LANDMARK DECISION FINDS FIPPA'S DELAY / BLOCK OF PUBLIC ACCESS TO ADJUDICATIVE RECORDS OF ADMINISTRATIVE TRIBUNALS UNCONSTITIUTIONAL

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Many municipal employers are familiar with the various administrative tribunals in Ontario. The Human Rights Tribunal of Ontario and the Ontario Labour Relations Board are two administrative tribunals employers are often aware of. Prior to the below decision, administrative tribunal records relied on privacy legislation to deny access to administrative records, such as pleadings and relevant documents. However, the Superior Court of Justice in *Toronto Star v AG Ontario* has declared certain privacy rules around the non-disclosure of administrative records to be unconstitutional.

Municipal employers should be aware of this decision when considering the privacy of administrative tribunal records.

Toronto Star v AG Ontario

In a landmark decision prompted by the Toronto Star, the Superior Court of Justice has found that denying journalists the right to access Ontario administrative tribunal records pursuant to section 21(1) of the *Freedom of Information and Protection of Privacy Act* ("FIPPA") is a constitutional violation of the "open courts" principle embedded within section 2(b) of the *Canadian Charter of Rights and Freedoms* (the "Charter"), and cannot be justified. Section 21(1) of FIPPA, also known as the personal privacy exemption provision, provides that "a head shall refuse to disclose personal information to any person other than the individual to whom the information relates."

The newspaper's constitutional challenge was first sparked in a 2014 case when Toronto Star reporters sent a request to the Ontario Labour Relations Board for information involving the Labourer's International Union of North America (Local 183). Reporters were looking for information linking the union to organized crime, secret surveillance of its members and employees, exploitation of undocumented foreign workers and fraudulently obtained pension credits. The records were initially released. However, the Ontario Labour Relations Board later requested the Toronto Star return and refrain from using the records on the basis that the Board had inadvertently disclosed personal information, which was presumed to constitute an unjustified invasion of personal privacy, contrary to FIPPA's personal privacy exemption provision.

The Toronto Star refused the Board's request, and filed a broad-based constitutional challenge to the application of FIPPA to Ontario's Administrative Tribunals, specifically regarding access to "Adjudicative Records" (e.g. applications, complaints, orders, documentary evidence, transcripts, decisions). The Toronto Star put forth the position that FIPPA's personal privacy exemption violated the "open courts" principle embedded within section 2(b) of the Charter, namely the recognition that judicial proceedings are presumptively open and accessible to the public and to the media.

The Ontario Superior Court found in favour of the Toronto Star and observed that the reported decisions of the Information and Privacy Commission ("IPC") regarding production of records demonstrated that the section 21 exemption had become the norm rather than the exception, despite the intended purpose of the provision.

The Court concluded that FIPPA had in effect created a system that impeded the disclosure of Adjudicative Records containing personal information, unless the individual requesting could provide valid justification for its release. However, the outcome was directly in contrast to the intended purpose of the legislation, which was to create a system whereby the onus would be placed on the holder of the records to justify why the record should not be disclosed. Thus, the Court found that the presumption of non-disclosure from section 21 of FIPPA violated the "open courts" principle, contrary to section 2(b) of the Charter and that the infringement could not be saved under the *Oakes* analysis. The Court acknowledged that freedom of the press is only operational when the press has timely enough access to information to publish to an audience, and that untimely disclosure that loses the audience is "akin to no disclosure at all".

Key Takeaways for Municipal Employers

Municipal employers should note that the Ontario government does not intend to appeal the decision of the Superior Court. FIPPA amendments and/or privacy-related legislative reforms may be introduced by the next elected Ontario government in response to this landmark decision. The Court has suspended its declaration of invalidity for a period of 12 months, thereby giving the province time to amend section 21(1) of the Act.

In any event, municipal employers should expect more openness from Ontario's Tribunals with respect to the disclosure of adjudicative records, which may have serious implications for cases that they are parties to. Employers should consider carefully the types of documents and the content of the information that they are willing to provide to administrative tribunals on a strategic basis wherever possible, while simultaneously recognizing that rules generally requiring disclosure of all relevant documents continue to govern administrative proceedings. While this may require a careful balancing act on the part of the municipal employer, it is important to remember that the documents may be disclosed to interested persons not party to the proceeding, and also to the media.

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HASHING OUT EMPLOYER RESPONSIBILITIES: CONSIDERATIONS FOR THE LEGALIZATION OF MARIJUANA AND ACCOMODATION OF MEDICAL MARIJUANA

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Federal legislation intending to legalize the use and sale of marijuana is expected to be in place this summer. With the impending legalization of marijuana, employers have become increasingly concerned about the impact this legalization could have in the workplace. However, municipal employers should be reminded that there is no duty to accommodate the recreational use of marijuana. Employers do not need to permit the recreational consumption of marijuana or tolerate impairment.
While recreational marijuana is not yet legal, medical marijuana has become a prevalent issue in the workplace. Employers must properly accommodate the use of medical marijuana. This requires consideration of employer obligations under both the *Human Rights Code* and the *Occupational Health and Safety Act*.

The below Human Rights Tribunal of Ontario ("HRTO") decision is helpful to municipal employers when understanding medical marijuana use in the workplace.

Aitchison v L & L Painting and Decorating Ltd.

In the recent decision of *Aitchison v L & L Painting and Decorating Ltd.*, the HRTO found that an employer did not discriminate against the applicant when his employment was terminated for smoking marijuana while at work, which was contrary to the employer's "zero tolerance" policy.

The applicant was employed as a seasonal painter and his duties required him to perform work on a swing stage located 37 floors above the ground. Due to chronic pain from a degenerative disc disease, the applicant smoked marijuana while at work, including smoking by himself on that swing stage during his breaks.

In June 2015, the applicant was observed smoking on the swing stage, untethered and not wearing his hard hat. The supervisor consulted the owner of the company and sent the applicant home. As a result of this incident, the owner terminated the applicant's employment due to the company's "zero tolerance" policy. The owner further noted the health and safety concerns of others on his site, as well as public safety concerns should an item fall from a swing stage located 37 floors above the ground. He testified that it would be "reckless" for him to allow the applicant to perform his duties in a "potentially intoxicated state." Moreover, company rules prohibited employees from being on a swing stage alone for safety concerns.

After weighing the credibility of the witnesses, the HRTO found in favour of the employer. While the applicant had a disability for the purposes of the Human Rights Code, his supervisor had never condoned his marijuana use at work and there was no evidence that the applicant had ever requested accommodation for his use of medical marijuana. Further, the applicant did not "have an absolute right to smoke marijuana at work regardless of whether it is used for medicinal purposes."

The HRTO concluded that the employer's reliance on its "zero tolerance" policy for the termination of the applicant's employment did not result in discrimination, nor was there any evidence that the applicant's disability was a factor in the decision to terminate his employment. The claim was dismissed.

It is good news for employers that the HRTO noted there is no "absolute right" to use marijuana at work regardless of whether it is medicinal. In this case, the health and safety issues clearly were a significant factor in upholding the "zero tolerance" policy.

While the HRTO placed weight on the employer's "zero tolerance" policy in upholding the termination and arriving at its decision, it is important for employers to be aware that "zero tolerance" policies will still be subject to the duty to accommodate in appropriate circumstances. As with any "blanket" policy, they cannot be applied mechanistically without regard to the individual circumstances of the employee and the nature of the workplace. It will not be enough for an employer to exclusively rely on a zero tolerance policy: however, where factors such as health and safety are at play, as they were in this case, the policy will be an important relevant consideration.

Implications for Municipal Employers

When accommodating the use of medical marijuana, municipal employers have the right to ask for supporting medical documentation addressing the use during working hours. This could include a copy of the licensing documentation. In certain circumstances, employers can seek medical confirmation of whether the employee is fit to perform their duties while using medical marijuana, as well. Employers should confirm if the use of medical marijuana will impact safety-sensitive tasks.

Further, municipal employers should turn their minds to their benefit plans when considering the issue of medical marijuana. Recently, in *Canadian Elevator Industry Welfare Trust Fund v Skinner*, the Nova Scotia Court of Appeal confirmed that a benefit plan administrator could choose the specific drugs and medication covered by the plan. It held that the exclusion of medical marijuana under the plan was not discriminatory.

Municipal employers should be reminded that accommodating the use of medical marijuana is complex and each case should be analyzed on its own set of circumstances. Policies should be updated to provide guidance. Lastly, with the changing legislation, municipal employers should generally educate themselves about marijuana and understand the substance that is being used. Since there are different kinds of marijuana, this will assist employers in understanding the impact on an individual.

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