ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

DECISION F2020-D-01

October 29, 2020

ALBERTA LABOUR RELATIONS BOARD

Case File Number 006333

Office URL: www.oipc.ab.ca

Summary: The Complainant participated in a proceeding before the Alberta Labour Relations Board (the LRB). The LRB published the decision resulting from the proceeding on its website and included the Complainant's name in the context of information about a complaint he had made. The Complainant asked the LRB to mask his name in the publicly available decision. The LRB referred to the request to the vice-chair of the panel, who determined that the request did not meet the criteria for masking his name. The Complainant made a complaint to the Commissioner about the vice-chair's refusal to mask his personal information and argued that failing to mask his personal information from the decision on the Public Body's website contravened Part 2 of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act).

The Adjudicator found that the decision not to mask personal information was made by a vice-chair of the LRB and was made within the LRB's exclusive jurisdiction to make under section 12(4) of the *Labour Relations Code*.

The Adjudicator determined that the doctrine of issue estoppel or "res judicata" applied and that factors relevant to this doctrine weighed against exercising discretion to deciding the issue for inquiry.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 3, 40, 65, 72; *Labour Relations Code*, R.S.A. 2000, c. L-1, ss. 12, 14, 19 **BC:** *Administrative Tribunals Act*, SBC 2004, c. 45 s. 61

Authorities Cited: AB: F2013-14 **ON:** PC17-9

Cases Cited: *Stepanova v. Human Rights Tribunal of Ontario*, 2017 ONSC 2386*; Doe v. Treasury Board (Canada Border Services Agency)*, 2018 FPSLREB 89 (CanLII); *Sunrise Poultry Processors Ltd v United Food & Commercial Workers, Local 1518*, 2013 CanLII 70673 (BC LA); *United Food & Commercial Workers Union, Local 1518 v. Sunrise Poultry Processors Ltd*., 2015 BCCA 354 (CanLII); *R. v. Canadian Broadcasting Corporation*, 2010 ONCA 726 (CanLII); *N. J. v. Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 129 (CanLII); *Lukács v. Canada (Transport, Infrastructure and Communities)*, 2015 FCA 140; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 (CanLII), [2001] 2 SCR 460; *Germain v. Automobile Injury Appeal Commission*, 2009 SKQB 106 (CanLII)

I. BACKGROUND

[para 1] On November 26, 2016, the Complainant filed a complaint with the Labour Relations Board (LRB) alleging that the union to which he belonged breached its duty of fair representation under section 153 of the *Labour Relations Code.*

[para 2] A panel of the LRB issued a decision in which it dismissed the Complainant's complaint. The decision contained the Complainant's name, and background information relating to his complaint.

[para 3] On July 10, 2017, the Complainant wrote to the LRB and requested that his personal information be removed from the decision posted on the LRB website. The Board considered this requests to be a "masking" request, and forwarded it to the vice-chair of the panel to make the decision.

[para 4] The vice-chair decided that the request did not meet the terms of the LRB's masking policy and denied the masking request in a letter dated July 25, 2017.

[para 5] The Complainant filed a complaint with the Office of the Information and Privacy Commissioner of Alberta (the "OIPC").

[para 6] The Commissioner authorized a senior information and privacy manager to investigate and attempt to settle the matter. At the conclusion of this process, the Complainant requested an inquiry. The Commissioner delegated her authority to conduct the inquiry to me.

II. ISSUE: Did the Public Body disclose the Complainant's personal information in contravention of Part 2 of the Act? In particular, was the disclosure authorized under section 40(1) and 40(4)?

[para 7] In this case, the actions of the LRB that are the subject of the complaint are those of a panel of the LRB and a vice-chair acting under the authority of the *Labour Relations Code*. As noted in the background above, the Complainant complains that the

LRB disclosed his personal information when the panel posted its decision regarding his complaint against his union on the internet and then declined to mask his personal information from that decision. As a tribunal has made a decision in relation to the subject matter of the complaint I am asked to decide, I must first consider whether it is appropriate to decide the issue before me, or whether other considerations must prevail.

[para 8] I turn first to the question of the LRB panel's authority to make the decision both to publish its decision and to refuse to mask names. Section 12(4) of the *Labour Relations Code* establishes that the LRB has exclusive jurisdiction to exercise the powers conferred on it by the Legislature, including the power to determine all questions of fact and law in matters it considers under the *Labour Relations Code*.

> *12(4) The Board has exclusive jurisdiction to exercise the powers conferred on it by or under this Act and to determine all questions of fact or law that arise in any matter before it and the action or decision of the Board on them is final and conclusive for all purposes, but the Board may, at any time, whether or not an application has commenced under section 19(2), reconsider any decision, order, directive, declaration or ruling made by it and vary, revoke or affirm the decision, order, directive, declaration or ruling.*

[para 9] In the foregoing provision, "exclusive jurisdiction" means that *only* the LRB has jurisdiction to determine issues of fact and law arising in relation to a matter before it under the *Labour Relations Code*.

[para 10] The issue that is the subject of the Vice Chair's decision in this case, is whether the open court principle requires the LRB to publish its labour relations decision in its entirety, or whether other considerations outweigh this principle and support masking the Complainant's identity. In making this decision, the Vice Chair had to make a decision of fact and law.

[para 11] The considerations in applying the open court principle are illustrated by *Stepanova v. Human Rights Tribunal of Ontario*, 2017 ONSC 2386, in which the Ontario Superior Court declined to judicially review a decision of the Vice Chair of the Ontario Human Rights Tribunal not to mask the identity of an applicant. The Court said:

> The Vice-Chair found that "the applicant has not provided… a sufficient basis to support anonymization and depart from the "open court" principle." This conclusion was grounded in the record and is reasonable.
>
> The applicant came to Canada as a Convention refugee. In oral argument she told us that, as a matter of common sense, it would expose her and members of her family in Ukraine to harassment and danger for information about her to be posted on the internet on CanLII. She argued that she was only asking that the decision be referred to by initials.
>
> The "open court" principle is a cornerstone of accountability for decision-making tribunals and courts. Publication of legal decisions is but one way in which the court system is open. It is true that there is greater scope for the protection of the vulnerable through sealing orders or anonymity orders, a development that is reflected in the HRTO's general approach to this issue. But it

> remains the general principle that the open court principle trumps desires for anonymity, and to overcome this general principle, a litigant must do more than make bald assertions about potential risks for them if their names are published.
>
> The Vice-Chair's approach to this issue was reasonable and in keeping with the applicable general principles that govern an exercise of discretion to grant an anonymity order. There is no basis for us to intervene.

[para 12] In the foregoing case, the Court noted that "decision-making tribunals" are subject to the open court principle. In *R. v. Canadian Broadcasting Corporation*, 2010 ONCA 726 (CanLII), the Ontario Court of Appeal noted that the open court principle applies to "quasi-judicial" decisions, saying the following:

> For the Supreme Court's post-Charter test that applies to all discretionary decisions limiting freedom of the press in relation to court proceedings, it is to Dagenais and Mentuck that one must turn. The Dagenais/Mentuck test, as restated in Toronto Star Newspapers Ltd. v. Ontario, 2005 SCC 41 (CanLII), [2005] 2 S.C.R. 188, [2005] S.C.J. No. 41, at para. 26, reflects the importance of the open court principle and the rights of freedom of expression and freedom of the press in relation to judicial proceedings. Restrictions on the open court principle and freedom of the press in relation to judicial proceedings can only be ordered where the party seeking such a restriction establishes through convincing evidence that
>
> > (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 interest 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.
>
> While the Dagenais/Mentuck test was developed in the context of publication bans, the Supreme Court has stated that it applies any time s. 2(b) freedom of expression and freedom of the press rights are engaged in relation to judicial proceedings: "[T]he Dagenais/Mentuck test applies to all discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings": Toronto Star, at para. 7 (emphasis in original). See, also, Vancouver Sun (Re), 2004 SCC 43 (CanLII), [2004] 2 S.C.R. 332, [2004] S.C.J. No. 41, at paras. 30-31.
>
> 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 <u>or quasi-judicial acts</u> [my emphasis] pre-dates the Charter: Nova Scotia (Attorney General) v. MacIntyre, 1982 CanLII 14 (SCC), [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.: [page 681] "At every stage the rule should be one of public accessibility and concomitant judicial accountability" and "curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance".

In the foregoing case, the Ontario Court of Appeal noted that the open court principle is linked to the freedom of expression guaranteed by the *Charter*. The Court also noted that there is a presumption of public access to proceedings.

[para 13] The open court principle requires that decision makers be independent and accountable; publishing decisions is one of the means by which such tribunals uphold this

principle. Labour relations boards, such as the LRB, are examples of quasi-judicial decision-making tribunals that must consider the application of the open court principle when they issue decisions.

[para 14] The Complainant's application to the Vice Chair of the panel to mask his identity in its decision, rather than publish his name, raised an issue of fact and law in relation to the matter that was adjudicated by the panel. The vice-chair of the panel then made the decision that is the subject of the complaint in accordance with the LRB's rules of procedure.

[para 15] The LRB provided the following description of its functions for the inquiry, and the processes by which it performs those functions:

> The Board is a quasi-judicial administrative body with statutory authority to make decisions in the area of labour relations in Alberta. Part of the Board's authority includes adjudicating complaints under s. 153 of the *Code*, which relate to a union's duty of fair representation:
>
> > 153(1) No trade union or person acting on behalf of a trade union shall deny an employee or former employee who is or was in the bargaining unit the right to be fairly represented by the trade union with respect to the employee's or former employee's rights under the collective agreement.
>
> Section 12 of the *Code* sets out the Board's powers in general, and sections 12(2)(c) and 12(2)(f) specifically authorize the Board to conduct any hearings it considers necessary, and to issue orders and decisions:
>
> > 12(1) Notwithstanding anything in this Act, the powers and duties of the Board shall be exercised and performed in a manner consistent with the jurisdiction conferred on the Board by this Act or any other enactment conferring jurisdiction on the Board.
> >
> > (2) The Board may for the purposes of this Act
> >
> > > (a) receive applications, references and complaints,
> > >
> > > (b) conduct any inquiries or investigations that it considers necessary, either itself or through its officers,
> > >
> > > (c) conduct any hearings that it considers necessary,
> > >
> > > (d) require, conduct or supervise votes only by secret ballot,
> > >
> > > (e) make or issue any interim orders, decisions, directives or declarations it considers necessary pending the final determination of any matter before the Board,
> > >
> > > (f) or issue any orders, decisions, notices, directives, declarations or certificates it considers necessary,
> > >
> > > (f.1) order the pre-hearing production of documents and things relevant to an application before the Board,
> > >
> > > (g) make rules

(i) of procedure for the conduct of its business, including inquiries and hearings,

(ii) for the giving of notice and the service of documents,

(iii) for the charging of fees for services or materials provided by or at the direction of the Board in a proceeding before it or in an application under section 19(2), and

(iii) for any other matters it considers necessary,

(h) through its members, officers and other representatives undertake efforts to assist the parties to a proceeding before the Board to settle the matter, and

(i) award any costs it considers appropriate in the circumstances if an application, reference or complaint, or a reply or defence to it, is, in the opinion of the Board, trivial, frivolous, vexatious or abusive.

Individuals filing complaints knowingly engage in a public process for determining their rights under the *Code*. Specifically, the complaint form the Complainant completed when submitting his DFR complaint contains the following notice at the top of the form:

> Individuals filing applications, complaints or references may be identified by name at various stages of the Board's procedures including in Board decisions, on the Board's website, and in print and online reporting services that publish the Board's decisions. An exception to this general practice may be made, at the discretion of the Board, in cases where sensitive personal information will be disclosed. **Individuals wishing to have their names masked may apply to the Board by letter setting out the reasons for the request including what sensitive information will be disclosed. This request should be made early on in the processing of the application** [emphasis in original].

The above information is also found in *Information Bulletin #2: Processing Complaints, Applications and References*, *Information Bulletin #18: The Duty of Fair Representation*, and on the Board's website.

The Complainant did not make a masking request when he filed his DFR Complaint, or before the DFR Decision was issued. Rather, he only submitted this request after the Board released the DFR Decision.

The Board will exercise its discretion to grant a masking request in circumstances where there is a risk of harm to a party to the proceedings or to third parties. Masking requests may also be granted to protect an individual's privacy where it is it is necessary to disclose sensitive information, such as information about an individual's health or medical history, as part of a decision.

When reviewing the Complainant's masking request, the Board determined that none of these criteria were satisfied.

[para 16] With regard to its jurisdiction, the LRB argues:

Section 12(2)(f) of the *Code* authorizes the Board to issue any orders or decisions it considers necessary. The Board further submits that section 12(2)(f) grants it the authority to publicly disclose a decision, because this provision contemplates that a Board may "issue" a decision, and this in turn provides the Board with a broad inherent authority to determine how and to whom its decisions will be released.

> As the Board is a quasi-judicial decision maker in the complex area of labour relations, many of its decisions and orders have impact and importance beyond the parties.
>
> The Board's authority to issue decisions and its practices in so doing are in keeping with *Re Energy Resources Conservation Board (Order* F2013-14), in which the broad authority contained in section 16 of the *Energy Resources Conservation Act* was interpreted as authorizing the ECRB to publish its decisions.
>
> If the broad plenary authority to do what is "necessary for or incidental to the performance of the [ERCB's] duties or functions" was interpreted in this manner, it follows that the Board's express authority to "issue" decisions under s. 12(1)(f) of the *Code* should also be interpreted as enabling the Board to publish and disseminate its decisions.
>
> The Board submits that F2013-IR-02 does not apply in these circumstances because that decision's application of s. 40(1)(f) involved a consideration of provisions of the *Police Act* that expressly outlined to whom the decision must be provided.
>
> Section 12(2)(f) of the *Code* contains no such limitations. Indeed, particularly in the context of unfair labour practice complaints, the Board regularly orders that its decisions be disseminated beyond the parties, including being posted at one or more worksites, or otherwise be distributed in accordance with the Board's directions.
>
> The Board strenuously opposes any interpretation of section 12(2)(f) of the *Code* that would limit the Board's ability to issue its decisions by publishing them or disseminating them as necessary to achieve the objectives of the *Code*, or in accordance with the open court principle.

[para 17] From the foregoing, I understand that LRB decisions are published on the internet by default to comply with the open court principle; it is only when an applicant makes an application to have the individual's personal information masked the LRB will consider doing so. The LRB has also instituted a process by which a party may request that his or her personal information is masked in a decision. The LRB will mask personal information if its criteria are met.

[para 18] The LRB points out that its processes are public. While I am unable to identify a provision of the *Labour Relations Code* that expressly requires or authorizes public hearings, I do note section 14(7), which states:

> *14(7) When the Board receives information in confidence the disclosure of which would, in the opinion of the Board, be likely to harm labour relations, the Board may by order protect against the disclosure of the information to any person, other than the parties to the Board's proceedings, until the Board is of the opinion that the disclosure of the information would no longer harm labour relations.*

The foregoing provision makes an *exception* for particular information that must be received in confidence. The implication of this provision is that other information not harmful to labour relations that is received by the LRB is not to be kept between the LRB and the parties; in other words, other information received by the LRB may be made public.

[para 19] I note that the question of whether to publish names in decisions, or to mask them is a decision made by labour relations boards and arbitrators across Canada in

order to meet the requirements of openness and independence that the common law and the Charter impose on quasi-judicial tribunals. For example, in *N. J. v. Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 129 (CanLII), a decision of the Public Service Labour Relations Board of Canada (PSLRB), the PSLRB had to determine whether to publish the name of a grievor when it released its decision. In making the decision, the PSLRB said:

> Counsel for the grievor argued that the facts of this case are so serious and unique that I should depart from the Policy and refer only to "grievor" without mentioning her name, hold the adjudication proceedings in private, and order evidentiary documents sealed. For the reasons mentioned earlier, counsel for the employer insisted that no exception be made to the open court principle.
>
> As noted earlier, it is recognized that the open court principle applies to courts and quasi-judicial tribunals. It is also recognized that, in some instances, limits could be imposed on the accessibility to proceedings. The Supreme Court of Canada developed the Dagenais/Mentuck test, which helps when deciding whether restrictions should be imposed on the open court principle. The Dagenais/Mentuck test was reformulated in *Sierra Club of Canada* as follows:
> …
>
> > *(a) such an order is necessary in order to prevent a serious risk to an important interest … in the context of litigation because reasonably alternative measures will not prevent the risk; and*
> > *(b) the salutary effects of the … 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.*
> > …
>
> 1. Application of the Dagenais/Mentuck test
>
> The Dagenais/Mentuck test, as reformulated *in Sierra Club of Canada*, is a two-pronged test. First, I need to decide whether an order limiting the open court principle is necessary, in the context of the litigation such as adjudication, to prevent a risk to an important interest. Second, I also have to decide whether the salutary effects of the order would outweigh its deleterious effects on the public's right to open and accessible adjudication proceedings.

[para 20] In *Doe v. Treasury Board (Canada Border Services Agency)*, 2018 FPSLREB 89 (CanLII), the Public Service Labour Relations Board had to determine whether to publish the name of the grievor when it issued its decision. Similarly, in *Sunrise Poultry Processors Ltd v United Food & Commercial Workers, Local 1518*, 2013 CanLII 70673 (BC LA), an arbitrator had to determine whether the consent provisions of British Columbia's *Personal Information Protection Act* applied to the decision he would issue, and whether these provisions prevented him from applying the open court principle. In that case, the employer argued that personal information should be disclosed in the public decision, while the union took a contrary position and argued that information should be masked.

[para 21] Decisions of labour relations tribunals and arbitrators, and other quasi-judicial tribunals to mask personal information or to publish decisions without doing so are the subject of appeals or applications for judicial review to the courts. For example, in *United Food & Commercial Workers Union, Local 1518 v. Sunrise Poultry Processors Ltd.*, 2015 BCCA 354 (CanLII), the British Columbia Court of Appeal heard the union's

appeal of an arbitrator's decision to include personal information in a published decision. The Court concluded that while British Columbia's *Personal Information Protection Act* applied, consent was not required to publish names in an arbitral decision. In *Lukács v. Canada (Transport, Infrastructure and Communities),* 2015 FCA 140 (CanLII) the Federal Court of Appeal concluded that the open court principle applied to decisions of the Canadian Transport Agency and determined that the Agency was not required by the federal *Privacy Act* to sever personal information from decisions, as the open court principle applied so as to make its records and decisions publicly available.

[para 22] From the cases I have reviewed, I understand that for many tribunals, including labour relations tribunals, the open court principle contemplates publication of personal information in decisions, unless publication would outweigh risks to significant interests. At the application of a party to mask personal information, the tribunal will hear from all the parties and apply the common law "*Dagenais / Mentuck"* test to determine whether to grant the request. Such decisions are reviewable by the courts.

[para 23] Section 19 of the *Labour Relations Code* establishes that decisions of the LRB are subject to judicial review in limited circumstances.

> *19(1) Subject to subsection (2), no decision, order, directive, declaration, ruling or proceeding of the Board shall be questioned or reviewed in any court by application for judicial review or otherwise, and no order shall be made or process entered or proceedings taken in any court, whether by way of injunction, declaratory judgment, prohibition, quo warranto or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings.*
>
> *(2) A decision, order, directive, declaration, ruling or proceeding of the Board, except a decision made under section 145(3), may be questioned or reviewed by way of an application for judicial review seeking an order in the nature of certiorari or mandamus if the application is filed with the Court and served on the Board no later than 30 days after the date of the decision, order, directive, declaration, ruling or proceeding, or reasons in respect of it, whichever is later.*

[para 24] Section 19 establishes that an application for judicial review may be filed with the Court of Queen's Bench and served on the LRB within 30 days of the date of the decision. Section 19 does not contemplate review by other bodies, such as the Commissioner. The decision of the Vice Chair not to mask the Complainant's personal information is arguably reviewable by the Court in the circumstances contemplated by section 19(2), as it is a decision or ruling in a proceeding of the LRB.

[para 25] As noted above, the LRB's jurisdiction to decide all matters of fact and law arising under the *Labour Relations Code* is exclusive. The decision to apply the open court principle or to mask personal information in the decision is a matter of fact and law arising from a matter under the *Labour Relations Code*. Moreover, if a party to a decision of the LRB is dissatisfied with the decision of the Board, the party may apply to the Court of Queen's Bench for judicial review. The *Labour Relations Code* does not contemplate

any other form of review of decisions such as the one before me, except judicial review by the Court of Queen's Bench.

[para 26] Section 65(3) of the FOIP Act gives a complainant the ability to make a complaint to the Commissioner that personal information has been collected, used, or disclosed in contravention of the FOIP Act. It states:

> *65(3) A person who believes that the person's own personal information has been collected, used or disclosed in contravention of Part 2 may ask the Commissioner to review that matter.*

[para 27] Section 65 permits a complainant to make a complaint about disclosure of personal information. The Complainant in this case complains that the LRB disclosed his personal information when it published its decision without masking his personal information.

[para 28] The doctrine of issue estoppel was developed in order to ensure that issues are not litigated gratuitously in multiple forums. In *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 (CanLII), [2001] 2 SCR 460, the Supreme Court of Canada described the origin of the doctrine at paragraphs 18 - 22:

> The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.
>
> Finality is thus a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a doctrine of public policy that is designed to advance the interests of justice. Where, as here, its application bars the courthouse door against the appellant's $300,000 claim because of an administrative decision taken in a manner which was manifestly improper and unfair (as found by the Court of Appeal itself), a re-examination of some basic principles is warranted.
>
> The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel *per rem judicatem* with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation: *Farwell v. The Queen* (1894), 1894 CanLII 72 (SCC), 22 S.C.R. 553, at p. 558; *Angle v. Minister of National Revenue*, 1974 CanLII 168 (SCC), [1975] 2 S.C.R. 248, at pp. 267-68. The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel): G. S. Holmested and G. D. Watson, *Ontario Civil Procedure* (loose-leaf), vol. 3 Supp., at 21§17 *et seq*. Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it: *Wilson v. The Queen*, 1983 CanLII 35 (SCC), [1983] 2 S.C.R. 594; *R. v. Litchfield*, 1993 CanLII 44 (SCC), [1993] 4 S.C.R. 333; *R. v. Sarson*, 1996 CanLII 200 (SCC), [1996] 2 S.C.R. 223.

> These rules were initially developed in the context of prior court proceedings. They have since been extended, with some necessary modifications, to decisions classified as being of a judicial or quasi-judicial nature pronounced by administrative officers and tribunals. In that context the more specific objective is to balance fairness to the parties with the protection of the administrative decision-making process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided.

[para 29] The doctrine of issue estoppel arises when:

1. the same question has been decided;
2. the judicial decision which is said to create the estoppel was final; and,
3. the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

Has the same question been decided?

[para 30] The issue has been stated for the inquiry as whether the LRB disclosed the Complainant's personal information in contravention of the FOIP Act, and is therefore a complaint falling within the terms of section 65(3). Regardless of whether the issue is set out in the language of LRB procedures or the terminology of the FOIP Act, the issue is actually one and the same. If I am to decide whether the LRB improperly disclosed the Complainant's personal information, I would be deciding the same issue that the Vice-Chair of the LRB decided: that is, whether the LRB should mask the Complainant's personal information in its public decision.

[para 31] The LRB did not raise the application of issue estoppel in its submissions. However, in considering the various legislative schemes and public interests raised by the complaint, as will be discussed below, I believe I must raise the issue, given the potential consequences of an order.

Was the decision judicial and final?

[para 32] At paragraph 41 of *Danyluk, supra*, the Supreme Court of Canada held that "judicial" decisions have the following characteristics: "[they] must be based on findings of fact and the application of an objective legal standard to those facts". The decision of the LRB to follow the open court principle rather than to mask personal information meets these criteria. It is therefore a judicial decision.

[para 33] At paragraph 57 of *Danyluk, supra,* a decision will be final when there is a review process that an applicant has not pursued. In this case, the review process is that contemplated by section 19 of the *Labour Relations Code*. The decision of the Vice-Chair is therefore a final decision.

Are the parties the same in this case?

[para 34] The Applicant applied to have his information masked in the LRB decision. Once the LRB decided not to grant his request, he then made the complaint

regarding the publication of his personal information in the LRB decision to the Commissioner. As the Complainant is the applicant in both proceedings, I find that this aspect of issue estoppel is satisfied.

[para 35] As the three factors giving rise to issue estoppel are met in this case, the next step is to consider whether discretion should be exercised to apply issue estoppel or to proceed with the inquiry. I turn now to consideration of the factors set out in *Danyluk*.

(a) *The Wording of the Statute from which the Power to Issue the Administrative Order Derives*

[para 36] As noted above, the *Labour Relations Code* grants the LRB exclusive jurisdiction to decide all matters of fact and law arising from a matter before it. That the Legislature granted the LRB exclusive jurisdiction, is a clear indication that the Legislature intended that only the LRB decide issues such as the application of the open court principle to its decisions.

[para 37] This factor weighs in favor of not exercising jurisdiction to decide the complaint.

(b) *The Purpose of the Legislation*

[para 38] The preamble to the *Labour Relations Code* sets out the purpose of the legislation. It states:

> *WHEREAS it is recognized that mutually effective relationships between employees and employers are critical to the capacity of Albertans to prosper in the competitive worldwide market economy of which Alberta is a part;*
>
> *WHEREAS employees and employers are best able to manage their affairs where statutory rights and responsibilities are clearly established and understood;*
>
> *WHEREAS it is recognized that legislation supportive of freedom of association, and free collective bargaining through trade unions when chosen by employees, are important components of Alberta's social and economic well-being; and*
>
> *WHEREAS the public interest in Alberta is served by encouraging harmonious, mutually beneficial relations between employers and employees through freely selected bargaining agents, through balanced, fair and constructive collective bargaining, and through fair, equitable and expedient resolution of matters arising with respect to terms and conditions of employment […]*

[para 39] The purpose of the *Labour Relations Code* is to regulate labour relations in Alberta. The creation of the LRB to adjudicate labour disputes satisfies the statutory objective of promoting fair, equitable and expedient resolution of matters arising with respect to terms and conditions of employment.

[para 40] In its submissions, the LRB explains how its adherence to the open court principle assists it to meet its statutory objectives:

> The Board's decisions are published electronically on the Board's website, and in hard copy through the Alberta Labour Relations Board Reports reporter services. In addition, other legal decision reporter services, such as the Canadian Legal Information Institute (CanLII), Quicklaw, and Westlaw also report the Board's decisions.
>
> The Board's general policy of disclosing the names of complainants and respondents ensures transparency, and demonstrates to the public that the Board's decisions are fair regardless of who is making the complaint, and whom the complaint is against.
>
> In addition, the Board permits public and media access to the Board's proceedings, hearings and decisions in order to promote the transparency of the Board's processes. Access to and disclosure of Board decisions is critical to transparent decision-making, and ensures public and stakeholder knowledge of the Board's operations, its interpretation of the *Code*, and the integrity of labour relations law in Alberta.
>
> In the context of section 153 of the *Code*, decisions concerning a union's duty of fair representation permit unions and complainants to understand how the Board interprets the scope of that duty.

[para 41] I accept that the LRB adheres to the open court principle in order to promote transparency and to ensure public and stakeholder knowledge of its processes. If I were to decide the complaint, the parties, the public, and the LRB's stakeholders would have less certainty as to what the LRB processes are, or their value, given that they would be subject to change by the Commissioner, outside the statutory process set out in the *Labour Relations Code*. I find that this factor weighs against my deciding the complaint.

(c) *The Availability of an Appeal*

[para 42] As noted above, a party dissatisfied with a decision of the LRB may seek judicial review in the Court of Queen's Bench pursuant to section 19 of the *Labour Relations Code* within 30 days of the date the decision was issued. The availability of a form of review set out in the legislation that was not pursued weighs against my exercising jurisdiction.

(d) *The Safeguards Available to the Parties in the Administrative Procedure*

[para 43] In *Danyluk*, supra, the Supreme Court of Canada stated the following:

> As already mentioned, quick and expeditious procedures suitable to accomplish the objectives of the ESA scheme may simply be inadequate to deal with complex issues of fact or law. Administrative bodies, being masters of their own procedures, may exclude evidence the court thinks probative, or act on evidence the court considers less than reliable. If it has done so, this may be a factor in the exercise of the court's discretion. Here the breach of natural justice is a key factor in the appellant's favour.

The Court considered in that case that the breach of natural justice weighed in favor of not applying issue estoppel, finding that there were insufficient safeguards in the employment standards process to prevent injustice. In the case before me, there is nothing to suggest that the Vice Chair arrived at her decision in contravention of the principles of natural justice. On the evidence before me, the LRB has adequate safeguards to ensure procedural fairness.

(e) *The Expertise of the Administrative Decision Maker*

[para 44] The LRB is expert in matters of labour relations and the interpretation of its home statute. Like other tribunals, it is the master of its own processes, and has created its own policies and procedures as to how it will conduct hearings and issue decisions to meet its statutory and common law obligations. The decision of the Vice Chair is a decision interpreting the extent to which the open court principle requires a decision under the *Labour Relation Code* to be made public. This is a decision that the LRB has experience and expertise in making.

(f) *The Circumstances Giving Rise to the Prior Administrative Proceeding*

[para 45] The Complainant made a complaint to the LRB that his union had failed in its duty to represent him. Once he learned that the decision had been posted on the LRB's website, he requested that his personal information be masked in the public decision. The Vice Chair denied the request on the basis that it did not meet the LRB's criteria for masking personal information.

(g) *Potential Injustice*

[para 46] In Danyluk, the Court considered the potential for injustice to be an important factor that must be considered when determining whether issue estoppel should apply. It said:

> As a final and most important factor, the Court should stand back and, taking into account the entirety of the circumstances, consider whether application of issue estoppel in the particular case would work an injustice.

[para 47] In this case, I conclude that conducting the inquiry could result in, if not injustice, then unfairness, in addition to undermining the LRB's ability to make independent decisions. First, it is important to note that the Complainant's union was also a party before the LRB. The union may have had an interest in the question of whether information in the LRB decision should be masked or not; however, in these proceedings, the union has no standing to make arguments. In addition, if I am to decide the issue of whether the information should be masked or not, the union would have no certainty as to when proceedings at the LRB are final, despite the clear intent of section 19 of the *Labour Relations Code*.

[para 48] In addition, any order I make under section 72 is directed at the head of the Public Body – in this case, the Chair of the LRB or the Chair's delegate. If I ordered the Chair to ensure that the Complainant's personal information is masked in the panel

decision, I would be ordering the Chair to change the Vice Chair's decision. It is not clear to me that the Chair would have the authority to alter the final decision of the Vice Chair, made on behalf of a panel. Further, assuming that the Chair did change the decision based on my order, a direction of this kind would create a situation where the person who heard the matter would not be the person who decided it. In other words, if I were to issue an order requiring the head of the Public Body to change the decision, the independence of the LRB panel would be undermined.

[para 49] In considering the foregoing factors, I conclude that I must exercise my discretion to find that issue estoppel applies in this case and not issue an order. In arriving at this decision, I acknowledge that the Complainant has waited years for a decision regarding his complaint. However, I note that in other Canadian jurisdictions, complaints regarding the publication of personal information in tribunal decisions are dismissed on the basis that public decisions are exempt from freedom of information legislation. For example, in Privacy Complaint Report PC17-9, a decision of the Office of the Information and Privacy Commissioner, the adjudicator determined that a decision of the Human Rights Tribunal was exempt from Ontario's *Freedom of Information and Protection of Privacy Act* because the decision was public. She said:

> In light of the above, I find that section 37 is applicable to Tribunal decisions. The personal information in those decisions is maintained for the purpose of creating a record that is available to the general public. Since section 37 applies, the Tribunal's decisions are excluded from the privacy provisions of Part III of the *Act*. Therefore, sections 39 to 42 are not applicable to the circumstances of this complaint.
>
> Since the parties provided their submissions, the Superior Court of Justice released its decision in *Toronto Star Newspapers Ltd. v. Attorney General of Ontario* holding that the open court principle applies to the "adjudicative records" of tribunals filed with or generated by the tribunal as part of its public hearing process. The Court specifically included "the decision of the tribunal and the reasons therefor" within the category of tribunal records accessible to the public under the open court principle.
>
> In *Toronto Star*, the Court went on to declare that the application to the Tribunal's adjudicative records of the exemption for personal information at section 21 and related provisions of the *Act* breached the open court principle, and therefore section 2(b) of the *Charter* and, to that extent only, those provisions are of no force or effect. While the Court suspended its declaration of invalidity for a period of 12 months, the Court's ruling that the open court principle applies to tribunal decisions and therefore the decisions are not subject to the *Act*, supports the submissions of the Tribunal in this complaint and my analysis, as set out above.

In the foregoing case, the investigator found that even though the Human Rights Tribunal's empowering statute did not refer to making decisions public, a recent Court decision required tribunal decisions to be publicly available by application of the "open court principle". She reasoned that the personal information gathered by the Human Rights Tribunal was therefore maintained for the purpose of publication, and determined that the decision was exempt from freedom of information legislation.

[para 50] The foregoing case also refers to *Germain v. Automobile Injury Appeal Commission*, 2009 SKQB 106 (CanLII), a decision in which the Court of Queen's Bench of Saskatchewan held that decisions of the Automobile Injury Appeal Commission were

public records, and therefore exempt from Saskatchewan's freedom of information legislation. The Court held:

> Further, it seems illogical that members of the public could sit at the hearing and listen to all of the evidence but not have access to the decision of the Commission. The written decision is the last piece of the hearing process. Public access to decisions made by the Commission is important to assist individuals in presenting their claims and understanding the decision-making process of the Commission and to further the principle of public access to adjudicative bodies.
>
> Based on the analysis above, I find that the decision of the Commission are a matter of public record as set forth in s. 3(1)(b). *FOIPP* and specifically, s. 29, does not operate to require the consent of Germain for the Commission to use her personal information in its decisions nor does it restrict the publishing of the Commission's decision online. Even if consent were required I find that the Commission is covered by s. 29(2)(a), (p) and (t) since the publishing of it is consistent with its mandate as an adjudicative body.

As in Privacy Complaint Report PC17-9, a complaint was made that a tribunal had issued a decision publicly, without severing personal information. It was argued that doing so contravened Saskatchewan's freedom of information legislation. The Court determined that even though the tribunal's empowering statute did not expressly authorize publishing decisions, it was necessary that it do so, and that the decision was a matter of public record and therefore exempt from Saskatchewan's *Freedom of Information and Protection of Privacy Act*.

[para 51] British Columbia also excludes quasi-judicial decisions from the strict application of freedom of information legislation. Section 61 of British Columbia's *Administrative Tribunals Act* states:

> *61 (1) In this section, "decision maker" includes a tribunal member, adjudicator, registrar or other officer who makes a decision in an application or an interim or preliminary matter, or a person who conducts a facilitated settlement process.*
>
> *(2) The Freedom of Information and Protection of Privacy Act, other than section 44 (1) (b), (2), (2.1) and (3), does not apply to any of the following:*
>
> > *(a) a personal note, communication or draft decision of a decision maker;*
> >
> > *(b) notes or records kept by a person appointed by the tribunal to conduct a facilitated settlement process in relation to an application;*
> >
> > *(c) any information received by the tribunal in a hearing or part of a hearing from which the public, a party or an intervener was excluded;*
> >
> > *(d) a transcription or tape recording of a tribunal proceeding;*

> *(e) a document submitted in a hearing for which public access is provided by the tribunal;*
>
> *(f) a decision of the tribunal for which public access is provided by the tribunal.*
>
> *[…]*

[para 52] The foregoing provision excludes evidence gathered by a tribunal, whether in an open hearing or *in camera*, and public decisions, the notes of tribunal members, and the transcripts of proceedings from British Columbia's freedom of information legislation. As a result, tribunal materials and decisions are not only exempt from the access provisions of freedom of information legislation, but from the personal information protection provisions as well. As a consequence, tribunals subject to British Columbia's section 61 of the *Administrative Tribunals Act* may treat personal information in accordance with their home statutes and /or the common law, and are not bound by the restrictions in the *Freedom of Information and Protection of Privacy Act.*

[para 53] Alberta does not have a provision equivalent to British Columbia's section 61(2)(f), although section 3 of the FOIP Act establishes that the powers of tribunals to demand documents and compel evidence are unaffected by the FOIP Act. In Order F2013-14, the Director of Adjudication acknowledged that the strict application of the FOIP Act is nuanced when a tribunal discloses personal information in the course of hearing a matter. She said:

> Before leaving the present section, I will take the opportunity raised by the facts of this case to comment on the scope of the jurisdiction of the Information and Privacy Commissioner (and of the scope of my jurisdiction as her delegate), in relation to dealings with personal information by quasi-judicial bodies. Quasi-judicial decision makers very often deal with personal information in their quasi-judicial roles: pursuant to their statutory and common law powers, they gather evidence, share it with parties, use it to make decisions, and disclose it to other parties and to the public when they issue written reasons. What is the role of the Commissioner in this context?
>
> The FOIP Act does not exclude quasi-judicial decision makers from its scope. However, it does permit them to collect use and disclose personal information where such dealings with information are authorized or required by statute (sections 33(a), 39(1)(a) and 40(1)(f)). Sometimes a tribunal's statutory powers in relation to information will be well-defined – it will be clearly required by its statute to deal with personal information in various ways, and may both follow its own provisions and still comply with FOIP by reference to the FOIP provisions just cited. However, in other cases tribunal powers over information are merely permissive rather than mandatory, or are grounded in the common law, and the intersection between their powers and FOIP's restrictions are less clear. For example, there may be no statutory provision clearly directing a tribunal to gather relevant evidence, or to disclose evidence in the course of issuing or publishing written decisions. Generally, tribunals may still do these things as a function of their common law ability to do what is necessary and incidental for performing their decision-making duties, but in the absence of clear statutory requirements for particular dealings with information, FOIP's restrictions come more into play.
>
> If that is so, it is important to ensure that the restrictions on dealings with personal information under the FOIP Act are not applied so as to interfere inappropriately with the statutory functions of the tribunal, in relation to what evidence it may gather, what evidence it treats as relevant, what

> evidence it uses in developing and issuing its decision, and to whom and to what degree (in terms of personally identifying information) the personal information it has relied on needs to be disseminated (though the last of these is arguably more than the others also within the province of the Commissioner).

The Director of Adjudication found, given the status of the public body as a quasi-judicial tribunal, its disclosure of personal information was in accordance with section 40(1)(f) of the FOIP Act. She concluded:

> Based on the foregoing, in my view, the FOIP Act does have some application to the ERCB in its dealing with personal information, even as a quasi-judicial maker. However, as noted above, in applying FOIP's restrictions to such dealings, it is very important to avoid encroaching on the Board's exercise of its quasi-judicial responsibilities. It is only when a quasi-judicial body can be said to be handling personal information in a manner clearly outside the scope of what is reasonable, for example by gathering or requiring, or disclosing, personal information that is entirely extraneous to its proceedings – where, in other words, it ranges outside its own territory and brings itself into the territory covered by the FOIP Act, that a response from the Commissioner is required. To put this another way, any application of the standard of reasonableness for dealings with personal information imposed the FOIP Act to a quasi-judicial body's dealings with personal information in the course of exercising it quasi-judicial functions should be done only in situations in which the possibility of impropriety in those dealings has clearly been raised. Even then it should be done with great care and deference to the expertise of the quasi-judicial body.
>
> Thus, the foregoing review of the manner in which the ERCB collected and used the personal information of the Complainants in this case was undertaken not to see whether I was in precise agreement with the manner in which it had dealt with personal information in reaching its decision, or if I agreed with the procedural and substantive decisions which it based on this personal information. Doing so could involve limiting the issues the ERCB may decide, or interfering with its decision making, despite the authority conferred upon it by the legislature to do these things. Rather, it was to see whether the ERCB had somehow strayed in its use of personal information in the manner described above. In my view, it is clear it had not.

[para 54] To conclude, I find that issue estoppel arises and that I must weigh discretion in favor of declining to decide the issue for inquiry.

III. DECISION

[para 55] I have determined that issue estoppel applies and that discretion should be exercised in favor of not deciding the issue of whether the LRB disclosed the Complainant's personal information in contravention of the FOIP Act.

_____

Teresa Cunningham
Adjudicator
/bah