Public Servants
Disclosure Protection
Tribunal Canada

Tribunal de la protection
des fonctionnaires
divulgateurs du Canada

Citation: El-Helou v. Courts Administration Service, 2012 PSDPT 1

File No.: T-2011-01

Issued at: Ottawa, Ontario
February 8, 2012

In the Matter of an Application by the Public Sector Integrity Commissioner of Canada to the Public Servants Disclosure Protection Tribunal

BETWEEN:

CHARBEL EL-HELOU
Complainant

-and-

OFFICE OF THE PUBLIC SECTOR INTEGRITY COMMISSIONER
Commissioner

and

COURTS ADMINISTRATION SERVICE
Employer

and

DAVID POWER
Individual Respondent

and

ÉRIC DELAGE
Individual Respondent

DECISION ON THE TWO MOTIONS TO CONTINUE THE INTERIM CONFIDENTIALITY ORDER

[1] This decision disposes of two motions brought by the two individual respondents and three interested parties. Both motions relate to the continuation of the interim confidentiality order, issued by the Public Servants Disclosure Protection Tribunal (the Tribunal), dated June 10, 2011.

[2] The continuation of this confidentiality order is being requested in relation to the hearing of an Application launched by the Public Sector Integrity Commissioner (the Commissioner) under subsection 20.4 of the *Public Servants Disclosure Protection Act*, SC 2005, c 46 (the Act) before the Tribunal.

[3] The individual respondents are David Power and Éric Delage. The interested parties are Laurent Francoeur, Eric Cloutier and Francine Côté. The individual respondents and the interested parties are the moving parties on these motions. They filed their motions on July 15, 2011 and request that this Tribunal continue its June 10, 2011 interim confidentiality order.

[4] On August 12, 2011 the employer states that it supported the motion for the continuation of the interim confidentiality order. On the same date, the Commissioner indicates that he does not oppose the motion for a confidentiality order, subject to a number of comments.

[5] In his response, dated August 12, 2011, the complainant opposes the motion.

I. BACKGROUND

[6] The complainant filed his initial complaint with the Office of the Public Sector Integrity Commissioner (OPSIC), dated July 3, and July 9, 2009. He identified four allegations of reprisal relating to the solicitation of negative feedback about him from his subordinates; a change in his employment responsibilities through a temporary transfer; the withholding of his security certificate; and harassment. The OPSIC investigator withdrew the issue of harassment, with the complainant's consent, after the commencement of the investigation.

[7] The OPSIC determined that it would deal with the complaint. The Senior Investigator concluded that there were reasonable grounds for believing that reprisal was taken against the complainant with respect to one allegation only, relating to withholding his Top Secret security

clearance. The Commissioner accepted the findings and recommendations contained in the report of the Senior Investigator, dated April 14, 2011.

[8] On May 16, 2011, the Commissioner filed an Application to the Tribunal (the Application) for a determination as to whether reprisal was taken against the complainant. In the Application, the Commissioner determined that there were sufficient grounds to proceed with only one of the three allegations that were investigated. The Application also stated that, should the Tribunal find that a reprisal was taken against the complainant, the Commissioner intends to seek an order respecting a remedy in favour of the complainant, and an order respecting disciplinary action against the person or persons alleged to have taken a reprisal.

Commissioner's request for an interim confidentiality order

[9] The request for an interim confidentiality order was initially filed by the Commissioner and not from the moving parties in this matter (i.e. the individual respondents and the interested parties). On the date that he filed the Application, the Commissioner also filed a notice of motion for an order declaring certain parts of the Application confidential, namely Appendices A and B. These appendices contain documents provided to OPSIC by the complainant with regard to the reprisal complaint, including allegations that were not filed in the Application itself. They contain allegations made against persons whose conduct was found not to be at fault by the Commissioner. In addition, they contain references to a security investigation conducted by the employer with regard to threats made against a member of the judiciary. The motion for an order of confidentiality from the Commissioner requested that the two appendices of the Application be filed in a sealed envelope and marked as confidential evidence.

[10] On June 1, 2011, Laurent Francoeur, Francine Côté and Eric Cloutier brought a notice of motion for interested party status with respect to the Commissioner's motion for an order of confidentiality. These three individuals were mentioned in the appendices and were not found to be at fault in the Application filed by the Commissioner.

[11] On June 2, 2011, the individual respondents responded to the Commissioner's motion

and requested a reformulation of the third paragraph of the proposed order. (That paragraph stated that the order would not affect any right of the complainant, by virtue of his having been the original author of those documents.

[12] On June 6, 2011, the complainant responded to the Commissioner's motion for an order of confidentiality, opposing it. He disputed the need for a blanket confidentiality order. He did not object to an order that would ensure that the name of the member of the judiciary be kept confidential and stated that the most effective way to accomplish this would be through redaction in the documents already filed in the proceedings and in any other documents. He submitted however, that the request for a confidentiality order is too broad.

Commissioner's request for a publication ban

[13] On June 6, 2011, the Commissioner filed his statement of particulars and a second notice of motion, this time for a publication ban on any information that could identify both the member of the judiciary and the person or persons suspected of making threats or alleged to have made threats against the member of the judiciary. The Commissioner clarified that the motion for a publication ban is an additional request. It is not a replacement for the earlier motion for a confidentiality order

Tribunal orders prior to this motion

[14] On June 10, 2011, the Tribunal granted interested party status to Francine Côté, Laurent Francoeur and Eric Cloutier with respect to the motion for an interim confidentiality order. The Tribunal also granted an interim publication ban on any information that could identify the member of the judiciary and the person or persons suspected of making threats or alleged to have made threats.

[15] On June 10, 2011, the Tribunal also issued the following interim confidentiality order. As detailed in the section below, the moving parties request a continuation of the terms of this particular order. It reads as follows:

1) The documents marked as Appendices A and B to the Commissioner's Notice of Application to the Tribunal, dated April 18, 2011 and filed with the Tribunal on

May 17, 2011, shall be kept sealed and separate from the public records and not be disclosed to anyone other than the Members and Staff of the Tribunal and the parties and their counsel, until the Commissioner's motion can be disposed of by the Tribunal or until such time as the Tribunal orders otherwise; and

2) The Tribunal may rescind, amend or vary this interim order at any time for cause upon the initiative of the Tribunal or on motion.

Moving parties request for the continuation of the interim confidentiality order

[16] On July 4, 2011, the OPSIC notified the parties to this matter of its intention to withdraw the motion for a confidentiality order at the hearing pertaining to jurisdiction, which was to be held on August 31, 2011. The individual respondents subsequently filed a notice of motion for the continuation of the terms of that order, dated June 10, 2011. Mr. Francoeur, Ms. Côté and Mr. Cloutier, the interested parties in relation to the Commissioner's motion for an interim confidentiality order, also filed a motion requesting the continuation of the terms of the order.

[17] The Commissioner stated that it did not oppose the motion, though he made some observations with regard to it. The employer stated that it consented to the motion in respect of the continuation of the interim confidentiality order. It also stated that it consented to the Commissioner's motion for the continuation of the publication ban.

[18] The complainant opposed this motion for the continuation of the interim confidentiality order. He stated that the moving parties failed to provide sufficient evidence to establish its necessity and could not to justify limiting the open court principle, protected by the *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982, c11* (the *Charter*).

Tribunal's issuance of a publication ban and order for interested parties' status

[19] On August 23, 2011, the Tribunal also issued an order for the status of interested parties in relation to the motion for the continuation of the interim confidentiality order to Laurent Francoeur, Eric Cloutier and Francine Côté.

[20] While not part of the present motion, it is important to remember that on August 23, 2011 the Tribunal issued a publication ban, which is still in effect. That ban pertained to materials relating to a member of the judiciary, and a person suspected of making threats against this person.

II. ARGUMENTS OF THE PARTIES

[21] The moving parties refer to Rule 5(c) of the *Interim Rules of the Tribunal,* now Rule 5(c) of the *Public Servants Disclosure Protection Tribunal Rules of Procedure,* SOR/2011-170 (the Tribunal Rules). That rule states that the original complaint must be submitted with the Application.

[22] They state that the complaint refers to alleged wrongdoings that are not within the OPSIC's authority to investigate; to numerous allegations of reprisal by various individuals; and to extensive documentation that the complainant believed was relevant to his complaint. They note that only one of the allegations of reprisal was referred to the Tribunal.

[23] They submit that privacy and confidentiality obligations apply to this situation because Appendices A and B raise questions as to the conduct of the interested parties and the two individual respondents. In addition, they submit that the information in the complaint is personal information because it is identifiable information that is recorded in any form, including the views or opinions of another individual about the identifiable individual. They argue therefore, that the Tribunal has an obligation to comply with legislative requirements pertaining to personal information and that a confidentiality order is necessary. They state that, as government institutions, both the Registry of the Public Servants Disclosure Protection Tribunal and the OPSIC are subject to the *Privacy Act,* RSC, 1985, c P-21 (*Privacy Act*).

[24] They refer to section 8 of the *Privacy Act*, which provides that personal information under the control of a government institution shall not be disclosed by that institution without the consent of the individual to whom the personal information relates, subject to enumerated exceptions. They argue that the enumerated exceptions under the *Privacy Act* do not apply. They submit, for example, that disclosure by OPSIC or by the Tribunal of any personal information contained in the complaint that relates only to unfounded allegations cannot be considered

disclosure for the purposes for which the information was obtained. Referring to subparagraph 8(2) (m) of the *Privacy Act*, they also argue that the public interest in disclosure of the personal information contained in Appendices A and B does not outweigh the invasion of privacy that would result from such disclosure.

[25] The moving parties state that the personal information in question is not relevant and would be of limited value in the public interest in open court. They also refer to the fact that they are career public servants, and that the disclosure of the complainant's views of them may have indeterminable negative consequences on their reputations.

[26] Alternatively, they submit that even if the *Privacy Act* does not require the continuation of the interim confidentiality order, well-established reasonable limits to the open court principle apply and the salutary effects of a confidentiality order outweigh its deleterious effects (*Dagenais v Canadian Broadcasting Corp*, [1994] 2 SCR 835; *R v Mentuck* [2001] 3 SCR 442; *Sierra Club of Canada v Canada (Minister of Finance)*, [2002] 2 SCR 522).

[27] The moving parties state that there is a serious risk to an important interest because there is the potential for damage to the personal and professional reputations of the interested parties. They state that the Commissioner's obligation under the Tribunal Rules, to provide a copy of the complaint, must be read in the context of the commitment to maintaining confidentiality to the extent possible for all persons involved in the disclosure process.

[28] They argue that confidentiality is a key component of the Act. They refer to subsection 22(e) of the Act, which requires the Commissioner to protect the identity of persons involved in the disclosure process, including that of persons making decisions, witnesses and persons alleged to be responsible for wrongdoing. They also highlight section 44, which requires that the Commissioner and every person acting on his behalf, not disclose any information that comes to their knowledge in the performance of their duties under the Act.

[29] They submit that the order in question is narrow, with no reasonable alternatives. They state for example, that expunging the content at issue would be impractical and would not allow for a readable and redacted version of the document in question. They state that the order sought pertains only to allegations that were submitted by the complainant but which were not found to

be valid by the Commissioner and which are irrelevant to the proceedings before the Tribunal. In support of the motion, the moving parties include several documents in the form of affidavits.

[30] The complainant opposes the motion. Although he takes the position that he would not object, in principle, to steps to protect certain confidential information, he argues that these steps must be shown to be necessary and not to outweigh the negative effect of such measures. He submits that in the present case the interested parties have failed to provide sufficient evidence to justify the order.

[31] He asserts that the order represents a sweeping incursion upon the interest of both the public and the parties and that this cannot outweigh the significant public interest in open proceedings under the Act. He asserts that the parties' reliance on concerns with respect to their personal and professional reputations and future career opportunities are speculative.

[32] The complainant also states that the Act was passed for the express purpose of fostering transparency and furthering the public interest in maintaining and enhancing public confidence in the integrity of the public service. He refers to the preamble, which states that the Act is intended to protect the public interest and play a central role in the protection and promotion of Canadian parliamentary democracy, in encouraging employees to disclose wrongdoing and in discouraging processes that might otherwise be employed to cover up wrongdoing or prevent disclosure.

[33] The complainant disputes a blanket prohibition of disclosure of information as "a rare and blunt instrument", to be used only in the clearest of cases. He refers to the open court principle and the test applied to determine whether to limit this fundamental aspect of the justice system (*Mentuck*; *Sierra Club*; *Singer v Canada (Attorney General)*, 2011 FCA 3 (*Singer*); and *Named Person v Vancouver Sun*, [2007] 3 SCR 253 (*Named Person*). He argues that the courts have repeatedly held that the confidentiality of proceedings will not be ordered based on bald assertions of the need for such protection. Parties requesting an order for confidentiality bear a heavy onus and must present evidence demonstrating a clear need for such an order (*Rivard Instruments Inc v Ideal Instruments Inc*, 2006 FC 1338 at paragraph 2 (*Rivard*); *Canada (Attorney General) v Almalki*, 2010 FC 733 at paragraph 17 (*Almalki*). The complainant also refers to *John Doe v Canada (Minister of Justice)* 2003 FCT 117 (*John Doe 2003*) and *John Doe*

v Canada (Minister of Justice), 2008 FC 916 (*John Doe 2008*) in support of his position that the evidence to support a confidentiality order is insufficient.

[34] He disputes the argument that public disclosure could compromise an investigation and that there is a great likelihood that the publication of the complainant's allegations would cause damage to personal and professional reputations. He also refers to *Mentuck*, where the Supreme Court of Canada emphasized the high societal value placed on the presumption that courts should be open; that their proceedings should be uncensored; and that the judge must have a convincing basis in evidence for issuing a ban.

[35] He also notes that in *Mentuck*, the Court was faced with an argument that specific aspects of an undercover police operation might be disclosed in the trial process. In that case, far more serious than the present one, in the complainant's view, the ban was not granted. In *Mentuck*, the Court also noted that the Crown's affidavit evidence was only able to positively identify one example of a negative impact resulting from a publication ban.

[36] The complainant reiterates that the Tribunal is intended to address incidents of reprisal where persons disclose wrongdoing in the federal public service. The issues raised by a case under the Act are of the highest public importance. He argues that not only must the outcome be fair and substantively proper, but that it must also be seen to be fair and proper.

[37] He emphasizes that the two documents which the interested parties seek to maintain as confidential comprise the complainant's actual complaint of reprisal. He asserts that these documents are akin to a statement of claim or a notice of application or a similar originating process or pleading which sets out the essence of the case. Referring to *Mentuck*, which arose in the context of a criminal proceeding, he submits that the public interest in the nature and outcome of these proceedings is no different.

[38] He states that the type of order sought is highly unusual and extraordinary, and points to the fact that individuals who are the subject of allegations are routinely referred to by name in many proceedings, even where those allegations have been dismissed on a final basis. In the complainant's view, it is an error to state that allegations submitted by the complainant, but which were not found to be substantiated by the Commissioner, are irrelevant to the proceedings

before the Tribunal. Evidence of context, he argues, may be relevant and admissible. In addition, he submits that the position of the moving party is premature.

[39] The complainant submits that the *Privacy Act* does not compel the Tribunal to abandon its own statutory purpose of fostering transparency for the purposes of the public interest. He states that exceptions under the *Privacy Act* apply, including subparagraph 8(2)(a) (consistent use exception), subparagraph 8(2)(b) (in accordance with an Act of Regulation authorizing its disclosure), and subparagraph 8(2)(m) (public interest exception).

[40] The Commissioner does not oppose the motion brought by the interested parties, but makes some qualified statements as to his support. He notes that he filed a motion for a similar order on May 17, 2011 and that interim order was granted by the Tribunal on June 10, 2011. The Commissioner states that his primary concern was with prejudicial information being made public without a proper evidentiary and contextual basis. In his response the Commissioner states that his Statement of Particulars and disclosure of evidence, including the investigation report, provide a more comprehensive context to the public and the information is less likely to harm the individuals concerned.

[41] He also notes that he advised the Tribunal and the parties that he would be withdrawing his motion on July 4, 2011. He affirms the importance of public and media access to the Tribunal. Referring to sections 22(e) and 44 of the Act, he observes that the filing of information that would otherwise be confidential is permitted for the purpose of making an Application to the Tribunal. However, he states that he generally agrees with the formulation of the *Dagenais/Mentuck* test as stated in the Notice of Motion in support of the confidentiality order.

III. ANALYSIS

Overview

[42] In the present motion, the individual respondents and the interested parties seek a continuation of the terms of the interim confidentiality order, issued by this Tribunal. They argue that the *Privacy Act* applies to limit the disclosure of material in Appendices A and B. In the alternative, they submit that this Tribunal ought to exercise its discretion, in accordance with the

principles enunciated in *Dagenais*, *Mentuck* and *Sierra Club*, to limit the open court principle and to allow the terms of the order to continue.

[43] Both the Commissioner and the employer indicate their support of the motions brought by the moving parties. The complainant opposes them. He submits that the open court principle applies, with only limited exceptions. He refers to the purpose of the Act to support his position that there is insufficient evidence upon which to limit the principle in this case. He also submits that the basis upon which the order is requested is speculative.

[44] The open court principle is considered a cornerstone of a democratic society. Nonetheless, it is not absolute. Protective orders that limit openness can come in a variety of forms: confidentiality orders, publication bans, orders for redacted or depersonalized versions of a pleading or other document supporting a legal proceeding, a requirement that a document be "for counsel's eyes only", an order requiring that a proceeding be held *in camera*, and informant privilege.

[45] In this decision, the Tribunal is requested to continue an interim confidentiality order, which would also have the effect of limiting the openness of its proceedings. Important interests are at the heart of this question. In order to provide a context for why these motions must be denied, this Tribunal will review the basic precepts of the open court principle in relation to judicial and quasi-judicial proceedings, in relation to sensitivities with personal information in the public domain, and in relation to the nature of this Act and the mandate of this Tribunal in disclosure and reprisal complaints.

The open court principle

[46] The open court principle has been repeatedly recognized in Canadian courts. Long before the passage of the *Charter,* the Supreme Court of Canada conveyed the importance of openness in court proceedings. Covertness in proceedings is an exception, and to be exercised with care. Justice must not only be done, but also must be seen to be done. Hence, there is a presumption that court proceedings should be a matter of public record. (See for example *Dagenais*; *Mentuck*; *Sierra Club*; *Named Person*; and *Almalki*. See also *Nova Scotia (Attorney General) v MacIntyre*, [1982] 1 SCR 175, which is referred to in *Almalki*)

[47] The courts do not operate in secret, as Justice Rothstein, as he then was, stated in *Sulco Industry Ltd v Jim Scharf Holdings Ltd* (1997), 69 CPR (3d) 71 at page 73 (*Sulco Industry*). The courts must exercise restraint in granting orders that limit information before the court, although there will be exceptions (involving, for example, trade secrets and other types of confidential information that may require a sealing order) (See *John Doe 2003* at paragraph 3, which refers to *Sulco Industry*). Where the confidentiality of proceedings is ordered without justification, the integrity of judicial proceedings can be compromised, essentially throwing the court back into the times of the notorious Star Chamber Court (See *John Doe 2003* at paragraphs 2 and 3).

[48] One of the critical objectives of the open court principle is to foster the pursuit of truth. An open examination of witnesses' oral testimony is "more conducive to the clearing up of truth than the private and secret examination taken down in writing before an officer, or his clerk." (*Blackstone Commentaries on the Laws of England* (1768) cited in *Named Person* at paragraph 82). As noted by Wigmore, (*Wigmore on Evidence*, vol. 6 (Chadbourn rev. 1976), § 1834, at pp. 435-36 and cited in *Named Person*, at paragraph 82), the operation of the open court principle improves the quality of testimony generally. It produces "in the witness' mind a disinclination to falsify; first by stimulating the instinctive responsibility to public opinion, symbolized in the audience (…)." It also objectively "secures the presence of those who by possibility may be able to furnish testimony in chief or to contradict falsifiers and yet may not have been known beforehand to the parties to possess any information".

[49] Evidence, including testimony of named witnesses, is important in the proceedings, as are documents that support the testimony. Generally, witnesses and parties are identified in judicial and quasi-judicial proceedings. This conveys the solemnity and significance of the adjudicative process in determining the truth and contributes to the transparency and accountability of proceedings.

The application of the open court principle to pleadings

[50] The open court principle applies not only to judicial proceedings, but to the publication of pleadings which were filed in those proceedings. In *Singer*, the Federal Court of Appeal reconfirmed the application of the principle in relation to court pleadings and evidence. Here, the Federal Court of Appeal addressed a confidentiality order that had an unnecessary and

overreaching effect on the proceedings. The appellant argued that her social insurance number, which had been reproduced in affidavit material, was not relevant to the issues raised in the proceedings. The Federal Court directed that the affidavit materials of the respondent be sealed. The Federal Court of Appeal overturned this order because it was broader than necessary. It observed that the open court principle is a basic tenet of the legal system and that it applies to hearings, decisions, court pleadings and evidence (at paragraph 6). It found that, in this instance, alternative measures were available to achieve the same result.

[51] These principles, most recently enunciated in *Singer*, are important in the present motion. In this proceeding, the Application, the statement of particulars, and supporting documentation can be considered the foundational material before this Tribunal. As such, they can be considered in the same light as pleadings. They are therefore, potentially subject to the open court principle.

The open court principle and the media

[52] The essential role that is played by the media, as the agent of the public in adjudicative proceedings, underlies the open court principle. The media is the agent of the public who cannot attend the proceedings (*Mentuck* at paragraph 52, and see *Named Person* at paragraphs 81-85, where Justice Lebel dissents in part but conveys undisputed aspects of the open court principle). The freedom of the press to report on judicial proceedings is a core value. The constitutional nature of the open court principle is also critical to keep in mind. Jurisprudence has confirmed that the open court principle is protected by freedom of expression under subsection 2(b) the *Charter*.

The Charter and the Dagenais/Mentuck test

[53] The underpinnings of the open court principle stayed intact after the passage of the *Charter*, grounded in subsection 2(b) and the right to freedom of expression. In most instances, the decision-maker's determination as to whether the open court principle should be limited is a matter of discretion. There are only a few exceptions to this. For example, an informer's privilege is absolutely protected, and is not subject to the application of a discretionary test by the courts (*Named Person*). There may be legislated exceptions as well. Most often however, any limitation upon openness is subject to the court's discretion and is not to be applied lightly.

[54] This general approach, where the decision-maker must apply discretion, also applies to the present motion. In cases that have come after the *Charter*, the test used to come to that determination is often referred to as the *Dagenais/Mentuck* test. It is an amalgamation of two Supreme Court of Canada decisions as to how a decision-maker should exercise his or her discretion to limit the scope of the open court. *Dagenais*, issued by the Court in 1994, addressed a publication ban requested by four accused persons who had asked for an order to prohibit the broadcast of a television programme dealing with physical and sexual abuse of young boys. The Supreme Court of Canada discussed the principles of freedom of expression and the right to a fair trial under the *Charter*.

[55] The Court confirmed that it is the individual claiming the restriction on the open court principle who has the burden of justifying the limitation on freedom of expression. It also developed a test for determining whether there was justification for doing so, which reflected the *Charter* and the substance of the "Oakes test" (from *R v Oakes*, [1986] 1 SCR 103 (*Oakes*)).

[56] In 2001, the Supreme Court rendered its decision in *Mentuck.* Here, the Court offered added flexibility to the test articulated in *Dagenais.* In this case, the accused was charged with second-degree murder. The Crown moved for a publication ban to protect the identity of officers and to protect some investigatory methods that had been used. The Court affirmed the test articulated in *Dagenais*, but changed some of its wording to ensure that it went beyond situations relating to the right of an accused so that it also applied to other situations concerning a fair trial.

[57] *MacIntyre, Dagenais* and *Mentuck* address limitations on the open court principle in the context of criminal proceedings. The Supreme Court of Canada has also endorsed this principle in the context of civil proceedings. In *Sierra Club,* the Court reversed the decision of the Federal Court and the Federal Court of Appeal, which denied a confidentiality order in relation to summaries of commercial documents.

[58] Given that the present motion is being considered in the civil context, and not the criminal context, the *Dagenais/Mentuck* test, as it was adapted in *Sierra Club* is spelled out below (*Sierra Club* at paragraph 53). A confidentiality order should be granted when:

> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

The application of the open court principle to this Tribunal

[59] It is clear from the above discussion that the open court principle is broad in scope. In addition, the principle has long standing significance, rooted in the gravity of judicial proceedings. This Tribunal finds that the purpose of this principle may apply equally in the administrative tribunal context, where the tribunal is engaged in quasi-judicial functions. The fact that the open court principle is recognized under the *Charter* only strengthens its application to the quasi-judicial functions of administrative tribunals. Needless to say, these constitutional values transcend both judicial and quasi-judicial proceedings.

[60] To determine whether or not the open court principle applies to an administrative agency, it is important to adopt a functional approach. A functional approach takes into consideration factors such as the following: the nature of the work of the tribunal, the mandate of the tribunal and the values underlining it, its adherence to the duty of fairness, whether the agency in question must weigh evidence to come to a determination, the degree to which the tribunal is otherwise engaged in quasi-judicial functions, whether or not the proceeding is adversarial in nature, and to what degree the rights and obligations of parties are at stake. Any wording of its statute that would limit that principle must also be considered, keeping in mind that the open court principle is constitutionally protected.

[61] With these factors considered, it is clear that this Tribunal must apply the open court principle. It must weigh evidence. It performs a quasi-judicial function much like that of a court of law. It adheres to the duty of fairness, and its enabling statute requires it to conduct its proceedings in accordance with the principles of natural justice (See subsection 21(1) of the Act). The Tribunal is adjudicative in nature and is an impartial decision-maker. It hears the contradictory positions of the parties and witnesses, makes findings of fact and assesses

credibility. The fact that its decision-makers are federally appointed judges is not determinative, but it is significant in the context of the Act and its values. The Act creates this Tribunal as a new and specialized body. The Tribunal makes decisions that affect the rights and duties of the parties before it (See also *El-Helou v Courts Administration Service*, 2011-PT-01 at paragraphs 85-89). There is no requirement to hold a proceeding *in camera*. Conversely, the inclusion of a provision in the Act, that allows the Tribunal to determine that proceedings may be held *in camera*, makes it clear that the proceedings are presumptively open to the public (See section 21.3 of the Act.)

[62] A framework of procedural rules is in place to ensure fairness, transparency and objectivity in the decision-making process. Subsection 21(2) of the Act permits the Chairperson of the Tribunal to make rules of procedure governing practice and procedure. These include, but are not limited to, the summoning of witnesses, the production and service of documents, and discovery proceedings. The Tribunal Rules also allow a party to make a motion for a confidentiality order, as an exception to the presumptively open proceedings held by the Tribunal.

[63] The Tribunal also finds that the wording of the Act does not restrict the application of the open court principle to its proceedings. It does not support the argument advanced by the moving parties that suggests that subsection 22(e) and section 44 of the Act endorse confidentiality as a key component of the Act. Subsection 22(e) pertains to specific considerations relating to the investigation of the complaint only. Furthermore, the wording of that provision is qualified by "any other Act of Parliament" and "in accordance with the law". It states that the duties of the Commissioner include:

subject to any other Act of Parliament,	**sous réserve de toute autre loi fédérale applicable,**
protect, to the extent possible in accordance with the law, the identity of persons involved in the disclosure process, including that of persons making disclosures, witnesses and persons alleged to be responsible for wrongdoing;	**veiller, dans toute la mesure du possible et en conformité avec les règles de droit en vigueur**, à ce que l'identité des personnes mises en cause par une divulgation ou une enquête soit protégée, notamment celle du divulgateur, des témoins et de

l’auteur présumé
de l’acte répréhensible;

(Emphasis added)

[64] Section 44 of the Act is also qualified in its wording. It requires that the Commissioner and every person acting on behalf of or under the direction of the Commissioner not disclose any information that comes to their knowledge in the performance of their duties under the Act. However, this requirement does not apply where disclosure is required by law or permitted by the Act:

Unless the disclosure is required by law or permitted by this Act, the Commissioner and every person acting on behalf of or under the direction of the Commissioner shall not disclose any information that comes to their knowledge in the performance of their duties under this Act.	**Sauf si la communication est faite en exécution d’une obligation légale ou est autorisée par la présente loi,** le commissaire et les personnes agissant en son nom ou sous son autorité sont tenus au secret en ce qui concerne les renseignements dont ils prennent connaissance dans l’exercice des attributions que leur confère la présente loi.

(Emphasis added)

[65] But beyond these observations, the Tribunal notes that it must interpret the Act in light of its entire context, in the grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the legislation and the intention of Parliament (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis, 2008) at 1, 257-259, 264-269). The preamble highlights the importance of the federal public administration as part of the essential framework of Canadian parliamentary democracy. It also highlights the balance between the duty of loyalty owed by public servants in the course of their employment and the right to freedom of expression guaranteed by the *Charter*. The purpose of the Act is to ensure effective procedures for the disclosure of wrongdoing and transparent processes for doing so.

[66] It could be said that the Act is designed in such a way that the public is meant to be the permanent observer or standing jury of the proceedings of the Tribunal.

The Privacy Act exceptions and the open court principle

[67] The moving parties argue that, due to the application of the *Privacy Act*, the confidentiality order should be granted. That legislation provides that personal information under the control of government institutions shall not be disclosed by that institution without the consent of the individual to whom the personal information relates.

[68] The Tribunal finds that the *Privacy Act* cannot operate to support the continuation of a confidentiality order. Exceptions under the *Privacy Act* apply in the present situation. Subparagraph 8(2)(a) allows the disclosure of personal information without consent where it is compiled or obtained by an institution for a purpose consistent with its use. The Tribunal is of the view that this information was obtained by the Commissioner pursuant to his mandate to investigate complaints under the Act. The information was referred to the Tribunal, pursuant to the Act. Therefore, this constitutes a disclosure for the purpose for which the information was obtained and, is most certainly a use consistent with that purpose.

[69] Subparagraph 8(2)(b) states that personal information may be disclosed "for any purpose in accordance with any Act of Parliament or any regulation made thereunder that authorizes its disclosure." The Tribunal notes that Rule 5(c) of the Tribunal Rules expressly provides that an Application made by the Commissioner under subsection 20.4(1) of the Act must contain a copy of the complaint and a summary of its content. This forms the basis upon which the Tribunal determines whether or not reprisal has been taken against the complainant due to the disclosure of wrongdoing within the meaning of the Act.

[70] The breadth and scope of the Act requires the Tribunal to conduct a proceeding that is transparent in nature. Similar to other quasi-judicial tribunals, this Tribunal receives personal information in the context of a tribunal proceeding. That information may include the Application, the statement of particulars, supporting documentary evidence, and testimony provided to it. That information fulfills a fundamental purpose: to allow the Tribunal to determine whether or not reprisal has taken place.

[71] In addition, the Tribunal is authorized by law to make this determination and it is master of its own proceedings. Therefore, the information that the Tribunal receives falls under subparagraph 8(2)(a); and subparagraph 8(2)(b) of the *Privacy Act*, which relate to a use consistent with that purpose (subparagraph 8(2)(a)); and a use of personal information for a purpose in accordance with any Act of Parliament (subparagraph 8(2)(b)).

[72] In addition, subparagraph 8(2)(m) allows the disclosure of material where the public interest in disclosure outweighs an invasion of privacy that could result from it. Disclosure is also permissible under this exception if it would clearly benefit the individual to whom it relates. With regard to this specific exception, the Tribunal cannot support the moving parties' argument that the public interest in disclosure does not, in the present case, outweigh any invasion of privacy that could result from the disclosure. Furthermore, the Act promotes the public interest through presumptively open proceedings before the Tribunal, amongst many other avenues and there is insufficient evidence to come to any other determination, but that the public interest in transparency should prevail.

[73] The moving parties take the position that the personal information in question is not relevant and would be of limited value in open court. They submit that many of the issues raised in the complaint were found not to be appropriately before the Commission; and that certain allegations were not substantiated by the Commission for the purposes of referral to this Tribunal. On this basis, they submit that there is no basis upon which to apply the exceptions under the *Privacy Act.*

[74] The Tribunal does not agree with this argument. In this regard, the complainant's response to this point is also compelling. Individuals who are the subject of allegations are routinely referred to by name in many proceedings, even when the allegations are later dismissed.

[75] The moving parties' argument is also premature. Although it is not within the Tribunal's jurisdiction to address questions as to whether or not reprisal was taken in the context of certain components of the complaint, this does not mean that the Tribunal cannot address this information in relation to evidence. Evidence pertaining to the allegations that the Commissioner dismissed may be relevant to the proceedings related to the allegation that actually warranted the

Application before this Tribunal. In addition, the facts relating to the allegations that were dismissed might be relevant. The evidence related to the initial complaint and all of its allegations may be considered at the hearing (See also *El Helou v Courts Administration Service*, 2011-PT-01 at paragraph 97).

[76] The Tribunal does not dispute the important purpose of the *Privacy Act*. However, its purpose must be balanced with other values. This balancing is even more compelling because the open court principle is constitutionally protected. It should also be noted that tribunals, such as this tribunal, do not actively seek out and "obtain" information. Tribunals receive information from the parties in the context of a dispute that will be adjudicated. This is quite distinct from other parts of the executive who "obtain" and actively gather information for other purposes.

[77] As the complainant noted in his response to this motion, the *Privacy Act* does not "compel the Tribunal to abandon its own statutory purpose". This Tribunal agrees. Nor can the *Privacy Act* override the constitutional principles that are interwoven into the open court principle. Due to the open court principle, personal information that this Tribunal manages, and which is received as part of its quasi-judicial functions, is publicly available. Subsection 69(2) of the *Privacy Act* provides an important exception to its application in this regard. Information that is available to the public is not subject to sections 7 and 8 of the *Privacy Act.* Those provisions prohibit the use or disclosure of personal information (except in limited circumstances). Under subsection 69(2), sections 7 and 8 do not apply to personal information that is publicly available. Therefore, if this constitutionally protected principle applies to an administrative tribunal-and this is the case here – personal information that is properly before it in its quasi-judicial functions is not subject to the *Privacy Act.*

Summary

[78] The open court principle is a cornerstone of the Canadian legal system. It applies not only to the hearing itself, but may also apply to all of the proceedings prior to the hearing. It applies to pleadings, and in this proceeding, to the Application, the statement of particulars and supporting documents that are filed in accordance with this Act and the Tribunal Rules.

[79] This principle can be limited in a few ways. For example, informer's privilege is unqualified and does not allow the court to exercise its discretion. It may also be limited by statute. Generally however, the court may exercise its discretion to limit the open court principle by applying its discretion according to the test in *Dagenais/Mentuck.* Therefore, the decision-maker would exercise his or her discretion, in its consideration of a variety of protective orders that limit access to information in the context of a proceeding. The open court principle applies to this Tribunal and it will exercise its discretion to determine whether or not the principle should be limited.

[80] The *Privacy Act* cannot have the effect of limiting the scope of the open court principle in these proceedings. Exceptions under the *Privacy Act* apply: the exception pertaining to consistent use (subparagraph 8(2)(a)); the exception pertaining to a purpose in accordance with an Act of Parliament or regulation made thereunder (subparagraph 8(2)(b)); and the exception pertaining to public interest (subparagraph 8(2)(m)). Due to the *Charter* protected open court principle and its application to the Tribunal, personal information that is obtained in the context of this Tribunal's quasi-judicial functions is otherwise available to the public. Therefore, the broad exception under subsection 69(2) of the *Privacy Act* applies as well.

IV. APPLICATION TO THE REQUEST FOR THE CONTINUATION OF THE CONFIDENTIALITY ORDER

[81] This Tribunal must now determine whether or not Appendices A and B ought to be limited through the application of a confidentiality order. As discussed above, for several reasons, the prohibitions under the *Privacy Act* do not allow the imposition of a confidentiality order. The open court principle also renders the information before this Tribunal available to the public. The question remains as to whether or not these two Annexes can be excluded or limited by virtue of the application of the test articulated in *Dagenais*; *Mentuck* and *Sierra Club.*

[82] This Tribunal adapts these tests from the jurisprudence for the purposes of its proceedings in the following manner. A confidentiality order will be granted when:

> The order is necessary to prevent a serious risk to an important interest sought to be protected and alternative measures will not prevent this risk; and

> The salutary (beneficial) effect of the order outweighs it deleterious (harmful) effects on the right to freedom of expression and the public's interest in open and accessible tribunal proceedings.

[83] The moving parties argue that there is a serious risk in disclosing this information because there is the potential for damage to the personal and professional reputations of the interested parties. They also argue that the order in question is narrow and that there are no reasonable alternatives. They note for example, that expunging the content at issue would be impractical and would not allow for a readable and redacted version of the document in question.

[84] They also note that some of the allegations in the complaint were not the subject of an investigation by the Commissioner and would not properly be the subject of such an investigation. They refer to the fact that not all the allegations form part of the Application to the Tribunal. Finally, they state that if the information in the Annexes was made public, then there is a great likelihood that this would cause damage to their personal and professional reputations. If they are not kept confidential, they will limit future career opportunities.

[85] In support of the motion, they submit several supporting affidavits, including an affidavit filed by the OPSIC investigator, dated May 13, 2011. A large number of her observations pertain to the security investigation conducted by the Courts Administration Service, relating to the safety and security of a member of the judiciary of one of its courts of law.

[86] As noted earlier in these reasons, there is a publication ban in effect that relates to the member of the judiciary in question and matters pertaining to the investigation.

[87] The contents of the other affidavits have a number of similarities. They refer to the fact that some of the allegations in the complaint were not the subject of an investigation by the Commissioner and would not properly be the subject of such an investigation. They also note that not all the allegations were found to constitute reprisal, and therefore, do not form part of the Application to the Tribunal. They state that they believe that if the allegations relating to them were made public, there is a great likelihood that they would cause damage to reputations, both personally and professionally; and that if these contents are not kept confidential, this will limit future career opportunities.

[88] The Tribunal cannot allow a confidentiality order on the basis of these submissions and evidence. The submissions and the supporting material that were provided are mere assertions, and there is insufficient evidence to satisfy the Tribunal that there is a serious risk to the respondents and to the interested parties in the disclosure of the information in the complaint. The fact that the material contains sensitive, damaging or embarrassing material does not constitute an exception that requires a confidentiality order or sealing order. In addition, these considerations must be weighed with the integrity of the legal process (*John Doe 2003*; *John Doe 2008*; and *Rivard*).

[89] As noted earlier in these reasons, the fact that an allegation was found by the Commissioner to not constitute reprisal does not, in and of itself, establish grounds for the limitation of the open court principle. In addition, in this case, the affidavit does not provide a basis in evidence as to the great likelihood that the allegations, if made public, would cause damage to the reputation of the parties.

[90] It is also important to note that those documents filed as pleadings do not yet constitute evidence of the contents. Furthermore, the interested parties and the individual respondents are already named, either in the proceedings as a whole, or in the motions.

[91] The requirement of the first branch of the discretionary test to determine whether or not the open court principle ought to be limited has not been met. Therefore, it is unnecessary for this Tribunal to proceed to the second branch of the test. However, even if it were to do so, there is no evidence before it to demonstrate how an order that would limit the open court principle in this instance would outweigh the harmful effects on freedom of expression and the public's interest in open and accessible tribunal proceedings.

[92] The Tribunal has therefore determined that it will rescind the interim confidentiality order, effective the date of this decision.

V. OTHER MATTERS PERTAINING TO THE PUBLICATION BAN

[93] The Tribunal reminds the parties that the publication ban, issued by this Tribunal on August 23, 2011, remains in effect. The ban pertains to any information contained in the documents and records before the Tribunal or heard in these proceedings that could identify both

the member of the judiciary and the person or persons suspected of making threats or alleged to have made threats against the member of the judiciary named in the confidential notice of motion and in documents filed with the Tribunal. The order remains in effect during the complete proceedings of the Tribunal and after the Tribunal has made a final decision in regard of the complaint, or until such time as the Tribunal orders otherwise.

[94] The Tribunal rescinds its interim confidentiality order, dated June 10, 2011, effective the date of this decision.

THE TRIBUNAL MAKES THE FOLLOWING DECISION:

1. The motions of the two individual respondents and of the three interested parties for the continuation of the interim confidentiality order are denied;
2. The interim confidentiality order, dated June 10, 2011, is rescinded, effective the date of this decision; and
3. The publication ban, dated August 23, 2011, remains in effect.

"Luc Martineau"

Chairperson

PUBLIC SERVANTS DISCLOSURE PROTECTION TRIBUNAL

PARTIES OF RECORD

DECISION NUMBER:	2012 PSDPT 2
TRIBUNAL FILE:	T-2011-01
STYLE OF CAUSE:	Charbel El-Helou v Courts Administration Service and David Power and Éric Delage
BEFORE:	The Honourable Mr. Justice Luc Martineau
DECISION OF THE TRIBUNAL DATED:	February 8, 2012

DECISION RENDERED ON THE BASIS OF THE WRITTEN ARGUMENTS AND RECORDS FILED

APPEARANCES:

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