Date: 20121211

Files: 566-02-5964 and 6736

Citation: 2012 PSLRB 129

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

N. J.

Grievor

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

Indexed as
N. J. v. Deputy Head (Correctional Service of Canada)

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Linda Gobeil, adjudicator

For the Grievor: Linelle S. Mogado, counsel, and Grace Chychul, Professional Institute of the Public Service of Canada

For the Respondent: Richard E. Fader, counsel, Marie-Eve Cantin, and Charlotte Castonguay

Heard at Ottawa, Ontario, and Edmonton, Alberta, via video conference,
October 10, 2012.

I. Individual grievances referred to adjudication

[1] On May 6, 2011 and October 20, 2011, N. J. ("the grievor") filed two grievances challenging the decision of the Correctional Service of Canada ("the respondent" or "the employer") to suspend her on April 14, 2011 without pay, pending the results of a disciplinary investigation, and to terminate her employment on September 27, 2012. Both grievances were referred to adjudication under paragraph 209(1)*(b)* of the *Public Service Labour Relations Act* ("the *Act"*).

[2] On April 24, 2012, a representative of the Professional Institute of the Public Service of Canada ("the bargaining agent") wrote to the Registry of the Public Service Labour Relations Board ("the Registry"), alleging that the grievor had been sexually assaulted by an inmate, following which her employment was terminated. To protect the grievor's privacy and safety, her representative requested that, contrary to the Public Service Labour Relations Board's *Policy on Openness and Privacy* ("the Policy"), her name not appear on the public hearing list. The representative also requested the full disclosure of all documents related to the termination of the grievor's employment.

[3] On May 16, 2012, counsel for the employer wrote to the Registry and objected to the request of the grievor's representative to not mention the grievor's name in the hearing list. Counsel for the employer argued essentially that disclosing parties' names is key to the open court principle as the Supreme Court of Canada stated in *Vancouver Sun (Re*), 2004 SCC 43. Counsel for the employer argued that the Supreme Court has recognized the strong presumption that all judicial proceedings will be heard publicly and that that presumption is linked to the freedom of expression guaranteed by the *Canadian Charter of Rights and Freedoms* ("the *Charter"*).

[4] Counsel for the employer argued that the legal test, known as the "Dagenais/Mentuck" test, to be applied to determine if access to judicial proceedings should be limited, was established by the Supreme Court in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and in *R. V. Mentuck*, 2001 SCC 76, and that the party asking for a restriction to the open court principle has the burden of demonstrating the following:

. . .

> *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*
>
> *The salutary effects of the order outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression. . . and the efficacy of the administration of justice.*

[5] Counsel for the employer argued that, in this case, the grievor was terminated for having an inappropriate relationship with an inmate.

[6] Counsel for the employer maintained that the grievor did not meet the Dagenais/Mentuck test on the issue of anonymization, which would allow the restriction to the open court principle. For counsel for the employer, there is no real, substantial and well-grounded evidence as required by the Dagenais/Mentuck test either that there would be a serious risk to the proper administration of justice or that the salutary effect of concealing one party's name from the public hearing list would outweigh the deleterious effect on the rights of the parties and the public.

[7] As for the argument of the grievor's representative that the grievor's safety would be risked were her name made public, counsel for the employer argued that, taking into account the circumstances of this case, no evidence was presented in support of that allegation.

[8] On the issue of document disclosure, counsel for the employer indicated that he would share with the grievor's representative, in advance of the hearing, the documents on which he intends to rely at the hearing once he identifies them. Specifically, with respect to the investigation report, he stated that I have authority under paragraph 226(1)*(e)* of the *Act* to order the production of such documents.

[9] Finally, counsel for the employer requested in advance of the hearing, full particulars of any medical condition that the grievor intends to rely on at the hearing.

[10] On July 19, 2012, at my request the Registry informed the parties that their preliminary issues would be dealt with at a preliminary hearing to be held in July 2012.

[11] On July 23, the grievor's representative informed the Registry that she would be unavailable until August 24, 2012. She also indicated that, in a related matter before the criminal division of a provincial court involving the inmate as a defendant and the grievor as the complainant and a witness ("the criminal court"), a publication ban was issued on any information that would help identify the complainant. As a result, the grievor's representative requested the following:

- that I issue a publication ban compliant with that already ordered by the criminal court with respect to the adjudication of these grievances;
- that any proceedings, including pre-hearing conferences and the hearing itself, proceed in private; and
- that all documentary evidence that could possibly lead to identifying the grievor
    - be redacted to protect the grievors's identifying information and be provided only to me and Board personnel, the employer's counsel and any expert witness; and
    - be subject to a sealing order.

[12] On August, 10, 2012, at my request the Registry informed the parties that a preliminary hearing would be convened and that they should prepare to address the following:

- the requests by the grievor's representative for confidentiality and a sealing order, and the supporting evidence, in light of the Dagenais/Mentuck test, as reformulated in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41;
- the scope and applicability of the criminal court's publication ban and the general impact of the proceedings in that court on the matter before me, if any;
- the disclosure of information; and
- the provision of particulars about the grievor's alleged medical condition.

[13] Until the preliminary hearing took place, or I decided otherwise, I ordered the following:

- the parties were to restrict to themselves and their representatives access to all files and documents related to these grievances;
- these grievances would not appear on the public hearing list for the moment; however, they were to remain scheduled to be heard on their merits; and
- the preliminary hearing would take place in the presence of only me and the parties and their representatives.

II. Summary of the arguments

[14] On October 10, 2012, a preliminary hearing was held via video conference with all the parties' representatives.

A. Publication ban, hearing in private and documents sealed

1. Counsel for the grievor's arguments

[15] Counsel for the grievor reiterated the arguments made in her submission dated April 24, 2012 and July 23, 2012. She also argued that, in March 2011, the grievor, who before her discharge was a psychologist working for the employer, had been the victim of a violent sexual assault by an inmate, which led the employer to terminate her employment. Counsel for the grievor indicated that, because of that assault, the grievor suffered from post-traumatic stress disorder (PTSD).

[16] Counsel for the grievor argued that, following the March 2011 incident, the R.C.M.P. launched an investigation. Criminal charges were then laid against the inmate. Counsel for the grievor indicated that the grievor is also the complainant and a witness in the matter before the criminal court.

[17] Counsel for the grievor indicated that the criminal court, issued a publication ban on any information that would help identify the complainant.

[18] Counsel for the grievor argued that the facts of this case are unique and difficult and that this matter is not a typical termination-of-employment case.

[19] Counsel for the grievor argued that the facts of this case are serious and recommended that I depart from the Policy by not mentioning the grievor's name on the public hearing list but instead, that it refers only to "Grievor v. Correctional

Service." She also asked that, under the circumstances I allow only the parties to attend the hearing and that I order that the resulting decision or any documentary evidence be edited to protect the grievor's identity. Counsel for the grievor also requested an order that all evidentiary documents be sealed.

[20] Counsel for the grievor argued that, under in the circumstances, it would be very traumatic for the grievor to testify about what happened if the public were in the hearing room. Her counsel maintained that the grievor suffers from PTSD and that she will likely have to testify about her medical condition. According to counsel for the grievor, the grievor could be traumatized again if she has to testify in an open court about these very personal matters. Counsel for the grievor argued that, in this case, the grievor's privacy clearly needs to be protected and that an exception to the open court principle is required. She referred me to the Supreme Court judgments in *A.B. v. Bragg Communications Inc.*, 2012 SCC 46 and *Canadian Newspapers Co. v. Canada (Attorney General),* [1988] 2 S.C.R.122, and to *Tipple v. Deputy Head (Department of Public Works and Government Services),* 2009 PSLRB 110.

[21] Counsel for the grievor maintained that, although the last media coverage about the inmate was in 2003, the media has demonstrated in the past an interest in the inmate's activities and would likely do so in this case. Counsel for the grievor maintained that that would prejudice and would be very traumatic for the grievor.

[22] As for the grievor's safety, her counsel argued that it was unknown whether her safety would be jeopardized if her identity became known. Counsel for the grievor conceded that, in this case, at least at that point, the emphasis was more on privacy than safety.

[23] Counsel for the grievor argued that if in the adjudicator's proceedings the grievor's identity were not concealed, the public would be able to connect this case to the proceedings before the criminal court that issued the publication ban. Counsel argued that that would be contrary to the criminal court's intentions.

[24] As for whether the request by the grievor's counsel surpasses the scope of the criminal court's publication ban, counsel for the grievor admitted that that ban is much narrower in scope than her request in the present matters. However, she maintained that the criminal court's order is the bare minimum and that nothing prevents me from surpassing it.

[25] Counsel for the grievor concluded by asking that the grievor be referred to only as "grievor" on the hearing list and in the decision and that the documentary evidence be sealed. As for holding the hearing in private, she asked that, as an alternative to having the entire hearing limited to the parties, I order that the grievor be allowed to testify in private at the hearing.

2. <u>Counsel for the employer's arguments</u>

[26] Counsel for the employer reiterated the arguments he made in his earlier submissions.

[27] Counsel for the employer argued that the open court principle is very important and that it must be respected and departed from only in very exceptional circumstances. He referred me to the test developed by the Supreme Court as follows in *Dagenais,* at page 838:

> *It is open to this Court to "develop the principles of the common law in a manner consistent with the fundamental values enshrine in the Constitution":* Dolphin Delivery, supra, *at p. 603 (*per *McIntyre J.) I am, therefore, of the view that 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 the freedom of the 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 necessarily 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 in the original]

[28] Counsel for the employer also referred me to *Mentuck*, as follows, at paragraph 39:

> *39. It is precisely because the presumption that courts should be open and reporting of their proceedings should be uncensored is*

> *so strong and so highly valued in our society that the judge must have a convincing evidentiary basis for issuing a ban. Effective investigation and evidence gathering, while important in its own right, should not be regarded as weakening the strong presumptive public interest, which may go unargued by counsel more frequently as the number of applications for publication bans increases, in a transparent court system and in generally unrestricted speech on matters of such public importance as the administration of justice.*

[29] Counsel for the employer argued that this matter deals with *Charter*-protected rights and that the grievor provided no justification, given the Supreme Court's judgements, for a publication ban, a private hearing or the sealing of documentary evidence. He argued that the arguments presented by counsel for the grievor were not enough to tilt the case in favour of the grievor's request. He referred me to *Almrei (Re),* 2001 FCT 1288, and to *Vancouver Sun (Re),* at para 23, 24, 26 and 28; as follows:

> *23. This Court has emphasized on many occasions that the "open court principle" is a hallmark of a democratic society and applies to all judicial proceedings* . . .
>
> *24. The open court principle has long been recognized as a cornerstone of the common law . . .*
>
> . . .
>
> *26. The open court principle is inextricably linked to the freedom of expression protected by s.2* (b) *of the* Charter *and advances the core values therein . . .*
>
> . . .
>
> *28. This Court has developed the adaptable* Dagenais/Mentuck *test to balance freedom of expression and other important rights and interest, thereby incorporating the essence of the balancing of the* Oakes *test:* Dagenais, supra; Mentuck, supra*;* R.v. Oakes, *[1986] 1 S.C.R.103. The rights and interests considered are broader than simply the administration of justice and include a right to a fair trial:* Mentuck, supra*, at para. 33, and may include privacy and security interests.*

[30] Counsel for the employer insisted that the grievor's employment was not terminated because she was allegedly sexually assaulted by an inmate but rather for having had an inappropriate relationship with an inmate. He explained that the events listed in the discharge letter dated September 27, 2011 are the real reasons that the grievor was terminated and that those events happened before the alleged sexual assault in March 2011. Counsel for the employer indicated that the employer decided

to terminate the grievor when it investigated the events that happened before the alleged assault of March 2011. He argued that, subject to the evidence that the grievor will adduce at the hearing, although the employer might at the hearing make an incidental or a contextual reference to the alleged assault, the employer does not intend to rely on the alleged assault but rather on the incidents listed in the termination letter of September 27, 2011.

[31] Therefore, according to counsel for the employer, the facts that the employer will rely on in its evidence at the hearing are different from those before the criminal court. According to counsel for the employer, the criminal court will decide whether a sexual assault occurred, while I will decide whether, before the alleged sexual assault, the grievor had an improper relationship with the inmate, as detailed in the September 27, 2011 termination letter. Moreover, according to counsel for the employer, the forum and the facts are different and so are the parties to the two proceedings. Therefore, he argued that this case is no different than any other case in which an employee has been terminated and his or her name is made public. As for the safety and health issues, counsel for the employer argued that, at that point they were speculative and that no evidence was adduced in support of them.

[32] As for the criminal court order, counsel for the employer pointed out that it is very narrow in scope and limited to the publication ban of the complainant's name. He reviewed the order and indicated that it does not prevent the public from attending the criminal proceedings and does not order the court's documents sealed. He pointed out that, even in correspondence with him on October 3, 2012, the criminal court's manager did not remove the complainant's name from some of the attached documents. In his view, that is additional evidence that the criminal court order is limited to banning the publication of the complainant's name and of information that could identify her and that it does not prevent public access to the criminal proceedings or order the documentary evidence sealed.

[33] Although counsel for the employer insisted that, in this case, the open court principle should prevail, the grievor's name should be on the public hearing list, the hearing should be public, and the documentary evidence should not be sealed, he indicated that, alternatively, he would not oppose the name of the institution involved being replaced with a reference to the employer and the grievor being allowed to testify in private.

[34] As for *A.B. and Canadian Newspapers Co.,* cited by counsel for the grievor, counsel for the employer stated that the facts in those cases are very different from this case. *A.B.* involved someone 15 years old. For *Canadian Newspapers Co.,* he distinguished it, arguing that the issue in that case was a sexual assault, which is not the issue in this case because of the employer's position that the termination is based on events that pre-date the alleged sexual assault.

B. <u>Production of documents</u>

[35] During the October 2012 preliminary hearing, the grievor's representative argued that, in May 2009, a request was made under the *Access to Information Act* ("the ATIA") to the employer for all documents related to the allegations against the grievor. She indicated that in January 2012, she received only a fraction of the documents and that most pages had been redacted under the *ATIA.*

[36] The grievor's representative asked specifically for the complete investigation report that led to the termination of the grievor's employment and for a copy of the inmate's Offender Management System ("the O.M.S.").

[37] As for the particulars about the grievor's medical condition, as requested by the employer, the grievor's representative indicated that she was in the process of providing them to the employer.

[38] Counsel for the employer reiterated that he would be prepared to share with the grievor's representative all the documents that he intend to rely on at the hearing. He also indicated that restrictions under the *ATIA* prevent the employer from disclosing some information. He referred me to paragraph 226(1)(*e*) of the *Act,* under which adjudicators have the authority to order the production of such documents.

III. <u>Reasons</u>

[39] Before addressing the issues raised at the preliminary hearing, I would like to point out that this decision is limited to the preliminary issues and that it does not address or dispose of any of the arguments about the merits of these grievances.

A. **Publication ban, hearing in private and documents sealed**

[40] Under common law, decision makers, such as adjudicators operating under the *Act*, are the masters of their own proceedings. For instance, decision makers have the discretion to determine the process that will govern their proceedings. That discretion must be exercised in accordance with the rules of natural justice and procedural fairness. Moreover, as stated by the Supreme Court of Canada in *Dagenais, Sierra Club of Canada* and *Vancouver Sun (Re)*, the decision maker's discretion must be exercised within the confines of the *Charter*.

[41] Paragraph 2(*b*) of the *Charter* guarantees freedom of expression. It reads as follows:

> ***2.*** *Everyone has the following fundamental freedoms*:
>
> . . .
>
> (b) *Freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication . . .*

[42] The Supreme Court of Canada in *Sierra Club of Canada* and *Vancouver Sun (Re)* found that freedom of expression includes the public's right to know about what happens in court proceedings, which is often referred to as the "open court principle". As stated by the Supreme Court of Canada in those decisions, the open court principle is a cornerstone of our democratic society.

[43] Section 1 of the *Charter* protects the open court principle, ". . . subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." In *Dagenais, Sierra Club of Canada* and *Vancouver Sun (Re),* the Supreme Court of Canada decided that the open court principle could be limited only to the extent necessary to protect the proper administration of justice and that, therefore, proceedings are presumptively open to the public.

[44] The parties do not dispute and I find that the open court principle applies to quasi-judicial tribunals and to the proceedings before me. As stated as follows by the Supreme Court ofCanada in *Vancouver Sun (Re):*

. . .

> *23. This Court has emphasized on many occasions that the "open court principle" is a hallmark of a democratic society and applies to all judicial proceedings . . .*
>
> *. . .*
>
> *25. Public access to the courts guarantees the integrity of judicial process by demonstrating that "justice is administered in a non-arbitrary manner, according to the rule of law":* Canadian Broadcasting Corp. v. New Brunswick (Attorney General), supra*, at para.22. Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts.*
>
> *26. The open court principle is inextricably linked to the freedom of expression protected by s. 2(*b*) of the* Charter *and advances the core values therein . . .*
>
> *. . .*

[45] The Public Service Labour Relations Board has also recognized in the Policy that the open court principle applies to proceedings under the *Act*, except only in very limited and exceptional situations. As follows, the Policy makes it clear that the public is informed of hearings, which are public:

> . . .
>
> *The Board's website, notices, information bulletins and other publications advise parties and the community that its hearings are open to the public. Parties that engage the Board's services should be aware that they are embarking on a process that presumes a public airing of the dispute between them . . . scrutiny when giving evidence before the Board, and that they are more likely to be truthful if their identities are known. Board decisions identifying parties and their witnesses by name and may set out information about them that is relevant and necessary to the determination of the dispute.*
>
> *. . .*
>
> *In exceptional circumstances, the Board depart from its open justice principles, and in doing so, the Board may grant requests to maintain the confidentiality of specific evidence and tailor its decisions to accommodate the protection of an individual's privacy (including holding a hearing in private, sealing exhibits*

> *containing sensitive personal information or protecting the identities of witness or third parties).*

. . .

[46] In this case, it is not in dispute and I find that, normally, deciding whether to place the grievor's name on the public hearing list, whether the hearing should be held in public or whether certain documents should be sealed, engages the open court principle.

[47] 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.

[48] 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. <u>Application of the Dagenais/Mentuck test</u>

[49] 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.

a. <u>Is such an order necessary to prevent a serious risk?</u>

[50] The argument of the grievor's counsel for not disclosing the grievor's name, for holding the hearing in private and for sealing the documentary evidence rests on two grounds. First, her representative maintained essentially that the facts on which the grievor intends to rely and testify about are so difficult for her and serious that her privacy would be invaded, she would feel intimidated and she would be traumatized again if she had to testify in an open proceeding or if her identity were made known.

[51] I am not convinced by those arguments. In my view, the party trying to limit or restrict the open court principle bears the burden of justifying a limitation to the constitutionally protected right to information. It has to not only prove that the limitation is necessary but also that no alternative measures are possible and that the proposed order is the least intrusive way to prevent a substantial risk to a real, important public interest.

[52] I agree with counsel for the employer that, although it might be very difficult for the grievor, no evidence was presented which justifies setting aside the open court principle on that basis. The grievor's counsel did not adduce evidence that the grievor's personal situation warrants limiting the open court principle in this case to protect the proper administration of justice. Again, I insist that, as decided by the Supreme Court of Canada in *Dagenais* and *Sierra Club of Canada*, the open court principle is one of the hallmarks of our democratic society, and it applies to both hearings and to records of proceedings (see *Sierra Club of Canada* and *Vancouver Sun (Re))*. It can be limited only in very exceptional circumstances. In my opinion, the grievor did not provide a sufficient evidentiary basis demonstrating that her personal situation warrants that the open court principle should be limited.

[53] The grievor's other argument is that, since she is also the complainant in the case before the criminal court, if her name were mentioned on the hearing list and in the eventual decision, the public would be able to link that criminal case to two grievances with which I am seized. Thus, the complainant's name in the case before the criminal court would be published, contrary to the criminal court's publication ban order.

[54] As mentioned earlier, the Supreme Court of Canada, in *Dagenais* and *Sierra Club of Canada,* found that the open court principle can be limited only to the extent that it protects the proper administration of justice and that proceedings before a court or quasi-judicial tribunal are therefore presumptively open to the public. In this case, it was noted that the criminal court issued a publication ban on any information that could identify the complainant in its case. It was also noted that the complainant before the criminal court is the grievor. The notion of "public interest" referred to in the Supreme Court test includes the notion of the administration of justice. The proper administration of justice is, in my opinion, an important public interest in the context of adjudication. Therefore, if I allowed the mention of the grievor's name on either the hearing list or in the decision, there is a risk of a link being made between the grievor in the present matters and the criminal court complainant. The unintended result would be the contravention of the criminal court's publication ban order, which would not be in the interest of the administration of justice. In my opinion, even though two different independent forums are involved, namely the criminal court and the adjudication proceedings before me, the parties to these forums may not be the same and the facts at issue may be different, depending on the forum in which they are debated the risk of a link is real. Indeed, a real risk exists of the public being able to identify the grievor as the same person who is the complainant before the criminal court. This would constitute, in my opinion, an interference with the proper administration of justice, even though it may have unintended. This interference is a serious risk to an important public interest in the context of adjudication where reasonably alternative measures will not prevent the risk.

2. Whether the salutary effects of the order would outweigh its deleterious effects on the public's right to open and accessible court proceedings

[55] I have concluded that it was not established that the grievor's personal interests justify making an exception to the open court principle. However, in this case, a risk exists of interference with the proper administration of justice if the grievor's name were mentioned on the public hearing list or in my decision. Thus, I must decide whether the positive effects of limiting the open court principle would outweigh its negative effects.

[56] As mentioned earlier, despite the publication ban being made by a different decision maker and under a different jurisdiction, it is in my view important for the

proper administration of justice and it is in the public interest that justice be exercised coherently. Although the public, as stated earlier, has the right to open and accessible court proceedings, in this case, a competing right, the coherent and proper administration of justice should prevail. At the very least, it would be unfortunate that a decision by an adjudicator to make a person's name public, had the perverse effect of contravening a publication ban made earlier by a criminal court.

[57] Counsel for the employer argued that, in addition to the fact that the grievor did not discharge her burden of justifying a limitation to the open court principle, the criminal court's publication ban order would not be violated if measures such as not identifying the institution and referring to the inmate as "inmate X" were taken. He maintained that, with those measures in place, ordinary members of the public would not be able to link the two cases.

[58] Although I agree with counsel for the employer that the administrative measures he proposed may somewhat limit the possibility that a link could be made between the two proceedings, in my view, there is still a real risk that the proposed measures may lead to the identification of the complainant in the criminal proceedings, especially if the fact patterns described in both proceedings end up being further similar or overlapping. I believe that public interest and justice would be better served if the grievor's full name was not mentioned on the public hearing list or in my decision. For that reason, and given the criminal court publication ban order, I believe that, in these exceptional circumstances, the grievor should be referred to only by the initials "N. J." on the public hearing list and in my decision.

[59] In addition to not publishing the grievor's name, counsel for the grievor asked that the hearing be held in private and that it be limited to the parties directly involved. She also asked that all documents entered into in evidence before me be sealed.

[60] In my view, there is simply no evidence or reason to support holding the hearing in private and sealing the documents. It is not in dispute that the criminal court's publication ban order is very narrow in scope. At the hearing, the parties agreed that the scope of the order is only to limit the publication of any information that could identify the complainant's name. I agree with counsel for the employer that nothing in the order restricts the public's access to the trial or seals the documents entered into evidence. For the reasons stated earlier, the courts have found that the open court

principle may be limited only to the extent necessary to protect the proper administration of justice; otherwise, proceedings should be open to the public. Although counsel for the grievor asked me to go beyond the criminal court's order, with the exception of the order itself, no evidence supports her request. Therefore, counsel for the grievor's request for a private hearing and for the sealing of documents entered into evidence before me is denied.

[61] In their submissions and at the preliminary hearing, the parties indicated that they would not object to the grievor or, if necessary, the inmate, testifying in private. Although the parties cannot waive the open court principle by an agreement, nevertheless, I am prepared to consider the parties' request at the hearing if or when the need arises. In the same vein, if the criminal court order varies before a final decision is rendered on the grievances with which I am seized, the parties could bring the request before me again for reconsideration of the components of this decision dealing with anonymization.

B. <u>Production of documents</u>

[62] Counsel for the grievor's requested the full disclosure of documents related to her termination, including a complete copy of the investigation report and its appendices as well as the O.M.S. record related to the inmate. As for the employer, its counsel indicated that, if the grievor will rely on medical evidence, the particulars of her medical condition should be shared with the employer.

[63] Given the circumstances, I agree with both parties that it is important that both sides have the necessary time to consult the documentation and prepare for the hearing scheduled for February 2013. As noted earlier and as correctly identified by counsel for the employer, I have authority under paragraph 226(1)*e*) of the *Act* to order production of documents that may be relevant. I find that the requested documents may be relevant and therefore order their production. However, in light of the criminal court's publication ban order described above and in the interest of justice, I find that certain restrictions should be imposes on the disclosure of the produced documents so as not to inadvertently reveal the identity of the complainant in the criminal proceedings.

[64] In addition, certain of these documents contain sensitive information involving third parties or are related to the security of an internal operation of a correctional

facility. Therefore, certain restrictions with respect to the handling of the documents are appropriate in the circumstances. I note that these restrictions are applicable only with respect to the disclosure of the produced documents and do not apply to what is to occur with any such document which may subsequently be adduced as evidence as an exhibit in the proceedings before me. The issue of restrictions, if any, to be placed on exhibits shall be dealt with if or when the need arises.

[65] For all of the above reasons, I make the following order:

(The Order appears on the next page)

IV. Order

[66] The grievor's request that her name not be mentioned is granted to the extent that she is to be referred to on the Board's hearing list by the initials "N. J." Therefore, I order that, 45 days after this decision is issued, the grievor will be referred to only as "N. J." in the hearing list and eventual decision. The employer will be referred to as the "Correctional Service of Canada" in the hearing list and in the decision, with no reference being made to the specific institution at issue. During the 45 days which follow the issuance of this decision, the grievances will not appear on the public hearing list but the matters will remain scheduled to be heard on their merits.

[67] The grievor's request for a private hearing is denied.

[68] The grievor's request for the sealing of documents adduced as evidence is also denied.

[69] Pursuant to paragraph 226(1)(*e*) of the *Act,* I order the deputy head to provide unredacted copies of the following documents to the grievor's representative by January 4, 2013:

a) the employer's disciplinary investigation report that led to the grievor's suspension and termination of employment;

b) all documents related to the grievor's suspension and termination; and

c) the inmate's OMS as it relates to the grievor's suspension or termination of employment.

[70] Should the deputy head claim privilege with respect to any of the documents ordered disclosed, its representative shall inform the Registry in writing by December 18, 2012 of the alleged ground for privilege and shall identify in a general manner the documents to which the alleged ground for privilege attaches. The deputy head's representative shall not disclose to the grievor's representatives any document for which privilege is claimed until otherwise ordered.

[71] With respect to any of documents ordered disclosed, this order further directs as follows:

a) the documents will be disclosed to the grievor's representatives under the express condition that no copies, either in whole or in part, shall be made to anyone, including the grievor, except to file them as exhibits at the hearing.

b) the grievor's representatives should take all measures to ensure that the documents will be kept in a secure location to which no one other than themselves shall have access.

c) the grievor's representatives are authorized to share the information in the documents solely with the grievor for the purpose of preparing for the hearing and for presenting the grievor's case at the hearing.

d) for greater certainty, the grievor's representatives are not authorized to discuss with or otherwise disclose to the bargaining agent's staff or its representatives any of the information contained in the documents.

e) the grievor is not authorized to share any of the information contained in the documents with anyone other than the grievor's representatives.

f) once the grievior's representatives no longer require the documents, for the purposes stated earlier in this decision, they shall return them to the employer's representative.

[72] I also order the grievor's representative to provide to the employer's representative, no later than January 4, 2013, any particulars, medical certificates, medical reports, names of physicians, psychologists, and other such similar information concerning the grievor's medical condition that they intend to rely on at the hearing.

December 11, 2012.

Linda Gobeil,
adjudicator