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Files: 566-02-10219 to 10222
and 11892 to 11893

Citation: 2016 PSLREB 23

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

Before a panel of the Public Service Labour Relations and Employment Board

BETWEEN

A.B.

Grievor

and

TREASURY BOARD
(Royal Canadian Mounted Police)

Employer

Indexed as
A.B. v. Treasury Board (Royal Canadian Mounted Police)

In the matter of individual grievances referred to adjudication

Before: Chantal Homier-Nehmé, a panel of the Public Service Labour Relations and Employment Board

For the Grievor: Peter Engelmann and Ben Piper, counsel

For the Employer: Michel Girard, counsel

Heard at Ottawa, Ontario,
September 21, 2015.
(Written submissions filed October 9 and 14, 2015.)

I. Introduction

[1] This decision reconciles the grievor's right to a fair hearing, the disclosure prohibitions contained in the *Witness Protection Program Act* (S.C. 1996, c. 15; "the *Act*"), and the open court principle. The *Act*, a public document, provides for the establishment and operation of a federal program ("the Program") for the protection of certain persons providing information or assistance and respecting the protection of persons admitted to certain provincial or municipal protection programs.

[2] As described in its "Policy on Openness and Privacy", the proceedings of the Public Service Labour Relations and Employment Board ("the new Board") and those of its panels are consistent with the open court principle. Part of that policy is that in exceptional circumstances, it is appropriate to limit the concept of openness to ensure the proper administration of justice.

[3] To protect the Program's integrity, and in keeping with the Supreme Court of Canada's pronouncement in what is known as the "*Dagenais/Mentuck*" test, in my view, confidentiality measures are appropriate and necessary in the circumstances of this case. Therefore, I have anonymized the names of the individuals involved. Moreover, not anonymizing them would be of no benefit to the merits of this decision and could potentially jeopardize the Program. Consequently, confidentiality is extremely important in this context. Therefore, I have introduced the following anonymizations to maintain it:

i) the grievor's name will be referred to by the alias "A.B.", and the names of the individuals the grievor worked with will be referred to only by their job titles, i.e., "acting supervisor" and "director"; and

ii) the employer's operational construct at issue will be referred to as "the Program" (see paragraph 1).

[4] This interim decision deals with the following requests:

1. the grievor's request for the pre-hearing production of documents;

2. the employer's request for sealing the consent order which was finalised and signed off by the parties on September 23rd, 2015 and this decision;

3. the employer's request to anonymize the grievor's identity and those of the persons who work for the Program;

4. the employer's request to not refer to the Program and to the *Act*; and

5. the employer's request to redact the record.

[5] For the following reasons, I am satisfied that the requested documents and the main issues in dispute before the new Board are rationally linked. The documents may be relevant to those main issues and should be disclosed to the grievor's counsel, subject to the same strict confidentiality measures that the parties agreed to in the consent order and the prohibitions contained in the *Act*.

[6] In my view, the confidentiality measures and the disclosure procedure described in the consent order comply with section 11 of the *Act* while providing the grievor with a true opportunity to a fair hearing.

[7] The employer's requests to redact the references to the *Act*, to seal the consent order, and to seal this decision are denied. The employer has not relieved itself of the burden of establishing that these measures meet the requirements of the *Dagenais/Mentuck* test.

[8] The employer's request to anonymize the grievor's identity and those of the persons who work for the Program is granted.

[9] The employer's request to redact the record is granted.

II. Background

[10] On July 10, 2014, the bargaining agent filed two grievances challenging the decision of the Royal Canadian Mounted Police (RCMP) to suspend the grievor without pay pending the outcome of a security review and to suspend the RCMP reliability status (RRS), which were imposed for allegedly having exhibited a variety of undesirable behaviours that brought into question the grievor's reliability and trustworthiness with respect to protecting the RCMP's information and assets.

[11] When the suspension grievances were filed, the grievor worked in the RCMP's Federal Policing Branch. The grievor alleged in them that the RCMP breached the rules of procedural fairness and applicable policies, including but not limited to its "Security

Manual". It was also grieved that the decision and the process outlined in the suspension letter constituted disguised discipline and discrimination based on disability, contrary to article 43 of the Health Services Group collective agreement concluded between the Treasury Board and the Professional Institute of the Public Service of Canada ("the collective agreement") and the *Canadian Human Rights Act* (R.S.C. 1985, c. H-6). These grievances were referred to adjudication on November 5, 2014.

[12] On August 25, 2015 the grievor's RRS was revoked. Consequently, the grievor's employment was terminated on September 1, 2015 retroactive to June 19, 2014. These grievances were referred to adjudication on December 21, 2015 and were joined to the suspension grievances. Therefore, this decision applies to files 566-02-10219 to10222 and 566-02-11892 and 11893.

[13] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; *PSLREBA*) was proclaimed into force (SI/2014-84), creating the new Board to replace the former Public Service Labour Relations Board ("the former Board") as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) before November 1, 2014, is to be taken up and continue under and in conformity with the *PSLRA* as it is amended by sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*. Consequently, this proceeding was heard as a panel under the *PSLREBA*.

[14] On September 21, 2015, a hearing was held to address the parties' request to use the hearing dates to deal with the issues of disclosure and the application of the *Act*.

[15] Until then, no audio recordings or evidence that formed the basis of the employer's conclusions to suspend the grievor's RRS and suspension without pay had been produced. During the security review, the grievor was played only selected clips of audio recordings, and the investigation reports provided for comments had been

heavily redacted. The grievor alleged that its rights to procedural fairness had been breached.

[16] The grievor requested the pre-hearing production of material it viewed as arguably relevant to the issues raised in the grievances. On September 23, 2015, the parties reached an agreement as to how the documents and information would be produced and disclosed, except for the following two items:

i) copies of any emails, correspondence, or documents involving the grievor and specific RCMP employees, including the acting supervisor, the director, and any other employer representative, which are about the grievor's job performance; and

ii) copies of any emails, correspondence, or documents involving the grievor and RCMP employees or any other employer representative about any conflict or dispute between the grievor and the director of the Program or the grievor's immediate supervisor.

[17] At the parties' request, I proceeded to hear arguments on producing and disclosing those two sets of items.

III. Summary of the arguments

A. The grievor's production request

1. For the grievor

[18] When the grievor was suspended without pay, the grievor had been working in the federal public service for over 20 years. The grievor began working for the RCMP in April 2013.

[19] After five months of working for the RCMP, the grievor alleged having suffered regularly aggressive and demeaning comments from the acting supervisor. The grievor submitted having suffered harassing behaviour from the director as well. The grievor also suffered isolating treatment from its acting supervisor, who was also a colleague throughout much of the grievor's employment with the RCMP. That person was responsible for reviewing reports and had extensive experience with the Program. The grievor filed a harassment complaint against both of them.

[20] The grievor alleged that the director and acting supervisor indicated that the grievor was not a good fit and that they would ensure that the grievor left the Program, willingly or not. It was submitted that all these issues form part of the substance of the internal harassment complaint currently under investigation. Furthermore, it was submitted that the grievor's evidence supporting the disguised discipline allegation is tied to the grievor's relationship with those two individuals where the grievor worked, and therefore is relevant to these grievances.

[21] The grievor argued that the director and the acting supervisor were behind the alleged disguised discipline. The suspension of the grievor's RRS and the subsequent suspension without pay represented retaliation and the perpetuation of the ongoing workplace conflict. For that reason, documents and correspondence involving the grievor and RCMP employees or any other employer representative about any conflict or dispute between the grievor and the director of the Program or the grievor's immediate supervisor should be produced.

[22] The core of the employer's security review was based on errors the grievor made while carrying out its duties. The employer's allegations for justifying suspending the RRS and suspending the grievor without pay are performance related and therefore justify the pre-hearing production of all documents and correspondence involving the grievor and specific RCMP employees, including the director, the acting supervisor, and any other employer representative, which relate to the grievor's job performance.

[23] The grievor submitted that the rules of natural justice require that the employer produce the requested documents and information that are necessary to enable the grievor to participate fully in the adjudicative process. The basic criterion for ordering the production of documents at the pre-hearing stage is determining whether they may be arguably, potentially, or seemingly relevant or that they have a semblance of relevance to the issues in dispute.

[24] In the grievor's view, all documents that are arguably or seemingly relevant or that have a semblance of relevance must be produced. It was argued that a liberal view should be taken with respect to producing documents at the pre-hearing stage. The test for relevance at the pre-hearing stage is much broader and looser than the test for relevance at the hearing stage.

[25] Relying on *Sather v. Deputy Head (Correctional Service of Canada)*, 2013 PSLRB 95 at para. 45, the grievor submitted that I have authority under s. 20(f) of the *PSLREBA* to ". . . compel, at any stage of a proceeding, any person to produce the documents and things that may be relevant."

[26] The grievor relied on the following authorities in support of its request for pre-hearing disclosure: Brown and Beatty, *Canadian Labour Arbitration* (4th edition) at para. 3.1400; *Zhang v. Treasury Board (Privy Council Office)*, 2010 PSLRB 46*; Sather, Toronto District School Board v. C.U.P.E., Loc. 4400* (2002), 109 L.A.C. (4th) 20; *Nasrallah v. Deputy Head (Department of Human Resources and Skills Development)*, 2012 PSLRB 12; and *Canada (Attorney General) v. Frazee*, 2007 FC 1176.

2. <u>For the employer</u>

[27] The employer took the position that only the information that was before it when it decided to suspend the grievor's RRS and to suspend the grievor without pay should be disclosed. The employer asserted that although some of the information relating to the grievor's work was relevant for the purposes of this hearing, it contains sensitive information, which is prohibited from disclosure by section 11 of the *Act* and is subject to public interest privilege. The employer stated that it would not produce any information contained in the grievor's disclosure request unless the new Board so ordered it to.

[28] The employer submitted that much of the requested information would touch upon revealing the identities and roles of persons who provide protection or directly or indirectly help provide protection and the details of the means and methods by which protected persons are protected. These details must be kept confidential for those means and methods to continue to function successfully. Once in the public domain, that information could put the security of those persons at risk, thus compromising the Program's integrity. It would not be in the public interest to have that information enter the public domain. The RCMP will claim public interest privilege over that information.

[29] The employer submitted that any information that reveals the locations or the identities of individuals who may or may not be determined protected is irrelevant to the grievances. It stated that producing such irrelevant information to the grievor would put all of them at risk. Moreover, ss. 11(1)(b) and (c) of the *Act* prohibit

disclosing that information if doing so could cause substantial harm to a protected person or to others.

[30] Paragraph 11.2(2)(c) of the *Act* provides the RCMP Commissioner with the discretion to make a disclosure described in s. 11(1) (a) if the ". . . Commissioner has reasonable grounds to believe that the disclosure is essential for the purposes of the administration of justice . . . ." In the employer's view, the information the grievor requested is not essential and is not relevant to the hearing.

B. Sealing the consent order and the production request decision

1. For the employer

[31] Should the new Board grant the disclosure request, the employer submitted that the production order and the consent order should be sealed. In support of its request, the employer reiterated its position that such measures are necessary to prevent a serious risk to the public interest. It submitted that although the open court principle applies to proceedings before the new Board, in some instances, limits can be imposed. The employer referred to the *Dagenais/Mentuck* test, which was reformulated in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41.

[32] The Supreme Court originally developed that test to determine if restrictions should be imposed on the open court principle. According to the reasoning in those decisions, the employer contended that an adjudicator must first decide whether an order limiting the open court principle is necessary to prevent a risk to an important interest. Second, the adjudicator must decide whether the beneficial effects of the order would outweigh its negative effects on the public's right to open and accessible adjudication proceedings.

[33] In its written submissions, the employer stated that many of the documents contain information protected under ss. 11(1)(b) and (c) of the *Act*. Much of the requested information would touch upon revealing the Program's employees and their roles and functions and the details of the Program's covert protection techniques. For all of these reasons, it would not be in the public interest to have that information enter the public domain. Furthermore, it is protected under ss. 11(1)(b) and (c).

[34] Therefore, the employer requested that the consent order and this decision be sealed. Alternatively, that information should be withheld, edited, or redacted from any material produced for the purposes of these grievances.

2. <u>For the grievor</u>

[35] Counsel for the grievor referred to the new Board's Policy on Openness and Privacy, which indicates that it ". . . maintains an open justice policy to foster transparency in its processes, accountability and fairness in its proceedings" and that it ". . . conducts its hearings in public, save for exceptional circumstances."

[36] Restrictions to the open court principle, such as sealing orders or hearings in private, will generally be assessed according to the *Dagenais/Mentuck* test, which asks the following:

i) whether such an order is necessary to prevent a serious risk to an important interest in the context of litigation because reasonably alternative measures will not prevent the risk; and

ii) whether the beneficial effects of the order, including the effects on the right of civil litigants to a fair trial, outweigh its negative effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[37] Accordingly, under that test, a sealing order should be granted only when the following three conditions are met:

i) it is necessary, to prevent a serious risk to an important interest;

ii) reasonably alternative measures will not prevent the risk; and

iii) the beneficial effects of the order outweigh its negative effects.

[38] The *Act* also deals with disclosing the information at issue in these proceedings. The employer suggested that an interviewee's name and where his or her interview took place would fall under s. 11(1)(a) of the *Act* as information ". . . from which may be inferred, the location or a change of identity . . ." of a protected person. The grievor agreed that in some cases, it may be true, provided that the interviewee then became a "protected" person under s. 11(1)(b). It is impossible to determine in the abstract

whether disclosing such information "could result in substantial harm" (s. 11(1)(b)) to any specific protected person. The employer has presented no evidence in support of its position.

[39] Moreover, there is no basis for concluding that the evidence could not be made public with any sensitive information redacted. The grievor agrees that this information should be redacted from the documentation it is requesting. Those redactions should be sufficient to limit any risk of substantial harm to protected persons, particularly in the absence of evidence to the contrary from the RCMP.

[40] It was submitted that beyond the protections contained in the consent order, there is no information in the consent order and nothing anticipated in the decision on the grievor's production request that would put any individuals or confidential information at risk. As a result, the RCMP did not meet its burden of justifying sealing this decision or the consent order.

C. The employer's request to anonymize those involved

1. For the employer

[41] In addition, the employer requested that certain information be anonymized based on limits to the open court principle necessary to prevent a serious risk to the public interest.

[42] The employer requested consistency with the wording of the consent order. It also requested that neither the grievor's name nor that of anyone listed in the exhibits be used.

[43] Many of the documents and audio recordings that the grievor requested be produced contain information protected under ss. 11(1)(b) and (c) of the *Act*. The parties have agreed to "gray seal" information that appears at sections 2(c), 3(c), 4(d), 5(c), 7(d), and 8(c) of the consent order, to outline to them information that is protected by public interest privilege as well as by ss. 11(1)(b) and (c) and yet to still provide a means to view it.

[44] In the consent order, the parties agreed that any document submitted into evidence that was gray redacted will be subject to the employer requesting it be sealed. In the event it is not sealed, the employer will request that what is gray redacted be

fully redacted, since it deems that measure necessary to prevent a serious risk to the public interest for the reasons outlined earlier in this decision.

[45] Should the grievor's production request be granted, the employer will gray-redact information protected under section 11 of the *Act*. Furthermore, at the hearing, if any documents containing gray redactions are submitted into evidence, the employer will request that the gray-redacted parts be fully redacted since it deems that measure necessary to prevent a serious risk to the public interest.

[46] The employer relied on the arguments presented on the limits to the open court principle for sealing the consent order and the production order in support of its request to redact and anonymize the record.

2. For the grievor

[47] With respect to the identities of individuals who may or may not be determined protected persons, the grievor submitted that the consent order already contemplates redacting that information. Those redactions were consented to because that information has no apparent relevance to these proceedings. In the absence of evidence to the contrary, the grievor did not agree that disclosing that information to counsel would put anyone at risk, in light of the many other safeguards contained in the consent order.

[48] The grievor accepted that many of the documents and evidence it requested would include information covered by ss. 11(1)(b) and (c) of the *Act*, which would include the names of Program employees as well as information on how it operates.

[49] However, like the information subject to s. 11(1)(a) of the *Act*, there is no basis for concluding that the evidence could not be made public with any sensitive information redacted. Specific Program employees could be referred to by initials or by an alternative individual alias, which should be more than sufficient to limit any risk of substantial harm to a protected person, to a person providing protection, or to that person's family, particularly in the absence of evidence to the contrary from the RCMP.

[50] With respect to the employer's argument that "[p]roducing this information, the name of the interviewee and where his/her interview took place to the lawyers for the grievor would put all of them at risk as they would have information of interest to the adversaries of the interviewee", the grievor submitted that the consent order already

contemplates redacting that information. Again, those redactions were consented to because that information has no apparent relevance to these proceedings.

[51] With respect to the employer's position that evidence that is gray redacted be fully redacted, the grievor strongly objected to any redaction of the evidence that would be provided to counsel. Given the lengthy confidentiality measures contained in the consent order, there is no basis for concluding that it could cause substantial harm to a protected person, to a person providing protection, or to that person's family.

D. The employer's request to not refer to the Program and to the *Act*

1. For the employer

[52] The employer submitted that no reference be made to the *Act*. Otherwise, someone could link the grievor to the Program. The employer based its argument on its commitment to protecting not only persons admitted to the Program but also those who assist with or who are involved directly or indirectly in protecting people. The employer relied on the same arguments raised in support of its request to seal the consent order and this decision.

2. For the grievor

[53] The grievor agreed that the *Act* should not be referred to explicitly. Referring to the full names of those involved could identify the grievor and others as directly or indirectly providing protection and should the grievor be reinstated to the position could violate the *Act*.

E. The employer's request to redact the record

1. For the employer

[54] For the same reasons and arguments listed above, the employer requested that references to the *Act* not be disclosed or advertised throughout the entire adjudication process, including in correspondence. The employer also requested that certain exhibits the grievance forms and the production request filed with the new Board be redacted for the same reasons.

2. For the grievor

[55] The grievor did not object to the employer's requests.

IV. Reasons

A. The grievor's production request

[56] The matters before the new Board raise issues pertaining to the grievor's performance of its duties, disguised discipline, and discrimination.

[57] The grievor requested the following documents and information:

i) copies of any emails, correspondence, or documents involving the grievor and specific RCMP employees, including the acting supervisor, the director, and any other employer representative, which are about the grievor's job performance; and

ii) copies of any emails, correspondence, or documents involving the grievor and RCMP employees or any other employer representative about any conflict or dispute between the grievor and the then-director of the Program or the grievor's immediate supervisor.

1. The new Board's authority to order production

[58] The new Board's authority to order documents produced before a hearing is based on its enabling legislation. A panel of the new Board has the power to exercise any of the new Board's powers, which are set out in sections 20 to 23 and 39 of the *PSLREBA*, including the power to compel, at any stage of a proceeding, any person to produce documents and things that may be relevant.

[59] Section 20 of the *PSLREBA* states in part as follows:

> ***20*** *The Board has, in relation to any matter before it, the power to*
>
> . . .
>
> *(e) accept any evidence, whether admissible in a court of law or not; and*
>
> *(f) compel, at any stage of a proceeding, any person to produce the documents and things that may be relevant.*
>
> [Emphasis added]

[60] The initial step when determining whether documents should be produced is to determine whether they may be relevant to the grievances before the new Board. When

making that determination, the issues in dispute and the documents sought must be rationally linked. In *Canada (Attorney General) v. Quadrini* [2011] F.C.A 115, the Federal Court of Appeal stated at paragraph 37 that the legal test to be applied when making a request for disclosure is to establish a realistic possibility that the documents may be relevant to an issue in dispute in proceedings that were before the former Public Service Labour Relations Board (the former Board). Mere speculation as to their possible relevance is not sufficient.

[61] In *Zhang*, the former Board cited Brown and Beatty, which details as follows the parameters to be applied to determine whether a production order should be issued:

> . . .
>
> *3:1400 Pre-hearing Disclosure*
>
> . . .
>
> *The requirements of natural justice require that one party not unfairly surprise the other, and accordingly, some arbitrators have required pre-hearing disclosure of information and documents that are necessary to enable a party to participate properly in the adjudicative process.*
>
> . . .
>
> *3:1420 Production of documents*
>
> *The purpose of production of documents is somewhat different from the requirement that particulars be provided, in that production of documents assists a party in actually preparing its case, whereas particulars simply inform the other side of the case it will be required to meet….*
>
> . . .
>
> *3:1422 Ordering production*
>
> *The basic criterion for ordering production of documents is a determination of whether they may be relevant to the issues in dispute. And in that regard, the test at the pre-hearing stage would appear to be either "arguably relevant" or "potentially relevant".*
>
> . . .

[62] That extract is consistent with the new Board's jurisprudence. As the new Board stated in *Sather* v. *Deputy Head (Correctional Service of Canada)*, 2015 PSLREB 45, at

the pre-hearing stage, there is no need to go beyond a finding that the requested documents have arguable relevancy. The new Board has broad power to compel production, which is rooted in the requirements for natural justice.

[63] Consistent with that approach, in *Toronto District School Board*, the arbitrator endorsed the well-established principle that a liberal view should be taken with respect to the production of documents at the pre-hearing stage. He expressed the following

> *. . . (iii) All documents which are arguably or seemingly relevant or have a semblance of relevance must be produced. The test for relevance for the purposes of pre-hearing is a much broader and looser test than the test of relevance at the hearing stage. A board of arbitration, at the pre-hearing stage, is simply not in a position, and ought not to lay down precise rules as to what may be relevant during the course of the hearing. . . .*

2. <u>The subject matter of the grievances</u>

[64] The grievor's main allegations are that the core of the employer's decision to suspend the RRS was based on inappropriate behaviour and errors made in the accomplishment of the grievor's duties. The grievor submitted that therefore, the underlying reasons for the suspensions are performance related. Moreover, the grievor alleged harassment by the persons the grievor reported to and who ultimately decided to suspend the grievor without pay pending the outcome of the investigation, which amounted to disguised discipline.

[65] In *Frazee*, the Federal Court stated that the concept of disguised discipline is a well-known and necessary controlling consideration that allows an adjudicator to look behind an employer's stated motivation to determine its actual intention. In this case, the grievor was suspended without pay pending an investigation of a security review. As stated in the grievance, it was alleged that those measures were disguised discipline.

[66] When determining whether an employer's measures constitute disguised discipline, an adjudicator must examine the effects of its actions on the employee. The impact of the employer's decision must be proportionate to its administrative rationale, which raises the question of whether the employer's action was a reasonable response to honestly held operational considerations.

[67] The grievor alleged disguised discipline and discrimination on the employer's part and requested copies of all emails, correspondence, and documents about any conflict or dispute between the grievor and the director of the Program or the grievor's immediate supervisor. In that context, I am satisfied that there is a realistic possibility that the documents may be relevant to the grievances. The documents sought could shed light on the employer's conduct or intentions when it suspended the grievor without pay and suspended the RRS and that those documents should be disclosed to the grievor as they may be relevant to the matters before the new Board.

3. Balancing competing interests

[68] Arbitral jurisprudence has recognized that determining whether to order the production of documents is a matter of discretion that requires balancing competing interests, those opposing the disclosure for privilege or confidentiality reasons against the interests of a fair hearing and the other party's need for that information to adequately present its case. Grievors have a right to a fair hearing and must benefit from a real opportunity to present their cases. That right must be balanced against the employer's concerns with respect to confidentiality and privilege.

[69] I must determine if the documents, despite the fact that they may be relevant to the matters before the new Board, should not be disclosed because doing so would violate section 11 of the *Act* or because they are confidential. Although the new Board's authority to order documents produced before a hearing is a broad discretionary power, that power is limited by legislative exceptions. The employer opposed the disclosure on the grounds that the information is not relevant and that its disclosure would violate section 11. The grievor requires the documents to present its case and to establish allegations of disguised discipline and discrimination against the employer.

4. Does section 11 of the *Act* prohibit the disclosure?

[70] The *Act* deals with three categories of information. Section 11 states as follows:

> *Protection of Information*
>
> *Disclosures prohibited*
>
> ***11 (1)*** *Subject to sections 11.1 to 11.5, no person shall directly or indirectly disclose*

> ***(a)*** *any information that reveals, or from which may be inferred, the location or a change of identity of a person that they know is a protected person;*
>
> ***(b)*** *any information about the means and methods by which protected persons are protected, knowing that or being reckless as to whether the disclosure could result in substantial harm to any protected person; or*
>
> ***(c)*** *the identity and role of a person who provides protection or directly or indirectly assists in providing protection, knowing that or being reckless as to whether the disclosure could result in substantial harm to*
>
> *(i) that person,*
>
> *(ii) a member of that person's family, or*
>
> *(iii) any protected person.*
>
> *Means and methods of protection*
>
> ***(2)*** *For the purpose of paragraph (1)(b), information about the means and methods by which protected persons are protected includes information about:*
>
> ***(a)*** *covert operational methods used to provide protection;*
>
> ***(b)*** *covert administrative methods used to support the provision of protection;*
>
> ***(c)*** *any means used to record or exchange confidential information relating to protection or used to gain access to that information; and*
>
> ***(d)*** *the location of facilities used to provide protection.*
>
> *Non-application — protected or other person*
>
> ***11.1*** *Paragraph 11(1)(a) does not apply to*
>
> ***(a)*** *a protected person who discloses information about themselves, if the disclosure could not result in substantial harm to any protected person; or*
>
> ***(b)*** *a person who discloses information that was disclosed to them by a protected person, if the disclosure could not result in substantial harm to any protected person.*

[71] The grievor requested copies of any emails, correspondence, or documents involving the grievor and specific RCMP employees, including the director and acting

supervisor or any other employer representative, about the grievor's job performance. Although the employer did not present any evidence about any potential substantial harm to any person, it is possible that the requested documentation could contain information prohibited from disclosure under section 11 of the *Act*.

i. Section 11 (1) (a) Information that reveals, or from which may be inferred, the location or a change of identity of a person that they know is a protected person

[72] The employer submitted that any information that reveals the locations or identities of individuals who may or may not be determined protected persons is not relevant to the grievances, to which the grievor agreed. This is also reflected in the consent order, in which the parties consent to fully redact the identities and locations of protected and non-protected persons. Since the parties agree that this information is not relevant to the proceedings, this issue is moot.

ii. Paragraph 11 (1) (b) Information about the means and methods by which protected persons are protected, knowing that or being reckless as to whether the disclosure could result in substantial harm to any protected person

iii. Paragraph 11 (1) (c) Identity and role of a person who provides protection or directly or indirectly assists in providing protection, knowing that or being reckless as to whether the disclosure could result in substantial harm to that person, a member of that person's family, or any protected person

[73] The employer did not present any evidence to establish that the requested documents would contain such information. It is impossible to determine in the abstract whether disclosing that information "could result in substantial harm" (s. 11(1)(b) of the *Act*) to any specific protected person or that person's family. Despite the lack of evidence, given the requested documentation, it is possible that the requested documents and evidence could include information covered by ss. 11(1)(b) and (c) of the *Act*, which would include the names of Program employees as well as information on how it operates. That information is prohibited from disclosure under ss. 11(1)(b) and (c) and 11(2) if it could result in substantial harm to that person or that person's family or any protected person.

[74] That said, according to the employer, so were the audio recordings for which disclosure was ultimately agreed to, as described in the consent order. Similar to the

information subject to s. 11(1)(a), there is no basis for concluding that the evidence could not be made available to the grievor's counsel subject to the same strict confidentiality measures that were agreed to in the consent order, i.e., redacting the names of protected and non-protected persons, locations, places and the means and methods by which protected persons are protected.

[75] Specific program employees should be referred to by initials or by an alternative individual alias, which should be more than sufficient to limit any risk of substantial harm to a protected person or to a person providing protection or to that person's family, particularly in the absence of evidence to the contrary from the RCMP.

[76] The employer did not present any arguments or evidence as to how emails, correspondence, or documents involving the grievor and RCMP employees or any other employer representative about any conflict or dispute between the grievor and the then-director of the program or the grievor's immediate supervisor would contravene the provisions of section 11 of the *Act*. In the absence of any evidence to the contrary, I cannot find that section 11 prohibits disclosing that information. Therefore, I find that the requested documents may be relevant to the matters in dispute as they are rationally linked to the grievances and should be disclosed to the grievor's counsel.

[77] The grievor has a right to a fair hearing and must benefit from a real opportunity to present their case. The documents sought are rationally linked to the matters that are before the new Board and may be relevant to issues that could become central to resolving the dispute. Although I have concluded that the documents should be disclosed, they could contain sensitive information prohibited from disclosure under the *Act*. For that reason, I consider that strict confidentiality measures and safeguards must be put in place to ensure that the *Act* is respected and that the people whom the federal government wishes to protect are protected. Therefore, at this point, the disclosure will be made consistent with the confidentiality measures that the parties agreed to in the consent order and with the agreed to redactions.

[78] This decision is not about the admissibility of the documents into evidence. This is the pre-hearing disclosure stage, and if the grievor wishes to introduce some of those documents during the hearing, the employer will have full opportunity to question their relevancy and to make any request about having them redacted or sealed or having portions of the hearing held in private.

B. Confidentiality requests

[79] The employer requested that the consent order and the production request decision be sealed. It requested that the *Act* not be specifically referenced and maintained that the identities of the grievor and those of persons whose role it is to provide protection, including those who directly or indirectly help provide protection, be anonymized. Furthermore, the employer maintained that the record should be redacted. In its view, all of these measures are necessary to prevent a serious risk to the public interest, which is the Program's integrity and the security of the individuals the *Act* seeks to protect.

[80] Those requests engage the open court principle. Decision makers, such as panels operating under the *PSLREBA*, are the masters of their proceedings and have the discretion to determine the process that will govern them. However, that discretion is not unfettered and must be exercised in accordance with the rules of procedural fairness and natural justice.

[81] The Supreme Court has repeatedly held that the open court principle is one of the hallmarks of our democratic society, and it applies to both hearings and to records of proceedings. It can be limited only in very exceptional circumstances, when no alternative measures are possible to prevent a substantial risk.

[82] Moreover, as the Supreme Court of Canada stated in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; and in *Vancouver Sun (Re)*, 2004 SCC 43; a decision maker's discretion must be exercised within the confines of the *Canadian Charter of Rights and Freedoms* ("the *Charter*"). Paragraph 2(b) of the *Charter* guarantees freedom of expression and states as follows:

> *Fundamental freedoms*
>
> ***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 . . .*
>
> . . .

[83] In *Dagenais*, *Sierra Club of Canada*, and *Vancouver Sun (Re)*, the Supreme Court of Canada found that freedom of expression includes the public's right to know what

happens in court proceedings. This is often referred to as the open court principle. The Court recognized that the open court principle is a cornerstone of our democratic society and that in accordance with s. 1 of the *Charter*, it can be ". . . subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." In those cases, the Court found 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.

[84] As mentioned by the former Board in *N.J. v. Deputy Head (Correctional Service of Canada),* 2012 PSLRB 129, the *Dagenais/Mentuck* test was reformulated in *Sierra Club of Canada* as follows:

. . .

> *(a) Whether 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) Whether the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.*

. . .

[85] The test is two-pronged. First, it must be determined if an order is necessary to prevent a serious risk to an important interest in the context of this hearing because reasonably alternative measures will not prevent the risk. Second, whether the beneficial effects of the sealing orders, including the effects on the grievor's right to a fair hearing, outweigh its negative effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible proceedings.

[86] It is well established that the party attempting 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 an important interest.

[87] The parties agreed that the open court principle applied to the proceedings before the new Board and made related submissions. The new Board recognizes that the open court principle applies to proceedings held under the *PSLREBA* and makes it clear that hearings held before it are open to the public and that only in exceptional circumstances will it deviate from its policy, which states as follows:

. . .

> *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, including the public availability of decisions. Parties and their witnesses are subject to public scrutiny when giving evidence before the Board, and they are more likely to be truthful if their identities are known. Board decisions identify parties and their witnesses by name and may set out information about them that is relevant and necessary to the determination of the dispute.*
>
> *At the same time, the Board acknowledges that in some instances mentioning an individual's personal information during a hearing or in a written decision may affect that person's life. Privacy concerns arise most frequently when some identifying aspects of a person's life become public. These include information about an individual's home address, personal email address, personal phone number, date of birth, financial details, SIN, driver's licence number, or credit card or passport details. The Board endeavours to include such information only to the extent that is relevant and necessary for the determination of the dispute.*
>
> *With advances in technology and the possibility of posting material electronically — including Board decisions — the Board recognizes that in some instances it may be appropriate to limit the concept of openness as it relates to the circumstances of individuals who are parties or witnesses in proceedings before it.*

. . .

[88] In exceptional circumstances, the new Board will depart from the open justice principle, and by doing so it may grant requests to maintain the confidentiality of specific evidence and tailor its decisions to accommodate protecting someone's privacy (including holding a hearing in private, sealing exhibits containing sensitive medical or personal information, or protecting the identities of witnesses or third

parties). It may grant such requests when they accord with applicable recognized legal principles.

[89] I agree with the employer that some of the information contained in the requested documentation could pose a serious risk to an important interest were it made public. For that reason, certain restrictions with respect to handling the documents are appropriate. However, for the reasons that follow, I do not agree that the consent order and the production request decision should be sealed. They contain no information that section 11 of the *Act* prohibits disclosing; therefore, at this point in these proceedings, there is no substantial risk to an important interest.

1. Employer's request for sealing the consent order and this decision

[90] The employer has not discharged its burden of establishing that making the consent order and this decision public would pose a serious risk to an important interest. The consent order and this decision do not contain information that section 11 of the *Act* prohibits disclosing. There is no evidence of a risk to an important interest. The consent order simply deals with the parties' agreement to disclose certain specific information, in accordance with strict confidentiality measures while respecting the prohibitions contained in the *Act*.

2. Employer's request for the anonymization of identities

[91] With respect to the employer's request to anonymize the names of the grievor, supervisor, director and other Program employees, the grievor agreed that references to individuals' names should be replaced by initials or an alternative that obscures their full names while still differentiating between them and making them identifiable to the parties and the new Board for adjudication purposes.

[92] As discussed, the *Act* contains specific prohibitions on disclosing information. Therefore, if I were to allow the grievor's name or those of Program employees to be mentioned, I agree with the employer that a risk would arise that Program adversaries could link those individuals and the Program, thus not only violating section 11 of the *Act* but also jeopardizing their safety. In my opinion, that would constitute an interference with the proper administration of justice, even though it might have been unintended. That interference would pose a serious risk to an important interest in the

context of adjudication when reasonable alternative measures would not prevent the risk.

[93] I must decide whether the beneficial effects of those measures, including the effects on the grievor's right to a fair hearing, outweigh their negative effects, on the right to free expression, which in this context includes the public interest in open and accessible court proceedings. Although the public has the right to open and accessible court proceedings, in this case, a competing right, the proper administration of justice, and the safety and security of individuals involved in the Program, should prevail.

[94] The public interest and justice would be better served if the grievor's full name as well as the names of individuals working either directly or indirectly in the Program are not mentioned on the public hearing list or in this decision. I believe that in these exceptional circumstances, the proper administration of justice warrants that the names of all individuals associated with the Program be anonymized. Therefore, as noted, the grievor should be referred to only as "A.B." in this decision, and the grievor's superiors should be referred to as "the director" and "the acting supervisor".

3. The employer's request to not refer to the Program and to the *Act*

[95] The employer requested that references to the Program under the *Act* not be disclosed or advertised throughout the entire adjudication process, including correspondence, to which the grievor did not object.

[96] In support of its request not to specifically refer to the *Act* and the Program, the employer submitted that it is committed to protecting not only persons admitted to the Program but also those who assist or are involved directly or indirectly in protecting protectees. The grievor agreed with the employer's request.

[97] As the former Board determined in *N.J.*, parties to adjudication cannot waive the open court principle by agreement. It is within the adjudicator's exclusive discretion to consider such requests and weigh them against the public's right to open and accessible court proceedings.

[98] The first step is to determine whether not referring to the Program and the *Act* are necessary to prevent a serious risk to an important interest in the context of this adjudication because reasonably alternative measures will not prevent the risk. The serious risk and important interest that the employer identified are the researching

capabilities of Program adversaries and protecting not only persons admitted to the Program but also those who assist or are involved directly or indirectly in protecting protectees. The employer is concerned that by referring to the *Act*, Program adversaries could link the grievor and others with the Program, thus jeopardizing their safety.

[99] The notion of "public interest" referred to in the Supreme Court of Canada test includes the notion of "the proper administration of justice". In this context, a decision maker's role is to ensure that the public's right to open and accessible proceedings is protected. In *N.J.*, the former Board recognized that the proper administration of justice is an important public interest in the context of adjudication. The object of the *Act* in this case is to ensure the protection of certain persons providing information or assistance respecting the protection of certain persons admitted to certain provincial or municipal protection programs. This *Act* was enacted to ensure the safety and security of persons admitted to these programs including those working directly or indirectly in the protection of persons admitted to these programs. The Program is considered to be an effective tool for law enforcement to combat terrorism and organized crime.

[100] With respect to the parties' agreement to not directly reference the *Act,* as mentioned earlier, the parties cannot agree to waive the open court principle. The reason advanced to justify not referencing the *Act* is the risk that adversaries of the Program could link the grievor and other individuals working at the RCMP to the Program, thereby jeopardizing their safety.

[101] The *Act* is a public document. As the employer indicated, some information about the Program and the *Act* is available publicly. In light of my order that the grievor and individuals working in the program be anonymized, I find no compelling reasons that could justify not referencing the Program or the *Act.* In the absence of evidence to the contrary, at this point in the proceedings, the anonymization is sufficient to ensure that the grievor and individuals working in the Program are protected. This measure represents the least intrusive measure to the right of the public to open and accessible proceedings.

4. Employer's request to redact the record

[102] The employer submitted that the grievance forms, production request, exhibits and all documents on the six files be redacted in accordance with the requested redactions by taking out references to the Program and *Act*, to which the grievor did not object.

[103] For the reasons listed above, at this point in the proceedings, there are no compelling reasons that could justify not referencing the Program or the *Act.*

[104] However, on the new Board's own motion and for the reasons listed above, the new Board orders the anonymization of the identities of the grievor, the acting supervisor, and the director on all documents contained in the new Board's files. The new Board also orders that the names of other employees whose role is to directly or indirectly provide protection shall be replaced by aliases.

[105] In order to allow for the anonymization of the documentation, the new Board shall temporarily seal the files for a maximum period of two weeks or less while the process for anonymization is ongoing. As explained above, this measure is necessary to ensure the adversaries to the Program do not link the grievor or anyone working in the Program. This interim measure represents the least intrusive measure on the public's right to open and accessible proceedings. The beneficial effects of this order which is the protection and safety of individuals who are directly or indirectly involved in providing protection under the *Act* outweigh the negative effects of the public's right to open and accessible proceedings.

V. Conclusion

[106] Should the circumstances of this situation change as the case progresses or should issues arise in the course of disclosing information to the grievor, the new Board is prepared to consider the parties' request at the hearing if or when the need arises with respect to having evidence presented in private or to sealing evidence or redacting documents.

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

(The Order appears on the next page)

VI. Order

[108] The employer is ordered to provide copies of the following documents to the grievor's counsel by April 18, 2016, subject to the same strict confidentiality measures the parties agreed to in the consent order that was issued on November 6, 2015 and to redact from those documents all names of protected and unprotected persons, locations and places:

> i) copies of any emails, correspondence, or documents involving the grievor and specific RCMP employees, including the acting supervisor, the director, and any other employer representative, which are about the grievor's job performance; and
>
> ii) copies of any emails, correspondence, or documents involving the grievor and RCMP employees or any other employer representative about any conflict or dispute between the grievor and the director of the Program or the grievor's immediate supervisor.

[109] Should the employer claim privilege with respect to any of the documents ordered disclosed, its representative shall inform the new Board's Registry in writing by no later than April 8, 2016, of the alleged ground for privilege and shall identify in a general manner the documents to which the alleged ground for privilege attaches. The employer's representative shall not disclose to the grievor's representative any document for which privilege is claimed until otherwise ordered.

[110] The employer's request to seal the consent order and this decision is denied.

[111] The Administrative Tribunals Support Service of Canada (ATSSC) is ordered to anonymize as follows the new Board's hearing list, the new Board's file covers and in future decisions, where applicable:

> a) the grievor's name shall be replaced by "A.B.";
>
> b) the name of relevant individuals working in the Program shall be referred to as "the director" and "the acting supervisor";
>
> c) the names of other employees whose role is to directly or indirectly provide protection shall be replaced by aliases;

[112] All public documents and exhibits entered into evidence or filed with the new Board during the course of this hearing that contain the grievor's name and those of Program employees shall be anonymized as described above.

[113] No specific references shall be made to the Program's full name. It shall be referred to as the "Program" in this decision and future decisions where applicable.

[114] The employer's request to redact the record is granted.

[115] The ATSSC is ordered to provide to the parties a copy of the new Board's files 566-02-10219 to 10222, and 11892 to 11893, except for documents protected by solicitor-client privilege.

[116] The parties shall anonymize as follows all documents contained in the copy of the new Board's files 566-02-10219 to 10222, and 11892 to 11893 provided by the ATSSC and will file a copy of those anonymized documents by 4:00 p.m. Ottawa local time on April 8, 2016:

a) the grievor's name shall be replaced by "A.B.";

b) the name of relevant individuals working in the Program shall be referred to as "the director" and "the acting supervisor";

c) the names of other employees whose role is to directly or indirectly provide protection shall be replaced by aliases;

[117] The new Board's files 566-02-10219 to 10222, and 11892 to 11893 shall be temporarily sealed until the first date on which the parties file a copy of the new Board's files 566-02-10219 to 10222, and 11892 to 11893 provided by the ATSSC or 4:00 Ottawa local time on April 8, 2016.

[118] The ATSSC is ordered to replace the original documents in the new Board's files 566-02-10219 to 10222, and 11892 to 11893 with those redacted by the parties upon filing of those redacted documents.

[119] In the event that the parties have difficulty redacting the documents contained in the new Board's files 566-02-10219 to 10222, and 11892 to 11893 provided by the ATSSC, I will remain seized of this matter until 4:00 p.m. Ottawa local time on April 29, 2016.

[120] The order regarding the redaction and anonymization of documents shall apply to the ATSSC when dealing with information related to files 566-02-10219 to 10222 and 11892 to 11893 which is under its control but that may not be in the new Board's files.

[121] The ATSSC is ordered to deal with information under its control related to, but that is not part of the new Board's files, 566-02-10219 to 10222, and 11892 to 11893, in compliance with section 11 of the *Witness Protection Program Act*.

[122] Should the employer be unable to produce the documentation by the above mentioned date, its counsel shall contact the new Board no later than March 31, 2016, to schedule a conference call with the panel to discuss the impediments to production and to request additional time, if necessary.

March 22, 2016.

Chantal Homier-Nehmé,
a panel of the Public Service
Labour Relations and Employment Board