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Re Provincial Health Services Authority and P.E.I. Union of Public Sector Employees

[Indexed as: Provincial Health Services Authority and P.E.I.U.P.S.E. (Re)]

Prince Edward Island
I. Christie

Last written submission received: May 12, 2005
Decision rendered: May 16, 2005

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PRELIMINARY AWARD concerning production of documents.

K.H.W. Turner, Q.C., for the union.
R. MacLeod, for the employer.

AWARD

Grievance by the Union alleging wrongful dismissal of the Grievor, based on allegations of physical abuse of a patient in one of the Employer's health care facilities. The Union has requested pre-hearing production of various documents in the medical file of the patient who made the allegations. The Employer has refused production based on the P.E.I. *Mental Health Act*, R.S.P.E.I. 1988, c. M-6.1. The parties have agreed that the issue of whether the Employer can and should be ordered to produce the documents in issue is to be decided by the Chair of the Board of Arbitration established to deal with this Grievance.

PRELIMINARY AWARD

The Employer has discharged the Grievor, Vincent Redmond, a Resident Care Worker, based on allegations of physical abuse of a patient. In this preliminary award and in any subsequent award on the merits this patient will be referred to as "patient X". In preparation for the defence, the Union has requested pre-hearing production of various documents found in patient X's medical file that are in the control of the Employer. The Employer is refusing to release any of these documents, claiming such release is prohibited by s. 31 of the *Mental Health Act*, R.S.P.E.I. 1988, c. M-6.1. The Union submits that a labour arbitrator has jurisdiction to compel the production of a third party's medical records that are arguably protected by the *Mental Health Act*.

On December 13, 2004, in anticipation of the hearing in this matter, originally scheduled to commence January 11, 2005, I signed a *subpoena duces tecum* prepared by Union counsel directing Ms. Debbie Tanton to appear at the hearing and to bring with her and produce at the hearing the following documents or things:

1. Any investigation reports, recommendations, notes, e-mails, or other material related to the investigation of this incident and subsequent recommendation to terminate Vince Redmond.
2. With respect to [patient X], the following material:
   a. The patient care plan for [patient X];
   b. The journal which is kept on the unit by [patient X]'s one-on-one worker;
   c. Nursing notes with respect to [patient X] for the period of two years prior to this incident and one month after the incident;
   d. Incident reports filed by staff members with respect to [patient X] for the period of two years prior to this incident and one month after this incident;
   e. Any case plans;
   f. Communication book entries for the period of two years prior to this incident to one month following this incident;
   g. Any police reports; and
   h. Any report to or from the Woodlawn Group Home, plus any file materials received from them at the time of [patient X]'s return from their care.
3. The entire personnel file of Vince Redmond.

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The Union submits that the two issues I must consider in deciding whether to compel production of material in patient X's medical file are:

1. Do the principles of natural justice require production of the documents? The Union submits that they do, subject to the safeguards arbitrators have required in ordering the production of privileged documents. The Employer submits that both the *Mental Health Act* and the *Freedom of Information and Protection of Privacy Act*, R.S.P.E.I. 1988, c. F-15.01, override any requirement of natural justice.

2. Do the provisions of the *Mental Health Act* prevent release of the documents even when required by arbitrator issued *subpoena*? The Union submits they do not, for three reasons:

(i) The *Freedom of Information and Protection of Privacy Act* removes or overrides the immunity from production the *Mental Health Act* might otherwise provide. The Employer submits that the *Freedom of Information and Protection of Privacy Act* does not affect this immunity from production, but, if anything, also precludes the arbitrator from ordering production.

(ii) The Union submits that the arbitrator's authority to compel "written evidence" under the *Labour Act*, R.S.P.E.I. 1988, c. L-1, permits the arbitrator to compel production under subsection 31(9) of the *Mental Health Act*. A more restrictive reading of the arbitrator's authority, Union submits in a brief paragraph, violates section 7 of the *Canadian Charter of Rights and Freedoms*. The Employer submits that the section 31 of the *Mental Health Act*, and specifically subsection (9) cannot be read other than as blocking the arbitrator's power under the *Labour Act* to compel the production of documents. The Employer made no submission on the Union's brief reference to the *Charter*.

(iii) The union submits that, because grievance arbitration is a private dispute resolution process between the Employer and the Union, an order to produce documents will not conflict with the privacy protection for third parties imposed by the *Mental Health Act*. The Employer submits that such an order would be contrary to both the *Mental Health Act* and the *Freedom of Information and Protection of Privacy Act*.

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For reasons that follow, I have reluctantly reached the following inconvenient conclusions on the issues set out above:

1. The *Mental Health Act* overrides any common law right to natural justice on the basis of which I would otherwise order the production of the documents sought by the Union. The *Freedom of Information and Protection of Privacy Act* is irrelevant here.

2. (i) The *Freedom of Information and Protection of Privacy Act* is irrelevant here.

(ii) The *Mental Health Act* cannot be read other than as blocking the arbitrator's power under the *Labour Act* to compel the production of documents. However, I think that in *Charter* terms, subsections 31(1) and (13) when read with subsection (9) are overbroad in effectively precluding any access by an employee under a collective agreement to clinical records or other information he or she may need if he or she is to be granted fundamental procedural justice. I need further submissions from counsel on this *Charter* issue. (This is the inconvenience to which I refer above.) In the interests of not leaving this matter in limbo, in the absence of agreement otherwise, if I have not received any written submission from counsel by the end of the day on Friday, June 27 I will order the *subpoena duces tecum* I signed in December to be complied with. If I do receive any written submission on the impact of the *Charter*, immediately after that date I will consider any submissions and either order the *subpoena duces tecum* I signed in December to be complied with or declare that I have no power to do so.

(iii) I do not accept this submission by the Union.

For the purposes of this Preliminary Award I am assuming, without deciding, that the documents sought by the Union are relevant and of sufficient probative value to outweigh patient X's privacy interests. In paragraph 10 of his brief counsel for the Employer states "The Employer concedes that if there is no statutory prohibition concerning the release of the requested information, then regardless of the confidential nature of the material sought, the concept of privilege will not prevent the compelled production of the documents." However, in the context of his submissions with respect to the interpretation of the P.E.I. *Freedom of information and Protection of Privacy Act*, R.S.P.E.I. 1988, c. F-15.01, he states:

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> ... the Employer is not convinced that the that the principles of natural justice will be defeated if this request for the medical file will be denied. The invasion of the third party's privacy through the examination of his medical file, containing his diagnosis, his medications, his medical history is an extreme measure, and for what purpose is this information to be used? The Employer assumes that it is sought to test the veracity of his complaint. But surely there are other, less intrusive means of obtaining information that is actually relevant to that point.

On the face of the scant factual material before me I would have thought that, if there were no statutory prohibition concerning the release of the requested information, I would order the pre-hearing production of the documents requested, as is not unusual in the arbitral jurisprudence. Whether or not such documents are admissible in evidence remains, of course, to be determined. Certainly, any such order would be subject to the safeguards outlined by Arbitrator Knopf in *Re Hastings and Prince Edward District School Board and O.S.S.T.F., District 29 (Willock)* (2000), 62 C.L.A.S. 193, set out by Union counsel in her brief, or such other safeguards as may be agreed upon:

> 1. Only those aspects of the record that are directly relevant to the issues at hand will be compellable or admissible;
>
> 2. The portions of the record that are produced shall be held in confidence by the counsel of Union representative. The comments can only be discussed between counsel or Union representative, the litigation advisor and the grievor;
>
> 3. The identity of the third party must not be communicated outside the scope of the hearing or become ascertainable from any resulting award;
>
> 4. The information and documentation adduced in evidence must be presented in an *in-camera* session with only the grievor, counsel or representative, and the litigation advisor present. If information and documentation are presented during the course of testimony of the third party, that third party and his/her parent/guardian or advisor are also entitled to be present. All people present in the room are prohibited from discussing or revealing this information or documentation with anyone else without express approval of the arbitrator; and
>
> 5. Any breach of these conditions is considered to be in contempt of the arbitration process.

Hemmed about that way, in my opinion the Grievor could be accorded procedural justice, with no real danger of prejudice to patient X.

I turn first to *the interaction of the Labour Act and the Mental Health Act*. Under section 37(6) of the P.E.I. *Labour Act*, R.S.P.E.I. 1988, c. L-1, I have the commonly exercised power of a labour arbitrator to compel the production of documents:

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37(6) An arbitrator or the chairman of an arbitration board, as the case may be, has power,

(a) to summon and enforce the attendance of witnesses and to compel them to give oral and written evidence on oath, or on solemn affirmation if they are people entitled to affirm in civil matters, in the same manner as a court of civil record in civil cases;

The first serious issue is whether s. 31 of the P.E.I. *Mental Health Act* limits that general power with respect to clinical records and any other knowledge or information in respect of a patient obtained in the course of assessing or treating or assisting in assessing or treating the patient in a psychiatric facility, or in the course of employment in the psychiatric facility. It provides:

31(1) Except as may be otherwise provided in this Act, no person shall disclose, transmit or examine a clinical record.

(2) The administrator of a psychiatric facility in which a clinical record is prepared and maintained may disclose or transmit the record to, or permit the examination thereof by

(a) any person with the authorization of the patient, where the patient has attained the age of majority and is competent to give such authorization;

(b) any person, where the patient has not attained the age of majority, with the authorization of the patient's parent or guardian;

(c) any person, where the patient is not competent to give authorization, with the authorization of the guardian of the patient;

[Other exceptions not relevant here.]

Subsections 31(3)-(8) deal with the right of a person to see his own clinical record.

Subsection 31(9), which is the most important here, then provides:

(9) Subject to subsections (10) and (11), the administrator of a psychiatric facility shall disclose, transmit or permit the examination of the clinical record of a patient pursuant to a subpoena, order or direction of a judge or provincial court judge with respect to a matter in issue before the judge.

The subsections to which this power in the judge is made subject are:

(10) Where the attending psychiatrist of the patient states in writing that he or she is of the opinion that the disclosure, transmittal or examination of the clinical record or of a specified part of the clinical record pursuant to subsection (9)

(a) is likely to result in serious harm to the treatment or recovery of the patient; or

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> (b) is likely to result in serious physical harm or serious emotional harm to another person,
>
> the administrator shall not disclose the clinical record or part thereof specified by the attending psychiatrist except under an order of the judge or provincial court judge before whom the matter is in issue, made after a hearing that is held on notice to the attending psychiatrist.
>
> (11) On a hearing referred to in subsection (10), the judge or provincial court judge shall consider whether or not the disclosure, transmittal or examination of the clinical record or the part of the clinical record specified by the attending psychiatrist
>
> (a) is likely to result in serious harm to the treatment or recovery of the patient; or
>
> (b) is likely to result in serious physical harm or serious emotional harm to another person,
>
> and for that purpose the judge or provincial court judge may examine the clinical record, and, if he or she believes that such a result is likely, the judge or provincial court judge shall not order the disclosure, transmittal or examination unless satisfied that to do so is essential in the interests of justice.

The admonition in subsection 31(1) is then broadened and reinforced by subsection 31(13) of the *Mental Health Act*:

> (13) Except as provided in subsection (9), (10), and (11), no person shall disclose *in an action or proceeding in any court or before anybody* other than the Review Board any knowledge or information in respect of a patient obtained in the course of assessing or treating or assisting in assessing or treating the patient in a psychiatric facility or in the course of employment in the psychiatric facility, except with the consent of the patient or consent on behalf of the patient under clause (2)(b) or (c), or to a person otherwise cited in subsection (2) or subsection (15). [emphasis added] [Subsection 15 refers to physicians]

Counsel for the Union submits that the arbitrator's powers under the *Labour Act* to compel production of documents are the same as a court of record in civil cases. In other cases, unencumbered by specifically limiting legislation, I have, I think properly, read the power to summon and enforce the attendance of witnesses and to compel them to give oral and written evidence on oath "in the same manner as a court of civil record in civil cases" in that way. I also agree generally with the submission by counsel for the Union, quoting Arbitrator Bendel in *Re Kimberly-Clark Inc. and I.W.A.-Canada, Loc. 1-92-4* (1996), 66 L.A.C. (4th) 266, an award dealing with the admission of surreptitious videotape evidence, at p. 276, that if evidence "is admissible in a court of law it would not appear prudent or

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proper for an arbitration board to exclude it". Here, however, I must give effect to the clear words of the *Mental Health Act*, whether or not I consider the result to be "prudent and proper", unless there is some basis in law for not doing so.

The statutory direction in the *Mental Health Act* to the administrator of a psychiatric facility, and anybody involved in treating a patient or employed in such a facility, could not be more clear. Of course it must be read with the power of an arbitrator under the *Labour Act*, but there is no legitimate basis in statutory interpretation upon which to conclude that, where the two conflict, the *Labour Act* overrides the *Mental Health Act*. Quite the contrary is true, because in this context section 31 of the *Mental Health Act* is highly specific, whereas section 37(6) of the *Labour Act* bestows a general power, and, if constitutional considerations are not involved, the specific overrides the general.

Subsections 31(10), (11) and (12) tend to buttress the conclusion that section 31 of the *Mental Health Act* cannot, as a matter of interpretation, be "read down" to give effect to the power of labour arbitrators under subsection 37(6) of the *Labour Act*. Subsection (12) refers to the "registrar of the court in which the clinical record is admitted in evidence". Of course, the arbitrator could be deemed to be his or her own administrator. Subsections (10) and (11) could similarly be deemed to refer to an arbitrator if subsection 37(6) of the *Labour Act* were to be given its usual application.

The Mental Health Act is very specific in granting the power to order disclosure only to "a judge or provincial court judge". The specific mention of "provincial court judge" means that the natural reading of the words does not include other judicial or quasi-judicial tribunals. This is buttressed by the words "with respect to a matter in issue before the judge", which make it clear, as counsel for the Employer submitted, that there is no power granted to the judge to make such an legislative intent that a judge is not to use this power in aid of another tribunal it would not be proper legislative interpretation to conclude that the legislative intent was that section 31(9) be extended to the orders of arbitrators.

The clear effect, however, of this plain reading of section 31(9) is that, where the *Mental Health Act* applies, there is no judicial or arbitral mechanism whatever by which a *subpoena duces tecum* or

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other order to compel the production of documents can be obtained for purposes of a labour arbitration. It must be remembered that since the Supreme Court of Canada's decision in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, the law is clear law that, where there is an applicable collective agreement, matters such as a grievance against discharge cannot be litigated other than by way of labour arbitration.

Even more chilling under this reading of subsection 31(9) is the effect of a similar literal reading of the provision in subsection 31(13) that *"Except as provided in subsection (9)*, (10), and (11), *no person shall disclose in an action or proceeding* in any court or *before anybody other than the Review Board any knowledge or information in respect of a patient* obtained in the course of assessing or treating or assisting in assessing or treating the patient in a psychiatric facility *or in the course of employment in the psychiatric facility, except with the consent* of the patient or consent on behalf of the patient..." [emphasis added]

On the face of it the effect of subsection 31(13) is that everyone employed by Employer, even the Grievor, is prohibited from telling the arbitrator anything about patient X's mental state learned in the course of employment in the Employer's facility, unless the requisite consent has been given. This, of course, is a gross denial of the Grievor's fundamental right to a fair hearing. How far is this to be carried? Are any of the Employer's witnesses who work in the facility precluded from giving evidence under cross-examination for which there has not been the requisite consent?

Section 7 of the Canadian Charter of Rights and Freedoms. Counsel for the Union submits that "a restrictive reading of section 31(9)" of the *Mental Health Act* "prohibiting the Grievor's access to the Employer's records also violates the Grievor's rights to liberty and security of person under section 7 of the *Charter of Rights and Freedoms*." I would add that, because such a reading of subsection 31(9) must also govern the reading of subsection 31(13), it also prohibits the Grievor's opportunity to testify or introduce other oral testimony, and violates his section 7 rights in that respect as well.

This submission by counsel for the Union is supported only by reference to the award of Arbitrator Oakley in *Re Waterford Hospital*

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Site and N.A.P.E. (J.M.) (1998), 77 L.A.C. (4th) 101. Counsel for the Employer did not address this issue.

Arbitrator Oakley held that the Grievor's "liberty" interests included "his right to proceed with his grievance and 'clear his name'." "Further", he stated, "An absolute prohibition against access to the hospital records of [the third party] is a denial of the Grievor's right to 'fundamental justice' as protected by section 7" [pp. 110-11]. Arbitrator Oakley's treatment of the *Charter* in the preliminary context in which he was addressing it is not sufficiently fleshed out for me to follow it with any great confidence. For one thing, he explicitly does not decide whether the *Charter* applies to the Newfoundland public hospitals in which the case before him arose. The *Charter of Rights and Freedoms* does apply to provincial legislation, and arbitrators have the power to apply it, but it does not apply to private actors. I have had no assistance from counsel on whether the Employer is an agent of the Government or a private actor, although it seems to me that its role is very public.

I hold that the protection afforded by section 31 of the P.E.I. *Mental Health Act* to the privacy of psychiatric patients is overbroad in that it is not properly balanced with the power of labour arbitrators to compel the production of documents and oral testimony, and to permit testimony. The effect of subsections 31(1) and (13) of the *Mental Health Act*, together with the limitation of judicial power in subsection (9), is that employees such as the Grievor, who work under a Collective Agreement, are denied any legal recourse to obtain clinical records or "any knowledge or information in respect of a patient obtained in the course of assessing or treating or assisting in assessing or treating the patient in a psychiatric facility or in the course of employment in the psychiatric facility, except with the consent of the patient or consent on behalf of the patient". This is so regardless of what, in particular circumstances, the appropriate balance might be between their rights to protect their employment, which may mean their livelihood, and those of the patient about whom they require information.

The submission by counsel for the Employer that the common law rules of natural justice are overridden by legislation is clearly correct. But insofar as section 7 of the *Charter of Rights and Freedoms* bestows a constitutional right to procedural fundamental

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justice it is the legislation that gives way. The effect of section 7 of the *Charter of Rights and Freedoms*, if it applies, would appear to be that the words of section 31, subsections (9) and (13) are of no force and effect to the extent that they preclude me as a labour arbitrator from exercising my powers under the *Labour Act* to compel the production of documents and compel and permit oral testimony and written evidence.

As indicated by my opening statement of my conclusions on the issues before me, I invite counsel to provide me with further assistance on this Charter issue, before I make an order compelling the production of documents. As I have said, in the interests of not leaving this matter in limbo, in the absence of agreement otherwise, if I have not heard from counsel by the end of the day on Friday, June 27 I will order the *subpoena duces tecum* I signed in December to be complied with.

The Freedom of Information and Protection of Privacy Act. Fundamentally, I agree with the submission of counsel for the Employer that the *Freedom of Information and Protection of Privacy Act* does not affect the power of either courts or labour arbitrators to order the production of documents. The purposes of the *Act*, as set out in section 2, are (a) to allow any person the right to access to documents under the control of a public body, subject to specific exceptions; (b) to control the collection and use by public bodies of information about individuals; (c) to allow individuals access to information about themselves held by public body, subject to specific exceptions; and (d) to provide independent reviews of decision made by public bodies and for resolution of complaints under the Act.

Under section 6 there is a general right of access to any public record, which is to be acted upon, according to section 7, by making a request to the pubic body holding it. That gives rise to a duty in the public body under section 8 to provide such information if it is available, unless it is under one of the exceptions listed in Division 2 of the *Act*. The public body is bound by section 5, which provides:

> 5(2) If a provision of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless
>
> (a) another Act, or
>
> (b) a regulation under this Act

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expressly provides that the other Act or regulation, or a provision of it, prevails despite this Act.

The exceptions in Division 2 include, in subsection 15(1), information the disclosure of which would be "an unreasonable invasion of a third party's personal privacy". Subsection 15(2) provides, in part:

(2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

...

However, by subsection (4) disclosure of personal information is not "an unreasonable invasion of a third party's personal privacy" if:

15(4)(c) an Act of Prince Edward Island or Canada authorizes or requires the disclosure.

In other words, if the *Labour Act* entitles me to order disclosure, the *Freedom of Information and Protection of Privacy Act* does not preclude me from doing so.

Against this skeletal background sketch of very complex legislation, it is to be noted that compliance is provided for in section 50, and 60 ff., including section 67, by investigation and attempts to resolve complaints and ultimately an order by the Privacy Commissioner, subject to judicial review.

This demonstrates that labour arbitrators' powers to compel the production of documents, like the court's powers, exist in parallel to the rights, duties, protections and remedies in the *Freedom of Information and Protection of Privacy Act*. That *Act* neither enhances not diminishes their powers. Indeed section 3 of the *Act* states precisely that:

3. This Act

(a) is in addition to and does not replace existing procedures for access to information or records.

(b) ...

(c) does not limit the information otherwise available by law to a party to legal proceedings;

(d) does not affect the power of any court or tribunal to compel a witness to testify or to compel the production of documents;

...

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In my opinion the only possible conclusion about the *Freedom of Information and Protection of Privacy Act* in the context of this matter is that my powers as arbitrator are unaffected by it. Whether it entitles the Grievor, or the Union on his behalf, to get information by the means provided in the *Freedom of Information and Protection of Privacy Act* is not properly before me.

Counsel for the Union relied on several awards in which arbitrators in other jurisdictions, under different legislation, have held that they had power to apply freedom of information and protection of privacy legislation, not unlike the P.E.I. *Act*, to order the disclosure to a Grievor's counsel of otherwise confidential or privileged documents. In *O.S.S.T.F., District 1 v. Windsor Board of Education*, [1995] L.V.I. 2694-6, Arbitrator Samuels held that the Ontario *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, superseded section 266(2) of the Ontario *Education Act*, R.S.O. 1990, c. E.2, which would have rendered school records uncompellable for the purposes for which his order was sought. Quoting a section of the applicable Ontario freedom of information and protection of privacy legislation, which appears similar in effect to section 5(2) of the P.E.I. *Act*, Arbitrator Samuels declared, at p. 4:

> In my view the [act] has established a uniform system of protection and access to personal information, regardless of the type of personal information. Section 53(1) sweeps away all other confidentiality provisions, unless the other provision has been expressly preserved by its own piece of legislation or by the [act].

In Arbitrator Knopf's *Re Hastings and Prince Edward District School Board and O.S.S.T.F., District 29 (Willock)* (2000), 62 C.L.A.S. 193, cited above in connection with the safeguards that will surround any order to produce the documents sought here, or any other evidence protected by the *Mental Health Act*, the learned arbitrator also considered the award of Arbitrator Samuels in *O.S.S.T.F., District 1 v. Windsor Board of Education* and another Ontario award, *Re Ontario Public Schools Authority and O.S.S.T.F., District 57* (Roberts) (March 2000, unreported), which, apparently, similarly concluded that the section of the Ontario *Municipal Freedom of Information and Protection of Privacy Act*, which is like subsection (2) of section 5 of the P.E.I. *Act*, overrode confidentiality provisions in other legislation, unless the other provisions had been expressly

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preserved. In that context Arbitrator Knopf concluded in para. [17] that "nothing in the legislative scheme [of the *Education Act*] dictates that a pupil's record cannot be compelled to be produced by a tribunal such as an arbitration board". I wish I could reach the same conclusion about section 31 of the P.E.I. *Mental Health Act*, but I cannot.

Whatever may be the case in Ontario, section 5(2) of the P.E.I. *Freedom of Information and Protection of Privacy Act*, quoted above, appears to be more modest in its intended and apparent effect. It says that where, in the application of the *Freedom of Information and Protection of Privacy Act*, "a provision of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails" in the absence of express provision to the contrary. Presumably, the "other enactment" continues to exist in other contexts and for other purposes, like the all too explicit limiting to courts of the power to make orders to produce documents relating to patients under the *Mental Health Act*.

Counsel for the Union put two other Ontario arbitration awards before me. In *Re West Park Hospital and O.N.A.* (1993), 37 L.A.C. (4th) 160, a board of arbitration chaired by Arbitrator Knopf addressed the balance between a third party's privacy rights and a grievor's right of disclosure in much the same terms she later used in *Hastings and Prince Edward District School Board*, dealt with above. In *Re Children's Aid Society of City of Belleville, County of Hastings and City of Trenton and C.U.P.E., Loc. 2197* (1994), 42 L.A.C. (4th) 259, Arbitrator F.D. Briggs cited the *West Park Hospital* Award with approval in ordering the pre-hearing production of documents, with conditions.

Because grievance arbitration is a private dispute resolution process between the Employer and the Union, an order to produce documents will not conflict with the privacy protection for third parties imposed by the Mental Health Act. There is nothing in the P.E.I. *Mental Health Act* to suggest that section 31 does not apply to grievance arbitration.

Counsel for the Union also relied on three Alberta cases in support of this argument. In *Re Mental Health Hospital Board and Health Care Employees Union of Alberta, Loc. 2 (Aldag)* (1990), 21 C.L.A.S. 172, a board of arbitration under the Alberta *Public Service*

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Employee Relations Act, R.S.A. 1980, c. P-33, chaired by Arbitrator Lucas, considered the effect on its powers to order the production of documents of the section 17 of the Alberta *Mental Health Act*, S.A. 1988, c. M-13.1. Subsection (4) of section 17 provided;

> (4) information obtained from records maintained in a diagnostic and treatment centre or from persons having access to them shall be treated as private and confidential information in respect of persons receiving diagnostic and treatment services in the centre and shall be used solely for the purposes described in subsection (3) [assessing standards of care etc, as authorized by the Minister], and the information shall not be published, released or disclosed in any manner that would be detrimental to the personal interest, reputation or privacy of that person or that person's attending physician or any other person providing diagnostic and treatment services to that person.

Section 17 then gave a list of exceptions, not including a labour arbitration board. The Lucas arbitration board concluded that it was not precluded by section 17 from exercising its normal powers to order production of documents, stating in paras. [22] and [23]:

> [22] The provisions of s. 17 of the M.H. Act do not conflict with the P.S.E.R. Act. The P.S.E.R. Act regulates the relations between employees and employers. It provides a means by which those parties are to resolve their differences and confers upon the adjudicator of those differences appropriate powers to ensure the dispute resolution process is carried out in a fair manner. The dispute resolution process is a private one and although a resulting award may be published, the award can be written in a manner that excludes specific or identifiable reference to persons places or things, if necessary. This is the usual practice followed with respect to arbitration or adjudication awards dealing with incidents of patient abuse by staff members.
>
> [23] The M.H. Act is concerned with the privacy of the patient and not the relationship between a hospital and its employees. So long as that privacy is not breached by improper and unnecessary references in an adjudication award, then the differences between a hospital and its employees can be properly resolved by the adjudication process.

The Board's award was upheld on judicial review. In the Queen's Bench the judgement of Trussler J., indexed as *Re Aldag*, [1991] A.J. No. 718 (QL), 28 A.C.W.S. (3d) 989 *sub nom. U.N.A. v. Alberta (Mental Health Hospital Board)*, includes the following, at p. 3:

> ...if one looks carefully at those exceptions [in section 17 of the *Mental Health Act*], one sees that they provide for the release to external bodies or parties. Here we have an internal matter within the hospital itself. It is not a question of release to an external body. We have the parties within the hospital resolving an internal dispute by means of a contract entered into pursuant to provincial legislation.

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> I am therefore of the opinion that the release of the information would not contravene the section.

On appeal these reasons were adopted by the Alberta Court of Appeal in *U.N.A. v. Mental Health Hospital Board (Edmonton)* (1992), 131 A.R. 50.

I agree with this purposive interpretation and all of these wise words. My difficulty is that, in the Alberta *Mental Health Act* as quoted in the Award and the judgements, there is no language explicitly directed to adjudicators as the language in the P.E.I. *Mental Health Act* clearly is. Section 17 of the Alberta *Act* simply says "the information shall not be published, released or disclosed", which is a far cry from subsection (13) of section 31 in the P.E.I. *Act*: "Except as provided in subsection (9) ... *no person shall disclose in* an action or *proceeding* in any court or *before anybody* ... any knowledge or information in respect of a patient ..." [emphasis added]. Subsection (9), it will be recalled says:

> (9) ... the administrator of a psychiatric facility shall disclose, transmit or permit the examination of the clinical record of a patient pursuant to a subpoena, order or direction of a judge or provincial court judge with respect to a matter in issue before the judge.

Conclusion and Order. As I have made clear above, I think subsections (9) and (13) of section 31 of the P.E.I. *Mental Health Act* is overly rigid law, which goes far beyond what is required to protect patient X's privacy, and which denies the Grievor fundamental procedural justice. While the point was not seriously addressed by counsel, my opinion is that section 7 of the *Canadian Charter of Rights and Freedoms* renders those provisions ineffective to preclude me from signing the *subpoena duces tecum* sought by counsel for the Union. In the absence of agreement otherwise, if I have not heard from counsel by the end of the day on Friday, June 27 I will order the *subpoena duces tecum* I signed in December to be complied with.

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