondents consented to the applicant’s request that the applicant’s patient chart be sealed and the Vice-Chair ordered anonymization on his own motion to “protect the

⁴⁸ *SM v Ontario (Community Safety and Correctional Services)*, 2012 CanLII 1460 (HRTO); *AB v Toronto Police Services Board*, 2013 CanLII 447 (HRTO); *GG*, *supra* note 31.

⁴⁹ *GG*, *supra* note 31 at para 9.

⁵⁰ *K v T*, 2012 CanLII 1374 (HRTO); *TF v McDonald’s Restaurants of Canada*, 2011 CanLII 2103 (HRTO) [*TF*].

⁵¹ *S v O*, 2010 CanLII 1019 at paras 1, 6 (HRTO) [*S v O*].

⁵² *Ibid*.

⁵³ *Ibid* at para 20.

⁵⁴ *BAS v Ryerson University*, 2009 HRTO 1407 (CanLII) [*BAS*]; *DM v Ontario (Health and Long-Term Care)*, 2013 CanLII 1034 (HRTO) [*DM*].

⁵⁵ *BAS*, *supra* note 54 at para 3.

⁵⁶ *DM*, *supra* note 54 at paras 5-6.

⁵⁷ *SD v Grand River Hospital*, 2010 CanLII 1653 (HRTO) at para 6 [*SD*].

integrity of the sealing order.”⁵⁸ In this case the applicant was brought to the hospital by police because she was experiencing a mental health crisis and she was treated as a “psychiatric outpatient.”⁵⁹ The applicant alleged that the respondent had discriminated against her through entries made in her patient chart and in her treatment.⁶⁰ In this case the Tribunal held that although orders for anonymization are “rare and extraordinary steps because of the importance of openness and transparency in legal proceedings ... because of the stigma attached to mental illness and the fact that the entries from the chart are of an extremely personal and sensitive nature,” this case was an “exceptional” case with a “narrow and overriding need” for protection of the applicant’s privacy interests.⁶¹ Anonymization and a partial publication ban were both ordered in *JM v St Joseph’s Health Care*.⁶² The applicant asserted that she had been discriminated against by medical personnel due to her mental health disability when they followed her to her home and harassed her when she refused a mental health assessment, and when a doctor reported to the Ministry of Transportation that she was “suspect[ed] of suffering from mental illness.”⁶³ The applicant requested anonymization because, “the possible disclosure of her mental health records would pose a real and substantial risk to her dignity and privacy rights [relying] on the stigma that may affect one who is labelled mentally ill.”⁶⁴ In addition, the applicant also maintained that her future medical care could be adversely impacted by disclosure of her name. She argued that she had “a reasonable belief” that her care could be impacted because the hospital staff had expressed “dismay over the applicant filing [other] complaints.”⁶⁵ Furthermore, the applicant argued that open justice principles would not be “interfered with” because the case “[would] still be adjudicated in an open hearing.”⁶⁶ When an interim decision regarding jurisdictional issues described the applicant’s depression and “suicidal ideation,” anonymity was granted for the interim decision with the possibility that the issue of anonymity would be revisited at a later date.⁶⁷

Anonymity was ordered when an applicant was being stalked in *AB v Timbercreek Asset Management*.⁶⁸ AB raised concerns about her stigmatizing medical condition and receipt of disability benefits, however, these were not the reasons considered by the HRTO in deciding to order anonymity.⁶⁹ Vice-Chair Doyle was satisfied that because the applicant’s application was regarding her housing and “given the concern that a decision may make a reference to her or her housing situation which would make it easier for her stalker to locate her” that an order of anonymity was warranted.⁷⁰ In the case of *TA v 60 Montclair*, the HRTO similarly ordered anonymity because the applicant had a stalker, but did not comment on whether the applicant’s medical conditions or receipt of public assistance were also sufficient reasons to order

⁵⁸ *Ibid* at para 5.

⁵⁹ *Ibid*; *V v V*, *supra* note 21 at para 18.

⁶⁰ *SD*, *supra* note 57 at para 1.

⁶¹ *Ibid* at para 6.

⁶² *JM v St Joseph’s Health Care*, 2010 CanLII 633 (HRTO) [*JM*].

⁶³ *Ibid* at para 2.

⁶⁴ *Ibid* at para 22.

⁶⁵ *Ibid*.

⁶⁶ *Ibid* at paras 23-24.

⁶⁷ *CB v Ontario (Transportation)*, 2013 CanLII 1388 at para 5 (HRTO).

⁶⁸ *AB v Timbercreek Asset Management*, 2012 CanLII 1297 (HRTO).

⁶⁹ *Ibid*.

⁷⁰ *Ibid* at para 5.

anonymity.⁷¹ *XY v Housing Connections* (a case in which the applicant was receiving Ontario Disability Support Program benefits, and had multiple sclerosis and environmental sensitivities) was decided on a similar basis, with the issue of the safety of the applicant who was in an abusive relationship grounding the granting of anonymity.⁷²

Anonymity was also ordered in *UN v Tarion Warranty Corporation* where the applicant was concerned about disclosing sensitive information about her disability (exacerbated by sensitivity to loud noise) and the impact it has on her lifestyle.⁷³ In this case the respondents consented to anonymity.⁷⁴ In a case which “alleged discriminatory disclosure of highly personal information” occurred during the completion of police reference checks under the *Mental Health Act*, anonymity was ordered because the circumstances were characterized as “exceptional” where it was appropriate to order anonymity.⁷⁵

A concern about disclosing Post Traumatic Stress Disorder (PTSD) and anxiety was not enough in *V v V*.⁷⁶ In that case the applicant sought an anonymization order because the proceeding would,

include evidence relating to the impact on her mental health of living in the apartment and evidence that she has been diagnosed with post-traumatic stress disorder. The applicant ... will be presenting evidence relating to the anxiety she suffered, and that the evidence will include “extremely personal and sensitive recordings of calls made to the respondents, while at her most vulnerable.”⁷⁷

Similarly, in *H v R*, a concern regarding disclosure of a private medical condition and information about an applicant’s disability was not enough for the HRTO to issue an order for anonymization.⁷⁸ A concern about revealing an “alleged medical condition” in a public decision was not sufficient in another.⁷⁹ In a creed and perceived disability case where the applicant made serious allegations—as well as potentially discriminatory comments—against the respondents, anonymity was not ordered because the interest of the applicant’s anonymity did not outweigh the open justice principle.⁸⁰ A concern about an undisclosed disability which could cause stigmatization paired with an uncommon name was also insufficient for the granting of anonymity.⁸¹ In this case, Vice-Chair Debané drew attention to the fact that the applicant did “not even refer to the nature” of the disability and found there were no reasons for anonymity and no “exceptional circumstances.”⁸²

⁷¹ *TA v 60 Montclair*, 2009 CanLII 369 at para 9 (HRTO).

⁷² *XY v Toronto Housing Connections*, 2011 CanLII 1377 (HRTO).

⁷³ *UN v Tarion Warranty Corporation*, 2012 CanLII 211 (HRTO) [UM].

⁷⁴ *Ibid*.

⁷⁵ *S and C v Toronto Police Services Board*, 2008 CanLII 437 at paras 1-2 (HRTO).

⁷⁶ *V v V*, *supra* note 21.

⁷⁷ *Ibid* at 16.

⁷⁸ *H v R*, *supra* note 42.

⁷⁹ *H v N*, *supra* note 18 at para 14.

⁸⁰ *W v C*, *supra* note 22.

⁸¹ *D v H*, *supra* note 22.

⁸² *Ibid* at para 5.

The HRTO did not anonymize an applicant's identity where the applicant was concerned that disclosure of his disability would have an impact on his future employment opportunities.⁸³ Vice-Chair Overend held:

the applicant notes that there is 'a potential risk to his ability to secure future employment if it becomes known that he is disabled.' Again, despite the fact that many of the applications to this Tribunal involve applicants with disabilities, the Tribunal has not anonymized their identity, even though many of them would be seeking future employment. The risk identified by the applicant is too speculative and does not outweigh the principle of openness that governs this Tribunal.⁸⁴

Rationales provided by the HRTO when refusing to issue an order for anonymity in regards to disability or private medical information are quite consistent. As discussed above, anonymity was denied in *V v V* (PTSD and anxiety) because it was not sufficiently similar to the exceptional case of *SD v Grand River Hospital* (mental health crisis).⁸⁵ Three recent cases have provided a similar rationalization for refusing to order anonymity. The rationale from *V v E* is cited below.⁸⁶

The details disclosed about the applicant's medical condition are not of the nature or degree of private or intimate information present in those cases where bans/anonymity have been ordered. Almost all disability human rights cases involve some disclosure of personal information surrounding an applicant's disability, or the basis for the perceived disability, in order to meet the definition in section 10 of the *Code* and establish that there is a *Code*-protected ground. The applicant did not articulate any unique concerns or issues of confidentiality surrounding her condition that necessitate special protection.⁸⁷

H v R and *M v N* both cite *V v E* while providing similar reasons for refusing to issue an order for anonymity.⁸⁸ This rationale is consistent with HRTO jurisprudence, which stresses that there has been no "blanket rule ordering any type of confidentiality for applicants with disabilities."⁸⁹ This is also the case for individuals with mental health disabilities as a,

general claim that there is still a stigma associated with mental illness is insufficient. Human rights proceedings are often difficult for all involved, most particularly applicants It is also routine that some evidence of the emotional consequences of alleged discrimination is heard, indeed the Code calls for such evidence when determining the appropriate remedy when it speaks of damages for injury to dignity,

⁸³ *C v R*, 2011 CanLII 1298 (HRTO) [*C v R*].

⁸⁴ *Ibid* at para 10.

⁸⁵ *V v V*, *supra* note 21 at paras 17-20.

⁸⁶ *V v E*, *supra* note 14 at para 11. See also *H v R*, *supra* note 42 at para 7; *M v N*, *supra* note 42 at para 6.

⁸⁷ *V v E*, *supra* note 14 at paras 11-20.

⁸⁸ *Ibid*.

⁸⁹ *D v P*, 2009 CanLII 1198 at para 12 (HRTO); *L v O*, *supra* note 26 at para 18.

feelings and self-respect in section 45.2 (1).⁹⁰

This survey of HRTO decisions partially lines up with the HRTO's draft *Practice Direction* from January 2014 which outlines how orders for anonymization are "only made in exceptional circumstances" except in the cases of minors.⁹¹ The HRTO *Practice Direction* provides examples of exceptional circumstances, including "threats to personal safety," "acute mental health crisis," and when there is a related criminal proceeding for sexual assault.⁹² However the *Practice Direction* does not make mention other past examples from the jurisprudence, such as disclosure of HIV status, gender identity, or sexual orientation, or cases of sexual harassment not involving a criminal proceeding.

VI. CONCERNS ABOUT DISCLOSURE OF DISABILITY

As set out above, the HRTO orders anonymity in applications brought on the ground of disability only in "exceptional" cases. In this section, I will turn to the question of whether the HRTO's approach to anonymization is appropriate given the difficulties that some individuals with disabilities face with disclosure of their disabilities in other contexts. ARCH made a submission to the Pinto review, stating that "threat of disclosure of ... disability may dissuade Applicants with meritorious complaints from seeking redress from [the] HRTO."⁹³ While there are no empirical studies that have examined the specific question of whether current HRTO practices dissuade applications from pursuing human rights applications, the body of social science evidence on disclosure gives us very good reasons to believe that human rights applicants may be deterred from bringing applications because of concerns about their disabilities being disclosed in an online decision.

In an ideal world, individuals with disabilities would never be concerned about disclosing their disabilities and they would never be mistreated as a result. Unfortunately, this is not the world in which we live. The HRLSC, for example, consistently receives a high percentage of calls citing disability as the ground of discrimination for inquiry.⁹⁴ Although not indicative of the number of meritorious human rights claims related to disability, applications on the ground of disability make up the majority of human rights applications.⁹⁵ Disclosure of disability can have real repercussions in varied contexts. Individuals with mental health disabilities face stigma and

⁹⁰ *K v N*, 2014 CanLII 136 at paras 8-10 (HRTO) [*K v N*].

⁹¹ HRTO, "Practice Direction on Anonymization of HRTO Decisions" (January 2014), online: <sjto.gov.on.ca/documents/hрто/Practice%20Directions/Anonymization%20of%20Hрто%20Decisions.pdf> [<https://perma.cc/RJ9F-CZYM>] [HRTO].

⁹² *Ibid.*

⁹³ ARCH Disability Law Centre, *ARCH Disability Law Centre's Submission to the Ontario Human Rights Review – March 2012* at (2012) at 10, online: [archdisabilitylaw.ca/sites/all/files/ARCH%20written%20submissions%20HR%20Review%20FINAL%20%20\(TSH%20L%20KRS\)%20MARCH%201%202012.txt](http://archdisabilitylaw.ca/sites/all/files/ARCH%20written%20submissions%20HR%20Review%20FINAL%20%20(TSH%20L%20KRS)%20MARCH%201%202012.txt) [perma.cc/Q8YH-UEMG] [*ARCH Submission*]

⁹⁴ *Ibid* at 224. Disability was the highest cited ground for fiscal years 2008-2009 (48 per cent over 9 months), 2010-2011 (44 per cent) and 2011-2012 (46 per cent) and the second highest cited ground in for 2009-2010 (28 per cent).

⁹⁵ *Ibid* at 217; Pinto, *supra* note 1 at 215. Applications on the ground of disability made up 54 per cent of all human rights applications filed in Ontario during the fiscal year of 2011-2012, 53 per cent in 2010-2011 and 52 per cent in 2009-2010.

systemic discrimination as outlined in the Human Rights Commission's report, *Minds That Matter*.⁹⁶ The Commission notes that individuals expressed their reluctance to disclose their disability because they, "feared discrimination or their performance being judged on the basis of their disability, instead of their contributions at work."⁹⁷ Some were also concerned that disclosure could impact their eligibility for life insurance.⁹⁸ Additionally, concerns about disclosure were often due to experiences facing discrimination or termination from employment after disclosure of their disability.⁹⁹ The *Minds That Matter* report documents as well how concerns about disclosure arise in the legal context, referencing the conclusion of one court representative who felt that individuals with mental health disabilities were uncomfortable disclosing their disabilities to their court representatives, let alone discussing their disability publicly in court.¹⁰⁰ Even individuals who came forward to speak about their experiences for the purpose of the *Minds That Matter* report were "reluctant to disclose their identities" for publication in the report "due to concerns about negative attitudes and stereotypes."¹⁰¹ Similarly, the Kirby report "cites surveys that show that between one-third and one-half of people with mental illnesses report being turned down for a job for which they were qualified, experienced dismissal, or were forced to resign."¹⁰² As a Mental Health Commission of Canada publication outlines,

[f]ear of being exposed as a person who lives with mental illness is a significant factor that explains why structural stigma remains unchallenged Many people chose to conceal their mental illness out of fear of being exposed to numerous exclusionary processes. For instance, a person who unveils their mental illness in one life domain (e.g., seeking job accommodations) opens themselves up to additional exclusionary practices and intense scrutiny in other domains (e.g., parenting).¹⁰³

There is a vast body of social science literature examining concerns about disclosure of disability, as analyzed by Wilton in the context of the workplace:

[d]isclosure is frequently cited as a concern, and anxiety about the potential for discrimination and dismissal coupled with concerns about loss or renegotiation of

⁹⁶ Ontario Human Rights Commission, *Minds that matter: Report on the consultation on human rights, mental health and addictions* (2012), online:

<ohrc.on.ca/sites/default/files/Minds%20that%20matter_Report%20on%20the%20consultation%20on%20human%20rights,%20mental%20health%20and%20addictions.pdf> [perma.cc/957B-SJFP] [OHRC *Minds that matter*].

⁹⁷ *Ibid* at 61.

⁹⁸ *Ibid*.

⁹⁹ *Ibid*.

¹⁰⁰ *Ibid* at 40.

¹⁰¹ *Ibid* at 10.

¹⁰² *Ibid* at 60; Senate, Standing Senate Committee on Social Affairs, Science and Technology, (Chair: Michael JL Kirby), *Report 1: Mental Health, Mental Illness and Addiction: Overview of Policies and Programs in Canada* (November 2004) at 74.

¹⁰³ James D Livingston, "Mental Illness-Related Structural Stigma: The Downward Spiral of Systemic Exclusion Final Report" (2013), *Mental Health Commission of Canada* at 27 online:

<mentalhealthcommission.ca/English/system/files/private/document/MHCC_OpeningMinds_MentalIllness-RelatedStructuralStigmaReport_ENG_0.pdf> [perma.cc/3D7E-SEKZ].

identity lead people to conceal conditions where possible. People may believe that their impairment places them at a disadvantage relative to non-disabled applicants ... and this belief is substantiated by experiences where attempts at disclosure have produced negative outcomes¹⁰⁴

A particular study focusing on the experiences of workers in Hamilton, Ontario confirms that individuals with disabilities may choose not to disclose their disabilities depending on factors such as the work environment, whether the workplace is unionized, and past experiences with disclosure.¹⁰⁵ Sometimes individuals chose not to disclose and forwent accommodation at a personal cost because they did not feel that they were in a safe space to disclose.¹⁰⁶ For individuals with non-evident disabilities, “the choice to disclose was complex and often centred on their perception of employers’ likely reactions to the information.”¹⁰⁷ Individuals with psychiatric disabilities were the least likely to disclose in the workplace.¹⁰⁸ In another study, 35 per cent of professional managerial workers who disclosed their psychiatric conditions at work regretted disclosure.¹⁰⁹ A further study which surveyed individuals with invisible disabilities found that 40 per cent did not “disclose freely” in their workplace and 36 per cent did not “disclose freely” in a post-secondary education context.¹¹⁰ By not disclosing their disabilities, 38 per cent did not access accommodation in that particular context.¹¹¹

In this section I have provided only a very brief look at some of the issues that some individuals with disabilities face with disclosure. There is a wealth of literature on the topic of disability disclosure including literature related to the disclosure of certain types of disabilities and related to disclosure in specific settings (*e.g.* in post-secondary institutions). The take home message is that individuals with disabilities make decisions to disclose their disabilities based on a variety of factors including their perceived vulnerability to social and economic marginalization and consequences (such as job loss or facing stigma). An individual may choose to disclose in some contexts and not others and an individual’s approach towards disclosure in these contexts can vary over time.¹¹² The amount of information provided about the disability can also vary (*e.g.* a tenant’s choice to provide a medical note outlining limitations and restrictions to a landlord for accommodation compared to disclosing the diagnosis).

No doubt, in the absence of empirical data it is difficult to assess whether or not applicants with disabilities are deterred from filing a human rights application because they do not want their disability to be disclosed publicly. However, this extensive literature on disability disclosure generally gives us good reason to surmise that this indeed may be the effect. Moreover, my experience at the HRLSC, and that of my colleague Laurie Letheren at ARCH, lends further support to this hypothesis. Potential applicants ask both ARCH and the HRLSC

¹⁰⁴ Robert Wilton, “Disability Disclosure in the Workplace” (2006) 8 JUST LABOUR 24 at 24 [Wilton].

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid* at 31.

¹⁰⁷ *Ibid* at 28.

¹⁰⁸ *Ibid* at 32.

¹⁰⁹ Marsha Langer Ellison et al, “Patterns and correlates of workplace disclosure among professionals and managers” (2003) 18 J Vocational Rehabilitation 3. Note that sixty per cent did not regret disclosure.

¹¹⁰ Jacqueline Côté, *Invisible Disability Disclosure* (MA Thesis, Athabasca University Faculty of Humanities & Social Science, 2009) at 28 [unpublished].

¹¹¹ *Ibid.*

¹¹² See Devlin & Pothier, Introduction, *supra* note 6 at 15-16. Devlin and Pothier discuss “passing.”

about anonymity, and weigh it in the balance in deciding whether to proceed with the application.

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

We have been advised by law school and graduate students who are seeking advice on the schools' obligation to accommodate their disability-related needs that they would not file an HRTO application out of fear that the fact of their disability could be accessed by law firms, fellow students or school department heads. Often their biggest concern in seeking accommodations of their needs is that their confidentiality will be breached.¹¹³

Applicants may consider that the respondents already know their identity and feel therefore that not much is gained by anonymization and others may in fact wish to have her/his name published in a public decision.

ARCH has conversations with potential applicants about whether the benefits of the human rights process outweigh the potential negative consequences, including how bringing a human rights case can impact their future career and employment prospects.¹¹⁴ This can include both the implications of being a whistleblower and that the decision would reveal the applicant's disability. In cases related to disability, often one's entire medical record is processed, and the applicant retains very little control over how much of the medical record will be looked at or included in the written decision.¹¹⁵ Cases related to mental health especially tend to go into very personal details and symptomology.¹¹⁶

With the low general damages awards (especially in cases for services and disability) and the current state of public interest awards provided through the HRTO process (typically Human Rights 101¹¹⁷), for many applicants the benefits of the human rights process do not outweigh the costs.¹¹⁸ In the 40 decisions in which the HRTO awarded remedies between May 2011 and May 2012, public interest remedies for the most part consisted of human rights training or policy creation. No remedies were particularly creative.¹¹⁹ Given the recent decision in *Moore*, the

¹¹³ Laurie Letheren & Natalie MacDonnell, *Open Court and Confidentiality: Can there be a Balance in Light of our New Media Age?* (May 23, 2014: Ontario Bar Association) online:

<archdisabilitylaw.ca/sites/all/files/Open%20Court%20and%20Confidentiality%20-%20OBA%20HR%20Update%20-%20May%202014_0.pdf> [perma.cc/SL29-Y3V5] [Letheren & MacDonnell] at 5; *W v W*, 2006 CHRT 23 (CanLII); Letheren, *supra* note 13; Personal experience HRLSC.

¹¹⁴ Letheren, *ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ Human Rights 101 is an online training available on the Ontario Human Rights Commission Website at ohrc.on.ca/en/learning/ohrc-elearning-your-elearning-source-human-rights [perma.cc/B8NV-H7U3].

¹¹⁸ Letheren, *supra* note 13.

¹¹⁹ Cheryl Lynn Knapp, "Update on Human Rights Tribunal Remedies and Human Rights Activity in Ontario's Civil Courts 2011-12" (Lecture delivered at the OBA Annual Update on Human Rights, 8 June 2012) [unpublished].

HRTO is also not encouraged to formulate creative public interest remedies in the near future.¹²⁰ In *Moore*, a case about the cancellation of a special education program, the Supreme Court of Canada (SCC) upheld the decision of the British Columbia Human Rights Tribunal (BCHRT) in part, ordering that the School District pay for the cost of Moore's schooling and damages.¹²¹ The SCC did not uphold the orders against the School District and the Ministry of Education for a wide range of systemic remedies.¹²²

Another downside of the human rights system is that there is a risk that an applicant's disability may be disclosed in a written decision prior to a full hearing.¹²³ Often the first move by the respondent is to request a summary hearing. A summary hearing "may be ordered when it appears there may be no reasonable prospect that the application or a part of the application can succeed."¹²⁴ The applicant is given an opportunity to clarify the allegations in their application and then the Tribunal Member determines whether or not to dismiss some or all of the application.¹²⁵ Even if one survives the summary hearing process, one's disability may be disclosed in an interim decision. Interim decisions can be made prior, during, or after a hearing to decide on procedural issues or part of an application ("for instance, whether some of the allegations are untimely").¹²⁶ For example, procedurally a party may be removed or the question of whether or not anonymization will be ordered may be decided. What this means for the purpose of this article is that an applicant may lose a potential benefit of a private settlement because the applicant can no longer negotiate a non-disclosure clause in the minutes of settlement which would prevent disclosure of these sensitive details.¹²⁷

Another related problem is that not all applicants are aware that the act of filing a human rights application may result in a public decision available online or that anonymous or redacted processes are even available.¹²⁸ This is not surprising given that most applicants are self-represented.¹²⁹ Sometimes applicants learned that these decisions are posted online after the fact, at which point it is difficult to redact the information.¹³⁰ This is demonstrated through two cases where the HRTO was reluctant to redact sensitive information from HRTO decisions when applicants sought to redact information after the decisions were published. In *J v T*, the HRTO found that the "information was necessary to meaningfully explain the reasoning in the decision" including information related to the applicant's disability.¹³¹ In another case, the HRTO would

¹²⁰ *Moore v BC*, 2012 SCC 61 at paras 55-70.

¹²¹ *Ibid* at para 70.

¹²² *Ibid* at para 22, 70.

¹²³ Letheren & MacDonnell, *supra* note 113 at 17; Letheren, *supra* note 13.

¹²⁴ HRTO, *Application and Hearing Process*, online: <sjto.gov.on.ca/hrto/application-and-hearing-process/#step8> [perma.cc/T367-VFSR].

¹²⁵ *Ibid*.

¹²⁶ *Ibid*.

¹²⁷ Letheren, *supra* note 13; Letheren & MacDonnell, *supra* note 113 at 20. For example, in one particular case the HRTO unnecessarily disclosed a great deal of personal information. In the written interim decision, the Vice-Chair went into specific details about the applicant's mental breakdown, suicidal thoughts, and depression. The case survived the summary hearing process and would have progressed at the next stage to mediation if the respondents consented. *M v S*, 2012 CanLII 1736 (HRTO) at paras 12-14.

¹²⁸ Letheren, *supra* note 13; Letheren & MacDonnell, *supra* note 113 at 3.

¹²⁹ Pinto, *supra* note 1 at 26, 45

¹³⁰ Letheren, *supra* note 13.

¹³¹ *J v T*, 2009 CanLII 1413 at para 38 (HRTO) [*J v T*].

not redact public online decisions which contained private employment and health information.¹³² The HRTO pointed to the *Rules of Procedure* and the declaration signed by the applicant as a part of submitting the human rights application.¹³³ The declaration at the time stated, “I understand that information about my Application can become public at a hearing, in a written decision, or in other ways determined by Tribunal policies,” and the application states, “Do not sign your Application until you are sure you understand what you are declaring here.”¹³⁴ However, Rule 3.12 (which states that all HRTO decisions are available to the public) and the declaration do not mention that the decisions made by the HRTO will be posted online.

In sum, there is good reason to be concerned about whether applicants are deterred from filing human rights applications as a result of the high bar for anonymous and redacted processes. Applicants must weigh the potential benefits and negative repercussions of the process. The benefits, given the low damage awards, lack of creative public interest remedies and the risk of disclosure of one’s disability before a private settlement, may not outweigh the costs. Given the social science literature surrounding disclosure, even if applicants have decided to proceed with an application because it is “worth it” overall, disclosure of one’s disability is a high transaction cost for an applicant to factor into their cost-benefit analysis.

VIII. CURRENT SAFEGUARDS

HRTO decisions cited on CanLII do have some protection from today’s powerful search engines such as Google. CanLII uses a “recognized web robot exclusion protocol.”¹³⁵ This means that CanLII “prohibits external search engines from indexing the text and case name of decisions published on its website,” with the exception of Supreme Court of Canada (SCC) decisions.¹³⁶ However, CanLII cannot control the actions of third parties. If a third party creates a link to a CanLII decision on a page over which CanLII does not have control, then the text from the link could be “indexed by external search engines.”¹³⁷ Decision text can easily be copied and pasted and PDF versions of the decisions can be saved and circulated.

IX. THE OPEN COURTS PRINCIPLE AND LITIGATION IN THE DIGITAL AGE

The test for anonymity requires that the applicant demonstrate that her/his concerns for anonymity outweigh any negative impacts on the “open justice system.”¹³⁸ The importance of an “open justice system” derives from the “open courts principle.” In what follows below I explore whether the “open courts principle” as currently applied is appropriate for the human rights system, whether the principle is properly applied by the HRTO, and whether the principle has

¹³² *L v G*, 2012 CanLII 303 at para 20 (HRTO).

¹³³ *Ibid* at para 16.

¹³⁴ *Ibid*.

¹³⁵ CanLII, *Privacy Policy*, online: <canlii.org/en/info/privacy.html> [perma.cc/LR7W-E4XH].

¹³⁶ *Ibid*.

¹³⁷ *Ibid*.

¹³⁸ *CM*, *supra* note 16 at para 12.

been engaged by the HRTO in a manner that factors in the digital age.

A. ONLINE COURT AND TRIBUNAL DECISIONS¹³⁹

In this section, I will focus on online court and tribunal decisions. However, I will draw on the broader literature that discusses court records generally when appropriate. Identifying information disclosed in other types of court records, such as pleadings, online raises many of the same concerns as identifying information in online court and tribunal decisions.

Academics have raised the issue of the degree to which privacy interests should be recognized in online court records systems. Those who advocate for the availability of court records online argue that online records enable lawyers to save time and money.¹⁴⁰ CanLII allows easy access to information which is helpful for lawyers working on limited budgets (such as those representing applicants), as well as for applicants who are required to self-represent. This is especially important in a regime where applicants frequently are self-represented (54% self-represented at mediation, 53% at hearing), whereas respondents are “almost always represented” (15% self-represented at both mediation and at hearing).¹⁴¹ Arguably, the availability of online HRTO decisions provides access to justice.

Proponents for access to online court documents also argue that “such openness would be beneficial to the media for accurate reporting.”¹⁴² However, the interests of journalism—such as government accountability and informing the public—can be achieved without having an entire court document available for view.¹⁴³ The SCC held in *Canadian Newspapers* that, “while freedom of the press is nonetheless an important value in our democratic society ... it must be recognized that the limits imposed by [prohibiting identity disclosure] on the media’s rights are minimal.”¹⁴⁴ The media can still attend the hearing and report on the facts and trial.¹⁴⁵ This case was decided in the context of a constitutional challenge to the provisions of the *Criminal Code* which anonymize the identities of sexual assault complainants.¹⁴⁶

Privacy advocates argue that private information should not be disclosed online because employers and rental or leasing agents could use this information to deny an individual employment or housing.¹⁴⁷ Human rights applicants have a legitimate basis to be concerned regarding the disclosure of personal information to potential employers through online decisions. In a recent study commissioned by Microsoft, hundreds of recruiters, human resource professionals (HRPs), hiring managers, and consumers from four countries were interviewed

¹³⁹ In this section at times I discuss concerns about online court records generally. Judicial and tribunal decisions are a form of court record, and judicial and tribunal decisions have the potential to disclose the same types of personal information as other court documents (e.g. pleadings) in their summary of the evidence and law. Their online availability results in some of the same benefits as court documents generally.

¹⁴⁰ Kristen M Blankley, “Are Public Records Too Public? Why Personally Identifying Information Should Be Removed from Both Online and Print Versions of Court Documents” (2004) 65 Ohio LJ 413 at 421.

¹⁴¹ Pinto, *supra* note 1 at 26, 45.

¹⁴² Blankley, *supra* note 140 at 422.

¹⁴³ *Ibid.*

¹⁴⁴ *Canadian Newspapers Co v Canada (Attorney General)*, [1988] 2 SCR 122 at para 20 [*Canadian Newspapers*].

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ Blankley, *supra* note 140 at 419.

about the impact of online reputational information on hiring decisions.¹⁴⁸ Of the 275 recruiters and HRPs surveyed from the United States, 75 per cent report that their companies require that hiring personnel conduct online searches of candidates through formal policies and 79 per cent check the online reputational data of job candidates.¹⁴⁹ Eighty-nine per cent thought it was appropriate to consider professional online data in hiring decisions, whereas 84 per cent thought it was appropriate to consider personal online data.¹⁵⁰ Seventy per cent had rejected one or more candidates due to information about the candidate found online.¹⁵¹ Forty per cent had rejected a candidate based on “comments criticizing previous employers, co-workers or clients.”¹⁵² The study noted:

Of concern are the lengths to which recruiters and HR professionals surveyed go in search of information as well as the types of information they are seeking. They are for the most part, comfortable searching for information that would be unethical or even illegal to ask a candidate to provide. ... Traditionally, recruiters have had clear restrictions on the types of information they can ask candidates. This included restrictions on asking about their families, their affiliation to religious, political or other groups, their financial situation, medical condition, and so on. Now recruiters can easily and anonymously collect information that they would not be permitted to ask in an interview, and the survey found that they are doing just that.¹⁵³

Moreover, the recruiters and HRPs indicated that they believe the importance of “online reputational information will significantly increase in the next five years.”¹⁵⁴

In the context of online legal databases specifically, there is one documented case in Cincinnati of an individual who used Internet dockets to inform his hiring decisions.¹⁵⁵ Based on information learned through court records posted online, he decided against hiring certain job applicants.¹⁵⁶ Anecdotally, there is an understanding that Ontario employers and human resource managers are searching in CanLII.¹⁵⁷

Such emerging evidence is in direct contrast to the HRTO jurisprudence which dismisses concerns about disclosure of disability in public decisions posted online and the related risk to employment prospects.¹⁵⁸ There is a similar disconnect between the number of consumers who believe that online reputation plays a role in hiring, and the current approaches of recruiters and HRPs. Only 7 per cent of the 335 United States consumers surveyed thought online data affected their job prospects.¹⁵⁹ Despite this fact, the majority of consumers recognize the importance of

¹⁴⁸ “Online Reputation in a Connected World” (2010), *Cross-Tab* online: <job-hunt.org/guides/DPD_Online-Reputation-Research_overview.pdf> [perma.cc/Z6PL-29L3] [Cross-Tab].

¹⁴⁹ *Ibid* at 6.

¹⁵⁰ *Ibid* at 7.

¹⁵¹ *Ibid* at 3.

¹⁵² *Ibid* at 9.

¹⁵³ *Ibid* at 11, 20.

¹⁵⁴ *Ibid* at 3.

¹⁵⁵ Blankley, *supra* note 140 at 419.

¹⁵⁶ *Ibid*.

¹⁵⁷ HRLSC, personal communication with clinic staff.

¹⁵⁸ *C v R*, *supra* note 83 at para 10. See also section on Research Findings.

¹⁵⁹ Cross-Tab, *supra* note 148 at 5.

managing their online identity as is demonstrated through the 79 per cent of consumers surveyed from the United States who took steps to separate their professional and personal online profiles.¹⁶⁰ However, individuals are limited in their ability to manage their identity; “[i]n an Internet of infinite memory, where our “portraits” are amateurishly assembled in an online aggregator, many of us have quite possibly and irrefutably lost control over our identity and how we are perceived.”¹⁶¹

B. THE OPEN COURTS PRINCIPLE

Scholars who advocate for increased access to public documents online argue that “[public] means public no matter the forum.”¹⁶² They argue that “because the public has a right to read, inspect, and copy documents at the courthouse,” the public should have the same right to access these documents online.¹⁶³ The open courts principle, whose origins date back to as early as 1685, is the “quasi-constitutional” principle that “court proceedings should be open and accessible.”¹⁶⁴ The open courts principle is articulated by the Supreme Court of Canada (SCC) in the two-part *Dagenais/Mentuck* test.¹⁶⁵ Both *Dagenais* and *Mentuck* answered the question of when the Court should order publication bans, and both were decided in the criminal context.¹⁶⁶ The test articulated in *Dagenais* focused on balancing the accused’s right to a fair trial with the media’s right to freedom of expression.¹⁶⁷ In *Mentuck*, the test in *Dagenais* was modified to apply to a broader set of issues.¹⁶⁸

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

¹⁶⁰ *Ibid* at 13.

¹⁶¹ Karen Eltis, *Courts, Litigants and the Digital Age: Law, Ethics and Practice* (Toronto: Irwin Law, 2012) [Eltis, *Courts, Litigants*] at 5

¹⁶² Blankley, *supra* note 140 at 421.

¹⁶³ *Ibid* at 421-22.

¹⁶⁴ R Gary Dickson, “Administrative Tribunals, Privacy and the Net” (2009) at 15, online:

<oipc.sk.ca/Resources/Administrative%20Tribunals.pdf> [perma.cc/A9L9-59C7]; Chantal Bernier, “The Open Court Principle and Privacy Legislation in the Digital Age” (2011) online: <priv.gc.ca/media/sp-d/2011/sp-d_20110927_cb_e.asp> [perma.cc/XK4B-XJMP].

¹⁶⁵ Dickson, *ibid*.

¹⁶⁶ *R v Mentuck*, 2001 SCC 76 [*Mentuck*]; *Dagenais*, *supra* note 15. In *Mentuck*, the Crown sought to suppress the identities of undercover police officers and operational investigation methods for a one year period. At para 60 the SCC upheld the original publication ban of *Menzies J* which it found to be properly tailored based on the circumstances. The order provided a one year ban on the names of the undercover police officers but did not extend the ban to cover the operational methods of the police. In *Dagenais*, four members of the Catholic Church who had been charged with physically and sexually abusing male children in Catholic schools sought to have the Canadian Broadcasting Corporation restrained from broadcasting a fictional program about physical and sexual child abuse in a Catholic orphanage anywhere in Canada until the criminal trials reached their conclusion. The publication ban was not upheld because it violated section 2(b) of the *Charter of Rights and Freedoms*.

¹⁶⁷ *Ibid* at 840.

¹⁶⁸ *Mentuck*, *supra* note 166 at para 32.

- (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.¹⁶⁹

As a part of the test, the Court must balance competing rights such as the right to a fair trial, privacy rights, and freedom of expression.¹⁷⁰ As Fish J concluded in *Toronto Star Newspapers Ltd v Ontario*,

...the Dagenais/Mentuck test applies to *all* discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings. Any other conclusion...would tend to undermine the open court principle... [which is] incorporated into the core values of s. 2(b) of the *Charter*. ”

...

Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would *subvert the ends of justice or unduly impair its proper administration*. [emphasis in original]¹⁷¹

The Dagenais/Mentuck test is applied in the HRTO context.¹⁷² The HRTO proceedings are open despite the “disadvantage,” or “inconveniences to the private persons whose conduct may be the subject of [the] proceedings.”¹⁷³

C. THE IMPLICATIONS OF *AB v BRAGG COMMUNICATIONS*

In the 2012 decision of *AB v Bragg Communications (Bragg)*, the SCC prioritized privacy concerns in its application of the Dagenais/Mentuck test.¹⁷⁴ The issue in *Bragg* was whether a fifteen year old cyberbullying victim could remain anonymous in an application requesting information from an Internet provider to use in an action for defamation.¹⁷⁵ Someone had created

¹⁶⁹ *Ibid.*

¹⁷⁰ *Hollinger Inc v The Ravelston Corporation Limited*, 2008 ONCA 207 at para 123 [Hollinger]; Dickson, *supra* note 164 at 16-17.

¹⁷¹ *Toronto Star Newspapers Ltd v Ontario*, 2005 SCC 41 at para 7, 4; *Hollinger supra* note 170 at para 123; Dickson, *ibid.*

¹⁷² Reema Khawja, “The shadow of the law: surveying the case law dealing with competing rights claims” (2012), online:

<ohrc.on.ca/sites/default/files/the%20shadow%20of%20the%20law_surveying%20the%20case%20law%20dealing%20with%20competing%20rights%20claims_full%20version.pdf> [perma.cc/2QEU-QT7C] at 11 [Khawja]; *M v O*, 2007 HRTO 24 [*M v O*]; *S v O*, *supra* note 51; *August, supra* note 14; *H v O, supra* note 14; *XY, supra* note 46; *CM, supra* note 16; *R v O*, 2008 HRTO 217 [*R v O*]; *C v C*, 2013 HRTO 1773; *N v T*, 2009 HRTO 1519; *K v N, supra* note 90, *TF, supra* note 50; *L v Y*, 2010 HRTO 1601 [*L v Y*].

¹⁷³ *K v N, supra* note 90 at para 9; *AG (Nova Scotia) v MacIntyre*, [1982] 1 SCR 175 at 186 [*MacIntyre*].

¹⁷⁴ *AB v Bragg Communications*, 2012 SCC 46 [*AB v Bragg*].

¹⁷⁵ *Ibid.*

a fake Facebook profile for AB and she requested that the Internet provider reveal the IP address of the Internet user who had created the profile.¹⁷⁶ Two media outlets opposed AB's request for anonymity.¹⁷⁷ Justice Abella, writing for the Court, held that an order allowing AB to proceed anonymously appropriately balanced AB's interest in privacy and the media's right to freedom of expression as the impact of prohibiting identity disclosure minimally impacts the rights of the media.¹⁷⁸ A party's identity has been described as a "[mere] ... sliver of information" by the SCC in other circumstances where the open court principle was engaged.¹⁷⁹

The Court highlighted the importance of privacy; "[p]rivacy is recognized in Canadian constitutional jurisprudence as implicating liberty and security interests. In *Dyment*, the court stated that privacy is worthy of constitutional protection because it is 'grounded in man's physical and moral autonomy,' is 'essential for the well-being of the individual,' and is 'at the heart of liberty in a modern state.'"¹⁸⁰

The *Bragg* case actually turned on the issue of whether there was sufficient evidence of specific harm to make an order for anonymity.¹⁸¹ The SCC held that the lower courts had, "erred in failing to consider the objectively discernable harm to AB."¹⁸² "[W]hile evidence of a direct, harmful consequence to an individual applicant is relevant, courts may also conclude that there is objectively discernable harm."¹⁸³ The Court can use "reason and logic" in the absence of "scientific or empirical evidence of the necessity of restricting access."¹⁸⁴ The Court referred to social science evidence and used common sense to determine that "young victims of sexualized [cyber]bullying are particularly vulnerable to the harms of revictimization upon publication."¹⁸⁵

Though this case was about a minor who experienced sexual harassment it can be applied to a broader set of privacy concerns. *Bragg* stands for the proposition that there is flexibility within the Dagenais/Mentuck framework to protect special¹⁸⁶ privacy concerns through anonymization and that this does not significantly impact on the media's interest in openness. This supports the anonymization of human rights applications for individuals with concerns about disclosure of their disabilities. *Bragg* permits the HRTO to use reason and logic to determine whether an applicant would suffer harm without anonymization in the absence of empirical evidence.¹⁸⁷ As such, notwithstanding the lack of empirical data showing that applicants who disclose their disability in a public decision suffer adverse consequences, based on what we do know about disability disclosure and the use of online searches in hiring as discussed above, and the presence of discrimination against people with disabilities in society in general, we can infer using reason and logic that some individuals with disabilities would suffer

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid* at para 4.

¹⁷⁸ *Ibid* at para 28; *Canadian Newspapers*, *supra* note 144 at para 20.

¹⁷⁹ *AB v Bragg*, *supra* note 174 at para 28 citing *FN (Re)*, 2000 SCC 35 (CanLII), [2000] 1 SCR 880, at para 12.

¹⁸⁰ *Ibid* at para 18 citing *Toronto Star Newspaper Ltd v Ontario*, 2012 ONCJ 27 at para 41.

¹⁸¹ *Ibid.*

¹⁸² *AB v Bragg*, *supra* note 174 at para 9.

¹⁸³ *Ibid* at para 15.

¹⁸⁴ *Ibid* at para 16.

¹⁸⁵ *Ibid* at para 27.

¹⁸⁶ Note that Justice Abella did not go as far to protect all privacy concerns, *ibid* at para 14.

¹⁸⁷ Arguably then the HRTO has erred in its conclusion that, "[l]ike the courts, the HRTO has required a sufficient factual basis for a publication ban, through actual evidence supporting the request" Khawja, *supra* note 172 at 11; *M v O*, *supra* note 172.

harm if their disabilities are disclosed on CanLII. Moreover, as outlined below, the court has lost its ability to redact and control information in online decisions. Therefore, it is difficult to evaluate the full extent of the risk of harm of having an online decision disclosing one's disability in the future.

D. THE OPEN COURTS PRINCIPLE REVISITED IN THE DIGITAL AGE

Legal scholars and authorities have questioned the applicability of the open courts principle in the digital age. The traditional scope of the principle was carved out when the courts had control over access to courthouses, physical court records, and hearings.¹⁸⁸ The principle has since been “perverted” by the Internet.¹⁸⁹

We have lived in a very forgiving world. The “practical obscurity” of paper judicial records largely sheltered us from the danger of information misuse, while we prided ourselves on our “public” judicial system. The world of electronic information is a far less forgiving place. It is now forcing us to recognize—by our actions, if not yet by our words—that the simple abstract rules developed for a world of paper-based information may no longer suffice to resolve the complex problems of judicial information management. Courts have traditionally been vigilant in protecting individuals from the misuse of sensitive personal information. They must now rise to the difficult task of designing rules to protect litigants and third parties from cyber-mischief and victimization. The failure of the legal system to maintain the ancient balance between access and privacy will lead to the greatest danger of all—inhibiting citizens from participating in the public judicial system.¹⁹⁰

Eltis argues we should be re-thinking the importance of privacy and the disclosure of information in legal decisions in the cyber context.¹⁹¹ This includes how the judiciary frequently “pits privacy against the open court principle and accepts a culturally narrow view of what constitutes privacy and how it affects the judicial process.”¹⁹² Eltis highlights the differences between the former paper court records system, from which the open courts principle evolved, and the current system. Court records were once protected by the “practical obscurity” of the paper system.¹⁹³ To obtain a court record, one had to physically relocate to the courthouse. Today individuals can access court and tribunal decisions online anonymously through databases

¹⁸⁸ Bernier, *supra* note 164.

¹⁸⁹ *Ibid.*

¹⁹⁰ Peter A Winn, “Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information” (2004) 79 Wash L Rev 307 at 328 [Winn].

¹⁹¹ Eltis, *Courts, Litigants, supra* note 161.

¹⁹² Karen Eltis, “The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context” (2011) 56 McGill LJ 289, online: <lawjournal.mcgill.ca/userfiles/other/5293931-Eltis.pdf > [perma.cc/EKE7-MYPH] [Eltis, “Judicial System”] at 289.

¹⁹³ *Ibid* at 303; Winn, *supra* note 190.

such as CanLII. In addition, Eltis describes how our courts have shifted from “custodians of information” or “passive repositories” to “active publishers.”¹⁹⁴

Furthermore, courts are losing control over court documents and their ability to redact sensitive information.¹⁹⁵ An example which readily demonstrates this point was when a man sued an Internet dating site because the site refused to delete postings from a former lover. The man had kept his sexual orientation private and his former lover revealed his identity and spread rumours about the man’s HIV status in the postings.¹⁹⁶ The pleadings for the case were “automatically and instantaneously” posted online by the Court, including the damaging information which sparked the lawsuit in Israel.¹⁹⁷ When the Judge attempted to redact the sensitive information, the original copy of the pleadings could not be removed from the Internet despite vigorous efforts.¹⁹⁸ Another difference between the current system and the paper system is that the networked nature of the Internet increases vulnerability to cyberbullying and embarrassment, magnifying “pre-existing difficulties” that litigants would have encountered in a conventional non-online context.¹⁹⁹

The previous Assistant Privacy Commissioner of Canada, Chantal Bernier, has taken the position that “unlimited disclosure of personal information” on the web exceeds the objectives which underlie the open courts principle such as tribunal accountability, legitimacy, and public trust in the legal system.²⁰⁰ “So rather than turning the light on the institution’s practices, it is turned on the parties, who become the subjects of idle curiosity or even voyeurism and malicious intent.”²⁰¹ She cites the example of two individuals involved in a workplace arbitration over ten years prior whose identities continue to be “exclusively associated with the incident” through Internet searches.²⁰²

Eltis investigates the history of our legal traditions surrounding privacy and the “open court principle.” She argues that the way in which privacy law developed in the common law tradition is inadequate to protect privacy rights in the cyber age. Eltis explains how the right to privacy in the English common law developed from the law of trespass and that “the right to privacy was first recognized by virtue of its intricate link to personal property.”²⁰³ In contrast, in French civil law, the right to privacy evolved as a “personality right.”²⁰⁴ A personality right is:

¹⁹⁴ Eltis, *Courts, Litigants*, *supra* note 161 at 54. Here the author is drawing on the work of Kenneth Withers speaking at the Princeton University, Centre for Information Technology Policy conference, “Privacy, Access, Technology, and the Future of Litigation in the United States” (13 May 2011), online (webcast): <citp.princeton.edu/event/privacy-access/> [perma.cc/8VXA-3KWH]; Grayson Barber speaking at the Princeton University, Centre for Information Technology Policy conference, “Privacy, Access, Technology, and the Future of Litigation in the United States” (13 May 2011), online (webcast): <citp.princeton.edu/event/privacy-access/> [perma.cc/WB29-CN6D].

¹⁹⁵ Eltis, *Courts, Litigants*, *supra* note 161 at 54.

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid* at 54-55.

¹⁹⁹ Eltis, “Judicial System,” *supra* note 192 at 301.

²⁰⁰ Bernier, *supra* note 164.

²⁰¹ *Ibid.*

²⁰² *Ibid.*

²⁰³ Eltis Judicial System, *supra* note 192 at 312.

²⁰⁴ *Ibid* at 313.

[A]n idea central to the civilian tradition but alien to the common law. What that means succinctly is that privacy attaches to persons rather than property, irrespective of property or special constraints. In other words, “Personality rights focus on the *être*—the being—in contrast with the *avoir*—the having” ... and are therefore divorced from territory. Central among these personality rights is privacy, which in turn is predicated on dignity...²⁰⁵

Civil law’s more flexible conception of privacy is better suited to protecting privacy rights in “intangible” and ever-evolving spaces like cyberspace.²⁰⁶ If the courts were to embrace this understanding of privacy rights, privacy could be seen as an “ally of accessibility.”²⁰⁷ In the current system, potential litigants may see the impact to their privacy and dignity rights as too great a transaction cost to pursue their claims.²⁰⁸ This is especially of concern in a legal system where protection of a litigant from “humiliation, embarrassment, or shame [is] looked upon with suspicion.”²⁰⁹

Despite problems outlined with the current application of the open court principle in the digital age, it is possible for privacy rights and the open court principle to co-exist.²¹⁰ Suggestions for reform could include a tiered approach: protective orders which result in total bans on dissemination and a lower standard which simply keeps documents offline, and reforming court rules to “reflect privacy interests.”²¹¹ Other options include the use of robot exclusion protocols or removing personal identifiers from decisions, methods used by CanLII and the Ontario Workplace and Safety and Insurance Appeals Tribunal (WSIAT) respectively.²¹² Another option would be to provide individuals different levels of access to the information depending on their reasons for obtaining the information and these individuals would be subject to certain terms and conditions.²¹³

Dickson, the previous Privacy Commissioner of Saskatchewan, who has written about the relevance of the open courts principle to administrative tribunals in the digital age, recommends that administrative tribunals should consider using anonymized processes if they post decisions online.²¹⁴ The HRTO is an administrative tribunal, not a court, and it may be argued that because of the administrative nature of HRTO decisions, the open courts principle should have less

²⁰⁵ *Ibid.* In this citation the author relies upon Adrian Popovici, *Personality Rights: A Civil Law Concept* (2004) 50:2 Loy L Rev 349 at 352, citing Alain Seriaux, “La notion juridique de patrimoine: Brèves notations civilistes sur le verbe avoir” (1994) 93:4 RTD Civ 801 at 804-806; Karen Eltis, “La surveillance du courrier électronique en milieu du travail: le Québec succombera-t-il à l’approche américaine?” (2006) 51:3 McGill LJ 475 at 495 citing Adrien Popovici, “Le Rôle de la Cour Suprême en Droit Civil” (2000) 34 RJT 607 at 615 [Popovici, “Rôle de la Cour Suprême”]; Gregoire Loiseau, “Des droits patrimoniaux de la personnalité en droit français” (1997) 42:2 McGill LJ 319 at 328, citing Popovici, “Rôle de la Cour Suprême” at 616.

²⁰⁶ *Ibid* at 314.

²⁰⁷ *Ibid* at 315.

²⁰⁸ *Ibid* at 302.

²⁰⁹ *Ibid* at 310.

²¹⁰ Bernier, *supra* note 164 at 26.

²¹¹ Blankley, *supra* note 140 at 442-43.

²¹² Christopher Berzins, “Personal Information in the Adjudicative Decisions of Administrative Agencies: An Argument for Limits” (2008) 34 The Advocates’ Quarterly 261 at 283 [Berzins].

²¹³ *Ibid.*

²¹⁴ Dickson, *supra* note 164 at 30.

applicability in the HRTO context.²¹⁵ *Dagenais* and *Mentuck* came out of criminal law cases; not the administrative law context. The *Human Rights Code* is considered quasi-constitutional legislation and thus the HRTO may be considered more like a court on the spectrum between courts and administrative tribunals, but this does not necessarily mean that the open courts principle should apply with full force in HRTO decisions. Furthermore, the SCC's decision in *Bragg* suggests that the HRTO should reconsider its application of *Dagenais/Mentuck*. Anonymization should be used as a tool to protect the privacy interests of certain vulnerable individuals, such as those who would choose not to stand up against discrimination if they had to publicly disclose their disabilities in the process. The media and the public still have access to the contents of the decision, resulting in an appropriate balance of competing rights.

X. WHAT IS THE PRACTICE IN OTHER JURISDICTIONS AND TRIBUNALS?

While the HRTO's practice for issuing orders related to anonymity has been discussed, an interesting question to ask in making recommendations for reform is: how do the practices of the HRTO compare to the practices of other tribunals in Ontario with similar mandates and human rights tribunals in other jurisdictions?

Social Justice Tribunals (SJTOs) in Ontario consist of the Child and Family Services Review Board (CFSRB), the Custody Review Board (CRB), the HRTO, the Landlord and Tenant Board, the Ontario Special Education Tribunals for both English and French, and the Social Benefits Tribunal.²¹⁶ The legislative authority for the Social Justice Tribunal Cluster is the *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*. The government can designate a cluster when "matters that the tribunals deal with are such that they can operate more effectively and efficiently as part of a cluster than alone."²¹⁷ The SJTO share the same mandate, mission and values including the following core values of accessibility: "We will strive to enhance full and informed participation of parties in the process, whether or not they have legal representation... We are committed to diversity and inclusiveness We will provide dispute resolution processes that are proportionate and appropriate to the issues in dispute."²¹⁸

All of the Social Justice Tribunals with the exception of the HRTO use some form of anonymization process in all decisions. For example, CFSRB pre-hearings and hearings are presumptively private.²¹⁹ Its decisions on CanLII use initials to maintain this privacy.²²⁰ The

²¹⁵ For a discussion of some of the differences between administrative tribunals and superior courts and why it may be inappropriate "to apply the 'open courts' principle indiscriminately to administrative tribunals" see Dickson, *supra* note 164 at 27-28.

²¹⁶ Social Justice Tribunals Ontario, "About Us," online: <sjto.gov.on.ca/en/> [perma.cc/NS73-9YZN].

²¹⁷ *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*, SO 2009, c 33, Sch 5 s 15.

²¹⁸ Social Justice Tribunals of Ontario, "Mandate, Mission, Values," (2015) online: <sjto.gov.on.ca/en/mandate-mission-values/> [perma.cc/94NT-TVUH].

²¹⁹ Child and Family Services Review Board, "Rules of Procedure," online:

<sjto.gov.on.ca/documents/cfsrb/CFSRB%20Rules%20of%20Procedure.pdf> [perma.cc/7AUH-DGXY] at 12.

²²⁰ CanLII, "Ontario - Child and Family Services Review Board: Recent Decisions," online: <canlii.org/en/on/oncfsrb/> [perma.cc/Z66X-9NSX].

CRB only provides samples of recommendations made by the Board on the CanLII website as examples of the sorts of questions raised in applications.²²¹ These sample recommendations use “Young Person” in the place of an Applicant’s name.²²² CRB hearings are presumed private (i.e. in the absence of the public).²²³ In the Special Education Board’s (SEB) decisions all identifying information about the student is removed from the version of the decisions posted on CanLII.²²⁴ Initials are used in the place of names.²²⁵ The anonymization procedures of the CFSRB, CRB and SEB are not surprising as the boards all involve decisions related to minors. Decisions of the Social Benefits Tribunal (SBT) are also private and confidential (i.e. not open to the public) as is mandated by statute and the decisions are anonymized.²²⁶ Anonymized decisions refer to the “Appellant” and are identified on CanLII using a docket number and legal citation.²²⁷

Of the SJTO cluster, the Landlord and Tenant Board (LTB) is arguably the most similar to the HRTTO and significantly, the LTB has jurisdiction to consider some human rights matters related to housing.²²⁸ Decisions at the LTB are all anonymized for both the tenant and landlord. Decisions which are posted on CanLII are referred to by a docket number and legal citation. Landlords and tenants are referred to by initials in the decisions. The names of tenants will not be provided to members of the public even if they bring a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA), whereas information about landlords may be provided.²²⁹ Information about landlords including their name and address is not protected under FIPPA because they are acting in a “business capacity.”²³⁰ Names and addresses of tenants, on the other hand, are protected under FIPPA because they are considered personal information.²³¹ The Consent and Capacity Board (CCB) also anonymizes decisions.²³² This is the case even though

²²¹ *Young Person v Provincial Director (CFSA s.97)*, 2012 ONCRB 1; CanLII, “Ontario – Custody Review Board: Recent Decisions,” online: <canlii.org/en/on/oncrb/> [perma.cc/3WST-DC5C] [*CRB Recent Decisions*], Custody Review Board, “Laws, Rules, Decisions” online: <sjto.gov.on.ca/crb/laws-rules-decisions/> [perma.cc/PL33-SJWA].

²²² *Ibid.*

²²³ *Child and Family Services Act*, RSO 1990, c C-11, s 45(4).

²²⁴ Ontario Special Education Tribunal (English), “Decisions,” online: <sjto.gov.on.ca/oset/decisions/> [perma.cc/67AZ-FNV8] [*OSET Decisions*]; Ontario Special Education Tribunal (English), “Appeal and Hearing Process,” online: <sjto.gov.on.ca/oset/appeal-and-hearing-process/> [perma.cc/9M58-JMVP].

²²⁵ *Ibid*; *BR v Halton DSB*, 2010 OSET 02, online:

<canlii.org/en/on/onset/doc/2010/2010onset3/2010onset3.html> [perma.cc/HJ34-XEA2].

²²⁶ *Ontario Works Act*, 1997, SO 1997, c 25, Schedule A, s 66(1); *Ontario Disability Support Program Act*, 1997, SO 1997, c 25, Schedule B, s 2; Social Benefits Tribunal, “Appeal and Hearing Process” online: <sjto.gov.on.ca/sbt/appeal-and-hearing-process/#step4> [perma.cc/7QTS-EYMB].

²²⁷ CanLII, “Ontario – Social Benefits Tribunal: Recent Decisions,” online: <canlii.org/en/on/onsbt/> [perma.cc/WXW4-QPZ6].

²²⁸ Landlord and Tenant Board, “Human Rights Guideline 17” online:

<sjto.gov.on.ca/documents/lrb/Interpretation%20Guidelines/17%20-%20Human%20Rights%20Guideline.pdf> [perma.cc/JLJ8-VZGN].

²²⁹ Landlord and Tenant Board, “Making a Request for Information to the Board” (2008), online: <sjto.gov.on.ca/documents/lrb/Brochures/Making%20a%20Request%20for%20information%20to%20the%20Board%20(EN).pdf> [perma.cc/3S6H-6JEA] [LTB Making a Request].

²³⁰ *Ibid*; *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F-31, s 2(3) [*FIPPA*]. See specifically the definition of “personal information.”

²³¹ LTB Making a Request, *supra* note 229; *FIPPA*, *ibid*, s 2(1).

²³² “To protect the privacy of individual parties (such as patients and their families), references such as an individual party’s full name (initials are used instead of full names), family members’ full names (initials are used instead),

the hearings of the CCB are presumed to be public.²³³ In the Ontario employment law setting, the Workplace Safety and Insurance Board (WSIB) and WSIAT both anonymize decisions.²³⁴ WSIAT removes information that could reveal the identity of the parties or witnesses and only provides the names of parties when there is a related civil case which is not anonymized.²³⁵ The WSIAT privacy policy holds that the “identity of the employer or worker is not necessary for ensuring that the public understands the reasons for Tribunal decisions and the principles of Workplace Safety and Insurance law.”²³⁶

The Ontario Labour Relations Board (OLRB), which has the jurisdiction to hear human rights cases, by contrast “issues written decisions, which may include the name and personal information about persons appearing before it” available on CanLII.²³⁷ The OLRB hearings are public unless there is an issue of public security, or financial or personal matters if disclosure would “be damaging to any of the parties.”²³⁸ Some labour arbitrators have taken steps to avoid the disclosure of the grievor’s identity in arbitration award decisions that reveal sensitive medical information about the grievor.²³⁹ Among such cases are the use of initials to anonymize decisions related to mental health, alcoholism, or other sensitive medical information.²⁴⁰ However, there is not a consistent approach among labour arbitrators as the case of *N v C* reveals. In that award decision sensitive information pertaining to mental health is revealed and the identity of the grievor was not anonymized.²⁴¹

Other Human Rights Tribunals in the Canadian context take different approaches to anonymity. The *Canadian Human Right Act* provides that a Canadian Human Rights Tribunal can hold a public hearing subject to a confidentiality order in certain circumstances including where “there is a real and substantial risk that the disclosure of personal or other matters will cause undue hardship to the persons involved such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public.”²⁴² An article by the author and Letheren only identified one decision in which the Canadian Human Rights Tribunal addressed confidentiality order issues. This case related to a parallel criminal proceeding.²⁴³ The Manitoba

workplace or employer’s name, and other personal identifiers have been omitted from all CCB Reasons for Decisions posted on CanLII.” Consent and Capacity Board, “Board’s Reasons For Decision” (2007), online: <ccboard.on.ca/scripts/english/legal/reasonsfordecisions.asp> [perma.cc/4U46-TM22].

²³³ Ontario, Consent and Capacity Board, *Rules of Practice*, r 21.1, online: <ccboard.on.ca/english/legal/documents/rulesofpractice.pdf> [perma.cc/3KLY-KPDC].

²³⁴ CanLII, “Ontario – Ontario Workplace Safety and Insurance Board: Recent Decisions,” online: <www.canlii.org/en/on/onwsib/> [perma.cc/B625-F7K3]; Workplace Safety and Insurance Appeals Tribunal, “Protecting Worker and Employer Privacy” online: <wsiat.on.ca/english/appeal/protectPrivacy.htm> [perma.cc/9F2K-PPGG] [WSIAT].

²³⁵ WSIAT, *ibid.*

²³⁶ *Ibid.*

²³⁷ Ontario Labour Relations Board, “Adjudication,” online: <olrb.gov.on.ca/english/hearing.htm> [perma.cc/D9Z2-JCGN].

²³⁸ *Ibid.*

²³⁹ *Complex Services v Ontario Public Service Employees Union, Local 278*, 2011 CanLII 26530 (ONLA); *University Health Network v Ontario Public Service Employees Union*, 2010 CanLII 14166 (ONLA); *Dover Flour Mills (Dover Industries Limited) v United Food and Commercial Workers Canada, Local 175*, 2012 CanLII 1234 (ONLA).

²⁴⁰ *Ibid.*

²⁴¹ *N v C*, 2010 CanLII 35849 (ONLA).

²⁴² *Canadian Human Rights Act*, RSC 1985, c H-6 s. 52(1)(c).

²⁴³ Laurie Letheren & Natalie MacDonnell, *supra* note 113 at 13-14; *W v W*, 2006 CHRT 23 (CanLII).

Human Rights Tribunal only has 33 written decisions published online. Out of those decisions, six were anonymized including three cases related to mental health (bipolar, addiction (two are decisions related to the same applicant)) and two cases related to physical disability (Hepatitis C and cancer). The sixth anonymized case was a sexual harassment case.²⁴⁴ Three other disability cases were not anonymized (involving wheelchair accessibility, back injury, and osteoporosis).²⁴⁵ In the case related to alcoholism the Manitoba Human Rights Commission asked the Manitoba Human Rights Board Of Adjudication that the complainant's full name not be used because of the sensitive nature of the information. The respondent did not object.²⁴⁶

The BCHRT is not consistent in its approach towards anonymity in cases of disability. The BCHRT has been, on occasion, receptive to arguments about the stigma of mental health disabilities and the impact of the publication of the applicant's name in cases brought on the grounds of disability. This is demonstrated in a case where an applicant's application was anonymized because he suffered from depression and alcoholism and expressed concern about the impact of the stigma on future employment and housing opportunities.²⁴⁷ In another case the BCHRT anonymized an application pertaining to a serious mental health disability to preserve the applicant's medical privacy. In this case the applicant provided medical documentation that her identification in the decision could worsen her condition.²⁴⁸ In this case, the respondents requested that anonymization be extended to them and this was granted.²⁴⁹ In *M v The University*, where the applicant was concerned about the disclosure of her mental health condition and its impact on future career and employment, the applicant and respondent consented to "reciprocal limits" on disclosure.²⁵⁰ Finally, in another decision, the BCHRT anonymized the names of the parties, including an applicant with a mental health disability (addiction for 8 years) on its own initiative.²⁵¹

The BCHRT has also taken an approach less sensitive to disability privacy concerns and has held that the "hurt," "stigma," and "negative impacts" of disclosure of the applicant's mental health disability are not enough to justify anonymity.²⁵² In at least three decisions the BCHRT has made a point of highlighting the fact that it regularly publishes decisions which identify applicants with mental health disabilities including cases involving (1) mental health therapy/stress leave (2) stress leave/mental break down and (3) mental and physical health concerns resulting from an injury.²⁵³

In sum, the HRTO stands out as the only SJTO which does not anonymize its decisions. This seems particularly striking considering that the SJTOs are moving towards common

²⁴⁴ *KK v Hair Passion*, 2013 CanLII 3982 (MBHRC); *A v Natural Progress Inc of Little Chief's Place*, 2005 (MBHRC); *CR v Canadian Mental Health Association Westman Region*, 2013 CanLII 125 (MBHRC) [CR]; *JD v CN* 2005 (MB HRC); *LH v Vietnamese Non-Profit Housing Corporation*, 2007(MBHRC); online: <manitoba.humanrights.ca/decisions.html> [perma.cc/J29L-2JLX]. Note that not all decisions are available on CanLII.

²⁴⁵ *C v T*, 2012 CanLII 51708 (MBRC); *K v MP* 2012 (MBHRC); *U v L*, 2009 (MBHRC) online: <manitoba.humanrights.ca/decisions.html> [perma.cc/2N32-ASK2].

²⁴⁶ *CR*, *supra* at note 244.

²⁴⁷ *Mr H v MVT Canadian Bus and another*, 2012 BCHRT 107 at paras 6, 25-30.

²⁴⁸ *K v Z and others*, 2012 BCHRT 41 at paras 1, 5-8 [*K v Z*].

²⁴⁹ *Ibid* at para 5.

²⁵⁰ *M v The University and others*, 2012 BCHRT 437 at paras 18-20.

²⁵¹ *ES v The Program and others*, 2012 BCHRT 276 at para 23.

²⁵² *S v V*, 2013 BCHRT 145.

²⁵³ *P v F*, 2013 BCHRT 18; *P v Q*, 2012 BCHRT 358; *M v W*, 2011 BCHRT 334.

procedures and values.²⁵⁴ Moreover, its practices are out of step with the other Ontario tribunals examined here. Tribunals which deal with similar matters such as landlord tenant issues, employment and labour law at WSIB/WSIAT and capacity law at the CCB are anonymizing decisions routinely or frequently.

Arguably this difference in approach stems from the nature of the HRTO; it differs from the other tribunals in that it is more similar to the civil law context where the parties are concerned about their reputation.²⁵⁵ Human rights are quasi-constitutional rights and “it is a serious matter to be accused of breaching the *Code*, which may also cause stress and stigma.”²⁵⁶ The thought is that parties should not be able to bring an application and remain anonymous without good reasons.²⁵⁷ If the applicant brings allegations from “behind a veil,” why should the respondent not also remain anonymous?²⁵⁸ As a general proposition, respondents, like applicants, are not entitled to anonymity in the regular proceedings because of the open courts principle.²⁵⁹ However, as is demonstrated in the BCHRT cases, anonymization of the respondent when an applicant wishes to remain anonymous may be one option to resolve the balancing between an applicant’s right to privacy and a respondent’s concern about openness.

XI. RECOMMENDATIONS AND REPERCUSSIONS

The findings of this article suggest that the HRTO has given insufficient weight to disability privacy concerns in its approach to anonymization. As is demonstrated through the literature, individuals with disabilities experience enough difficulties making day-to-day choices about disclosure at work, school and in social contexts. Requiring that an individual make a choice to disclose his or her disability on the internet to the entire public is too much to ask from individuals who we know choose not to disclose when they are not in safe spaces. Considering the nature of the Internet, the importance of one’s online information to employers, and concerns about loss of control over our Internet identities, the Internet is not a safe space to disclose. Individuals without concerns about disability are taking steps to separate their professional and personal information online. Individuals with disabilities who have concerns about disclosure of their disabilities should not have to make a choice between separating their professional and personal lives online and standing up to discrimination because the process results in online disclosure of their disability..²⁶⁰

It is a very personal choice to disclose a disability. Similar arguments can be raised in support of anonymity for applicants alleging disability as those which have been raised in support of anonymity for applicants alleging sexual harassment or discrimination because of gender identity. There are similar issues at play related to “privacy and dignity interests,” impacts on “self-confidence,” “sense of self-worth” and “relationships with others,” as well as

²⁵⁴ Social Justice Tribunals of Ontario, “Mandate, Mission, Values”, (2015) online: <<http://sjto.gov.on.ca/en/mandate-mission-values/>> [perma.cc/NG4F-7JT6].

²⁵⁵ HRLSC, personal communication.

²⁵⁶ *CM*, *supra* note 16 at para 20.

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.*

²⁵⁹ *MacIntyre*, *supra* note 173.

²⁶⁰ It is noted that some individuals with disabilities may not see a need to separate their personal and professional information relating to their disability.

how the disclosure of the applicant's name could cause "ongoing pain and humiliation."²⁶¹ The OHRT has recognized stigma and prejudice as warranting anonymization in cases of HIV status and gender identity.²⁶² Why is a general concern about stigma surrounding mental health or another disability not enough? As I have argued, if the Tribunal does not protect the identities of applicants in proceedings where they disclose their disability, applicants may be less likely to bring human rights applications.²⁶³ Recognition by the Tribunal in the context of sexual harassment applications that a failure to protect applicants' anonymity is inconsistent with the purposes of the *Code*, should be extended to the disability context.²⁶⁴ The purpose of the *Code* is to promote equality and systemic change. Procedural reforms introduced in 2008 to create a direct access model were for the very purpose of promoting access to the Tribunal.²⁶⁵ The SCC also supports anonymization to encourage reporting and access to legal remedies.²⁶⁶ Eltis highlights how the common law tradition has failed to protect privacy rights in the digital age, but the HRTO has been willing to recognize privacy and dignity concerns in other contexts. It may be that Vice-Chairs do not fully understand the impact that disclosure of disability can have in a way that allows them to properly balance privacy concerns of individuals with disabilities with disclosure concerns against the importance of openness. Other administrative tribunals have done a much better job at protecting privacy concerns of individuals with disabilities and other privacy concerns through the use of initials or other anonymized processes.

The HRTO's current approach is incongruent with principles of human rights law. Employers must keep their employee's disability confidential. Employers may only ask for limitations and restrictions of a disability, not a diagnosis. As it now stands, to obtain a remedy for discrimination on the ground of disability in the HRTO system, other than in exceptional cases, applicants have to disclose their disability in a public decision available online. Does this allow individuals with disabilities with disclosure concerns to obtain meaningful remedies for discrimination if the transaction costs to bringing an application are so high? Based on what we know about how and when individuals with disabilities choose to disclose, the HRTO approach is a deterrent to access to justice.

A. RECOMMENDATION 1: WARNING TO APPLICANTS THAT DECISIONS ARE POSTED ONLINE

First, it is important that applicants are aware that by pursuing a human rights application, the decision may be posted online. As discussed, applicants sign a declaration that they understand that their decision may become public through a written decision, hearing, or other Tribunal policies. However, there is no indication from the declaration itself that the written decision will be posted online. The declaration should be amended to inform applicants that all decisions (even interim decisions) are posted on CanLII. ARCH has recommended that a warning be

²⁶¹ *SS*, *supra* note 18 at para 41.

²⁶² *BAS*, *supra* note 54 at para 3; *KM*, *supra* note 30 at para 8.

²⁶³ *SS*, *supra* note 18 at para 43.

²⁶⁴ *Ibid* at para 44.

²⁶⁵ Pinto, *supra* note 1.

²⁶⁶ *AB v Bragg*, *supra* note 174 at para 25.

provided to the applicant in the application.²⁶⁷ This is beneficial for applicants who are self-represented at any stage of the process, as it is best for an applicant to request an order for anonymity prior to the posting of any interim decisions.

B. RECOMMENDATION 2: INTERIM DECISIONS SHOULD BE ANONYMIZED

As a further option, ARCH has recommended that interim decisions be anonymized and the issue of anonymity argued fully at the hearing stage.²⁶⁸ There could be a mechanism to request anonymity at the same time as filing the application and the threshold for obtaining anonymity could be lower at this juncture when compared to a full hearing.²⁶⁹ This would protect applicants from disclosure in a summary hearing decision or other interim decisions.²⁷⁰ Not all motions for summary hearings involve written decisions made by the HRTO but this would provide a layer of protection for applicants whose cases meet the threshold for a full written summary decision.²⁷¹ This would allow applicants to access the benefits of private settlements without having to endure public disclosure of their disability.

C. RECOMMENDATION 3: OVERHAUL OF SYSTEM FOR ORDERS OF ANONYMITY

There are various options for overhauling the current system to make the human rights system more accessible to individuals with disabilities with disclosure concerns. All options would allow the applicant to choose to be identified by name in the public decision. The application could contain a box where an applicant could state his or her preference. This would also draw attention to the fact that anonymous and redacted processes exist for the self-represented applicant.

1. PRESUMPTION OF ANONYMITY

A rule similar to Rule 3.11.1 (for minors) could be implemented for individuals with disabilities who wish to remain anonymous. The application form could be modified to include two options for the application to choose from “I wish to remain anonymous” or “I wish be identified by name in the public decision”. The applicant would indicate his or her choice. If the applicant chose to remain anonymous there would be a presumption that the applicant’s choice would be respected. A sample Rule could read: “Unless otherwise ordered, the HRTO will use initials in its decisions to identify individuals with disabilities who request anonymization”.

²⁶⁷ Letheren, *supra* note 13.

²⁶⁸ Letheren, *ibid.*

²⁶⁹ Letheren, *ibid.*

²⁷⁰ Letheren, *ibid.*

²⁷¹ HRLSC, personal communication.

2. CHANGES TO THE HRTO'S BALANCING OF PRIVACY INTERESTS RELATED TO DISCLOSURE OF DISABILITY

Another option would be for the HRTO to develop a new jurisprudence for anonymization of applicants with disabilities that is similar in keeping with cases involving sexual harassment, sexual orientation, or gender identity. The HRTO could rely on the privacy and dignity concerns raised by the applicant. Applicants with disabilities deserve access to the same set of presumptions and processes for anonymity as applicants with these other disclosure concerns. The HRTO does not need legislative intervention to reform its practices. Under the *Code* the HRTO is granted the power to “may make rules governing the practice and procedure before it.”²⁷² Rule 3.11 provides the HRTO with the power to make orders for anonymity “where it considers it appropriate to do so.”²⁷³ The HRTO could also consider an approach to privacy law more similar to that found in the civil law tradition based on personality rights and dignity as recommended by Eltis.

3. ANONYMIZE ONLINE DECISIONS, IDENTIFIABLE INFORMATION AVAILABLE AT THE HRTO

A third option would be to anonymize applicants' information online and have full decisions, including the names of the applicants, available at the HRTO (or other physical location). This would provide applicants with the same “practical obscurity” which was previously available to litigants before the transition to the digital age. A foreseeable problem with this approach is that information obtained from the HRTO could be circulated online which would undermine the return to “practical obscurity.” A potential solution could be requiring that individuals who wish to access non-redacted documents at the HRTO's physical offices agree to certain terms and conditions for their use.²⁷⁴

D. IMPACT TO SYSTEM AND WEIGHING OF REFORM OPTIONS

What would the repercussions be of providing anonymity to more applicants? If applicants could choose whether to remain anonymous or could obtain orders for anonymity more easily, it may be difficult to use strategies such as press releases for public education purposes which involve publicizing information about the case and the applicant. An example of such a case was the mediated settlement where taxi companies in Toronto agreed to stop charging extra fees to passengers who use wheelchairs.²⁷⁵ The HRLSC and ARCH are pushing against traditional minutes of settlement with non-disclosure clauses which prevent the applicant from telling his or her story.²⁷⁶ However, the types of cases in which applicants opt to remain anonymous may not

²⁷² *Human Rights Code*, RSO 1990, c H-19 s 43 (1).

²⁷³ *Rules of Procedure*, *supra* note 20, s 3.11.

²⁷⁴ Berzins, *supra* note 212.

²⁷⁵ Patty Winsa, “Toronto cab companies agree to stop illegal extra charges for wheelchair passengers” *Toronto Star* (16 April 2013), online: <thestar.com/news/gta/2013/04/16/toronto_cab_companies_agree_to_drop_illegal_extra_fees_for_wheelchair_users.html> [perma.cc/72UM-EYLR].

²⁷⁶ Letheren, *supra* note 13; Personal experience HRLSC.

be the types of cases where applicants feel comfortable in the media spotlight for the same reasons they do not wish to have a public decision disclosing their disability. In addition, in many instances, disclosure of identity would not be required in order for the applicant to tell their story. Therefore, there may not be much potential for public education lost through this reform.

Would a presumption of ordering anonymity or a shift in jurisprudence which routinely provides anonymity to applicants with disabilities who request to remain anonymous play into the very stigma that the applicant is trying to avoid? The reform options outlined above are premised on the view that applicants should be able to choose whether to remain anonymous. ARCH recognizes the tension that exists in encouraging applicants to use anonymous processes to address human rights concerns and their mandate to “empowe[r] people with disabilities” and educate the public about disability rights.²⁷⁷ Tied into this issue is the concept of Disability Pride. Sarah Triano, a leader in the disability community has defined Disability Pride as follows:

Disability Pride represents a rejection of the notion that our physical, sensory, mental, and cognitive differences from the non-disabled standard are wrong or bad in any way, and is a statement of our self-acceptance, dignity and pride. It is a public expression of our belief that our disabilities are a natural part of human diversity, a celebration of our heritage and culture, and a validation of our experience. Disability Pride is an integral part of movement building, and a direct challenge to systemic ableism and stigmatizing definitions of disability. It is a militant act of self-definition, a purposive valuing of that which is socially devalued, and an attempt to untangle ourselves from the complex matrix of negative beliefs, attitudes, and feelings that grow from the dominant group’s assumption that there is something inherently wrong with our disabilities and identity.²⁷⁸

I do not see my proposed model for reform (an individual choice model) at odds with the concept of Disability Pride; to me they are not mutually exclusive. The individual choice model allows individuals to self-identify in the decision. Any one particular decision by an individual to disclose or not to disclose is not an indication that someone does or do not feel or identify with Disability Pride: it is a calculated decision related to many factors including social and economic impacts. Further, as a study by Malhotra and Rowe suggests, the way that individuals with disabilities understand their disabilities in relation to their “sense of self” may vary, for example “depending on the social context ... [and] how they [are] treated and perceived by others.”²⁷⁹ “When the participants felt scrutinized or when they faced barriers, their identities as disabled people became more pronounced but in other circumstances, their impairment was often seen as largely irrelevant, something that contributed to who they were over their life but did not comprise the entirety of their identity within the specific moment..[being a person with a disability] could be both a sometimes unpleasant or painful experience and also a source of

²⁷⁷ Letheren, *supra* note 13; ARCH Disability Law Centre, *Vision and Mission Statement* (2010), online: <www.archdisabilitylaw.ca/about-arch> [perma.cc/EWE7-468Z] [ARCH Mission].

²⁷⁸ Sarah Triano, “Disability Pride” in Gary L Albrecht, ed, *Encyclopedia of Disability* (London: Sage Publications, 2006) at 447.

²⁷⁹ Ravi Malhotra & Morgan Rowe, *Exploring Disability Identity and Disability Rights through Narratives: Finding a Voice of Their Own* (Abingdon: Routledge, 2014) 53 [Malhotra & Rowe].

pride.”²⁸⁰ The study participants displayed a range in how they identified with their disability: “[s]ome almost always identified their self with a disability identity and found great pride and motivation in that identity while others wished to distance themselves from disability and felt that their impairment was more often something that prevented others from seeing their true, “core” selves than something which contributed positively to who they were”²⁸¹ In the view of ARCH, the disability community would be receptive to an argument for reform that prioritizes the choice of individuals with disabilities to disclose their disability.²⁸² It takes the position that “[p]ersons with disabilities themselves are in the best position to determine their own priorities.”²⁸³

The problem with the HRTO’s current approach is that by imposing disclosure on individuals with disabilities a segment of the population is potentially left unprotected from human rights abuses. The jurisprudence shows that individuals with disabilities are in at least some cases asking to remain anonymous and my experiences at the HRLSC and those of ARCH suggest that anonymity factors into the cost benefit analysis of applicants on whether to file a human rights application. To leave certain individuals with disabilities without recourse against discrimination would not be a step towards combating stigma and discrimination; this would serve only to leave such stigma and discrimination intact. In my opinion, an applicant’s choice to remain anonymous in this context is not stigmatizing in itself. Anonymization is not the source of stigma; it is society and its structural economic, social, and political forces that sustain disability. It would be unfair for the HRTO to impose disclosure on individuals in the name of the de-stigmatization of society. The purpose of the *Code* is to provide Ontarians with equal treatment and freedom from harassment in essential areas of their lives. I recognize that when an individual with a disability steps forward and tells their story this can help to reduce stigma and breakdown stereotypes. While the goal of reducing stigma in society is an honourable one, it should not trump the goal of providing all Ontarians with accessible remedies under the *Code*, which exist to reduce discrimination and stigma. The decision to disclose in an HRTO decision—a particularly high stakes form of discrimination—represents only one of many, many decisions that an applicant will make about disclosure over the course of their lifetime. Individuals with disabilities can continue to tell their stories to stand up to stigma and stereotypes inside and outside of the HRTO forum whether they self-identify or remain anonymous, with or without the support of advocates but the individual’s decision to disclose needs to remain within that individual’s control.

Opponents to reform may be concerned that more vexatious litigants would bring cases because they would remain free from public scrutiny. Letheren does not believe that this type of reform would encourage vexatious litigants, as in her experience those types of litigants are those that want their name to be publicly acknowledged.²⁸⁴ Even if vexatious cases increased as a result of this change, the HRTO has the responsibility to sort out the meritorious cases from

²⁸⁰ *Ibid.*

²⁸¹ *Ibid.* The authors here also cited David M Engel and Frank W Munger, *Rights of Inclusion: Law and Identity in the Life Stories of Americans with Disabilities* (Chicago: University of Chicago Press, 2003) 46 and Erving Goffman, ‘The Stigmatized Self’ in Charles Lemert and Ann Branaman, eds, *The Goffman Reader* (Malden, MA: Blackwell Publishing, 1997) 75.

²⁸² Letheren, *supra* note 13.

²⁸³ ARCH Mission, *supra* note 277.

²⁸⁴ Letheren, *supra* note 13.

those without merit.²⁸⁵ These tools exist such as the mechanism for summary hearing.²⁸⁶

It is possible that some respondents might disagree with reform. It is clear from my survey of the jurisprudence that respondents sometimes oppose anonymization of the applicant. However, applicants are not the only ones to bring motions to anonymize the identity of the applicant. In one case a respondent requested that the applicant be identified by “M” because they wished to call a psychiatrist from the Centre for Addiction and Mental Health who would provide evidence of a sensitive nature and felt that anonymity would better serve the applicant’s privacy interests.²⁸⁷ Respondents have also consented to anonymization in certain cases.²⁸⁸

As disability cases make up the majority of the current human rights caseload, implementing any of these options for anonymity of applications on the ground of disability could change the human rights system significantly, depending on how many applicants chose to use anonymous processes. It may be argued that other *Code* grounds also deserve the protection of anonymity so we should extend reforms to all applicants. Each *Code* ground is unique and may have its own anonymity concerns. However, conclusions will not be drawn in regards to other grounds in this article as its focus is on the ground of disability which has special privacy concerns related to disclosure. There is also an impact of bringing a human rights case to one’s reputation generally, which could be another rationale to extend reforms to all applicants. Those searching legal databases will know who is willing to stand up to an employer, landlord, or service provider. The whistleblower implications of bringing a human rights case are also a deterrent to filing. There is also the fact that individuals who experience discrimination must describe the impact of the discrimination on their physical, emotional and mental health as a part of proving that they should be awarded compensation for “injury to dignity, feelings and self-respect.”²⁸⁹ This could also give rise to similar privacy concerns to those discussed in this article.

In my opinion, the best reform would be to provide a presumption for anonymity in all cases of disability where the applicant wished to remain anonymous. The option of having the unredacted version of the decision available at the HRTO would likely involve the use of too many resources. I am not of the opinion that developing HRTO jurisprudence in a similar way as cases involving sexual harassment or gender identity is the best option as it takes control over the decision to disclose away from of the applicant with the disability. If the HRTO were to pursue this option the HRTO would need to completely reform its understanding of disability disclosure. The HRTO would need to abandon its current approach in which it requires applicants to raise “unique concerns or issues of confidentiality” or involve “exceptional circumstances.”²⁹⁰ The HRTO would need to develop the jurisprudence in a way that allows the typical case where an individual has concerns with disclosure as meriting an order of anonymity and which recognizes the social and economic repercussions of disclosure.

The presumption of anonymity could be implemented by creating a set of checkboxes on the application form for the applicant to indicate their wishes and the form would inform applicants of the online nature of decisions. This would leave the option for individuals with

²⁸⁵ Letheren, *supra* note 13.

²⁸⁶ Letheren, *supra* note 13.

²⁸⁷ *AM v Michener Institute for Applied Health Sciences*, 2010 HRTO 430.

²⁸⁸ *DM*, *supra* note 54 at paras 5-6; *BAS*, *supra* note 54 at para 3; *SD*, *supra* note 57; *UN*, *supra* note 73.

²⁸⁹ *Human Rights Code*, RSO 1990, c H-19 s 45.2(1).

²⁹⁰ *V v E*, *supra* note 14 at para 11. See also *H v R*, *supra* note 42 at para 7; *M v N*, *supra* note 42 at para 6.

disabilities who want to self-identify to do so, giving control to the particular applicant to make the decision and provide the applicants with the requisite information to make an informed choice about what a public decision entails in the HRTO context. A presumption of anonymity would provide clarity and reassurance to applicants with disabilities who may otherwise be deterred in filing an application that they would remain anonymous. Respondents would regain a right to argue that the applicant should be identified in the decision (as in the case of minors) but this would be a high bar to meet.

XII. CONCLUSIONS

The HRTO's approach to anonymization of applications brought on the ground of disability should be reformed. The HRTO's current approach to anonymization is insensitive to applicants' concerns surrounding disclosure of disability which in turn, may impact on applicants' willingness to file applications. The HRTO's approach is also disconnected from our transition into the digital age. This argument is advanced based on an understanding of the HRTO's current approaches to ordering anonymity developed through primary research, social science pertaining to disclosure of disability, a critique of the HRTO's reliance on the open courts principle, and a survey of approaches to anonymization by other tribunals in Ontario and other jurisdictions and the SCC. It is also informed by my experiences at the HRLSC and my collaborations with Laurie Lethere at ARCH. Applicants should be forewarned that HRTO decisions are posted on CanLII and there should be a presumption of anonymity where an applicant with a disability chooses to remain anonymous. This would reduce the high transaction cost that the system currently places on applicants with disability disclosure concerns to access justice against discrimination and respect the autonomy of an applicant to make his/her own decision regarding the disclosure of her/his disability. This article's scope is limited to the ground of disability but a topic for further research is whether applicants bringing applications under other protected grounds should have a choice to remain anonymous in HRTO decisions. This is a contemporary topic given the increasing importance of our online identities in all facets of our lives.

ADDENDUM

Since the primary research for this article was completed in March 11, 2014, five additional relevant cases were released.²⁹¹ In *G v P* a concern about being labelled as mentally ill was not sufficient for anonymization.²⁹² Anonymization was granted in the cases of *DG* and *AG*.²⁹³ In *DG*, the respondent did not oppose and the case involved sensitive medical information about mental health including depression and anxiety.²⁹⁴ In *AG* the application involved sensitive

²⁹¹ *G v P*, 2014 HRTO 565 [*G v P*]; *DG v Centre for Addiction and Mental Health*, 2014 HRTO 1336 [*DG*]; *AG v Bombardier Aerospace*, 2014 HRTO 1164 [*AG*]; *JM v Toronto Police Services Board*, 2014 HRTO 1317 [*JM* 2]; *RL v Federation of Law Societies of Canada – National Committee on Accreditation*, 2014 HRTO 1433 [*RL*]. This update was current as of October 21, 2014.

²⁹² *G v P*, *ibid.*

²⁹³ *DG*, *supra* note 291; *AG*, *supra* note 291.

²⁹⁴ *DG*, *ibid.*

health information and the respondents did not oppose.²⁹⁵ In *JM* the names of the applicant and the individual respondent were anonymized because of sensitive information in the decision.²⁹⁶ The applicant had an anxiety disorder and the application involved an allegation of discrimination in housing and in the provision of police services.²⁹⁷ In the *RL*, the HRTO used its discretion to anonymize the identity of an applicant who had experienced cognitive difficulties during law school due to cancer related treatment.²⁹⁸ It is uncertain whether these new cases suggest that the HRTO is moving towards an approach to anonymization that is more sensitive to disability privacy concerns. The HRTO's *Practice Direction on Anonymization of HRTO Decisions* remains unchanged as of 21 October 2014.

Note that since the primary research for this paper was completed, the Criminal Injuries Compensation Board (CICB) was added to the SJTO cluster.²⁹⁹ The decisions are not published on CanLII. According to the legislation the CICB, "shall prepare and periodically publish a summary of its decisions and reasons thereof."³⁰⁰ The annual reports do not identify the Applicants by name³⁰¹ and Board decisions are sent in writing to the applicants.³⁰²

Since the primary research for this article was written the HRTO has changed its application form. The form now states:

... I understand that information about my Application can become public at an open hearing, in a written decision, or in other ways determined by Tribunal policies that balance transparency in the justice system and privacy interests of participants I understand that the Tribunal must provide a copy of my Application to the Ontario Human Rights Commission on request I understand that the Tribunal may be required to release information requested under the Freedom of Information and Protection of Privacy Act (FIPPA)... . I understand that the Tribunal makes all of its Decisions and Case Assessment Directions available to the public, including the media on request, and that the Tribunal also makes its decisions available to the public on the websites of the Canadian Legal Information Institute (www.CanLii.org). I also understand that the Tribunal may issue decisions that protect the identity of an applicant, a respondent or a witness in certain circumstances.³⁰³

²⁹⁵ *AG*, *supra* note 291.

²⁹⁶ *JM 2*, *supra* note 291 at para 8.

²⁹⁷ *JM 2*, *ibid* at para 1.

²⁹⁸ *RL*, *supra* note 291.

²⁹⁹ Social Justice Tribunals Ontario, "Welcome to SJTO" online: <<http://www.sjto.gov.on.ca/en/>>.

³⁰⁰ *Compensation for Victims of Crime Act*, RSO 1990, c C.24 s 4.

³⁰¹ Criminal Injuries Compensation Board, "Annual Reports" online: <<http://www.cicb.gov.on.ca/en/about3.htm>>

³⁰² Criminal Injuries Compensation Board, "Board Decisions" online: <<http://www.cicb.gov.on.ca/en/nextstep5.htm>>.

³⁰³ HRTO, "Forms and Filing" (January 2016), online: <sjto.gov.on.ca/hrto/forms-filing/> [perma.cc/AN92-6XLK] [HRTO].