Date: 20230627

File: EMP-2016-10822

Citation: 2023 FPSLREB 67

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

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

BETWEEN

PAMELA MENEGUZZI

Complainant

and

DEPUTY HEAD
(Office of the Director of Public Prosecutions)

Respondent

And

OTHER PARTIES

Indexed as
Meneguzzi v. Deputy Head (Office of the Director of Public Prosecutions)

In the matter of a complaint of abuse of authority – paragraph 77(1)(a) of the *Public Service Employment Act*

Before: David Olsen, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Herself and Sean McGee, counsel

For the Respondent: Richard Fader, counsel

Decided on the basis of written submissions, filed October 13, November 9 and 16, and December 17, 2021, and March 29 and August 18, 2022.

REASONS FOR DECISION

I. Request before the Board

A. Background

[1] The relevant complaint (Board file no. EMP-2016-10822) was made under s. 77(1)(a) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*) and was about an alleged abuse of authority in the application of merit in an advertised appointment process. It was submitted to the former Public Service Labour Relations and Employment Board on November 15, 2016. A decision was issued on July 29, 2019 (2019 FPSLREB 77). The complaint was dismissed.

[2] On October 13, 2021, the Federal Public Sector Labour Relations and Employment Board ("the Board") received a request from the complainant, Pamela Meneguzzi, to seal or anonymize the decision in light of the Supreme Court of Canada's recent decision in *Sherman Estate v. Donovan*, 2021 SCC 25, which held that sealing can be ordered when a privacy interest striking at the core of human dignity is impacted.

[3] The complainant alleged that an abuse of authority occurred on the basis of bad-faith discrimination when she was not appointed to a general counsel position with the Public Prosecution Service of Canada. The complainant alleged that she was discriminated against in the appointment process on the basis of her gender.

[4] In the appointment process, a score of "More than Capable" was required for all the essential qualifications of the general counsel position, given the role's importance.

[5] Based on her interview during the appointment process and her references, the complainant was scored as More than Capable for specialized skills, knowledge, professionalism, judgement, practice management, and communication. She was scored as "Capable" for interpersonal relationships and leadership.

[6] The complainant strongly disputed those two assessments.

[7] The Board determined that she had established a *prima facie* case of discrimination based on the circumstantial evidence produced, including the perception of an attribute that may be seen as negative in a woman. Nevertheless, the Board found that the respondent (the Director of Public Prosecutions) had provided a

reasonable, non-discriminatory explanation for attributing the score assigned to the complainant when it assessed her leadership and interpersonal skills based on her interview and her references.

[8] The Board concluded that the complainant's gender was not a factor in her assessment and that she did not prove that the assessment board acted in bad faith.

II. Summary of the submissions

A. Summary of the complainant in person

[9] The complainant brings this application pursuant to the Board's management responsibilities based on the *Canadian Broadcasting Corp. v. Manitoba* 2021 SCC 33 decision where the court determined that even after the case comes to an end, important decisions about the openness of the court record may need to be taken.

> …
>
> [The complainant requests] *that the decision be sealed in light of the recent Supreme Court of Canada decision in Sherman Estate v. Donovan 2021 SCC 25 which held that sealing can be ordered when a privacy interest striking at the core of human dignity is impacted.*
>
> …

[10] The complainant referred to paragraph 72 of *Sherman Estate*, which reads as follows:

> *[72] Where dignity is impaired, the impact on the individual is not theoretical but could engender real human consequences, including psychological distress (see generally* Bragg*, at para. 23). La Forest J., concurring, observed in* Dyment *that privacy is essential to the well-being of individuals (p. 427). Viewed in this way, a privacy interest, where it shields the core information associated with dignity necessary to individual well-being, begins to look much like the physical safety interest also raised in this case, the important and public nature of which is neither debated, nor, in my view, seriously debatable. The administration of justice suffers when the operation of courts threatens physical well-being because a responsible court system is attuned to the physical harm it inflicts on individuals and works to avoid such effects. Similarly, in my view, a responsible court must be attuned and responsive to the harm it causes to other core elements of individual well-being, including individual dignity. This parallel helps to understand dignity as a more limited dimension of privacy relevant as an important public interest in the open court context.*

[11] The complainant then stated this:

> …
>
> *As a participant in the complaint process, I can unequivocally say that publicizing a staffing decision has a very strong chilling affect [sic]. I did not bring a subsequent complaint. I believe* [the decision] *has impaired my application [sic] for other positions. Moreover, the continuing publication of the decision (which addresses the core of my dignity in the sense of it discussed in detail my unique personality and personhood - it specifically addressed my personality) continues to cause distress especially para. 72.*

[12] Paragraph 72 of the decision refers as follows to evidence of Todd Gerhart (Chief Federal Prosecutor for the respondent's British Columbia region) and a discussion with Rosellina Dattilo (Deputy Chief Federal Prosecutor for that same region), who together constituted the assessment board of the process to which the complainant applied:

> *[72] Mr. Gerhart testified at the hearing that he carefully reviewed the complainant's further submissions and that he discussed them with Ms. Dattilo but that together, they concluded that her submissions did not alter their assessment of not meeting the More than Capable grade for leadership and interpersonal skills. They believe that the appointees had demonstrated those skills at that grade, but not the complainant.*

[13] The complainant questions why her promotion concerns are public concerns.

B. Submissions of counsel for the complainant

[14] The complainant's counsel submitted the following:

> …
>
> *Ms. Meneguzzi is requesting an order that the Board take steps to control the distribution of* [the decision]*. The request is to do so either by anonymizing her name or by removing the case from direct access and requesting that CanLII do the same.*
>
> …
>
> *Although the Association* [of Justice Counsel] *did not typically lend support to members on staffing complaints at the time this matter was heard, it does support her request for a sealing order of the kind requested.*

> *The order is being requested based on the statements of the Supreme Court of Canada in* Sherman Estates *[sic]* v. Donovan, *2021 SCC 25. As the Board is aware, the Court has made it clear that there must be a balancing of the principles associated with an "open court" approach and the protection of dignity interests related to core identity-giving information about themselves (para. 71). This includes issues and conclusions related to character.*
>
> *The* Sherman *decision has confirmed that the exercise involves a balancing of interests that must include this focus on the privacy interests of the individual. The submission is not meant to suggest that cases such as* Sierra Club *and* Dagenais *are no longer good law. It clarifies that privacy and core identity interests are among the important interests that require consideration when determining the extent to which information provided at a hearing should or must be disseminated. This is why the Court has always required the decision maker to proceed to the second part of the test and assess the proportionality related to disclosure interests and protection of other personal interests of a litigant. Neither can be dismissed without careful consideration.*
>
> *The Association of Justice Counsel supports the request either to control the distribution in the manner requested or to anonymize the decision so that the dignitary [sic] interests set out above are protected.*
>
> *…*

C. Submissions of counsel for the respondent

[15] The respondent submitted the following:

> *…*
>
> *2. The respondent opposes this request for the following reasons.*
>
> *3. The publication of decisions rendered by the Federal Public Sector Labour Relations and Employment Board (the "Board") is central to the open court principle. The Board's* Policy on Openness and Privacy *cautions parties that they are embarking on a process that presumes a public airing of their dispute. Specifically, the policy states: "When the identity of a party and a witness is publicly known, the reliability of their testimony is enhanced. Board decisions identify parties and their witnesses by name and may set out information about them that is relevant and necessary to the determination of the dispute."*
>
> *4. There is a strong presumption that all judicial proceedings be heard publicly. The Supreme Court of Canada has recognized that this presumption is inextricably linked to the freedom of expression guaranteed by the* Canadian Charter of Rights *and is not to be lightly interfered with.*

5. The application of the open court principle to quasi-judicial tribunals was considered in Lukacs v Canada (Transport, Infrastructure and Communities)*. The same principles that have been articulated for the courts apply to quasi-judicial proceedings, including staffing complaints made to the Board pursuant to section 77 of the* Public Service Employment Act*.*

6. The complainant relies on Sherman Estate v. Donovan*, 2021 SCC 25, at paragraph 72. It is important to note that the Supreme Court of Canada in* Donovan *was dealing with the application of well-established principles to a particular fact pattern (paragraphs 30 and 31). The Supreme Court was not purporting to alter the law in this area.*

7. A party seeking restriction on the open court principle must meet the test established by the Supreme Court of Canada in Dagenais/Mentuck*, later reformulated* Sierra Club of Canada v. Canada (Minister of Finance)*, and demonstrate that:*

> *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.*

Application of the Dagenais/Mentuck test

*8. The Supreme Court has emphasized that, for a party to prove the element of "serious risk" in the first stage of the test, it must be demonstrated that the threat of injury is "*real, substantial, and well grounded *in evidence."*

*9. The complainant's statement regarding the potential adverse effect on her employability resulting from the publication of the decision is based on hypothesis, speculation, and conjecture without a true evidentiary foundation. While it is possible that a potential employer could become aware of this decision, there is nothing "*real, substantial, *and* well grounded in evidence*" to suggest that there would be a serious risk of an important interest. As stated in* Abi-Mansour 2018*,* [at para 37] *"the harm the complainant speaks of and his risk of being unemployable is speculative in nature."*

10. The second stage of the test deals with proportionality, balancing the positive and negative impacts that would result from the order. The salutary effect of not publishing the decision does not outweigh the public interest. As stated in Abi-Mansour 2018*, "the salutary effects of the order would most certainly not outweigh its deleterious effects on the public's right to open and accessible adjudication proceedings."*

> *11. It is also worth noting that the decision was released on July 29, 2019 and has been available on numerous platforms not controlled by the Board, such as QuickLaw and CanLII. The complainant has provided no explanation why this motion wasn't brought in a timely way. The basic principles applied in* Donovan *have been established at least since the* Sierra Club of Canada *decision in 2002.*
>
> *12. As noted in the Board's* Policy on Openness and *Privacy: "The open court principle is significant in our legal system. In accordance with this constitutionally protected principle, the Board conducts its hearings in public, except for exceptional circumstances. Because of its mandate and the nature of its proceedings, the Board maintains an open justice policy to foster transparency in its processes, accountability, and fairness in its proceedings."*
>
> ***Conclusion***
>
> *13. There is nothing in* Meneguzzi *v.* Director of Public Prosecutions, *2019 FPSLREB 76 which elevates to the level of seriousness described by the Supreme Court of Canada in* Donovan. *The Board recently denied a similar request: "As further noted recently in* Sherman Estate *v.* Donovan, *2021 SCC 25 at paragraph 7, 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, is a justifiable exception to the open court principle."*
>
> *14.* Meneguzzi 2019 *is a straightforward decision not unlike hundreds of other decisions available on the Board's website. There is nothing in the decision that would cause discomfort or embarrassment let alone be an affront to the complainant's personal dignity as that term is used by the Supreme Court of Canada.*
>
> …
>
> [Emphasis in the original]
>
> [*Sic* throughout]

D. The complainant's reply submissions on the timeliness issue

[16] The complainant made these reply submissions on the timeliness issue:

> …
>
> *This application is made pursuant to the Board's management responsibilities and based on the Canadian Broadcasting Corp. v. Manitoba, 2021 SCC 33 decision where Justice Kasirer said, even after the case comes to an end, "important decisions about the openness of the court record may need to be taken".*

> *The time for bringing the application was not delayed. The application was brought as soon as practical after the* Sherman Estate *decision was rendered and clarified the law regarding the importance of respecting the dignity of litigants. The dignity issues that publication of the decision raised only became apparent when I endeavoured to seek other positions and in particular when I filed my application for a judicial appointment. In the application I was required to refer to this public decision, which makes my appointment improbable. The harm is ongoing. It is not clear that public servants exercising their only formal avenue to ensure hiring fairness need to be publicly identified in the style of cause when the employer is named generically (e.g. Director of Public Prosecution [sic]).*
>
> …

E. Position of the Public Service Commission

[17] The Public Service Commission ("PSC") took no position on the complainant's request for a sealing order and advised the Board that it would not make submissions.

III. Analysis

A. Constitutional and statutory provisions

[18] Section 2(b) of the *Canadian Charter of Rights and Freedoms* (enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.)) and the preamble to the *PSEA* are the constitutional and statutory provisions relevant to this decision. They read as follows:

> ***2*** *Everyone has the following fundamental freedoms:*
>
> …
>
> ***(b)*** *freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication ….*
>
> …
>
> ***Preamble***
>
> *Recognizing that*
>
> …
>
> *Canada will continue to benefit from a public service that is based on merit and non-partisanship in which these values are independently safeguarded;*
>
> …
>
> *the government of Canada is committed to an inclusive public service that reflects the diversity of Canada's population, that*

> *embodies linguistic duality and that is characterized by fair,* ***transparent employment practices****, respect for employees, effective dialogue, and recourse aimed at resolving appointment issues ….*
>
> [Emphasis added]

B. Jurisprudence

1. The open court principle

[19] In *Vancouver Sun (Re)*, 2004 SCC 43, the Supreme Court of Canada emphasized the importance of the open court principle, linked the principle to the freedom-of-expression provisions in the *Canadian Charter of Rights and Freedoms* as follows:

> …
>
> *23 This Court has emphasized on many occasions that the "open court principle" is a hallmark of a democratic society and applies to all judicial proceedings:* Attorney General of Nova Scotia v. MacIntyre, *[1982] 1 S.C.R. 175, at p. 187;* Canadian Broadcasting Corp. v. New Brunswick (Attorney General), *[1996] 3 S.C.R. 480, at paras. 21-22;* Edmonton Journal v. Alberta (Attorney General), *[1989] 2 S.C.R. 1326. "Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized":* Edmonton Journal, supra, *at p. 1336.*
>
> *24 The open court principle has long been recognized as a cornerstone of the common law:* Canadian Broadcasting Corp. v. New Brunswick (Attorney General), supra, *at para. 21. The right of public access to the courts is "one of principle … turning, not on convenience, but on necessity":* Scott v. Scott, *[1913] A.C. 417 (H.L.),* per *Viscount Haldane L.C., at p. 438. "Justice is not a cloistered virtue":* Ambard v. Attorney-General for Trinidad and Tobago, *[1936] A.C. 322 (P.C.),* per *Lord Atkin, at p. 335. "Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity": J. H. Burton, ed.,* Benthamiana*:* Or, Select Extracts from the Works of Jeremy Bentham *(1843), p. 115.*
>
> *25 Public access to the courts guarantees the integrity of judicial processes by demonstrating "that justice is administered in a non-arbitrary manner, according to the rule of law":* Canadian Broadcasting Corp. v. New Brunswick (Attorney General), supra, *at para. 22. Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal*

> *component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts.*
>
> *26 The open court principle is inextricably linked to the freedom of expression protected by s. 2(*b*) of the* Charter *and advances the core values therein:* Canadian Broadcasting Corp. v. New Brunswick (Attorney General), supra*, at para. 17. The freedom of the press to report on judicial proceedings is a core value. Equally, the right of the public to receive information is also protected by the constitutional guarantee of freedom of expression:* Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712;* Edmonton Journal, supra*, at pp. 1339-40. The press plays a vital role in being the conduit through which the public receives that information regarding the operation of public institutions:* Edmonton Journal*, at pp. 1339-40. Consequently, the open court principle, to put it mildly, is not to be lightly interfered with.*
>
> …

2. Balancing freedom of expression and other important rights and interests the *Dagenais/ Mentuck* test

[20] In *Vancouver Sun (Re)*, the Supreme Court of Canada restated the *Dagenais/Mentuck* test to balance freedom of expression and other important rights as follows:

> …
>
> *28 This Court has developed the adaptable* Dagenais*/*Mentuck *test to balance freedom of expression and other important rights and interests, thereby incorporating the essence of the balancing of the* Oakes *test:* Dagenais, supra*;* Mentuck, supra*;* R. v. Oakes*, [1986] 1 S.C.R. 103. The rights and interests considered are broader than simply the administration of justice and include a right to a fair trial:* Mentuck, supra*, at para. 33, and may include privacy and security interests.*
>
> *29 From* Dagenais *and* Mentuck*, this Court has stated that a publication ban should be ordered only when:*
>
> ***(a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and***
>
> ***(b) the salutary effects of the publication ban 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 accused to a fair and public trial, and the efficacy of the administration of justice.***
>
> **(Mentuck, supra*, at para. 32)***
>
> *30 The first part of the* Dagenais/Mentuck *test reflects the minimal impairment requirement of the* Oakes *test, and the second part of*

> *the* Dagenais/Mentuck *test reflects the proportionality requirement. The judge is required to consider not only "whether reasonable alternatives are available, but also to restrict the order as far as possible without sacrificing the prevention of the risk":* Mentuck, supra*, at para. 36.*
>
> …
>
> [Emphasis added]

[21] In *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 SCR 522 ("*Sierra Club*"), the Supreme Court of Canada reformulated the test for a confidentiality order set out in previous decisions, including *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835, and *R. v. Mentuck*, [2001] 3 SCR 442, and applied the previous decisions that had been decided in the context of criminal cases to a civil case as follows:

> …
>
> *53 Applying the rights and interests engaged in this case to the analytical framework of* Dagenais *and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:*
>
> *A confidentiality order under Rule 151 should only be granted when:*
>
> *(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.*
>
> …

[22] The Court then added the following:

> *54 As in* Mentuck*, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat to the commercial interest in question.*

[23] In *Lukács v. Canada (Transport, Infrastructure and Communities)*, 2015 FCA 140, the Federal Court of Appeal discussed the applicability of the open court principle

to quasi-judicial tribunals at paragraph 37 as follows, quoting *R. v. Canadian Broadcasting Corporation*, 2010 ONCA 726 at para. 22:

> *[37] …*
>
> > *[22] The open court principle, permitting public access to information about the courts, is deeply rooted in the Canadian system of justice.* ***The strong public policy in favour of openness and of "maximum accountability and accessibility" in respect of judicial or quasi-judicial acts pre-dates*** [sic] ***the Charter:*** Nova Scotia (Attorney General) v. MacIntyre, *[1982] 1 S.C.R. 175, [1982] S.C.J. No. 1, at p. 184 S.C.R. As Dickson J. stated, at pp. 186-87 S.C.R.:* ***At every stage the rule should be one of public accessibility*** *….*
>
> [Emphasis in the original]

3. The Board and the open court principle

[24] The Board and its predecessor boards, the Public Service Labour Relations Board and the Public Service Staffing Tribunal ("PSST"), have followed the open court principle and have applied the *Dagenais/Mentuck* test in balancing that principle with other important rights. See *Basic v. Canadian Association of Professional Employees*, 2012 PSLRB 120 at paras. 9 to 11.

[25] The Board has adopted a *Policy on Openness and Privacy* that is posted on its public website and that reads in part as follows:

> ***OPEN JUSTICE***
>
> *The Federal Public Sector Labour Relations and Employment Board ("the Board") is an independent quasi-judicial tribunal that operates very much like a court when it conducts proceedings under several labour-related statutes, including the* Federal Public Sector Labour Relations Act, *the* Parliamentary Employment and Staff Relations Act, *the* Public Service Employment Act, *and Part II of the* Canada Labour Code. *The Board's mandate is such that its decisions can impact the entire public service and Canadians in general. This document outlines the Board's policy on the openness of its processes and describes how it handles privacy issues.*
>
> *The open court principle is significant in our legal system. In accordance with this constitutionally protected principle, the Board conducts its hearings in public, except for exceptional circumstances. Because of its mandate and the nature of its proceedings, the Board maintains an open justice policy to foster transparency in its processes, accountability, and fairness in its proceedings.*

The Board's website, notices, forms, information bulletins, and other publications advise parties and the community that its process and hearings are open to the public. Parties that engage the Board's services should be aware that they are embarking on a process that presumes a public airing of the dispute between them, including the public availability of their case files and the Board's related decisions.

Parties and their witnesses are subject to public scrutiny when giving evidence before the Board. When the identity of a party and a witness is publicly known, the reliability of their testimony is enhanced. Board decisions identify parties and their witnesses by name and may set out information about them that is relevant and necessary to the determination of the dispute.

At the same time, the Board acknowledges that in some instances, mentioning an individual's personal information during a hearing or in a written decision may affect that person's life.

Privacy concerns arise most frequently when some identifying aspects of a person's life become public. These include an individual's home address, personal email address, personal phone number, date of birth, bank account number, SIN, PRI, driver's license number, or credit card or passport details. The Board endeavours to include such information only to the extent that is relevant and necessary for the determination of the dispute.

With advances in technology and the possibility of posting material electronically — including Board decisions — the Board recognizes that in some instances, it may be appropriate to limit the concept of openness as it relates to the circumstances of individuals who are parties or witnesses in proceedings before it.

The Board's policy is consistent with the statement of the Heads of Federal Administrative Tribunals Forum (endorsed by the Council of Canadian Administrative Tribunals) and the principles found in the "Protocol for the Use of Personal Information in Judgments" approved by the Canadian Judicial Council.

PARTIES' RESPONSIBILITY

It is recommended that the parties redact information that is not necessary to their case before sending it to the Board and before introducing it into evidence at the hearing. Examples of such information include a PRI, information about someone not a party to the case (e.g., a person's or a company's financial information, a family member's medical information, etc.), medical information (e.g., health card number, date of birth, etc.), security information, financial details (e.g., tax information, SIN, bank account number, salary, etc.), and personal home and email addresses.

In exceptional circumstances, the Board departs from its open justice principles. When it does, it may grant requests to maintain the confidentiality of specific information and evidence and may 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 and information of witnesses or third parties).*
>
> *It is the party's responsibility to ask for a confidentiality order if it wants to protect information from the public. The Board may grant such requests when they accord with applicable recognized legal principles.*
>
> …

a. *Sherman Estate*

[26] In *Sherman Estate*, Supreme Court of Canada recognized for the purposes of the test set out in *Sierra Club* that 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 is a justifiable exception to the open court principle.

[27] It is important to set out the context in the decision in which this exception was discussed as follows, at paragraphs 1 to 3 and 7:

> *[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.*
>
> *[3] Notwithstanding this presumption, exceptional circumstances do arise where competing interests justify a restriction on the open court principle. Where a discretionary court order limiting constitutionally-protected openness is sought — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — the applicant 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 and that, as a matter of proportionality, the benefits of that order restricting openness outweigh its negative effects.*
>
> …
>
> *[7] For the reasons that follow, I propose to recognize an aspect of privacy as an important public interest for the purposes of the relevant test from* Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522. Proceedings in 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.*
>
> …
>
> *[33] … 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.*
>
> …
>
> *[75] If the interest is ultimately about safeguarding a person's dignity, that interest will be undermined when the information reveals something sensitive about them as an individual, as opposed to generic information that reveals little if anything about who they are as a person. Therefore the information that will be revealed by court openness must consist of intimate or personal details about an individual — what this Court has described in its jurisprudence on s. 8 of the* Charter *as the "biographical core" — if a serious risk to an important public interest is to be recognized in this context (*R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293;* R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 60;* R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 46). Dignity transcends personal inconvenience by reason of the highly sensitive nature of the information that might be revealed. This Court in* Cole *drew a similar line between the sensitivity of personal information and the public interest in protecting that information in reference to the biographical core. It held that "reasonable and informed Canadians" would be more willing to recognize the existence of a privacy interest where the relevant information cuts to the "biographical core" or, "[p]ut another way, the more personal and confidential the information" (para. 46). The presumption of*

> *openness means that mere discomfort associated with lesser intrusions of privacy will generally be tolerated. But there is a public interest in ensuring that openness does not unduly entail the dissemination of this core information that threatens dignity — even if it is "personal" to the affected person.*
>
> *[76] … Recognizing that privacy, understood in reference to dignity, is only at serious risk where the information in the court file is sufficiently sensitive erects a threshold consistent with the presumption of openness. This threshold is fact specific. It addresses the concern, noted above, that personal information can frequently be found in court files and yet finding this sufficient to pass the serious risk threshold in every case would undermine the structure of the test. By requiring the applicant to demonstrate the sensitivity of the information as a necessary condition to the finding of a serious risk to this interest, the scope of the interest is limited to only those cases where the rationale for not revealing core aspects of a person's private life, namely protecting individual dignity, is most actively engaged.*
>
> …

4. Waiver of the right to privacy

[28] In the course of his reasoning in *Sherman Estate*, Justice Kasirer discussed limits to the right to privacy at paragraph 58 as follows:

> *[58] Though writing before* Dagenais*, and therefore not commenting on the specific steps of the analysis as we now understand them, to my mind, Dickson J. was right to recognize that the open court principle brings necessary limits to the right to privacy. While individuals may have an expectation that information about them will not be revealed in judicial proceedings, the open court principle stands presumptively in opposition to that expectation. For example, in* Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743, LeBel J. held that "a party who institutes a legal proceeding waives his or her right to privacy, at least in part" (para. 42).* MacIntyre *and cases like it recognize — in stating that openness is the rule and covertness the exception — that the right to privacy, however defined, in some measure gives way to the open court ideal. I share the view that the open court principle presumes that this limit on the right to privacy is justified.*

5. How the Board applied the open court principle

[29] In *Basic*, at para. 11, a predecessor to the Board, the Public Service Labour Relations Board, adopted the refined test set out in *Sierra Club* for a confidentiality order, which is repeated at paragraph 20 of this decision.

[30] In *Wepruk v. Deputy Head (Department of Health)*, 2021 FPSLREB 75, the grievor in that case referred to adjudication her termination grievance. The employer in that case relied on a threat that she had made against her manager to justify her termination.

[31] The grievor in *Wepruk* requested that the decision concerning her termination be anonymized. She expressed concern that some of the relevant evidence was very personal. She was concerned that the use of her name could be professionally embarrassing in the future and that it could undermine her ability to find employment.

[32] At paragraph 22 of *Wepruk*, the Board applied the *Dagenais/Mentuck* test as refined in *Sierra Club* as follows:

> *[22] In this case, the serious risks identified by the grievor include her personal reputation, job prospects … The impact of a decision on a personal reputation or on job prospects is not a significant risk that would justify anonymization. All grievors are aware that Board hearings and decisions respect the open court principle and that their names will be made public. In this case, the salutary effects of a confidentiality order do not outweigh the deleterious effects of such an order.*

[33] In *Abi-Mansour v. Deputy Minister of Fisheries and Oceans*, 2018 FPSLREB 53 ("*Abi-Mansour* (2018)"), a decision was rendered on a complaint of abuse of authority under ss. 77(1)(a) and (b) of the *PSEA* in which the complainant in that case alleged that the respondent in that case abused its authority when it made appointments to two program analyst positions. The allegation was about abuse of authority by choosing non-advertised processes, by allowing personal favouritism to influence the appointments, by setting the essential qualifications for the two positions, and by appointing two candidates who did not meet the essential qualifications. The Board found that the complainant in that case did not meet his burden of proving an abuse of authority.

[34] The complainant in *Abi-Mansour* (2018) requested that the decision be anonymized on the basis that he had been told that hiring managers were refusing to consider him for appointments because of his notoriety of being a frequent litigant before the Board and that decisions of the Board and the predecessor PSST that were in the public domain were being unfairly held against him.

[35] The complainant in *Abi-Mansour* (2018) suggested that he was at serious risk of not being able to find any job from the time of the hearing until his retirement.

[36] The Board discussed in *Abi-Mansour* (2018) the jurisprudence from the Supreme Court of Canada, the *Dagenais/Mentuck* test, as refined in *Sierra Club*, and the fact that the open court principle applies to quasi-judicial tribunals.

[37] The PSC did not attend the hearing in *Abi-Mansour* (2018); however, it made written submissions on the complainant's request to anonymize the decision in that case, noting that the PSST considered this issue in *Boivin v. President of the Canada Border Services Agency*, 2010 PSST 6, and determined at paragraph 157 as follows:

> ***157*** *This Tribunal is of the view that, given its mandate and its quasi-judicial nature, it is bound by the rules governing the open court principle. The Tribunal applies legal principles and evidence in making its determinations. Hearings are held in public. Complaints to the Tribunal are made by individual employees, and the Tribunal's decisions are of interest to the parties in conflict. In addition, there are other stakeholders with a valid interest in these decisions. The mandate of the Tribunal is such that issues and interests in conflict between the individual parties have an impact on the public service and the public at large. The values found in the preamble to the* PSEA *underline the spirit and letter of the legislation, and the Tribunal has a significant role in demonstrating to the public that those values are upheld.*

[38] In *Abi-Mansour* (2018), after weighing the interests required in a request to anonymize, as set out in the *Dagenais/Mentuck* test, the Board concluded as follows at paragraphs 36 to 39 and 42:

> *[36] … I have no hesitation in concluding that such an order should not be granted under both parts of the test. An order limiting the open court principle is unnecessary in the context of this litigation to prevent a serious risk of [sic] an important interest. In addition, the salutary effects of the order would most certainly not outweigh its deleterious effects on the public's right to open and accessible adjudication proceedings. The harm to the public interest in open court hearings before this Board far outweigh the benefit the complainant seeks to escape the notoriety he has created for himself by his frequent appearances before this Board.*
>
> *[37] The harm the complainant speaks of and his risk of being unemployable is [sic] speculative in nature. More importantly, if in fact he is suffering from loss of employment opportunities, this cannot be reversed retroactively.*

> *[38] I rely upon years of consistent jurisprudence from our Supreme Court, Federal Court of Appeal and practice of this Board holding hearings and publishing decisions that are open to the public, transparent and accountable in guiding my decision to reject the complainant's arguments to seal the records of this hearing and anonymize this decision.*
>
> *[39] The complainant is aware that every time he files a complaint under the* Act *that it will result in a public hearing and public Board decision of the matter. He has no right to privacy of the subject matter of his complaint and the decision arising therefrom.*
>
> …
>
> *[42] Furthermore, if I were to grant the complainant's request, then literally every complainant appearing before this Board could reasonably request that his or her case not be published out of the fear that some ill will could arise from putting public service managers through a hearing process.*

[39] Mr. Abi-Mansour filed a motion before the Federal Court of Appeal for an order to stay the decision's publication, leave to commence an application under the pseudonym "Mr. P", and other stays. The motion was dismissed by a judge sitting alone on August 24, 2018 (docket 18-A-32). Mr. Abi-Mansour then brought a motion for an order permitting him to file a notice of appeal from the August 24, 2018, decision to a full panel of that Court. The application was dismissed (docket 18-A-32).

[40] Mr. Abi-Mansour then made an application for leave to appeal the August 24, 2018, decision to the Supreme Court of Canada, which on November 18, 2019, dismissed the application. The motion to anonymize the style of cause was also dismissed as were Mr. Abi-Mansour's other motions (docket 38728).

6. Board decisions since *Sherman Estate*

a. Tarek-Kaminker

[41] In *Tarek-Kaminker v. Attorney General of Canada*, 2021 FPSLREB 120, the grievor in that case grieved her management's decision to rescind accommodation measures, its alleged harassing behaviour, and its failure to accommodate her. The grievor alleged that she was discriminated against by the employer in that case based on religious affiliation, family status, and mental or physical disability, in violation of the no-discrimination article in the relevant collective agreement. The grievance was dismissed.

[42] During the course of the hearing, the grievor submitted copies of medical records and reports signed by her children's pediatrician with respect to the health issues of some of her children. The parties agreed to seal these documents.

[43] The Board referred to *Basic*, at paras. 9 to 11, where the *Dagenais/Mentuck* test was referred to and recited.

[44] The Board then referred to the decision in *Sherman Estate* as follows at paragraph 154:

> *[154] As further noted recently in* Sherman Estate v. Donovan, *2021 SCC 25 at para. 7, the dissemination of highly sensitive information that would result not just in discomfort or embarrassment, but in an affront to the affected person's dignity, is a justifiable exception to the open court principle.*

[45] The Board concluded at paragraph 155 that medical records relating to the grievor's children should not be in the public domain as doing so constituted a serious risk to their privacy and dignity.

[46] Subsequent to the close of the hearing, in a written reply to the employer's outline of its oral argument, the grievor requested that the Board anonymize the decision.

[47] Addressing the issue, the Board referred to *Reynolds v. Treasury Board (Correctional Service Of Canada)*, 2019 FPSLREB 47, and *Olynik v. Canada Revenue Agency*, 2020 FPSLREB 80.

[48] The Board referred to paragraph 6 of *Olynik*, which summarizes the exceptional circumstances that may justify a departure from the open court principle 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 witness or 3rd parties). The Board may grant such requests when they accord with applicable recognized legal principles.

[49] The Board then referred to paragraphs 65 and 67 of the *Reynolds* decision, which stated in part as follows:

> ***65*** *The grievor requested that the exhibits that contained his sensitive medical information be sealed. I agree and order that those exhibits listed in Appendix A shall be sealed. He also requested that his name be anonymized, which is not granted on the basis that he has not shown why the Board should deviate from its practice of observing the open court principle and publish the name of the grievor.*
>
> …
>
> ***67*** *… Anonymization is rare in the Board's jurisprudence, particularly when these rights may be protected by other means, such as sealing exhibits. I am satisfied that the grievor's privacy rights can be sufficiently protected by sealing exhibits and heard no argument to the contrary.*

[50] After reciting that passage, the Board observed the following at paragraph 163:

> *[163] Each case must be assessed on its merits. Information that is clearly sensitive, private, and not relevant to the findings need not be published. It is for this reason that many documents and information redacted, as the general public need not know such things as a person's home address or telephone number. It is also common that there are persons who play a part in the larger narrative of the case; however, there specific identities need not be divulged as they are not pertinent to the decision. Often, they are identified by a neutral designation such as "Mr. A" or "Ms. B" ….*

[51] In *Tarek-Kaminker*, after referring to the statements in *Reynolds*, the Board stated that the open court principle is a significant principle in our legal system and that conducting hearings in public fosters transparency in processes and accountability and fairness in proceedings. The Board concluded that it had been provided with no argument or reasons to depart from the regular practice of identifying parties to its proceedings.

b. *Abi-Mansour v. Public Service Alliance of Canada*, 2022 FPSLREB 48

[52] In *Abi-Mansour v. Public Service Alliance of Canada*, 2022 FPSLREB 48 ("*Abi-Mansour* (2022)"), Mr. Abi-Mansour made a complaint in which he alleged that the Union of Canadian Transportation Employees, a component of the Public Service Alliance of Canada, committed an unfair labour practice by failing to represent him in

relation to a ban by his employer on him entering Employment and Social Development Canada buildings.

[53] Mr. Abi-Mansour requested that any decision relating to his complaint not be publicly released.

[54] The respondent in that case objected to the request, arguing that it was in the public interest for the decision to be published, given Mr. Abi-Mansour's frequent appearances before the Board. It was observed that he had made multiple anonymization requests before the Board and the courts and that all of them had been denied.

[55] The Board stated at paragraph 16 as follows:

> *[16]* [It] … *operates under the open court principle, which is a significant component of the Canadian legal system and should be departed from only in exceptional circumstances; see* Doe v. Treasury Board (Canada Border Services Agency)*, 2018 FPSLREB 89 at paras. 13 and 14.*

[56] The Board quoted from its *Policy on Openness and Privacy*, which was reproduced earlier in this decision.

[57] The Board referred to the Supreme Court of Canada's decision in *Sherman Estate*, in which the Court discussed the open court principle at paragraph 3, as follows:

> *[3] … Where a discretionary court order limiting constitutionally-protected openness is sought — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — the applicant 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 and that, as a matter of proportionality, the benefits of that order restricting openness outweigh its negative effects.*

[58] The Board stated that the open court principle applies to all tribunals that exercise quasi-judicial functions and noted that the preamble to the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2) states that the public service labour-

management regime "… must operate in a context where protection of the public interest is paramount …". The Board concluded, "There is a public interest in transparency, and the open court principle enhances that transparency."

[59] Mr. Abi-Mansour had argued that the Board was subject to the *Privacy Act*. The Board stated it was not subject to that *Act* as it applies to "government institutions". Section 3 of that *Act* defines a "government institution" as any body or office listed in the schedule. The Board is not listed in the schedule.

[60] The Board detailed the bases upon which Mr. Abi-Mansour had requested anonymization and a sealing order at paragraph 25 of the decision. It was "… based on the 'sensitivity of the situation' and because issues related to [Mr. Abi-Mansour's] banning are '… seen [as] extremely serious by the public service managers and any publishing of these issues would mean the end of the complainant's career'."

[61] Mr. Abi-Mansour argued that disclosing a party's name on the public record causes serious consequences, including "… exposure to discrimination, deprivation of employment, attacks on reputation, reprisals, and invasion of highly private information (such as medical information)."

[62] The respondent had noted Mr. Abi-Mansour's history of anonymizing and sealing order requests to the Board that had all been rejected. The Board then outlined in some detail the nature of those requests and their disposition by the Board as well as the courts, as discussed earlier in this decision.

[63] The Board referred to the fact that in *Abi-Mansour* (2018), the Supreme Court of Canada denied leave to appeal and dismissed the anonymization request, among other matters.

[64] The Board concluded that the dismissal of the anonymization request in *Abi-Mansour* (2018) and the reasons for that dismissal remain authoritative case law of the Board.

[65] In *Abi-Mansour* (2022), at para. 30, Mr. Abi-Mansour alleged that things had worsened, as follows: "The respondent submitted that the Board's rulings in three instances relating to this complainant should be determinative. It stated that his request in this complaint is no different than his earlier requests."

[66] Mr. Abi-Mansour submitted that these decisions were not binding on the Board. He also submitted that the complaint was factually different from the anonymization decisions on his staffing complaint.

[67] The Board concluded at paragraphs 32, 33, and 36 as follows:

> *[32] I agree that the previous denials of the complainant's anonymization requests by the Board are not binding on me. Each anonymization request must be determined on its own facts and circumstances. However, the reasoning in those decisions is persuasive and the refusal of both the Federal Court of Appeal and the Supreme Court of Canada to grant anonymization is also persuasive.*
>
> *[33] The Board has not recognized personal reputation and the impact on job prospects as issues of public importance (see* Wepruk v. Deputy Head (Department of Health)*, 2021 FPSLREB 75 at para. 22). I agree that in this case, reputation and job prospects are not issues of public importance.*
>
> …
>
> *[36] I find that the complainant has not established a serious risk to an interest of public importance. I also find that the negative effects of an anonymization and a sealing order outweigh any benefits. Therefore, the request for anonymization and a sealing order is denied.*

C. Applying the *Dagenais/Mentuck* test, as reformulated in *Sherman Estate,* to the facts in this case

[68] Under the first part of the test in *Sierra Club*, a party seeking a restriction on the open court principle, in this case, an anonymization order, must prove that such an order is necessary to prevent a real and substantial risk that is well grounded in the evidence and that poses a serious threat to an important public interest.

[69] The complainant argues that from a participant's perspective, a staffing complaint process that makes the decision available to the public has a very strong chilling effect. She believes that it impaired her applications for other positions. She argues that the continuing publication of the decision, which addresses the core of her dignity in the sense that it discussed in detail her unique personality and personhood, continues to cause distress. She concludes by stating that it is unclear to her why her promotion concerns are public concerns.

[70] The respondent argues that the complainant's statement about the potential adverse effect on her employability from the publication of the decision is based on hypothesis, speculation, and conjecture and is without a true evidentiary foundation and that while it is possible that a potential employer could become aware of this decision, there is nothing real, substantial, and well grounded in evidence to suggest that there would be a serious risk to an important interest.

[71] The Board's decisions both before and after the Supreme Court of Canada's decision in *Sherman Estate* have consistently determined that personal reputation and the impact on job prospects are not issues of public importance that would justify a restriction on the open court principle.

[72] In my view, the complainant, based on the facts of this case and on a balance of probabilities, has not demonstrated that there is a serious risk to an interest of public importance that is real, substantial, and well grounded.

[73] I also conclude that the salutary effects of an order anonymizing the decision would not outweigh its deleterious effects on the public's right to open and accessible adjudication proceedings.

D. The timeliness of the request

[74] The respondent notes that the decision was released on July 29, 2019. It argues that the complainant provided no explanation as to why this motion was not brought in a timely way as the basic principles applied in *Sherman Estate* have been established at least since *Sierra Club* in 2002.

[75] The complainant states that she made her request pursuant to the Board's management responsibilities and based on *Canadian Broadcasting Corp.*, in which Justice Kasirer said that even after a case comes to an end, important decisions about the openness of the court record may need to be taken.

[76] In *Tarek-Kaminker*, the request to anonymize the decision came after the hearing ended and in a written reply to the respondent's outline of an oral argument yet to be delivered. The Board commented as follows at paragraph 159:

> *[159] However, this does not hamstring the Board from taking the step of sealing a document, ordering a redacted version to replace one that is not redacted, or anonymizing the identity of a person, if*

> *it is not relevant to the determination of the grievance. It is not uncommon for parties to proceedings to fail to address the issues of anonymizing the identities of individuals or of redacting information from documents submitted, which will become accessible to the public at large. The Board is the master of its proceedings and certainly has the jurisdiction to address those issues, if it chooses and it is appropriate.*

[77] In the circumstances of this case, I am not prepared to find that the request was untimely.

[78] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

IV. Order

[79] The request is denied.

June 27, 2023.

David Olsen,
a panel of the Federal Public Sector
Labour Relations and Employment Board