

IN THE MATTER OF: The Nova Scotia Human Rights Act

-and-

IN THE MATTER OF: The Complaint of Y.Z. v. Halifax Regional Municipality

Before Lynn Connors, Q.C., Chair of the Board of Inquiry

DECISION

Y.Z., the Complainant, has applied for an Identity Publication Ban and Sealing Order protecting his identity.

The Application was originally scheduled for September 27th, 2013, which was delayed for hearing until December 2nd, 2013 because the Media had not been notified of the Application.

A Consent Order was entered into by the Complainant, Commission Counsel, Counsel for the Respondent and, Counsel for the Media's undertaking, to avoid the Board of Inquiry making a ruling on its jurisdiction to grant an Identity Publication Ban, (hereinafter referred to as an I.P.B.), and so the process could continue without there being any risk to the Complainant that any of his identifying features would be published until the final determination had been made.

The Consent Order confirmed counsel for the Media's undertaking not to publish the name of or any information which would identify the Complainant. This Order remains in effect until such time as I render a decision.

Written and oral submissions were made by counsel for the Complainant, Commission Counsel, and Counsel for the Media. Before I rendered a decision at the conclusion of the hearing in December of 2013, Counsel for the Complainant, Commission Counsel, and Counsel for the Respondent advised that they wished to attempt to resolve the substance of the complaint through alternative dispute resolution. As a result, the matter was then adjourned and a return date was set for June, 2014.

Because of a conflict in my schedule, the matter was subsequently adjourned over to August 19th, 2014 to deal with issues concerning the production of documents by way of

subpoenas and as well, for the decision on the I.P.B. When this hearing reconvened in August of 2014, I was also to make a determination as to the admissibility as to the subsequently filed medical evidence on behalf of the Complainant. I admitted the evidence as part of that hearing and as well, despite the fact that it was filed late and after the initial Application for the I.P.B. was filed, I am admitting the evidence because of the nature of this sensitive Application and because of the submissions made concerning the Complainant's mental health status.

There are a number of issues that I must resolve in relation to the Application for an I.P.B. They are as follows:

1. Does a Board of Inquiry, pursuant to the Human Rights Act, R.S.N.S. 1989, c. 214 as amended and/or the Public Inquiries Act, have jurisdiction to make an I.P.B.?
2. If some form of an I.P.B. is granted, how broad should it be in the circumstances of this case?;
3. What is the proper process for notifying the Media in relation to a request for I.P.B. before a Board of Inquiry?

In relation to the last issue, which is a process issue, I am going to defer my comments in the interest of time and will subsequently render a decision at a later date.

The more pressing issue is the question of the merits of this Application.

1. Jurisdiction

It was originally the position of Counsel for the Media that a Nova Scotia Human Rights Commission Board of Inquiry lacks jurisdiction to grant the I.P.B. sought.

Counsel for the Media has subsequently conceded that the Board of Inquiry has jurisdiction expressly granted by statute arising by necessary implication to carry out its authorized mandate. Section 8 of the Regulations of the Human Rights Act mandates a public hearing but gives discretion to exclude members of the public in whole or in part if it is in the public interest to do so. Counsel for the Media has also submitted that a Board of Inquiry must act consistent with the Charter of Rights and Freedoms and its values when exercising its statutory functions and the Board must consider lesser measures than an Order excluding members of the public.

Section 34 (1) the Human Rights Act states:

“A Board of Inquiry shall conduct a public hearing and has all the powers and privileges of a commissioner under the Public Inquiries Act.”

Section 34 (7) says that the general jurisdiction of the Board of Inquiry is:

“A Board of Inquiry has jurisdiction and authority to determine any question of fact or law or both required to be decided in reaching a decision as to whether or not any person has contravened this Act or for the making of any order pursuant to such decision.”

Regulation 8 under section 42 of the Human Rights Act R.S.N.S. 1989 c. 219, N.S. Reg. states:

“A hearing of the Board of Inquiry shall be public, but a Board of Inquiry may exclude members of the public during the whole or any part of the hearing if it considers such exclusion to be in the public interest.”

Section 5 of the Public Inquiries Act, R.S.N.S. 1989, c. 372 as amended gives the Board of Inquiry “... the same privileges and immunities as a judge of the Supreme Court.”

In *A.B. v. C.D. (1992)*, 18 C.H.R.R.D./147 (N.S. Bd. Inq.) the Board of Inquiry found jurisdiction to issue a Publication Ban pursuant to the Human Rights Act, within the power to decide questions of law and fact and relied upon section 34 (7). This provision provided the Board Chair with the ability to decide jurisdictional issues. Jurisdiction to grant a Publication Ban was found implicitly in the Act, and the Chair found that a reason of safety is sufficient to grant the ban.

Further, in both *A.B. v. Nova Scotia Youth Facility 2009 (N.S. Bd. Inq.)* and *A.B. v. C.D. (1992)* 18 C.H.R.R. D / 147 (NS Bd Inquiry), the Boards of Inquiry held that they had jurisdiction to ban the publication of the identity of a party or parties to the complaint. Both Boards issue Orders banning publication of the identities of the parties.

In *A.B. v. Nova Scotia Youth Facility*, the Board of Inquiry at page 3 of the decision stated:

“Section 34(1) of the Human Rights Act and s. 8 of the Board of Inquiry Regulations made there under stipulate in no uncertain terms that Board hearings are to be public. That said, s. 8 of the Regulations also reserves a power to the Board to exclude the public from hearings where that is deemed to be in the public interest.

An order for such an in camera hearing is a more invasive restriction on public access to information than is a publication ban or an order restricting the disclosure of identifying information. As such, I consider that the power to exclude the public from a hearing includes the lesser power to restrict public access to the contents of the hearing by means of a publication ban. Further, the Board’s power to determine questions of law under s. 34(7) of the Human Rights Act accords me the power to make such legal determinations as are necessary to a finding as to whether a publication ban is appropriate.

Likewise, s. 7 of the Regulations and ss. 4 and 5 of the Public Inquiries Act accord me the power to make orders respecting the manner in which evidence is to be presented before the Board. Finally, s. 34(9) of the Human Rights Act allows me to determine the manner of publication of Board Decisions, and, accordingly, whether such decisions should contain indentifying information.”

The Board of Inquiry in *A.B. v. Nova Scotia Youth Facility* has sufficiently distinguished the decision in *McLellan v. MacTara Ltd. (No. 1)*, 2004, 51 C.H.R.R.D/89 (N.S. Bd. Inq.) which dealt with an Application for the ban of publication of the Respondent’s financial documents and other financial information.

Further, on May 14th, 2012, Walter Thompson, Q.C. issued an I.P.B. in *A.B. v. Canadian Maritime Engineering Limited* (unreported) without rendering a written decision, after receiving written submissions and Affidavit evidence from the Complainant and oral arguments.

I also find that the statutory provisions gives the Board of Inquiry the jurisdiction to exercise its discretion to issue an I.P.B. in an appropriate circumstance and I rely specifically on *A.B. v. C.D. (1992)* 18 C.H.N.D.D./147 at paragraphs 8 – 9 (Nova Scotia

Board of Inquiry) and *A.B. v. Nova Scotia Youth Facility*.

2. What are the Applicable Principles in Deciding Whether or Not to Grant the I.P.B.?

a. Case law

In *Dagenais v. Canadian Broadcasting Corporation* [1994] 3 S.C.R.835 (S.C.C.) persons facing a criminal trial on charges of sexual abuse of children in training schools in Ontario, applied for an injunction barring the CBC from broadcasting a fictional drama depicting sexual abuse of children in a Catholic institution in Newfoundland. The rights in conflict were freedom of expression and freedom of the press under s. 2(b) of the Charter, versus the right to a fair trial for the accused under s. 11(d) of the Charter.

The majority of the Supreme Court of Canada stated at paragraph 73:

“... it is necessary to reformulate the common law rule governing the issuance of publication bans in a manner that reflects the principles of the Charter. Given that publication bans, by their very definition, curtail freedom of expression of third parties, I believe that the common law rule must be adapted so as to require a consideration both of the objectives of a publication ban, and the proportionality of the ban to its effect on protected Charter rights. The modified rule may be stated as follows:

A publication ban should only be ordered when:

- a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and*
- b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.”*

(emphasis added)

The more generalized test stated in *Degenais* is found in the underlined portions of the above quotation. The “modified rule” stated above, is the rule applicable where the

conflicting rights are freedom of expression versus right to fair criminal trial.

In *R. v. Mentuck* 2001 SCC 76 a publication ban (regarding the identities of police officers involved in an undercover operations, who had been identified by the Crown during a criminal trial) was issued at the request of the Crown to protect the safety of the police officers. In this context, the Supreme Court of Canada found it necessary to restate the applicable principle more generally than the “modified rule” stated in *Dagenais*.

In *Mentuck* (S.C.C.) the Supreme Court of Canada at paragraph 31 stated:

However, the common law rule under which the trial judge considered the publication ban in this case is broader than its specific application in Dagenais. The rule can accommodate orders that must occasionally be made in the interests of the administration of justice, which encompass more than fair trial rights. As the test is intended to “reflect the substance of the Oakes test”, we cannot require that Charter rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the Charter be justified exclusively by the pursuit of another Charter right.

(emphasis added)

While *Mentuck* at paragraph 32 refers to *Dagenais* simply requiring “...findings of (a) necessity of the publication ban, and (b) proportionality between the ban’s salutary and deleterious effects.” The Supreme Court found it necessary to restate the rule in *Dagenais* more generally at paragraphs 32-22 as follows:

A publication ban should only be ordered when:

- (a) Such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonable alternative measures will not prevent the risk;*
- (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.

This reformulation of the Dagenais test aims not to disturb the essence of that test, but to restate it in terms that more plainly recognize, as Lamer C.J. himself did in that case, that publication bans may invoke more interests and rights than the rights to trial fairness and freedom of expression..... For cases where concerns about the proper administration of justice other than those two Charter rights are raised, the present, broader approach, will allow these concerns to be weighed as well
.....

It is submitted by Counsel for the Media that a Human Rights Board of Inquiry, being an administrative tribunal, does not detract from the general statements referring to “courts” and that the test in *Mentuck* applies. It is a quasi-judicial tribunal with all the attributes of a court – including the power to subpoena witnesses, compel testimony and hear and render a decision based on examination and cross-examination. Further, law-makers have made it clear that a Human Rights Board of Inquiry is a public process. Therefore, the test in *Dagenais/Mentuck* applies to the Board of Inquiry process.

In *Loveridge v. H.M.T.Q.*, 2005 B.C.S.C. 1068 (CanLii), the plaintiff claimed damages for sexual assault committed by a prison guard while he was incarcerated. The same assaults were the subject of criminal charges against the prison guard. In the criminal proceedings, a publication ban was granted in respect of the complainant’s name, Mr. Loveridge, under s.486(3) of the Criminal Code. Similar to the publication ban sought in this case, Mr. Loveridge applied to ban his identity in his civil action.

Justice Fraser began by observing paragraph 66 of the decision:

Any case in which the personal characteristics and history of the plaintiff are relevant, whether it be a case like this one, a motor vehicle accident, medical negligence, wrongful dismissal case or otherwise, carries with it the potential that the plaintiff will be required to lay bare private information he or she would prefer to keep secret. ...

The request for a ban in *Loveridge* rested on two premises. First, that potential claimants

will be discouraged from pursuing civil actions if it is made known they are the victim of a sexual assault; and second, that it is desirable for sexual assault victims to be encouraged to bring actions for damages. Justice Fraser observed that the first premise rested on behavioral social science as a predictor of conduct; the second premise is social policy (at para.68). In relation to both, he stated that he lacked information to endorse or refute the premise. Ultimately, in the absence of unequivocal social science establishing the chilling effect publication might have on those pursuing civil claims for historic sexual abuse or a legislative change, Justice Fraser declined the ban sought. He continued at paragraph 76 of the decision:

“ It is not apparent to me why a plaintiff commencing action in this Court should be seen as having a smaller obligation to the integrity of the process than does the Judge, the jury, the sheriff, the court clerk, counsel and other witnesses. By commencing action, a plaintiff commits himself or herself to various kinds of proper conduct, including the obligation to disclose information and the obligation to speak the truth. I can see no rationale for protecting the plaintiff by a publication ban from the risk of public opprobrium for breach of these obligations. Everyone else in the process is at that risk.” (emphasis added)

A similar argument was made and rejected in *R. v. Rhyno, 2001 NSPC 9*. In that case, the Crown sought an order banning publication of the names of two alleged victims as well as the name of the accused. The accused was charged with assault causing bodily harm. It was argued that there was a societal interest in encouraging the reporting of offences and to have victims and witnesses participate in the criminal process that may follow. The two alleged victims were sisters aged 11 and 13 years and they, along with the accused who was the boyfriend of the mother, lived in the small community of Sheet Harbour which has a population of between 100 and 200 people.

The Crown called as a witness, an R.C.M.P. officer, stationed in Sheet Harbour, who testified as to his belief (based upon his discussions with the girls) that they would be humiliated if their names were published. He testified to the reluctance by the public to come forward and report criminal activity for fear of being labelled a "fake" or fear of retaliation in Sheet Harbour.

The court considered the factors in Section 486(4.7) of the Criminal Code (essentially, a codification of the *Dagenais/Mentuck* criteria). Ultimately, the court rejected the argument there was a substantial risk the victims would suffer significant harm if their identities were disclosed, observing that the possibility of embarrassment or humiliation did not meet the evidentiary standard of significant harm. The Court also observed that it could also be reasonable to speculate that positive or sympathetic responses may be evoked in the community, regardless of the outcome. With respect to the public interest in reporting offences and participation in the criminal process, Associate Chief Judge Gibson observed:

“(d) There was no evidence before me that the alleged victims in this case would have difficulty participating in the trial as witnesses if their names were not banned from publication or that their cooperation in the investigation of these charges was predicated upon the seeking of such a ban. Society clearly has an interest in the reporting of offences, however, there is no evidence before me that without such bans, as sought here, in respect of these types of alleged offences, that individuals will be discouraged from reporting such offences.

There is a certain reality about the making of a complaint to the police or the reporting of alleged offences that must be recognized. It is the fact that it is a serious matter to complain or report that someone has allegedly committed a criminal offence. Such a complaint, when made to the police, is usually the initial step causing the State, through police agencies, to investigate. Thus, the power of the State is invoked through a complaint made to the police. The public always has an interest and right to be informed when the investigation leads to criminal charges because it is the State, on behalf of society, that brings criminal charges against an individual. Those who make complaints of possible criminal conduct ought to know and expect that the investigation of such complaints which leads to criminal charges, will be subject to public scrutiny. Public scrutiny provides a balance. That balance ought to exist and is presumed to exist even with respect to alleged child victims other than those victims of the offences enumerated in s.486(3) of the Criminal Code.”

In *A.B. v. Bragg Communications Inc.*, [2012] 2 SCR 567, 2012 SCC 46, (S.C.C.), a 15-year-old girl found out that someone had posted a fake Facebook profile using her picture, a slightly modified version of her name, and other particulars identifying her. The picture was accompanied by unflattering commentary about the girl's appearance along with sexually explicit references. Through her father as litigation guardian, the girl brought an application for an order requiring the Internet provider to disclose the identity of the person(s) who used the IP address to publish the profile so that she could identify potential defendants for an action in defamation. As part of her application, she asked for permission to anonymously seek the identity of the creator of the profile and for a publication ban on the contents of the profile. Two Media groups opposed the request for anonymity and the ban. The Supreme Court of Nova Scotia granted the request that the Internet provider disclose the information about the publisher of the profile, but denied the request for anonymity and the publication ban because there was insufficient evidence of specific harm to the girl. The judge stayed that part of his order requiring the Internet provider to disclose the publisher's identity until either a successful appeal allowed the girl to proceed anonymously or until she filed a draft order which used her own and her father's real names. The Court of Appeal upheld the decision primarily on the ground that the girl had not discharged the onus of showing that there was evidence of harm to her which justified restricting access to the Media.

The judgment of the Supreme Court of Canada was delivered by Abella J.

The Appellant's Appeal to the Supreme Court of Canada was based on what she claimed as the failure to properly balance the harm in revealing her identity versus the risk to her by proceeding in open court. Unless her privacy was protected, she argued that young victims of sexualized cyber bullying like herself, would refuse to proceed with their claims and will as a result, be denied access to justice.

The open court principle was clearly stated by Abella J. at paragraph eleven of the decision. In paragraph 14 of the decision, Abella J. made the following statement:

"The girl's privacy interests are tied both to her age, and to the nature of the victimization she seeks protection from and is not merely a question of her privacy, but of her privacy from the relentlessly intrusive humiliation of sexualized online bullying."

In paragraph 15 of the decision Abella J. made the following statements:

The amicus curiae pointed to the absence of evidence of harm from the girl about her own emotional vulnerability. But, while evidence of a direct, harmful consequence to an individual applicant is relevant, courts may also conclude that there is objectively discernible harm.

Abella J. paragraph 17 of the decision, made the following statements concerning the recognition of the inherent vulnerability of children:

Recognition of the inherent vulnerability of children has consistent and deep roots in Canadian law. This results in protection for young people's privacy under the Criminal Code, R.S.C. 1985, c. C-46 (s. 486), the Youth Criminal Justice Act, S.C. 2002, c. 1 (s. 110), and child welfare legislation, not to mention international protections such as the Convention on the Rights of the Child, Can. T.S. 1992 No. 3, all based on age, not the sensitivity of the particular child. As a result, in an application involving sexualized cyber bullying, there is no need for a particular child to demonstrate that she personally conforms to this legal paradigm. The law attributes the heightened vulnerability based on chronology, not temperament: See R. v. D.B., 2008 SCC 25 (CanLII), [2008] 2 S.C.R. 3, at paras. 41, 61 and 84-87; R. v. Sharpe, 2001 SCC 2 (CanLII), [2001] 1 S.C.R. 45, at paras. 170-74.

Abella J. made the following statement at paragraph 23 of the decision:

In addition to the psychological harm of cyberbullying, we must consider the resulting inevitable harm to children — and the administration of justice — if they decline to take steps to protect themselves because of the risk of further harm from public disclosure.

In paragraph 28 – 30 of the decision, Abella J. engages in the balancing inquiry and made the following findings:

The answer to the other side of the balancing inquiry — what are the countervailing harms to the open courts principle and freedom of the press

— has already been decided by this Court in *Canadian Newspapers*. In that case, the constitutionality of the provision in the Criminal Code prohibiting disclosure of the identity of sexual assault complainants was challenged on the basis that its mandatory nature unduly restricted freedom of the press. In upholding the constitutionality of the provision, Lamer J. observed that:

While freedom of the press is nonetheless an important value in our democratic society which should not be hampered lightly, it must be recognized that the limits imposed by [prohibiting identity disclosure] on the Media's rights are minimal. . . . Nothing prevents the Media from being present at the hearing and reporting the facts of the case and the conduct of the trial. Only information likely to reveal the complainant's identity is concealed from the public. [Emphasis added; p. 133.]

*In other words, the harm has been found to be “minimal”. This perspective of the relative insignificance of knowing a party's identity was confirmed by Binnie J. in *F.N.* where he referred to identity in the context of the Young Offenders legislation as being merely a “sliver of information”: *F.N. (Re)*, 2000 SCC 35 (CanLII), [2000] 1 S.C.R. 880, at para. 12.*

*The acknowledgment of the relative unimportance of the identity of a sexual assault victim is a complete answer to the argument that the non-disclosure of the identity of a young victim of online sexualized bullying is harmful to the exercise of press freedom or the open courts principle. *Canadian Newspapers* clearly establishes that the benefits of protecting such victims through anonymity outweigh the risk to the open court principle.*

*On the other hand, as in *Canadian Newspapers*, once A.B.'s identity is protected through her right to proceed anonymously, there seems to me to be little justification for a publication ban on the non-identifying content of the fake Facebook profile. If the non-identifying information is made public, there is no harmful impact since the information cannot be connected to A.B. The public's right to open courts and press freedom*

therefore prevail with respect to the non-identifying Facebook content.

I would allow the appeal in part to permit A.B. to proceed anonymously in her application for an order requiring Eastlink to disclose the identity of the relevant IP user(s). I would, however, not impose a publication ban on that part of the fake Facebook profile that contains no identifying information. I would set aside the costs orders against A.B. in the prior proceedings but would not make a costs order in this Court.

In *M.E.H. v. Williams: the Ottawa Citizen*, 2012 ONCA 35, the estranged wife of Colonel Williams sought to divorce her husband after learning that he was in reality a sexual predator and serial murderer. There was a request for a non-publication ban. An Affidavit was filed from her treating psychiatrist Dr. W. Kwan. He was cross examined on his Affidavit. His testimony begins in paragraph 38 of the decision. Dr. Kwan first saw Ms. Williams in March of 2010. He stated that she was initially devastated by the revelations about her husband, shocked, confused, and unable to sleep and focus. Due to publicity associated with his criminal trial, she left the country. Dr. Kwan further stated that:

... There is a very real and great potential that her fragile recovery can be seriously compromised if she cannot be protected from the persistent, insistent and incessant efforts of the Media to gain entry into her private life.

... [Her] precarious mental and emotional state would be imperiled if she continued to be the subject of Media harassment regarding her private life and Mr. Williams.

... Currently has a very tenuous hold on her mental health and is a mere shadow of her usual self.

... requires calm, peace and quiet if she is to continue functioning normally, which I believe will not occur if her application for divorce plays out in the media.

... I believe that if pushed further by constant invasions of her privacy,

there is a very strong possibility that Mrs. Williams will deteriorate and be incapable of functioning at her current level of ability.

Dr. Kuan did not offer any opinion as to whether she would seek out the divorce if she was not guaranteed the kind of anonymity and privacy she sought. The Court of Appeal concluded:

Assuming that Dr. Kuan's opinion goes so far as to assert a real risk that the respondent would suffer the degree of emotional harm required to engage the public interest in maintaining access to the courts, that opinion rests entirely on his assumption that the respondent would be subject to media harassment occasioned by "persistent, insistent and incessant" efforts to invade her privacy. These assumptions have no foundation in the evidence. Consequently, Dr. Kuan's opinion cannot be said to provide the kind of convincing evidence needed to meet the rigorous standard demanded by the necessity branch of the Daganais/Mentuck test.

Dr. Kuan expressed the view that the publicity surrounding the divorce proceeding could adversely affect Mrs. Williams employment which in turn could cause significant damage to her emotional well-being. The court rejected that this was evidence of harm.

b. Medical Evidence Submitted by the Complainant

At the original hearing date, which was September 23rd, 2013, an Affidavit was filed on behalf of the Complainant. In relation to his mental health history, at paragraph 12 of the Affidavit, he states:

"By June, 2004, the poisoned work environment, harassment, humiliation, social isolation, and attempts to cause me physical harm, or causing or contributing to, me suffering stress, anxiety, depression, dizziness and blackouts, and as a result, I was unable to work from June 22nd, 2004 to July 30th, 2006."

Further, the Affidavit states in paragraphs 14-18:

14. On July 18, 2006, I filed a complaint with the Nova Scotia Human Rights Commission, alleging discrimination by the HRM ... in relation to race, colour and ethnic, national or aboriginal origin.

15. I returned to work on light duties from July 31, 2006 until January 19, 2007, in an attempt to rehabilitate myself back into the workplace.

16. My return to the poisoned work environment ... aggravated my anxiety and depression symptoms, and I have been unable to work at any employment since January 19, 2007 due to my health.

17. In the fall of 2007, I attempted to commit suicide.

18. In June of 2008, I was assessed by Dr Rosenberg, a psychiatrist, who diagnosed me as having a Major Depressive Disorder and Generalized Anxiety Disorder and who gave the opinion that any return to work ... would fail unless the workplace harassment issues were addressed and resolved.

Further, in relation to his mental health status, the Complainant made the following statements in paragraphs 21-23 of his Affidavit:

21. I have been asked by medical doctors on various occasions, whether I have thoughts of committing suicide and I believe that suicide could be a risk for me if my medical condition worsens.

22. I have been informed by medical doctors and I believe that stress can worsen my medical condition and symptoms.

23. Since before June, 2004, I have suffered from anxiety in varying degrees, which is aggravated by stress.

In December of 2013, at the hearing, Counsel for the Media, in November of 2013, Counsel for the Media questioned the sufficiency of the medical evidence that was before the Board, based on the case law that was provided for the Board's consideration. At that point, Counsel for the Complainant requested the opportunity to provide more evidence

and the matter was ultimately adjourned to a review date in June of 2014.

By way of a subsequent Order, I allowed the admission of further and more detailed medical evidence concerning the Complainant's mental health. I note the objection made by Counsel for the Media, however, under the circumstances and because of the nature of the request, and the nature of the medical information involved, I have admitted this information. What I received as part of exhibit 1, is a copy of a request for a medical legal opinion dated April 23rd, 2014, written by Counsel for the Complainant also attached are a series of medical legal reports attached to exhibit 1, the latest being a medical legal report of Dr. E.M.Rosenburg, Psychiatrist, dated June 10th, 2008.

The updated history that was requested, is comprised of two letters written by Dr. T.J.P. Graham dated June 26th, 2014, one dealing with the specifics of this Application and the other dealing with a disability claim from the set up and contents of the letter. The rest of the medical legal reports set out in exhibit 1 are attached to these two reports.

Dr. Graham, who is a family doctor, states in the report:

"In my opinion, the Complainant's participation in the public hearing of his complaint would expose him to a significant risk of emotional harm. As you know, the Complainant has been followed for some time in the past by Dr. William McCormick. Eventually, Dr. McCormick sent me a note on November 15, 2011, which said, in part"... He has settled and is now able to live reasonably well He should remain on his meds for the foreseeable future... At that point Dr. McCormick discharged Y.Z. to me for ongoing management of his medications. In the interval since then, I have found him to be quite stable. However, over several visits in April, May, and June, he let me know that he had an upcoming public hearing, likely to be quite protracted, concerning an identity publication ban. The anticipation of this hearing had caused significant anxiety, and he complained of a recurrence of previous symptoms, including irritability, dizzy spells, flashbacks, and nightmares. I did adjust his medication during this time, and he did realize some benefit. However, he expressed concern that he would be unable to function during a long and protracted hearing. I believe that the

recurrence of his symptoms was brought about by anxiety surrounding the upcoming hearing. Since the anticipation of this hearing was sufficient to bring about a recurrence of symptoms, I believe that participation in the actual event would in fact be quite detrimental, and would lead to worsening of the symptoms mentioned above.”

Counsel for the Media has argued that there is no foundation laid in the report of Dr. Graham to come to his conclusion that an I.P.B. regarding the Complainant's name, identity, and image would in fact reduce the likelihood of further worsening of the symptoms.

There is a lack of updated medical information. It appears from the letter of Dr. Graham that the Complainant has not seen his treating Psychiatrist Dr. McCormick since November 15th, 2011. At that time, Dr. McCormick wrote:

“...He has settled and is now able to live reasonably well. He should remain on his meds for the foreseeable future.”

There is no updated psychiatric information concerning the status of the Complainant that has been produced to substantiate the opinion provided by Dr. Graham, the family doctor.

We are left with the historical medical reports that has been produced. The best summary of that medical history is contained in the letter of Dr. Graham to Mr. Evans dated October 21st, 2007 in relation to a long term disability claim. In this letter, the family doctor sets out the physical, psychological, and psychiatric history of the Complainant. There had been other medical reports that pre-date the difficulties he experienced in the work place. It appears from the review of the medical records and the summary provided by Dr. Graham, that the first record of difficulties being experienced at work was in November of 2003. The Complainant reported at that time, as set out in page 3-4 of Dr. Graham's report the following:

“...There had been dissention between him and one of his supervisors, that he filed a harassment complaints, and that an investigation was underway. In the meantime he had ongoing trouble coping, complained of major

stress, and had arranged counselling through the employee assistance program at his workplace. I heard next from his EAP counsellor, who informed me that the Complainant had scored high on a depression scale. I therefore arranged to see him, began treatment with Effexor, an antidepressant medication in December, 2003. When I saw him in follow-up in January, 2004, he complained of some gastro-intestinal side effects from the Effexor, and he was switched to Paxil, another antidepressant."

The report continues to state that in late January 2004, a referral was made to Dr. David Andrews an ophthalmologist who prescribed reading glasses. There was a follow-up appointment in May 2004, during which the Complainant, complained of ongoing stress and anxiety related mostly to his work. He had continued to take Effexor, but had run out of this several weeks before and was seeing his EAP counsellor, was taking Temazepam for sleep and Alprazolam for anxiety.

In June 2004 the Complainant saw his family doctor and reported symptoms of dizzy spells with occasional near blackouts. Physiotherapy was recommended, Effexor was increased, and there was some improvement in the Complainant's depression. He continued to see his EAP counsellor.

The dizzy spells reoccurred later in July of 2004. There was a referral to Dr. David King a neurologist who arranged for a CT scan, and a carotid ultrasound exam, and who concluded that the Complainant had a variant of migraine and began him on Sibelium, a medication for the disorder. It was the opinion of Dr. King that the Complainant's migraines were probably related to stress in the workplace.

The Complainant had begun seeing a counsellor through his EAP program and the counsellor had suggested that he be referred to Dr. Allan Abbass, who was a psychiatrist at the Abby J. Lane Hospital because of depression. This referral was made in August of 2004 and the Complainant began attending sessions at the Abby J. Lane in April of 2005.

Dr. Graham saw the Complainant in May of 2005 and noted that the Complainant had stopped taking his antidepressant medication because he thought that the antidepressants

could not be taken together with the Sibelium prescribed by Dr. King for the migraines.

There were attendances at physiotherapy during the last half of 2004 and the first month of 2005 as a result of a referral made by Dr. Alexander. An MRI was ordered by Dr. Alexander, as a result of meeting with the Complainant in January of 2006, he felt that there were no neurological problems present. Despite this, the Complainant continued to have problems varying in severity, with left leg pain and numbness, which caused problems with walking. Pain had been an ongoing problem and a number of analgesics have been tried and he eventually had good relief with Tramacet.

Through the last half of 2005, the Complainant remained off work, attended physiotherapy and attended his sessions at the Abby J. Lane. Physiotherapy sessions continued through 2006, and he attended at the Abby J. Lane for the first half of the year. In April of 2006 he reported to his family doctor that the Human Rights Commission had started to deal with his work situation. In May of 2006 he reported some dizzy spells, which he related to his physio/exercise schedule. In June of 2006 he began seeing Mark Russell, a psychologist through his LTD insurer. A return to work plan had been developed as a result of the Complainant seeing Mr. Russell and he did go back to work on July 31st, 2006 on light duties. The plan was modified from time to time. From October 23rd, 2006 until January 19th, 2007 the investigation of his human rights complaint was ongoing. The Complainant continued to experience intermitted back pain, with associated left side sciatica. On January 2nd, 2007, he experienced chest tightness and nausea. An EKG was done and was normal.

Dr. Graham saw the Complainant on January 23rd, 2007, when he reported to have developed reoccurring migraines and dizzy spells. The Complainant reported experiencing further problems at his workplace; he said his co-workers wanted him out of the workplace. He also reported that though he was placed on light duties, his supervisor appeared to be unaware of this. He had discontinued work because of illness on January 19th, 2007.

At a subsequent visit on February 27th, 2007, because the Complainant was very upset by the recent death of a friend who he worked with, and having discussed the Complainant's condition with the E.A.P. psychologist, Mr. Russell, the family doctor found that the

Complainant was significantly depressed and started him again on Effexor. The Complainant has been off on long term disability since that time. Dr. Graham at that time wrote:

"I believe that the above description of the Complainant's past history gives appropriate details of the various medications and treatment prescribed during this period in question. I would have to say that he has significant physical pain, suffering, and disability as a result of his various musculoskeletal problems described above. These, in and of themselves, have been sufficient to curtail his ability to work, and to lead a reasonable normal life. In addition, however, and just as importantly, he has had and continues to have very significant anxiety and depression, which still have a considerable impact on his life."

The next medical report of significance is that of Dr. Rosenberg which is dated June 10th, 2008. It is in this report that Dr. Rosenberg documents the Complainant's attempt on his life, which was thwarted by the efforts of his brother, and as well, provided his diagnosis of major depressive disorder, recurrent, moderate severity with features of anxiety, psychosocial stress relating to perception of intimidation and harassment at the workplace, moderate symptomatology with moderate difficulty in social and occupational functioning.

Dr. Rosenberg stated that the Complainant was suffering from a major depression, which is generally viewed as a chronic and reoccurring condition, the initial episodes of which may be preceded by significant psychosocial stressors, as may subsequent episodes. He further writes that individuals suffering with depressive illness are susceptible to stressors (which may be particular to them), which will serve to augment and sustain depressive symptomatology. Numerous recommendations were made for medication and lifestyle changes. Dr. Rosenberg at the conclusion of his report wrote:

"... At this stage I am unable to provide a prognosis regarding the Complainant's return to the workplace. If the Complainant is correct in his assumption that there is non-resolution of his complaints regarding harassment at the workplace, then any program designed to return him to

work will likely fail, because of his perception of stress. The Complainant's response to stress in the past have been characterised by emotional symptomatology ... and are likely to continue without resolution of what the Complainant views as significant personal/personnel issues."

c. Analysis – Dagenais / Mentuck Test

The first step that I must address is whether or not an I.P.B. is necessary in order to prevent serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk.

The risk is the first prong of the Dagenais/Mentuck test analysis, and as noted by Iacobucci J. must be:

"...Real, substantial, and well grounded in the evidence; that must be "a risk that poses a serious threat to the proper administration of justice. In other words, it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration justice sought to be obtained (Mentuck, 2001 Carswell Man 535 (SCC), at para 34)."

It is the position of Counsel for the Media that the Complainant has failed to meet the first branch of the test. Counsel for the Media submits that the privacy and medical risk identified are speculative, not grounded in reliable evidence of specific circumstances and conditions of the Complainant to demonstrate this case takes it beyond personal and emotional stress to serious, debilitating, physical and emotional harm.

I have some difficulty with the Counsel for the Media's characterization of the medical evidence produced on behalf of the Complainant. There is a long standing history of a major depressive disorder and a general anxiety disorder since 2008. A four year process of counseling, medication, and short term disability did not ameliorate the Complainant's stress level in the workplace. Based on the medical evidence I have before me there was no improvement, in fact a deterioration of the Complainant's mental health status, largely brought on by the work environment he was functioning in, plus the commencement of the human rights investigation. Stress aggravates anxiety levels. As stated at page 7 of Dr. Rosenberg's report:

“Major depression is generally viewed as a chronic reocurrant condition, the intital episodes of which may be proceeded by significant psychosocial stressors, as may subsequent episodes. Further, individuals suffering with depressive illness are susceptible to stressors (which may be unique to them), which will serve to augment and sustain depressive symptomatology.”

Further, Dr. Graham, the family doctor, has written:

“Since the anticipation of the this hearing was sufficient to bring him out a reoccurrence of symptoms, I believe that participation in the actual event would in act be quite detrimental, and would lead to worsening of the symptoms mentioned above.”

Unlike the decision in *Loveridge; M.E.H. v. Williams; the Ottawa Citizen*; and *R. v. Rhyno*; the Complainant in this case has a long standing and well documented mental health history. Certainly it would have been helpful to me to have more detailed, updated information, however, the medical history, the fact that the Complainant still remains medicated and off work, and the family doctor’s report, all lead to the conclusion that there is a substantial risk that participation in this process will increase the Complainant’s stress level, anxiety, and depressive symptoms, which will affect his ability to participate in the hearing.

It is true that an I.P.B. would place a significant restriction on freedom of the press, however, if an individual with a well documented and long standing mental health history is unable to mentally deal with the stress generated by a Board of Inquiry process appointed to address the cause of his mental health condition, restricting that Complainant’s ability to participate poses a serious threat to the proper administration of justice. I find that there is a serious danger to the administration of justice, which ought to be avoided. Justice cannot be achieved in this matter if the Complainant is potentially unable to participate because of the aggravation of his long standing and pre existing mental health condition. There are no reasonable alternative measures. Counsel for the Complainant has not requested that the court room be empty when the Complainant testifies or any other, more restrictive measures. The barebones request is that the Complainant’s name and any identifying features of the Complainant not be published.

I find that the risks are real to the administration of justice because of the potential limitation of the Complainant's ability to fully participate in the hearing process. Because of the recent deterioration of the Complainant's mental health, I find that an I.P.B. of a very limited nature can address this issue.

The next question I must address is:

Whether or not the salutary effects of the I.P.B. outweigh the deleterious effects of 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.

I now move to the balancing analysis, I note that the presumption is an open court process which can only be overcome with sufficient and convincing evidence.

Does the lack of publication of the Complainant's name affect Counsel for the Respondent's ability to hold up the Complainant's testimony to public scrutiny? There will be no restrictions to the ability to cross examine the Complainant and to test, in the normal trial process, the credibility of his testimony. His name can be used for the purposes of cross examination and in the proceeding. The Complainant will testify in the normal course and be subjected to cross-examination. He must face those that he has accused.

Further, there is no request to seal any of the medical evidence to be adduced at trial. The medical evidence will be subject to public scrutiny and the scrutiny of the Board of Inquiry. Other than the name, and other identifying features of the Complainant, the trial shall be conducted in the normal course. An I.P.B. will not restrict the open court process. The ability to challenge the credibility of the Complainant and the accuracy of his medical evidence will be subject to cross examination. The only restriction on the Media is the ban on identifying the name of the Complainant and any of his identifying features.

Therefore, I am, on a limited basis, granting the Application for the Identity Publication Ban. I order the following:


1. The Media shall not publish the name or any information which would identify the

Complainant;

2. No member of the public shall publish the name or any information which would identify the Complainant.

DATED by the Board of Inquiry as of October 30th, 2014.

ISSUED by the Board of Inquiry as of October 30th, 2014.



LYNN M. CONNORS, Q.C., Chair
Human Rights Board of Inquiry