Order under Section 16.1 of the
Statutory Powers Procedure Act
and the **Residential Tenancies Act, 2006**

Citation: Brown v Reiger, 2023 ONLTB 66141
Date: 2023-11-03
File Number: LTB-T-063620-22-IN
LTB-T-063631-22-IN

In the matter of: 2, 11 Blain Pl.
St. Catharines ON L2P2R7

Between: Angelee Brown — Tenant

And

Karl Reiger — Landlord

I hereby certify this is a true copy of an Order dated
NOV 03, 2023
Landlord and Tenant Board

INTERIM ORDER

Angelee Brown (the 'Tenant') applied for an order determining that Karl Reiger (the 'Landlord'):

- substantially interfered with the reasonable enjoyment of the rental unit or residential complex by the Tenant or by a member of their household.
- harassed, obstructed, coerced, threatened or interfered with the Tenant (‘T2 Application’).

Angelee Brown (the 'Tenant') also applied for an order determining that Karl Reiger (the 'Landlord') failed to meet the Landlord's maintenance obligations under the *Residential Tenancies Act, 2006* (the 'Act') or failed to comply with health, safety, housing or maintenance standards (‘T6 Application’).

These applications came before me by videoconference on September 25, 2023.

The Tenant, the Tenant’s legal representatives, Shaun Harvey (‘SH’) and Michelle Sparrow, the Landlord, the Landlord’s legal representative, Judith Callender (‘JC’), and the Landlord’s witnesses, Avery Sargent, Rylee Henderson, and Katharine Porter, attended the hearing. The Landlord’s witnesses were all excluded from the hearing room and have not yet provided any evidence.

Determinations:

1. At the outset of the hearing, two preliminary issues were raised: The Tenant’s request to amend the T2 Application and the T6 Application, and the Tenant’s requests that the public be excluded from the hearing of the applications, and that the order be sealed. I heard argument relative to each of these issues.

Request to Amend Applications

2. The Tenant requested to amend both the T2 Application and the T6 Application. The amendments to both applications are identical, and were first filed with the LTB on November 7, 2022.

3. I am satisfied that the amendments are appropriate, would not prejudice either party, and are consistent with a fair and expeditious proceeding. The amendments are therefore granted.

Requests for Public to be Excluded from the Hearing, and for the LTB Order to be Sealed

4. SH requested that the hearing be closed to the public and that the order be sealed because the Landlord's disclosure includes information that is "borderline defamatory". SH said that it appeared that the Landlord would make allegations against the Tenant of racial discrimination, and that it is not appropriate for the Landlord to do so in the context of a tenant application where the Landlord's allegations have no basis in an application, and the Landlord is not seeking any relief relative to the allegations.

5. SH conceded that some of these concerns could be addressed by objecting to any evidence that is not relevant to the matters before the LTB, but said that his client operates a business, it is important for her to maintain the value of it, and even if an objection is sustained, once something is said on the record, it cannot be unsaid.

6. JC pointed out that the LTB is a public tribunal, and that matters before the LTB frequently include allegations and evidence about a person's character.

7. The *Statutory Powers Procedure Act,* RSO 1990, c. S.22 (the "SPPA') applies with respect to all proceedings before the LTB: *Residential Tenancies Act, 2006,* ss. 184(1) (the 'Act').

8. Subsections 9(1) and (1.2) of the SPPA provide:

> **Hearings to be public, exceptions**
>
> **9** (1) 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. R.S.O. 1990, c. S.22, s. 9 (1); 1994, c. 27, s. 56 (16).

Electronic hearings

(1.2) An electronic hearing shall be open to the public unless the tribunal is of the opinion that,

(a) it is not practical to hold the hearing in a manner that is open to the public; or

(b) clause (1) (a) or (b) applies. 1997, c. 23, s. 13 (14).

9. In *Toronto Star v. Attorney General (Ontario),* 2018 ONSC 2586 (CanLII) (*'Toronto Star'*), the Court found that the *Freedom of Information and Protection of Privacy Act* (*'FIPPA'*) improperly restricted access to records at adjudicative boards and tribunals because it was inconsistent with the open court principle.

10. The *Tribunal Adjudicative Records Act* (*'TARA'*) confirms the court's decision in *Toronto Star.* An order of the LTB falls within the definition of "adjudicative record" set out at subsection 1(2) of *TARA.* A tribunal must make adjudicative records in its possession relating to a proceeding that was commenced after June 30, 2019 available to the public in accordance with *TARA*: ss. 2(1), *TARA.* A tribunal may, on application of a party to such a proceeding, order that an adjudicative record be treated as confidential and not disclosed to the public if it is determined that (a) "matters involving public security may be disclosed", or (b) "intimate financial or personal matters or other matters contained in the record are of such a nature that the public interest or the interest of a person served by avoiding disclosure outweighs the desirability of adhering to the principle that the record be available to the public": ss 2(2) and 2(3), *TARA*.

11. This means that proceedings and orders of the LTB are open to the public in the absence of an order to the contrary. A confidentiality order, such as a sealing order or an order excluding the public from a hearing, is an adjudicative decision.

12. Where a party seeks any limitation on public access to LTB proceedings, the onus is on the person seeking to restrict access. For either a sealing order or an order restricting public access to an LTB hearing, a two-part test must be considered *R. v. Mentuck,* 2001 SCC 76 (CanLII), para 32:

(a) Such an order is necessary in order to prevent a serious risk to the proper administration of justice or broader public interest because reasonable alternative measures will not prevent the risk; and

(b) The salutary effects of the confidentiality order 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 parties to a fair and public trial and the efficacy of the administration of justice.

13. With respect to the first branch of the above test dealing with necessity, the Supreme Court articulated that the reference to "serious risk" must be a "real and substantial" risk

that is "well-grounded in the evidence. It must be a risk that poses a serious threat to the proper administration of justice. In other words, it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained": *Mentuck,* para 34.

14. In *Sherman Estate v. Donovan,* 2021 SCC 25 (CanLII) ('*Sherman Estate*'), the Supreme Court wrote:

> [1] This Court has been resolute in recognizing that the open court principle is protected by the constitutionally-entrenched right of freedom of expression and, as such, it represents a central feature of a liberal democracy. As a general rule, the public can attend hearings and consult court files and the press — the eyes and ears of the public — is left free to inquire and comment on the workings of the courts, all of which helps make the justice system fair and accountable.
>
> [2] Accordingly, there is a strong presumption in favour of open courts. It is understood that this allows for public scrutiny which can be the source of inconvenience and even embarrassment to those who feel that their engagement in the justice system brings intrusion into their private lives. But this discomfort is not, as a general matter, enough to overturn the strong presumption that the public can attend hearings and that court files can be consulted and reported upon by the free press.

15. Competing interests may justify a restriction on the open court principle in exceptional circumstances. Where an order is sought, *inter alia,* sealing an order or excluding the public from a hearing, the requestor "… must demonstrate, as a threshold requirement, that openness presents a serious risk to a competing interest of public importance. That this requirement is considered a high bar serves to maintain the strong presumption of open courts. Moreover, the protection of open courts does not stop there. The applicant must still show that the order is necessary to prevent the risk that, as a matter of proportionality, the benefit of that order restricting openness outweigh its negative effects": *Sherman Estate*, para 3.

16. In *Sherman Estate,* the Supreme Court recognized that "… proceedings in an open court can lead to the dissemination of highly sensitive personal information that would result not just in discomfort or embarrassment, but in an affront to the affected person's dignity. Where this narrower dimension of privacy, rooted in what I see as the public interest in protecting human dignity, is shown to be at serious risk, an exception to the open court principle may be justified": *Sherman Estate,* paras 7-8, 33.

17. An affront to a person's dignity that is serious enough to rebut the strong presumption of open courts is a narrower concern than privacy generally. It goes beyond individual interests, and is a matter concerning society at large: *Sherman Estate,* para 33.

18. The Supreme Court in *Sherman Estate* further clarified this principle:

> [33] Personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this affront, it is an important public interest relevant under *Sierra Club*. Dignity in this sense is a related but narrower concern than privacy generally; it transcends the interests of the individual and, like other important public interests, is a matter that concerns the society at large. A court can make an exception to the open court principle, notwithstanding the strong presumption in its favour, if the interest in protecting core aspects of individuals' personal lives that bear on their dignity is at serious risk by reason of the dissemination of sufficiently sensitive information. The question is not whether the information is "personal" to the individual concerned, but whether, because of its highly sensitive character, its dissemination would occasion an affront to their dignity that society as a whole has a stake in protecting.
>
> [34] This public interest in privacy appropriately focuses the analysis on the impact of the dissemination of sensitive personal information, rather than the mere fact of this dissemination, which is frequently risked in court proceedings and is necessary in a system that privileges court openness. It is a high bar — higher and more precise than the sweeping privacy interest relied upon here by the Trustees. This public interest will only be seriously at risk where the information in question strikes at what is sometimes said to be the core identity of the individual concerned: information so sensitive that its dissemination could be an affront to dignity that the public would not tolerate, even in service of open proceedings.

19. I am not satisfied that an order excluding the public from the hearing or a sealing order are necessary in this case.

20. First, there is no real and substantial risk to the proper administration of justice or broader public interest that is well-grounded in the evidence. SH's submission that there is some information in the Landlord's disclosure that is "borderline defamatory" and that he believes the Landlord may allege that the Tenant is racist or is engaged in some discriminatory practice does not satisfy this test. The articulated risk is that the Tenant operates a business and it is important to maintain its value, which may be affected by the allegations the Landlord may make. This is not a real and substantial risk to the proper administration of justice or broader public interest that is well-grounded in the evidence.

21. In *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (CanLII) ('*Sierra Club*'), the Supreme Court provided that the risk to the administration of justice or broader public interest referred to in the first branch of the test can be interpreted as "a serious risk to an important interest, including a commercial interest": para 53. The Supreme Court goes on to clarify that to qualify as an "important commercial interest", the interest in question "… cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality". "[T]he open

court only yields 'where the public interest in confidentiality outweighs the public interest in openness'" [emphasis in original]: *Sierra Club,* para 55.

22. While evidence of some discriminatory practice or racism may affect an economic interest that is important to the Landlord, there is no general principle at stake here. The public's interest in confidentiality as it relates to allegations about discriminatory practices or racism, if it exists at all, does not outweigh the public's interest in open courts.

23. The information at issue does not relate to intimate financial, personal, or other matters that are of such a nature that the public interest, or the Tenant's interest, outweighs the desirability that the hearing and record be open to the public. This is also not an affront to the Tenant's dignity to the extent that its dissemination through this proceeding would occasion an affront to the Tenant's dignity that society as a whole has a stake in protecting.

24. The salutary effects of closing the hearing to the public and/or a sealing order also do not outweigh the deleterious effects on the rights and interests of the parties and public. Such orders may protect the Tenant from potential embarrassment, or potentially protect his commercial interests if the evidence at issue is accepted and proven. These salutary effects are greatly outweighed by the deleterious effects of the orders sought, which include putting a limit on the open court principle, which is a central feature in a liberal democracy; infringing on the *Charter*-protected right relating to freedom of expression; removing transparency from the LTB's process in this case, and potentially impacting public confidence in the integrity of the system.

25. SH's argument that the evidence is not relevant to the matters before the LTB or that they are not grounded in an application made by the Landlord are not relevant to this test. If the evidence at issue is not relevant to the case or is not properly before the LTB for some other reason, then the Landlord can object to its introduction.

26. There are no exceptional circumstances in this case to justify restricting the open court principle. The Landlord's requests for an order excluding the public from this hearing and for a sealing order are therefore denied.

It is ordered that:

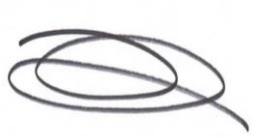
1. The Tenant's requests to amend the T2 Application and the T6 Application are granted.

2. The Tenant's request for an order excluding the public from this hearing is denied.

3. The Tenant's request for a sealing order is denied.

4. The hearing of these applications will be scheduled on a date to be set by the LTB.

5. I am seized.



November 3, 2023
Date Issued

Mark Melchers
Member, Landlord and Tenant Board

15 Grosvenor Street, Ground Floor
Toronto ON M7A 2G6

If you have any questions about this order, call 416-645-8080 or toll free at 1-888-332-3234.