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Landlord & Tenant Board
Consultation on Proposed Amendments to Rules of Procedure

Submissions of the HIV & AIDS Legal Clinic Ontario

Introduction

The HIV & AIDS Legal Clinic (Ontario) ("HALCO") is pleased to have the opportunity to participate in the Landlord & Tenant Board's ("LTB") consultation on the proposed changes to the LTB Rules of Procedure. HALCO's submissions focus on the proposed amendment to Rule 7.6 governing the discretion to hold a closed hearing.

HALCO has the following concerns with respect to the proposed amendment to Rule 7.6:

1) The proposed amendment is inconsistent with the *Statutory Powers and Procedures Act* and therefore with the procedural rules of the other Social Justice Tribunals of Ontario;
2) The proposed amendment is unnecessary based on the court's decision in *Toronto Star v. AG Ontario*, 2018 ONSC 2586; and
3) The proposed amendment would impair access to justice for vulnerable tenants.

Regardless of the rule the LTB ultimately adopts, however, it is vital for the reasons below that any amended rule continue to include a presumption that a closed hearing is appropriate where medical information will be disclosed.

HALCO has reviewed and fully supports the submissions of our colleagues at the Advocacy Centre for Tenants Ontario ("ACTO").

Background

HALCO, founded in 1995, is a community legal clinic serving the legal needs of low-income people in Ontario who are living with HIV. It is the only such organization in Canada. The clinic is governed by a board of directors, the majority of whom must be living with HIV. In addition to providing direct legal services, HALCO staff engage in public legal education, law reform and community development initiatives. Among other activities, clinic staff have (i) handled almost 60,000 legal issues, including those related to housing, human rights, privacy, income maintenance, HIV non-disclosure and the criminal law, health, immigration, insurance and employment; (ii) conducted hundreds of public legal education workshops; (iii) produced numerous public legal education materials; (iv) provided submissions in relation to various government consultations; and (v) intervened at various courts including the Court of Appeal for Ontario and the Supreme Court of Canada.

Stigma and Discrimination Facing People Living With HIV

There are believed to be in excess of 63,000 people living with HIV in Canada.[1] The HIV/AIDS epidemic, which is now over three decades old, has been marked by remarkably persistent stigma, with accompanying discrimination. HALCO observes, on a daily basis, how the disclosure of a person's HIV-positive status can result in serious harm due to stigma and discrimination.

Canadians' attitudes and opinions toward people living with HIV were assessed in a national study in 2012.[2] Many Canadians still report feeling uncomfortable having contact with a person with HIV or AIDS.[3] Twenty-four percent would be somewhat or very uncomfortable wearing a sweater previously worn by someone with HIV. Forty-nine percent say that they would feel uncomfortable using a restaurant drinking glass once used by a person living with HIV. Fifty-one percent say they would be uncomfortable if a close family member or friend dated someone with the illness.[4] In addition, 69 percent of respondents felt that people may be unwilling to disclose their HIV status because of the stigma associated with HIV.

The consequences of stigma and discrimination are far reaching. People living with HIV are often isolated from friends, family and society. They are also often denied housing, health care, employment, and services.

Given this reality, our clients are deeply concerned with whether, when or how to disclose their HIV-positive status to people who would not otherwise know. It is vital for people living with HIV to have control over the circumstances in which they disclose their HIV status to others.

HIV Status and closed hearings

Closed hearings are a vital option for people living with HIV who do not want to disclose their HIV status to a hearing room full of strangers. The more likely that a person's HIV status will be disclosed as part of a proceeding, the less likely they are to commence or participate in legal proceedings to enforce or defend their legal rights. This means that some people living with HIV choose not to pursue legal remedies for wrongs done to them or to face eviction rather than risk disclosing their status and face stigma and discrimination. Closed hearings provide a third option: allowing vulnerable tenants to seek to enforce or defend their rights while protecting their safety and wellbeing.

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[1] Public Health Agency of Canada. Summary: Estimates of HIV Incidence, Prevalence and Canada's Progress on Meeting the 90-90-90 HIV targets, 2016. Public Health Agency of Canada, 2018. Available from: https://www.canada.ca/en/public-health/services/publications/diseases-conditions/summary-estimates-hiv-incidence-prevalence-canadas-progress-90-90-90.html.

[2] EKOS Research Associates, "2012 HIV/AIDS Attitudinal Tracking Survey: Final Report (October 2012). Available at www.catie.ca/sites/default/files/2012-HIV-AIDS-attitudinal-tracking-survey-final-report.pdf.

[3] *Ibid.*

[4] *Ibid.*

The proposed amendment to rule on public access to hearings

The existing Rule 24 and the similar first draft Rule 7.6 (the "Existing Rule") mirror the wording of section 9(1) the *Statutory Powers and Procedures Act*, RSO 1990, c S.22 ("*SPPA*") which states:

> An oral hearing shall be open to the public except where the tribunal is of the opinion that,
>
> (a) matters involving public security may be disclosed; or
>
> (b) 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,
>
> in which case the tribunal may hold the hearing in the absence of the public.

The proposed amendment to Rule 7.6 ("the Proposed Rule") adopts the *Dagenais/Mentuck* test for obtaining a publication ban in court proceedings. The Proposed Rule states:

> LTB hearings are open to the public, except where:
>
> a. it is necessary to close some or all of a hearing to the public to prevent serious risk to the proper administration of justice and reasonably alternative measures will not prevent the risk, and
> b. the benefits of closing some or all of a hearing to the public outweigh the harm to the rights and interests of the parties and the public.

HALCO's concerns regarding the Proposed Rule

1) <u>Proposed Rule deviates from the *SPPA* and other SJTOs</u>

HALCO has significant concerns regarding the proposed amendment to the LTB's rule governing discretion to hold a closed hearing. The Existing Rule adequately protects the right to privacy of intimate personal matters, including health information, while upholding the open court principle. We see no need to amend the Existing Rule.

Every one of the other Social Justice Tribunals of Ontario either has a rule regarding public hearings that reflects the above *SPPA* rule, or it holds hearings that are by default not open to the public.[5] We have no indication that any other board or tribunal in the SJTO cluster intends to amend its rule regarding public hearings to stray from the *SPPA* standard.

5 See Appendix A - SJTO Rules on Public Access to Hearings.

The Proposed Rule would unnecessarily raise the threshold to obtain a closed hearing and fails to protect sensitive health information.

Pursuant to section 25.1 of the *SPPA*, boards and tribunals may make rules governing their own procedures, but those rules "shall be consistent with" the *SPPA*. The Proposed Rule is a significant departure from the *SPPA* standard and arguably inconsistent with it.

2) Proposed rule change is unnecessary based on the *Toronto Star* decision

It appears that the LTB is considering a change to the Proposed Rule in response to the recent decision in *Toronto Star v. AG Ontario*, 2018 ONSC 2586 ("*Toronto Star*"). Such a change is an unnecessary response to the *Toronto Star* decision. In *Toronto Star*, the Superior Court dealt solely with the narrow issue of access to adjudicative records under the *Freedom of Information and Protection of Privacy Act* ("*FIPPA*"), and whether the *FIPPA* regime violated the right to freedom of expression under section 2(b) of the *Canadian Charter of Rights and Freedoms*. The issue of closed hearings was not before the Court, though the Court explicitly acknowledged the application of the *SPPA* rule regarding open hearings to administrative tribunals.[6] The Court did not consider and made no finding regarding whether the *SPPA* criteria for holding a closed hearing infringed the right to freedom of expression or the open court principle.

It is therefore unnecessary for the LTB to pre-emptively amend its rule on closed hearings to mirror a test applied by the court in *Toronto Start* to an altogether different issue.

3) Proposed rule will impair access to justice for vulnerable tenants

During eviction hearings, tenants routinely provide oral and documentary evidence of a highly sensitive or personal nature, such as evidence of a physical or mental health disability, poverty, domestic violence or sexual abuse, substance dependence (also known as "addiction"), and a history of homelessness, as such factors may be considered to avoid eviction. These factors would be presumptively considered under the Existing Rule as "intimate financial or personal matters" of such a nature that they may outweigh the desirability of a public hearing in certain circumstances.

The Proposed Rule raises the threshold and requires vulnerable litigants, who are often unrepresented, to make submissions regarding "serious risk to the administration of justice" and the complex balancing of benefits and harms, without concrete language to guide litigants on what those harms and benefits might be. The Proposed Rule would likely make it much more difficult to obtain a closed hearing even where it is warranted.

Moreover, the legal threshold under the *Dagenais /Mentuck* test for sealing medical records is very high, may require expert evidence[7] and presents a significant barrier to low-income, unrepresented and marginalized parties. In applying *Dagenais/Mentuck*, courts have routinely held that stigmatization, emotional distress, embarrassment and adverse individual employment

[6] Toronto Star v. AG Ontario, 2018 ONSC 2586 at para 6.
[7] *M.E.H. v Williams*, 2012 ONCA 35, para 30.

or reputational consequences are "purely personal interests" and do not constitute a risk to the administration of justice.[8] This framework is unsatisfactory for marginalized litigants and a significant departure from the Existing Rule.

Explicit protection for private health information is necessary

HALCO recommends that the Existing Rule (specifically, the first draft of Rule 7.6) remain in place as a fair balance between the open court principle and protection of parties' privacy.

Regardless of which version of the rule is adopted, HALCO strongly recommends that the rule include an explicit direction that information related to health matters, at the very minimum, requires special protection and weighs heavily in favour of a closed hearing.

Many tenants appearing before the LTB live with stigmatized conditions, such as HIV, mental health disabilities or substance dependence and have heightened privacy interests in relation to their personal medical information.

The commentary under Rule 24 explicitly recognises the importance of protecting medical information. It provides the following guidance: "In rare circumstances, an LTB Member or Hearing Officer will be satisfied that the hearing must be closed in accordance with section 9 of the SPPA. For example, this may occur if there will be medical evidence in a hearing […]."

Moreover, in the *Toronto Star* decision, Justice Morgan recognized that some categories of private information presumptively protected by *FIPPA* would "doubtless survive a s. 2(b) Charter analysis". Justice Morgan states:

> Thus, the concern for protecting the very vulnerable and for ensuring less formal and more efficient hearing processes where health matters – and especially mental health matters – are at stake would arguably justify the non-publication rule contained in s. 21(3)(a) (information that "relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation").[9]

Given this explicit recognition that presumptive protection is appropriate for medical information, we recommend that any rule regarding public access to hearings contains clear guidance to this effect.

Conclusion

We recommend that the LTB revert to the original draft of Rule 7.6, which is consistent with the *SPPA* and other SJTOs; preserves access to justice for vulnerable populations; and appropriately protects sensitive health information from disclosure while maintaining the open court principle.

[8] I*bid* para 25,; *R v Bartholomew*, 2017 ONSC 3084, paras 34-36; *Law Society of Upper Canada v Nicolas Xynnis*, 2014 ONLSAP 9, para 44.
[9] *Toronto Star v. AG Ontario*, 2018 ONSC 2586 at para 138.

Regardless of the rule the LTB ultimately adopts, however, it is vital for the aforementioned reasons that any amended rule continue to include a presumption that a closed hearing is appropriate where medical information will be disclosed.

Appendix A – SJTO Rules on Public Access to Hearings

Criminal Injuries Compensation Board

15.1 Public Hearings

CICB hearings are public. The CICB may order all or part of a hearing closed to the public where an open hearing may:

a. disclose matters involving public security;
b. disclose intimate personal or financial matters or other matters, including alleged sexual offence or child abuse, which are of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure, in the interest 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
c. be prejudicial to the final disposition of criminal proceedings against an alleged offender.

Ontario Special Education Tribunals

10.4 Hearings will be open to the public except where the Tribunal is of the opinion that:
a. matters involving public security may be disclosed; or
b. intimate financial or personal matters or other matters of a similar nature may be disclosed, and the interest in avoiding disclosure outweighs the public interest of an open hearing.

Human Rights Tribunal of Ontario

Public Proceedings

3.10 The Tribunal's hearings are open to the public, except when the Tribunal determines otherwise.

3.11 The Tribunal may make an order to protect the confidentiality of personal or sensitive information where it considers it appropriate to do so.

3.11.1 Unless otherwise ordered, the Tribunal will use initials in its decisions to identify children under age 18 and the next friend of children under 18. It may use initials to identify other participants in the proceeding if necessary to protect the identity of children.

3.12 All written decisions of the Tribunal are available to the public.

Social Benefits Tribunal

Confidentiality

7.1 SBT hearings are conducted in private and are not open to the public.

7.2 No person shall make an electronic recording of a proceeding unless authorized by the SBT in advance of the hearing or by the Member at the beginning of the hearing.

7.3 Parties and their representatives may not use documents or recordings obtained under these Rules for any purpose other than the proceeding before the SBT.

Child and Family Services Review Board

Hearings Conducted in Private

9.1 Due to the nature of the proceedings, hearings and pre-hearings are to be held in private.

9.2 A party or a member of the public may bring a motion to have a hearing held in public. The CFSRB will not consider a request to hold an ESTA hearing in public.

9.3 Subject to an order of the Court or the CFSRB, parties and their representatives shall not use documents or information obtained under these Rules or in the course of the CFSRB's proceeding for any purpose other than the proceeding before the CFSRB.

9.4 All CFSRB decisions are subject to a confidentiality order and may also contain information subject to section 87(8) of the CYFSA, 2017. The CFSRB publishes a redacted version of its decisions. No one shall circulate, reproduce, communicate or publish any information contained in or obtained from an unredacted decision of the CFSRB without first obtaining an order of the CFSRB or the Court.