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*Federal Public Sector
Labour Relations and
Employment Board Act and
Federal Public Sector Labour
Relations Act*



Before a panel of the
Federal Public Sector
Labour Relations and
Employment Board

BETWEEN

JANE DOE

Grievor

and

**TREASURY BOARD
(Canada Border Services Agency)**

Employer

Indexed as
Doe v. Treasury Board (Canada Border Services Agency)

In the matter of individual grievances referred to adjudication

Before: Ian R. Mackenzie, a panel of the Federal Public Sector Labour Relations and
Employment Board

For the Grievor: Andrew Raven and Amanda Montague-Reinholdt, counsel

For the Employer: Richard Fader, counsel

Heard at Ottawa, Ontario,
November 8, 2018.

REASONS FOR DECISION

I. Overview

1 A decision of a Board panel on a grievance involving sexual harassment and a sexual assault was issued on May 19, 2017 (2017 PSLREB 55). In the decision, the co-worker's name was anonymized, but the grievor's name and the name of her partner were not. The grievor's counsel has requested that the decision be anonymized (through the removal of the names of the grievor and her partner). The employer took no position on the request.

2 The decision did address the redaction of exhibits in the Board's files.

3 The grievor filed an application for judicial review of the decision on the merits. The Federal Court of Appeal issued a confidentiality order on August 11, 2017.

4 On October 5, 2017, the Board determined that although it had the jurisdiction to make the anonymization order requested, it declined to at that time. In recognition of the Federal Court of Appeal's confidentiality order, the Board sealed its files, removed the decision from its website, and requested legal publishers to remove and not publish the decision. The legal publishers agreed. The Board informed the parties that it would issue a decision on the request to anonymize the decision once the Federal Court of Appeal rendered its judgment, which occurred on October 10, 2018.

5 In a hearing held by conference call on November 8, 2018, the grievor's new counsel relied on the submissions already before the Board with respect to anonymization. Counsel also submitted that the fact that the Federal Court of Appeal had issued a confidentiality order was a relevant factor in considering the anonymization request. Counsel for the employer stated that the employer was taking no position on anonymization.

II. Summary of the arguments

6 The grievor's previous counsel provided submissions on anonymization on June 23, 2017.

7 The grievor submitted that the interests of justice required protecting her identity in the reasons for decision. She submitted that there was an important public interest in protecting complainants in cases involving sexual violence and in

encouraging them to report such violence and to seek redress.

8 The grievor stated that protecting the privacy rights of victims of sexual abuse was an important consideration in the proper administration of justice; she referred to *R. v. Pickton*, 2010 BCSC 1198. In addition to the grievor's personal privacy rights, she submitted that there is a broader societal interest in publication bans when allegations of sexual violence are made. This broader societal interest is in reducing the occurrence of sexual assault and in encouraging victims of sexual assault to come forward; she referred to *C.W. v. L.G.M.*, 2004 BCSC 1499; and *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122.

9 The grievor submitted that the Board's task is to balance those interests with the open court principle, using the test set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835, and *R. v. Mentuck*, 2001 SCC 76, known commonly as the "Dagenais/Mentuck" test.

10 The grievor submitted that anonymization is a minimally intrusive form of a publication ban; see *Canadian Newspapers Co.*, at para. 20. She noted examples of Board decisions in which the anonymization of reasons or comparable protections had been ordered; see, for example, *Employee X v. Canada Revenue Agency*, 2017 PSLREB 18.

11 The grievor submitted that the following factors supported her request for anonymization:

- a) She is a victim and is entitled to the protection of her privacy and psychological integrity.
- b) Publishing her identity would pose systemic risks by decreasing the likelihood that other victims of workplace sexual assault will seek redress.
- c) The relief sought is narrow and tailored, will minimally impair the open court principle, and will not meaningfully withhold the substance of the litigation from the public.

12 On September 8, 2017, the grievor's counsel provided submissions on the Board's jurisdiction to order the anonymization. Since the Board has already

determined that it has the jurisdiction to order the anonymization, I have not summarized

those submissions.

III. Reasons

13 The Board operates on the open court principle and does not usually anonymize the name of a party or third party in its decisions.

14 The Board has issued a “Policy on Openness and Privacy”, which is posted on its website. The policy notes that the open court principle is significant in our legal system and that in accordance with this constitutionally protected principle, the Board conducts its hearings in public, save for exceptional circumstances. The policy expands on those exceptional circumstances as follows:

...

In exceptional circumstances, the Board departs from its open justice principles, and in doing so, the Board may grant requests to maintain the confidentiality of specific evidence and tailor its decisions to accommodate the protection of an individual's privacy (including holding a hearing in private, sealing exhibits containing sensitive medical or personal information or protecting the identities of witnesses or third parties). The Board may grant such requests when they accord with applicable recognized legal principles.

...

15 The anonymization of names and identifying information is a restriction placed on the open court principle that requires an evaluation against the *Dagenais/Mentuck* test.

16 The decision in *Basic v. Canadian Association of Professional Employees*, 2012 PSLRB 120 at para. 11, summarizes the *Dagenais/Mentuck* test as follows:

[11] The Dagenais/Mentuck test was developed in the context of requests for publication bans in criminal proceedings. In Sierra Club of Canada, the Supreme Court of Canada refined the test in response to a request for a confidentiality order in the context of a civil proceeding. As adapted, the test is as follows:

...

- (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
- (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

...

17 Given that the matter before the Board involved sexual harassment, including sexual assault, and given the sensitive nature of the decision, I find it necessary to keep the grievor's name confidential to prevent a serious risk to her privacy, psychological integrity and dignity. In addition, there is a public interest in not discouraging victims of sexual assault from coming forward with allegations. The salutary effects of keeping the grievor's name confidential to preserve her privacy, psychological integrity and dignity, and to protect the public interest in not discouraging the reporting of sexual assault outweigh the deleterious effects of the public's interest in open and accessible court proceedings. The public interest and justice would not be better served if the grievor's name appeared in the Board's decision.

18 For these reasons, I order the anonymization of the grievor's name. She should be referred to only as "the grievor" or "Jane Doe" in the Board's decision.

19 The Board's decision also identifies the grievor's partner, a witness, by name. He was not a party to the grievance. The Federal Court of Appeal did not refer to him by name in its judgment but as her fiancé. Allowing his identity to become part of the record would serve no public or judicial interest and would be a serious risk to his privacy interests. In addition, in some circumstances, the identity of a partner can reveal the identity of the victim of the sexual assault. The public interest and justice would not be served if the partner's name appeared in the Board's decision.

20 For these reasons, I also order the anonymization of the name of the grievor's partner, who should be referred to only as "the partner" or "the grievor's partner" in the Board's decision.

21 Therefore, I order the anonymization of the names of the grievor and the grievor's partner in the reasons for decision in 2017 PSLREB 55.

22 The Federal Court of Appeal has remitted the issue of remedy for redetermination by the Board. The hearing of this redetermination has not yet commenced. For the reasons above, this anonymization order will also apply to any decision on remedy.

23 I now turn to confidentiality of the Board files related to the grievor's grievances. In the decision on the merits, the Board issued a confidentiality order requiring the parties to prepare a copy of exhibits in which any personal or medical information of the grievor, the co-worker, or any third party that was not essential to the transparency of the decision be redacted. On June 30, 2017, the Board determined that the documents had not been redacted in accordance with the decision, and the parties were directed to provide redacted copies of the exhibits. However, this does not deal with the names of the grievor, her partner and the co-worker in the Board's files. For the reasons listed for the grievor's name and the partner's name, I order the anonymization of the names of the grievor and the grievor's partner in all Board files. As for the co-worker's name who sexually assaulted the grievor, I order the anonymization of his name in all Board files, given the Board's existing order that the co-worker's name, who assaulted the grievor, should be anonymized.

24 To allow for the anonymization of the documents, the sealing order dated October 5, 2017, remains in effect while the anonymization process is ongoing.

25 The Board will provide the parties with a copy of its files, except for documents protected by solicitor-client privilege. The grievor's representatives shall anonymize the documents in accordance with the following instructions and obtain the agreement of the employer's representative with respect to the anonymization. The documents shall be anonymized as follows:

- a) the grievor's name shall be replaced by "the grievor" or "Jane Doe";
- b) the name of the grievor's partner shall be replaced by "the partner" or "the grievor's partner"; and
- c) the name of the co-worker who sexually assaulted the grievor shall be

replaced by “the co-worker”.

26 The grievor’s representatives shall file a copy of those anonymized documents by December 20, 2018, no later than 4 p.m., Ottawa local Time.

27 Once the Board has confirmed that the documents have been appropriately anonymized, it will replace the original documents in its files with those anonymized documents.

28 The sealing order will cease once the original documents are replaced by the anonymized documents.

29 In the event that the parties have difficulty with anonymizing the documents, I will remain seized of this matter until it is finalized.

30 For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

IV. Order

31 The reasons for decision in 2017 PSLREB 55 will be anonymized by the Board. The grievor's name will be anonymized to "Jane Doe" or "the grievor" and her partner's to "partner" or "grievor's partner".

32 The anonymization of the grievor, her partner, and the co-worker will apply to any future decision related to the issue of remedy.

33 The sealing order of October 5, 2017, remains in effect while the anonymization process is ongoing. The order will cease once the Board has confirmed that the original documents have been replaced by the anonymized documents.

34 The Board will provide the parties with a copy of its files, except for documents protected by solicitor-client privilege. The grievor's representative shall anonymize as follows all documents in the copy provided and obtain the agreement of the employer's representative with respect to the anonymization:

- a) the grievor's name shall be replaced by "the grievor" or "Jane Doe";
- b) the name of the grievor's partner shall be replaced by "the partner" or "the grievor's partner"; and
- c) the name of the co-worker who sexually assaulted the grievor shall be replaced by "the co-worker".

35 A copy of the anonymized documents will be filed with the Board by December 20, 2018, no later than 4:00 p.m. Ottawa local Time.

36 Once the Board has confirmed that the documents have been anonymized in accordance with these reasons, it will replace the original documents in its files with those anonymized documents.

37 In the event that the parties have difficulty with anonymizing the documents in the Board's files, I will remain seized of this matter.

December 4, 2018.

**Ian R. Mackenzie,
a panel of the Federal Public Sector
Labour Relations and Employment Board**