
Transparency, Access & Privacy Dilemmas for Tribunals

Lorne Sossin, Faculty of Law, U. of T.

COBA

November 5, 2009

Outline

- Why now?
 - Privacy issues relating to tribunals
 - Privacy rights relating to tribunals
 - Transparency issues relating to tribunals
 - Possible Reforms
-

Why Now?

- General increase in scrutiny of privacy issues, especially on-line (e.g. Facebook, etc)
 - Canadian Judicial Council model protocol on publication of court decisions (2005) affirms “open court” principle but calls for limiting personal data identifiers (e.g. name, date of birth, social insurance or financial account information) – onus is on adjudicators, not publishers, to protect privacy
 - Emerging case law applying privacy legislation to tribunals (e.g. *Germain*)
 - Recent reports from Privacy Commission of Canada, Saskatchewan, etc
-

Privacy Issues for Tribunals

- Publication of tribunal decisions – issue of anonymizing decisions
 - OPC decision re Canada Pension Appeals Board and Office of the Umpire (2008) concluding that named parties should be replaced with initials
 - Internet posting of tribunal decisions (The “practical obscurity” of paper based records vs. the potential for data mining & exploiting information culled from tribunal records by third parties)
 - Third party requests for documents in the Tribunal record – relevance of SPPA and JRPA.
-

Privacy Rights for Parties before a Tribunal

- The right of parties to prevent publication of personal information – *Germain v. Automobile Injury Appeal Commission* 2009 SKQB 106
 - Tribunals may publish decisions and other material without specific statutory authority to do so
 - Tribunals have latitude in setting their own procedure
-

Privacy Rights for Parties before a Tribunal

- From *Germain*:

- **96** The lack of notice in this case regarding publishing decisions did not violate the principles of fundamental justice of procedural fairness. The right of the Commission to publish its decisions is an incidental power to the hearing being of a public nature and applicants to the Commission do not have in every case a right to be heard on this issue.
 - **97** The open court principle also applies to the Commission. This is so despite the fact that it is not a court. The principle is not restricted to courts only, but is a theme running through the administration of justice in this country.
-

Transparency Issues for Tribunals

- Publication/posting of Tribunal documents:
 - Rules of practice
 - Guidelines
 - Schedule of hearings
 - Biographical information on members
 - “Public Accountability Documents” (Code of Conduct, etc) in Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009
 - Privacy policies; Accessibility policies; policies on translation and interpretation, etc
-

Possible Reforms

- Consult with tribunal & stakeholders
 - e.g. Ontario Human Rights Tribunal consultation
 - Consider options to respond to new challenges relating to privacy
 - notice to parties that decisions will be posted on-line
 - a policy regarding not publishing personal data identifiers, or publishing anonymized or redacted decisions for posting
 - “robot exclusion” protocols and other technological responses
 - determine privacy issues via policy or case by case
 - Bold initiatives to show leadership vs. “go slow” or pilot projects to determine full scope of privacy and transparency implications
-