QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2019 SKQB 91**

Date: **2019 03 28**
Docket: QBG 220 of 2019
Judicial Centre: Saskatoon

BETWEEN:

CROMBIE STEBNER

PLAINTIFF
(APPLICANT – INJUNCTION)
(RESPONDENT – PUBLICATION BAN)

- and -

THE OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER, SASKATCHEWAN

DEFENDANT
(RESPONDENT – INJUNCTION)

- and –

CANADIAN BROADCASTING CORPORATION and POSTMEDIA NETWORKS INC.

NON-PARTIES
(APPLICANT – PUBLICATION BAN)

Counsel:

Mark R. Vanstone	for the plaintiff
Reginald A. Watson, Q.C.	for the defendant
Sean M. Sinclair	for the non-parties

FIAT
March 28, 2019

DANYLIUK J.

I. FACTS

Introduction

[1] Due to unforeseen circumstances these reasons have taken longer than hoped to deliver. My apologies to the parties and their counsel for the delay.

[2] This is a fiat dealing with two related applications. The first is the plaintiff's (Dr. Stebner) application for interlocutory injunctive relief and a publication ban. This pits the plaintiff as adverse in interest to both other parties. Regarding this first application, only the Information and Privacy Commissioner (IPC or Commissioner) opposes. The second application was brought by the non-parties (collectively, the Media), seeking to set aside an *ex parte* short-term publication ban granted by another judge of this Court. Only Dr. Stebner is engaged in opposition to that application.

[3] For the reasons set out below, I have determined I must dismiss Dr. Stebner's application for injunctive relief and a continued publication ban. Further, I have determined that I must grant the Media's application to set aside the *ex parte* order for a temporary publication ban.

[4] For the better organization of this ruling I have divided it into the following sections:

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ITEM **PARAGRAPHS**

The Parties

[5] At all material times Dr. Stebner was a medical resident, through the College of Medicine at the University of Saskatchewan. When the subject events were occurring she went by the surname of "Maltman", but now uses "Stebner" and is so styled in her own application. There is evidence and documentation on the court file bearing both names. I am using Stebner in this decision, as that is the name she currently uses.

[6] To phrase matters informally, she was (and is) a young physician at the beginning of her career. In the spring of 2018 she was a medical resident working at a hospital in Saskatchewan, a hospital falling under the authority of the Saskatchewan Health Authority [SHA]. Her status as a resident meant she also continued to fall under the supervision of the postgraduate division of the College of Medicine, University of Saskatchewan. Medical residents enjoy a somewhat odd legal status, insofar as they are simultaneously students and employees of the University.

[7] The IPC is a statutory position, continued under s. 38(1) of *The Freedom of Information and Protection of Privacy Act*, SS 1990-91, c F-22.01 [FOIP]. The IPC administers or oversees three pieces of Saskatchewan legislation: FOIP, *The Local Authority Freedom of Information and Protection of Privacy Act*, SS 1990-91, c L-27.1 [LAFOIP], and *The Health Information Protection Act,* SS 1999, c H-0.021 [HIPA]. Collectively, these statutes deal with privacy rights of people in this province and deal with access to their private information. The IPC oversees a number of provincial public entities which include government institutions, local authorities and trustees. The IPC oversees these entities to safeguard the public's privacy and information access rights.

[8] The nature of the office of the IPC, and the legal effect of same, is

discussed in more detail below.

[9] Finally, two media entities became involved in this matter as a result of a short-term *ex parte* publication ban issued by another judge of this Court. In this ruling I shall refer to the CBC and Postmedia collectively as "the Media". Under the existing media protocol within this Court, the media is alerted when a form of publication ban or restriction on access to file material is sought.

[10] In this case the Media brought its own application without notice to allow access to the court file. Another judge of this Court dismissed that application and directed the Media to apply with notice. That judge observed that "the onus is on the applicant, not the Media, to continue the publication ban granted on a 'without notice' basis". The Media did bring such an application, returnable on the same date as Dr. Stebner's application for interim injunctive relief.

Background

[11] April 6, 2018 saw the occurrence of a tragedy that had an international effect. At the intersection of two secondary highways in rural Saskatchewan a bus carrying members and associates of the Humboldt Broncos hockey team collided with a semi-tractor trailer unit operated by an inexperienced driver, who failed to stop for a Stop sign. There were 16 people killed and 13 injured on the bus. The effect on everyone on that bus, as well as their families and friends, was devastating. Lives were ended. Lives were changed. The outpouring of anguish and support crossed national, social and economic borders.

[12] Of course, people wanted to know what had happened, and why. They wanted to know how the survivors were doing. In a time marked by confusion, and in

a time simultaneously calling for privacy and compassion, the quest for information that is the hallmark of our present era continued unabated.

[13] The injured were treated by numerous health care professionals. As a result, personal health information was recorded. Those records are retained in a health record system that is accessible via computer. Active treatment professionals can readily obtain information required for ongoing treatment through this computer information storage and retrieval system. However, people within the health care field with access to this system also can obtain information, even if they do not need it for any legitimate ongoing health care reason.

The Privacy Breaches

[14] As might be expected, this happened. The information of the injured people from the Broncos' bus was flagged and monitored by eHealth Saskatchewan, an entity in charge of this information system. eHealth detected that a number of people inappropriately accessed the information of these patients. One of them was Dr. Stebner. I note she is not the only person who did so.

[15] The monitoring set up by eHealth effectively triggered a notification when the information of the injured patients from the Broncos' bus was accessed. Any time that information was viewed, an email notice was sent to eHealth's privacy personnel, who serve within eHealth's Privacy, Access and Patient Safety Unit. It was this "watchdog" software within the health information system that alerted this Unit to the fact that Dr. Stebner accessed the personal and private medical information of three different patients on three successive days.

[16] It was detected that Dr. Stebner accessed three patients' personal and

private medical information. She did so as follows:

- On April 7, 2018, the day after the collision, Dr. Stebner accessed one patient's personal health care records and information.
- On April 8, 2018, Dr. Stebner accessed the electronic portal to view a second patient's personal health care records and information.
- On April 9, 2018 Dr. Stebner accessed the personal health care records and information of a third individual.

[17] As noted above, Dr. Stebner remained under the supervision of the College of Medicine. So, eHealth contacted the College to determine the reasons underlying Dr. Stebner's access to the three patients' private medical information. The College advised eHealth that Dr. Stebner indicated she had treated two of the three patients before the collision. She apparently wanted to see how they were doing. She was unsure of the name of one patient and got it wrong on one search, which accounted for the third accessing of patient medical information.

[18] Dr. Stebner's accessing of private medical information was perceived by eHealth as a potential breach of privacy rights, so they reported this matter (as well as other matters involving other individuals who accessed health records) to the IPC. The IPC investigated.

The IPC's Investigation and Reports

[19] Once advised of this situation, the IPC's investigation commenced. The IPC, as noted, is responsible for the administration of HIPA. The Commissioner saw Dr. Stebner's accessing of the private medical information of three individuals as potential breaches of the privacy provisions of HIPA, thus further investigation was

warranted.

[20] IPC staff had contact with eHealth, the University and the Saskatchewan Health Authority. Information was gathered, information that was inconsistent. Let me explain those inconsistencies:

- The IPC received information from eHealth. Apparently Dr. Stebner told eHealth personnel that she had provided services to two of these three individuals prior to the collision. After hearing of the collision Dr. Stebner felt the need to check up on these two prior patients "to get closure" and to regain her focus on the job. She could not recall the names of the two individuals, which is why she ended up accessing three different sets of health records.

- Through the University, the IPC was informed that Dr. Stebner accessed the medical information out of a desire to know whether the two individuals to whom she had provided treatment prior to the collision had been admitted to the hospital she worked at, as she might encounter or treat them on her next shift at that hospital. She indicated she did this out of concern for these two patients, concern related to their future care with which she might be involved.

- A third account emerged through the SHA. The SHA indicated that Dr. Stebner had actually only personally attended to one of the three patients whose information was accessed by her, and that the SHA had no records indicating Dr. Stebner had any prior interaction at all with the other two individuals involved, at least at SHA facilities. As a result of this conflict the IPC contacted local medical clinics and was able to confirm Dr. Stebner provided no medical services to these

people at these clinics.

[21] From the material before me, it appears these conflicts in the various accounts as to this doctor's reasons for accessing private medical health information understandably spurred on the report from eHealth and the investigation by the IPC.

[22] I note that in her affidavit sworn February 7, 2019 and filed in support of her application Dr. Stebner provided this reason for accessing the patients' information:

> 10. I had previously attended to the medical needs of two members of the Humboldts [*sic*] broncos team in hospital, prior to viewing the medical reports in question, and had accessed the records in anticipation of continuity of care as I anticipated a likelihood of seeing these individuals again on my return to their community hospital in approximately two week's [*sic*] time. I had inadvertently accessed incorrect record(s) as I had misremembered the name of one of the two individuals I had seen as a patient.

[23] Dr. Stebner is not entirely clear or forthcoming in her affidavit as to the circumstances in which she provided prior treatment. She does not, for example, depose to a time frame for her provision of medical treatment although other material indicates it was prior to the collision on April 6, 2018. She does not say why she believed she would again treat these two individuals in the future, just because she had done so in the past in her capacity as a medical resident completing her training. It is a long-standing principle that in seeking equitable relief from the courts an applicant should make full disclosure, sometimes referred to as "coming to the court with clean hands". In this application, Dr. Stebner has not completely disclosed all relevant facts. More on this later.

[24] The Commissioner determined that this access to patients' private health information constituted a breach of HIPA. He determined that the three required

elements for engagement of HIPA were present: the patients' health information was being stored; the SHA qualified as a trustee within the meaning of HIPA; and the SHA was the actual trustee of that information. He determined that SHA is the trustee of patient information for resident doctors who are finishing their term of residency at an SHA facility, such as a hospital. As trustee, SHA is responsible for resident physicians and for how they use, access and disclose private patient medical information.

[25] It was further determined by the IPC that privacy breaches occurred, as Dr. Stebner accessed, viewed and used information about these three patients without authority from SHA (the trustee of that information). The Commissioner noted that such information use under HIPA is governed by the "need to know" principle set out in ss. 23 and 24; that is, health care providers should only use information necessary to diagnose, treat or care for a patient. As it appeared to the Commissioner that Dr. Stebner had accessed patient information for other, non-qualifying purposes, her access of information was a breach of HIPA.

[26] I note that there was no finding that Dr. Stebner was doing this out of any improper motive. She stated, variously, that she was getting "closure" for herself regarding people she had treated, and was concerned for their welfare. For these reasons, she said, she accessed the information. Whether those reasons were genuine is beside the point of this application, and in any event there is nothing to cast doubt on her stated reasons, other than her lack of consistency in providing an explanation for her actions.

[27] Dr. Stebner's access of patient records occurred April 7, 8, and 9, 2018. The detection of that access by eHealth occurred swiftly. As a result, on April 18, 2018, Dr. Stebner was advised via email from the College of Medicine that the IPC had contacted the College on the matter. The College's email to Dr. Stebner named the three

patients in issue. Dr. Stebner replied to the College's email that same day, indicating yet other reasons for her access to the medical records, and her reply is reproduced verbatim below:

> Yes I did have care with more than one of these players. When the accident happened I couldn't remember who I had seen and I thought it was forsure [*sic*] 2 of 3 of those boys you listed below, as they looked familiar on television/online. It was really upsetting me that I had had contact with them but couldn't remember their names. So I just wanted to see if they had been seen by me in humboldt [*sic*] hospital. I looked up [name redacted] first and saw I had seen him and then thought forsure [*sic*] it was one of the other two boys but it turned out it wasn't so I stopped. The only part of their chart I accessed was the list hospital visits. Sorry if this was outside my scope of privileges, I felt a personal connection to some of these players and it was affecting my ability to focus at the time. Let me know if you need any information from me.

[28] She had a further meeting with a College of Medicine official on June 11, 2018. Then, on September 11, 2018 an IPC staff member emailed Dr. Stebner with a list of questions. She contacted the same College official for advice and was referred to an internal University of Saskatchewan lawyer and privacy officer. They had a meeting later in September and shortly thereafter prepared a response to the IPC inquiries.

[29] The next event Dr. Stebner deposes to is receiving the draft IPC report via the U of S privacy officer on January 28, 2019. This draft IPC report pertained to Dr. Stebner's (at the time, Maltman's) privacy breach. This was Investigation Report 240-2018. The draft was dated January 29, 2019 and a copy of this draft was emailed to Dr. Stebner by IPC staff and that email stated:

> Dr. Crombie Maltman,
>
> Please find attached the Information and Privacy Commissioner's Investigation Report 240-2018. My office is sending you a copy of this report because you are named in it. This investigation report will be posted to my office's website.

[30] The next day, Dr. Stebner asked the U of S privacy officer to ask the IPC to remove her personal information from the report. Later that day, Dr. Stebner was informed that the Commissioner would not make the changes she had requested. I note this exchange is reflected in Exhibit "I" to Dr. Stebner's affidavit, which is incomplete. The commencing email in the string is incomplete. I am unsure whether anything turns on that fact, but I again reference the clean hands/full disclosure doctrine. Care must be taken by litigants and their counsel in the preparation of sworn material to be placed before this Court.

[31] At the end of this February 1, 2019 email exchange, the U of S lawyer/privacy officer advised Dr. Stebner that the IPC would not use the doctor's full name but only initials. The U of S privacy officer indicated "I think this is a reasonable outcome". It appears Dr. Stebner disagreed, given the within application.

[32] Again, I must note that in Dr. Stebner's affidavit (para. 17) she only outlined a summary of this email exchange and said the IPC refused to take her name out of the report. For some reason her affidavit does not reference the final advice from the U of S privacy officer that the IPC was redacting her name and only using initials. In this regard, para. 17 of her affidavit is somewhat misleading. While she does indicate that initials were agreed upon she suggests in her affidavit that this was not until February 5, 2019. In fact, from the evidence it appears it was February 1, 2019. Yet again, I say that a party seeking relief from this Court (especially extraordinary relief such as a mandatory interlocutory injunction) needs to be scrupulously accurate and complete in providing evidence.

[33] Dr. Stebner's affidavit discloses she retained private counsel, being present counsel on this application. He wrote to the Commissioner February 4, 2019. This three-page letter identifies a number of matters Dr. Stebner wanted "corrected" or

altered. For present purposes it is worthwhile to review these requests in summary form:

- The letter repeatedly refers to Dr. Stebner being in the patients' "circle of care". As will be discussed below, this is not a concept enjoying a place in privacy law considerations. It is suggested that because Dr. Stebner perceived herself in the circle of care of these patients, "her use of the medical records was anticipatory of her potential continued involvement in their medical needs, and was not 'to get closure' as the Report indicates". This appears to ignore Dr. Stebner's earliest response to the suggestion of a privacy breach, being her April 18, 2018 email. Nowhere does she advance this anticipatory treatment in her initial email. In fact, her wording is far closer to obtaining "closure" than it is to a treatment matter. She speaks of her inability to focus and accessing the medical records to address this.

- Dr. Stebner's counsel indicated that she did not wish to be named or have her personal information disclosed. It is suggested that by naming her personally in the report, the IPC created "an implication that she is responsible for the breach and resulting recommendation of the Commission [*sic*]". This is difficult to understand. If she improperly accessed private medical records, who else would be responsible for that breach?

- Counsel repeatedly refers to a "public shaming" emanating from Dr. Stebner's identification in the IPC report, notwithstanding that by February 1, 2019 the IPC had agreed to use initials only. This letter must be regarded very carefully in terms of its weight and value as evidence, as it contains numerous self-serving statements not otherwise proven in any evidence before this Court on this

application. For example, on page 2 of the report counsel refers to Dr. Stebner's "exemplary career", the "stigma" the report would cause her, comparing the report to a "scarlet letter", and "damage to her reputation". Outside of this letter, there is no actual evidence before me proving the existence of any of these things.

- Finally, counsel seeks to enter into negotiations with the IPC regarding the report's final content "so that we might arrive at a mutual outcome" (page 3). This will be discussed in detail below but it is difficult to see why an official with a mandate such as the Commissioner's would negotiate the content of his reports or effectively let someone who was the subject of a report, someone who had committed a breach, edit his report. The Commissioner addressed this concept by way of an emailed reply on February 5, 2019 (Exhibit "K", Stebner affidavit) which in part reads as follows:

> Regarding my reports, I have the authority to put in the reports thee [*sic*] important and relevant facts. Breaches occurred and I am entitled to set out the facts surrounding those breaches.

[34] The Commissioner therefore publicly issued his report 240-2018 as he had amended it to redact Dr. Stebner's name, referring to her as "Dr. M".

[35] As well, the Commissioner publicly issued his report 161-2018. This report related to the same subject matter, breach of patients' private medical records by medical personnel related to the Humboldt Broncos collision in early April 2018. Six users who accessed these records are discussed in that report. Four other reports dealt with other users. In report 161-2018 (para. 3) the Commissioner first uses the term "snooping" to describe this unauthorized access.

[36] It is fair to say Dr. Stebner takes great exception to the term "snooping".

[37] Dr. Stebner is discussed at paras. 62 to 82, 145, 150, and 159 of report 161-2018.

[38] After retaining private counsel to seek to edit the Commissioner's report, and after being rebuffed by the Commissioner, Dr. Stebner commenced this matter by way of Originating Application. The matters raised therein are to be heard in April 2019. Presently I am dealing with a Notice of Application dated February 8, 2019 which seeks the following relief:

> 1. An Order granting a mandatory interlocutory injunction such that the Defendant, including any and all directors, officers and employees of the Defendant, shall immediately remove any and all publications of the Investigation Report #240-2018 dated January 29, 2019.
>
> 2. An Order granting a mandatory interlocutory injunction such that the Defendant, including any and all directors, officers and employees of the Defendant, shall immediately remove any and all publications of the Investigation Report #161-2018 dated January 29, 2019.
>
> 3. An Order granting a mandatory interlocutory injunction such that the Defendant, including any and all directors, officers and employees of the Defendant, shall immediately request to any third party that received the Investigation Report #240-2018 dated January 29, 2019 from the Defendant remove the same immediately.
>
> 4. An Order granting a mandatory interlocutory injunction such that the Defendant, including any and all directors, officers and employees of the Defendant, shall immediately request to any third party that received the Investigation Report #161-2018 dated January 29, 2019 from the Defendant remove the same immediately.
>
> 5. An Order granting an interlocutory injunction restraining the Defendant, including any and all directors, officers and employees of the Defendant, from releasing or republishing the Investigation Report #240-2018 dated January 29, 2019.

6. An Order granting an interlocutory injunction restraining the Defendant, including any and all directors, officers and employees of the Defendant, from releasing or republishing the Investigation Report #161-2018 dated January 29, 2019.

7. An Order for a publication ban restricting media access and reporting on these proceedings and all documents filed herein, and requiring the use of pseudonyms in the Court records in order to protect the Plaintiff's identity.

8. Costs of the Action.

[39] It is this set of requests for relief that I am to adjudicate upon.

Issues

[40] The issues before the Court are:

1. What is the general law applicable to each of these applications?

2. Should an injunction be granted?

3. Should a publication ban be continued?

4. Should any order regarding costs be granted?

Analysis

1. What is the general law applicable to each of these applications?

[41] Counsel did not differ as to the test for an injunction, or as to the general considerations surrounding same; rather, they differed as to matters of interpretation and application. Still, this application engages several distinct yet overlapping areas of law.

Saskatchewan Privacy Law

[42] As stated above, much of Saskatchewan privacy law emanates from statutes. Regarding this matter three statutes pertain: FOIP, LAFOIP, and HIPA. HIPA is particularly relevant to this case.

[43] During the verbal submissions in this matter and in Dr. Stebner's written materials there was discussion of two concepts: "circle of care" and "need to know".

[44] Circle of care is a somewhat outmoded medical concept, at least within the realm of privacy law. Circle of care has been described in numerous ways, but a simple definition would be that the circle of care in any case is the group of medical and health care providers who collectively are providing treatment to a patient, and who need access to medical information to provide that care at an acceptable level. Physicians have been trained that those parties within the circle of care of a particular patient generally enjoy an implied consent from that patient to access the patient's private medical information. For example, a circle of care for a knee injury might include the patient's family physician, a specialist, nurses, and therapeutic providers such as physiotherapists or psychologists. It is unlikely to include the patient's dentist or optometrist in that circle of care, in terms of the knee injury.

[45] In her affidavit and in her communications with others prior to the launching of this application, Dr. Stebner relied on the circle of care concept. She regarded herself as being in the circle of care. I am not at all sure she was correct but for privacy law purposes I do not have to make that decision. This is because the other referenced concept, need to know, prevails in privacy law.

[46] Need to know is not a construct of the IPC. It comes from s. 23 HIPA:

> 23(1) A trustee shall collect, use or disclose only the personal health information that is reasonably necessary for the purpose for which it is being collected, used or disclosed.
>
> (2) A trustee must establish policies and procedures to restrict access by the trustee's employees to an individual's personal health information that is not required by the employee to carry out the purpose for which the information was collected or to carry out a purpose authorized pursuant to this Act.

[47] Section 23 imposes two related duties on a trustee of private medical information, such as SHA:

- First, data minimization. SHA is to strive to collect, use and/or disclose the least amount of private medical information required to carry out the purpose behind that information. In SHA's case, this purpose is generally the delivery of health care.
- Second, need to know. SHA, as a trustee, must set up its information system so that patients' private medical information is only available to its employees having a legitimate need to know that information for the purpose of delivering medical care services to that patient.

[48] The IPC has rendered numerous decisions on privacy matters within the context of health care organizations. The IPC has explained that circle of care is not used in HIPA and within privacy law has a somewhat ambiguous meaning. For example, see *Regina Qu'Appelle Regional Health Authority (Re)*, 2013 CanLII 5640 (Sask IPC). Paragraphs 59 and 60 provide a useful overview of the weaknesses of circle of care within privacy law matters:

> [59] Before I discuss RQRHA's administrative safeguards I need to address a problematic theme evident in the RQRHA materials. I am referring to the frequent reference in the materials to 'circle of care'. This term does not appear in HIPA. This concept has, in our

nine years of experience overseeing trustees in Saskatchewan, contributed to confusion of HIPA requirements in section 23(2) and non-compliance with HIPA. We have communicated our concern to trustees, including regional health authorities, for a number of years. I am surprised that RQRHA continues to include circle of care in its suite of HIPA resources. In my *2010-2011 Annual Report*, I stated the following:

> **Health and a number of other trustee organizations persist in utilizing 'circle of care' in their literature and education efforts. This is often done without acknowledging that 'circle of care' focuses on the provider and not the patient and is entirely variable given each individual patient and the presenting needs of each individual patient. We have found this concept has contributed to professionals misunderstanding the requirements of HIPA, particularly the 'need to know principle' in section 23(1) of HIPA.** The argument, as we understand it, is that health professions are familiar with the term and have used it for a very long time. Yet, that reliance on old concepts and assumptions has proven, in our experience, to perpetuate an over-confidence that translates into no incentive to learn what HIPA requires. We continue to urge those organizations to instead focus on the 'need to know' which is explicitly provided for in HIPA and which squarely puts the focus on the patient.
>
> [emphasis added]

[60] My office produced a document entitled *Glossary of Common Terms: The Health Information Protection Act* (Glossary) to assist trustees in understanding what is required of them by HIPA. In it, we explain why the term circle of care is unhelpful to health professionals:

> **CIRCLE OF CARE** is not a statutory term and has different meanings depending on whether you are considering the federal PIPEDA [*Personal Information Protection and Electronic Documents Act*] Awareness Raising Tools (PARTS) document or provincial literature re: HIPA. This phrase may help explain HIPA in very basic terms to a layperson. Our view is that it is unhelpful when it comes to training of health care workers in trustee organizations. Trustees and trustee employees require a more nuanced understanding of when and how sharing of [personal health information] can occur. The weaknesses of "circle of care" are as follows:
>
> > (1) **It puts the focus on a variety of roles and persons within trustee organizations as to whether they are or are not a member of the 'club' instead of focusing on**

the patient and the particular care transaction in question. The better approach is to utilize the 'need to know' principle in section 23 of HIPA which focuses not on the provider as much as it does on the individual patient and the health needs presented in any particular health transaction.

(2) **It suggests a static kind of entitlement to information.** In fact, the circle of care should likely change, even for the same patient, if the patient seeks treatment on Day 1 for a fractured femur and then returns to the same facility on Day 2 for a dietary issue or a mental health problem. There will perhaps be an entirely different group of health workers dealing with the injury on Day 2 than treated the fracture on Day 1. Every member of the Day 2 health care team may not be entitled to all of the [personal health information] collected, used or disclosed on Day 1. A number of trustee organizations in their policies and training material have developed long lists of suggested or possible circle of care members. In our experience this is often misunderstood as a kind of green light for sharing [personal health information] among all of those members without regard to the particular patient and the particular health transaction.

(3) **The circle of care in the training material and policy of a number of trustee organizations is restricted to trustees and their employees. In our view this is unduly restrictive.** Reliance on need-to-know permits disclosure in appropriate circumstances to non-trustees. Using the need-to-know principle, it is not uncommon that even non-trustees may, from time to time, require certain [personal health information] in the course of the diagnosis, treatment or care of the patient (e.g. a police officer who is transporting a sick individual to a different care facility, an adult child providing temporary housing for a senior being discharged from an acute care facility or even a teacher or day care worker who needs to monitor a child for certain adverse drug reactions).

In our experience, a much better practice is to focus on the patient's particular needs and the particular health transaction. This can be done by concentrating on which individuals/roles have a demonstrable need-to-know (per section 23 of HIPA) for some or all of the patient's [personal health information].

[emphasis added]

[49] The Commissioner's report regarding Dr. Stebner focused, correctly in my view, on whether she had a need to know. The Commissioner determined, again correctly in my view, that she had no legitimate need to know. Her initial reasoning expressed in her first email was akin to seeking closure, in terms of wanting to see the information to restore her "focus". Subsequently Dr. Stebner's account was varied, and she suggested she "anticipated" that she might "possibly" be called upon to care for one of the players injured in the Broncos collision.

[50] The real point is, the Commissioner correctly viewed the matter through the lens of privacy law, his core mandate. A basic understanding of privacy law is required to make or review that determination.

The Nature of the Office of the IPC

[51] Distinct from any potential Crown immunity argument, it is helpful to consider the nature of the IPC's office.

[52] As noted above, the IPC is a creation of statute. The position was continued under s. 38(1) FOIP. The Office of the IPC administers or oversees three statutes: FOIP, LAFOIP, and HIPA. Collectively, these statutes deal with privacy rights of people in this province and deal with access to their private information.

[53] Presently the Commissioner is Ronald J. Kruzeniski, Q.C., a highly experienced lawyer of over 45 years' standing. In all references within these reasons, when I refer to the IPC or the Commissioner I am referring to Mr. Kruzeniski Q.C. and/or members of his staff.

[54] The IPC oversees a number of provincial public entities which include government institutions, local authorities and trustees. The IPC oversees these entities

to safeguard the public's privacy and information access rights. Examples of each category of public entities under the jurisdiction of the IPC could be summarized as:

- Government institutions would include government ministries, Crown corporations, and commissions, boards and tribunals created by provincial regulations.
- Local authorities would include various branches of municipal governments, post-secondary educational institutions, and health authorities.
- Trustees encompass entities entrusted with retention and management of private information, including health authorities, medical treatment providers, and care homes.

[55] Given the issues in this application, the precise nature of the office of the IPC bears scrutiny. Under ss. 38(2) and (3) FOIP, the IPC is "an Officer of the Legislative Assembly" and is "appointed by order of the Legislative Assembly". While appointed to a renewable fixed term, the IPC may only be suspended or removed from office for cause by the Legislative Assembly. Under s. 44 the IPC and every member of his staff must take an oath; the IPC's oath can only be taken before the Speaker or Clerk of the Legislative Assembly. The IPC produces annual reports, and it is of note that the report is to the Legislative Assembly, to the attention of the Speaker. The direct links between the IPC and the Legislative Assembly are unmistakeable.

[56] Section 47 FOIP provides that the IPC is insulated from some legal proceedings. For example, the Commissioner is not compellable as a witness in court or in any quasi-judicial proceedings.

[57] In terms of his investigative and reporting functions the IPC has relatively broad powers to compel and obtain disclosure of documents, and even to summon people to appear before him to provide evidence under oath (s. 54). At the end of a particular investigation the Commissioner may prepare a written report setting out, *inter alia*, his recommendations and his reasons for making same (s. 55). Indeed, his powers to recommend fall under all three *Acts* and are broad; the IPC may make "any recommendations with respect to the matter under review or investigation that the commissioner considers appropriate". This plenary jurisdiction to make recommendations is found under s. 55 FOIP, s. 44(3) LAFOIP, and s. 48(2) HIPA.

[58] For the purposes of this application the nature of the IPC's office is important from the perspective of jurisdiction. The question arises, does this Court have jurisdiction to issue injunctive relief against the Commissioner? In turn, this determination rests on whether the IPC is covered by general Crown immunity against injunctive relief.

[59] To determine this I must refer to *The Proceedings against the Crown Act*, RSS 1978, c P-27. The relevant portions read as follows:

> 2. (a) **"agent"**, when used in relation to the Crown, includes an independent contractor employed by the Crown;
>
> ...
>
> (c) **"officer"**, in relation to the Crown, includes a minister of the Crown and a servant of the Crown;
>
> ...
>
> 17(2) Where, in proceedings against the Crown, any relief is sought that might, in proceedings between persons, be granted by way of injunction or specific performance, the court shall not, as against the Crown, grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties.

...

> (4) The court shall not in any proceedings grant an injunction or make an order against an officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown that could not have been obtained in proceedings against the Crown, but may in lieu thereof make an order declaratory of the rights of the parties.

[60] The authorities appear to hold that the Crown itself cannot be enjoined. As well, there is case law indicating that while Crown servants or officers cannot be the subject of an injunction, Crown agents may be enjoined as such agents do not enjoy Crown immunity from injunctive relief. Whether the IPC is a servant of the Crown or an agent of the Crown is one important component of the determination of this issue, as discussed below.

[61] Separate and apart from the immunity issue I have considered another aspect of the office of the Commissioner, one that can impact on the consideration of the "overall equities" portion of the test for injunctive relief. This consideration takes a broader perspective on his office.

[62] From a plain reading of the relevant legislation and a consideration of the IPC's mandate the Commissioner is, amongst other things, something of a privacy watchdog. He must deal with institutions, even government agencies, which are alleged to have committed breaches of privacy. He is not "of" government; indeed, from time to time he may have to call government to account. His role is broadly akin to a privacy Ombudsman.

[63] To properly fulfil his statutory mandate, the Commissioner cannot be unduly fettered. He cannot be influenced by individuals who will not like what he has to say. He must be -- and thus far he has been -- able to speak plainly and honestly about his findings and recommendations.

[64] This is a principle of long standing. For example, see *Maltby v Saskatchewan Attorney General* (1982), 2 CCC (3d) 153 (Sask QB). The applicants applied under the *Canadian Charter of Rights and Freedoms* for a declaration that the rights of prisoners on remand had been violated in several enumerated respects. The application met with limited success. But of import is Justice Sirois' statement at para. 20:

> [20] Prison officials and administrators should be accorded wide ranging deference in the adoption and execution of policies and practices that in their judgments are needed to preserve internal order and discipline and to maintain institutional security. Such considerations are peculiarly within the province and professional expertise of corrections officials, and in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters. *Bell* V. *Procunier*, 417 U.S. at 827. The unguided substitution of judicial judgment for that of the expert prison administrators on matters such as this would to my mind be inappropriate.

[65] Also see *Ontario (Minister of Health and Long-Term Care) v Ontario (Assistant Information and Privacy Commissioner)* (2004), 73 OR (3d) 321 at para 28 (Ont CA). That case was decided in the context of a disclosure issue. The conclusion was that the Ontario Privacy Commissioner should enjoy significant deference.

> [28] The second contextual factor is the relative expertise of the Commissioner and the court both in relation to the Act generally and to the particular decision under review. **One of the principles the Act is expressly founded on is that disclosure decisions should be reviewed independently of government.** It creates the office of the Commissioner to deliver on that principle and gives to the Commissioner broad and unique powers of inquiry to review those decisions. It constitutes the Commissioner as a specialized decision maker**. In my view, this implies that the legislature sees the Commissioner as the appropriate reviewer of disclosure decisions by government. The very structuring of the office and the specialized tools given to it to discharge one of the Act's explicit objectives suggests that the courts should exercise deference in relation to the Commissioner's decisions.**
>
> [Emphasis added]

[66] These same principles are apposite when the Commissioner is dealing with a privacy breach, another core function within his mandate. If he is not acting *ultra vires*, then he is entitled to both independence and deference on an issue such as this.

[67] An example may illustrate my point. Imagine, if you will, a situation wherein the IPC must be critical of the Saskatchewan government for a privacy breach. Would a reasonable onlooker, informed of the relevant law and facts, countenance a Member of the Legislative Assembly (or his or her assistants) repeatedly contacting the IPC and his staff to attempt to influence him to change his decision, or the way he worded his decision? Would that sort of attempt to influence a legal decision within the IPC's core mandate be acceptable to the citizens of this province? Or would the citizens expect the Commissioner to operate independently and honestly, free from untoward influence or pressure? I cannot imagine that reality would bring anything but the latter proposition.

[68] One of my many concerns with this application is that it reflects a seemingly growing public view that within the rule of law, a person is "entitled" to a particular outcome or for an outcome to be expressed in a particular way. These people assume that if they receive a negative outcome in their case, something must be wrong or that "the system is broken" and further, that they have some inalienable right to "fix" it outside of the regular judicial process. The aura of entitlement is palpable.

[69] No. Judges, arbitrators, tribunal members and independent Crown officers such as the Commissioner must decide matters based on legal principles applied to the facts before them. That a decision might be unpopular (whether on a singular or widespread basis) is entirely beside the point. From my review, one of the hallmarks of Saskatchewan's Commissioner has been his steadfast independence and freedom from influence. He calls them as he sees them. This must continue.

[70] Thus I see this application as being something of a collateral assault on the independence of the Commissioner. In my view his position is one requiring substantial independence. I accept without reservation that he must stay within his statutory mandate. But if he does, then one would interfere with his exercise of that mandate (particularly through third-party editing of his reports, as sought here) with the greatest trepidation. To me, that would not be an exercise for the faint of heart.

Crown Immunity

[71] In discussing the nature of the IPC's office I have already touched upon Crown immunity and *The Proceedings against the Crown Act*. I will say a bit more about it here.

[72] Justice Dawson provided a succinct overview of traditional Crown immunity and the development of exceptions thereto at paras. 22 and 23 of *R v Medvid*, 2010 SKQB 22, [2010] 4 WWR 643. While that case dealt with sovereign immunity as between provinces, the general background provided is helpful:

> [22] It is well known that specific rules apply when suing the Crown. Historically, the Crown was immune from suit. This is known as Crown immunity. Eventually, legislation was passed imposing tortious liability against the Crown in all Canadian jurisdictions. *The Crown Proceedings Act* of each province rendered the Crown in right of that province liable to be sued in its own provincial Superior Courts but not in the courts of other provinces (Horseman and Morley, *Government Liability Law and Practice* (Canada Law Book, 2008), at pp. 12-22-12-23). This is referred to as provincial Crown immunity.
>
> [23] In *Liability Solutions Inc. v. New Brunswick* [(2007), 88 O.R. (3d) 101 (Ont SC], Madam Justice Ferguson of the Ontario Superior Court of Justice, set out the history and exceptions to the rule of Crown immunity at paras 10 - 14:
>
> > [10] Historically, the Crown has enjoyed immunity from prosecution. In *Dreidger on the Construction of Statutes*, Ruth Sullivan writes that "[a]t common law, since the 15th century, it

> has been presumed that legislation is not intended to apply to the prejudice of the Crown unless the Crown is expressly mentioned" (Ruth Sullivan, *Dreidger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at 343).
>
> [11] Reforms to Crown immunity in the United Kingdom came in 1947, when the government adopted a *Crown Proceedings Act*. This Act replaced the need to petition the Crown for relief, and also abolished the "royal fiat" (Peter Hogg, *Constitutional Law of Canada*, 4th ed. (Scarborough: Thomson Carswell Limited, 1997) at 273). Canada brought similar legislation, following the British example, in all provinces, save Québec, between 1951 and 1974 (Hogg, *supra*).
>
> [12] As Peter W. Hogg explains, "[t]he rule is that the Crown is not bound by statute except by express words or necessary implication" (Hogg, *supra*, at 279). Thus, the *Proceedings Against the Crown Act* is the legislation which, in New Brunswick, serves to make the Crown legally liable in certain situations, and explains how and when those situations arise.
>
> . . .

[73] Justice Dawson's decision was upheld at 2012 SKCA 49, 393 Sask R 157.

[74] Very recently the Saskatchewan Court of Appeal had an opportunity to review the history of Crown immunity and the development of exceptions thereto: *Saskatchewan Crop Insurance Corporation v McVeigh*, 2018 SKCA 76, *per* Justice Schwann at paras. 134 to 171. That historical analysis is mandatory reading for anyone venturing into the territory of Crown immunity.

[75] For this portion of the application, much turns on ss. 17(2) and (4) of *The Proceedings against the Crown Act*. This has been canvassed above, and will be analyzed with the preliminary matters below.

Injunctive Relief

[76] Dr. Stebner's brief of law relies upon *RJR-MacDonald Inc. v Canada*

(Attorney General), [1994] 1 SCR 311. While that is not wrong as such, the injunctive relief test enunciated in that case has evolved. In particular, Chief Justice Richards has brought a modern perspective to the test, a perspective that is now the gold standard for injunctions within Saskatchewan and elsewhere.

[77] The test to be utilized on applications for interlocutory injunctions is as set out by the Saskatchewan Court of Appeal in *Potash Corporation of Saskatchewan Inc. v Mosaic Potash Esterhazy Limited Partnership*, 2011 SKCA 120, 377 Sask R 78 (hereafter *PCS v Mosaic*):

> [113] In the interest of clarity, it may be useful to recapitulate the basic points which have been developed in the course of these reasons and to summarize the approach a judge should typically take when deciding whether to grant interlocutory injunctive relief. This can be done as follows:
>
> > (a) The judge should normally begin with a preliminary consideration of the strength of the plaintiff's case. The general rule in this regard is that the plaintiff must demonstrate a serious issue to be tried, i.e. the plaintiff must have a claim which is not frivolous or vexatious. If the plaintiff raises a serious issue to be tried, it is necessary for the judge to turn to the matters of irreparable harm and balance of convenience.
> >
> > (b) Irreparable harm is best seen as an aspect of the balance of convenience. The general rule here is that the plaintiff must establish at least a meaningful doubt as to whether the loss he or she might suffer before trial if an injunction is not granted can be compensated for, or adequately compensated for, in damages. Put another way, the plaintiff must demonstrate a meaningful risk of irreparable harm. If this is done, the analysis turns to the balance of convenience proper.
> >
> > (c) The assessment of the balance of convenience is usually the core of the analysis. In this regard, the relative strength of the plaintiff's case, the relative likelihood of irreparable harm, and the likely amount and nature of such harm will typically all be relevant considerations. Depending on the particulars of the case, strength in relation to one of these matters might compensate for weakness in another. Centrally, the judge must weigh the risk of the irreparable harm the plaintiff is

> likely to suffer before trial if the injunction is not granted, and he or she succeeds at trial, against the risk of the irreparable harm the defendant is likely to suffer if the injunction is granted and he or she prevails at trial. That said, the balance of convenience analysis is compendious. It can accommodate a range of equitable and other considerations.
>
> (d) The judge's ultimate focus in considering whether to grant interlocutory injunctive relief must be on the overall equities and justice of the situation at hand.

[78] Justice Richards also observed (paras. 25 and 26) the following as to the efficacy of the more rigid *RJR* test:

> [25] The point raised by Mosaic's argument concerns how independently the tests or considerations referred to in *Metropolitan Stores* stand from each other and, as well, how they operate in relation to each other. These questions are not answered, or at least not answered with great clarity, by either the *Metropolitan Stores* [[1987] 1 SCR 110] decision itself or the Supreme Court's subsequent ruling in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.
>
> [26] For the moment, let me observe that the strength of case, irreparable harm and balance of convenience considerations, although prescribed and necessary parts of the analysis mandated by the Supreme Court, are nonetheless not usefully seen as an inflexible straightjacket. Instead, they should be regarded as the framework in which a court will assess whether an injunction is warranted in any particular case. The ultimate focus of the court must always be on the justice and equity of the situation in issue. As will be seen, there are important and considerable interconnections between the three tests. They are not watertight compartments.

[79] This summary of the governing principles was confirmed at para. 28 of *Wildman v Kulyk*, 2013 SKCA 55, 414 Sask R 293. As well, the *PCS v Mosaic* test has been adopted and utilized in subsequent decisions of this Court and by courts in other provinces. *PCS v Mosaic* established a fresh perspective on the classic test to be used on injunction applications in this province. No longer is there a mechanical application of the traditional three-part test, as if it was a series of hurdles to overcome. The true

focus of whether to grant an injunction must be on the overall equities and justice in the case.

[80] As well, it is settled law that where, as here, the applicant seeks an interlocutory mandatory injunction, the first branch of the test is more stringent. More than an arguable issue needs to be shown. The party seeking the mandatory injunction must demonstrate a strong *prima facie* case. See *R v Canadian Broadcasting Corp.*, 2018 SCC 5, [2018] 1 SCR 196.

Publication Bans

[81] Dr. Stebner sought and obtained a short-term *ex parte* publication ban. She has applied to continue it. At the same time the Media has applied to discontinue it. Both sides filed helpful briefs, for which I am grateful.

[82] Open courtrooms are one of the cornerstones of our free and democratic society. It is presumed that judicial proceedings will be open to the public, which has a genuine interest in such proceedings. Justice must be done and must be seen to be done. It is widely accepted that those goals are best achieved through an open justice system. This was set out in the now classic statement of Justice Fish in *Toronto Star Newspapers Ltd. v Ontario*, 2005 SCC 41, [2005] 2 SCR 188:

> [1] In any constitutional climate, the administration of justice thrives on exposure to light — and withers under a cloud of secrecy.
>
> [2] That lesson of history is enshrined in the *Canadian Charter of Rights and Freedoms*. Section 2(*b*) of the *Charter* guarantees, in more comprehensive terms, freedom of communication and freedom of expression. These fundamental and closely related freedoms both depend for their vitality on public access to information of public interest. What goes on in the courts ought therefore to be, and manifestly is, of central concern to Canadians.

> [3] The freedoms I have mentioned, though fundamental, are by no means absolute. Under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice. A temporary shield will in some cases suffice; in others, permanent protection is warranted.
>
> [4] Competing claims related to court proceedings necessarily involve an exercise in judicial discretion. It is now well established that court proceedings are presumptively "open" in Canada. Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would *subvert the ends of justice* or *unduly impair its proper administration.*
>
> [Emphasis in original]

[83] In the *Toronto Star* case the Supreme Court also clarified that the applicable test applies to all discretionary court orders in the nature of a publication ban.

[84] As a result, to obtain or continue a publication ban the party seeking same bears the onus and that party is required to set out an evidentiary basis showing why the restriction on public access is required. See *R v Mentuck*, 2001 SCC 76, [2001] 3 SCR 442.

[85] In Canada the test for the granting of a publication ban was developed through two controlling authorities: *Mentuck*, above, and *Dagenais v Canadian Broadcasting Corporation*, [1994] 3 SCR 835. *Mentuck* refined *Dagenais* and restated the test at para. 32:

> [32] The *Dagenais* test requires findings of (a) necessity of the publication ban, and (b) proportionality between the ban's salutary and deleterious effects. However, while *Dagenais* framed the test in the specific terms of the case, it is now necessary to frame it more broadly so as to allow explicitly for consideration of the interests involved in the instant case and other cases where such orders are sought in order to protect other crucial aspects of the administration of justice. In

> assessing whether to issue common law publication bans, therefore, in my opinion, a better way of stating the proper analytical approach for cases of the kind involved herein would be:
>
> > A publication ban should only be ordered when:
> >
> > (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

[86] For the purposes of the application now before me it is also important to note there is a body of case law pertaining to the grounds for a publication ban and more specifically, grounds pertaining to public embarrassment or humiliation or violation of privacy. Generally, such grounds are insufficient to support a publication ban. Counsel for the Media cited several helpful cases on point:

- *MacIntyre v Nova Scotia (Attorney General),* [1982] 1 SCR 175 at 185-186:

> Let me deal first with the 'privacy' argument. This is not the first occasion on which such an argument has been tested in the courts. Many times it has been urged that the "privacy" of litigants requires that the public be excluded from court proceedings. It is now well-established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings. ...
>
> ...
>
> The reported cases have not generally distinguished between judicial proceedings which are part of a trial and those which are not. *Ex parte* applications for injunctions, interlocutory proceedings, or preliminary inquiries are not trial proceedings, and yet the 'open court' rule applies in these cases. The

> authorities have held that subject to a few well-recognized exceptions, as in the case of infants, mentally disordered persons or secret processes, all judicial proceedings must be held in public. ...

- *Canadian Broadcasting Corp. v New Brunswick (Attorney General),* [1996] 3 SCR 480. While decided in the criminal context, the principles can be applied generally. The Supreme Court held that a publication ban is not justified even where there is "highly offensive evidence, whether salacious, violent or grotesque" (para. 40). It was held that "mere offence or embarrassment will not likely suffice for the exclusion of the public from the courtroom".

- *R v Turcotte*, 2008 SKQB 491, 328 Sask R 108. This was a criminal case in which a local newspaper had standing. A murder was committed by a 16-year old who ultimately was sentenced as an adult. The collateral issue was whether a publication ban, in place while the proceedings were essentially youth proceedings, ought to be lifted. It was decided there was no reason to continue the publication ban. In his concluding paragraph Justice Barclay said:

> [20] In interpreting non-publication legislation, one should always bear in mind that **with a few well recognized exceptions, all judicial proceedings must be held in public**. In other words, **it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counter-balances the inconvenience or embarrassment to the private person whose conduct may be the subject of such proceedings**. As the accused has received an adult sentence, there is no basis for a publication ban of identity and I dismiss the application.
>
> [Emphasis added]

- *R v Hankey*, 2008 CarswellOnt 7932 at paras 8 to 10 (WL) (Ont Sup Ct):

> [8] With respect to the concern expressed by Mr. Gauvin as to possible embarrassment or difficulties caused by the disclosure of details of his life on the streets some two and a half years ago, what is being sought is a form of right of privacy on the part of Mr. Gauvin with respect to such evidence. In that regard, the statement by the Ontario Court of Appeal in *R. v. Unnamed Person*, [1985] O.J. No. 189 (Ont C.A.) at p. 3 has application:
>
> > In my respectful view, the order which is the subject of this appeal has little, if anything, to do with protecting the process of the court. What the respondents seek in this case is the creation of a discretionary right of privacy to be extended to those caught up in the criminal process.
>
> [9] In that case, the application for a non-publication order was dismissed.
>
> [10] In the case before me, Mr. Gauvin is indeed seeking a discretionary right of privacy with respect to his evidence. However, there is no real or substantial risk to the fairness of this trial involved and accordingly the necessity of the publication ban has not been established.

- *R v Carswell,* 2008 ONCJ 518 at para 102:

> The principle of open courts is the case despite the inconvenience, damage, humiliation and even danger to witnesses. ...

- *101114386 Saskatchewan Ltd. v Hearing Panel of the Financial and Consumer Affairs Authority*, 2013 SKCA 122, 427 Sask R 25. The issue regarding a publication ban arose in the context of an application by Ms. Pastuch for a publication ban on certain medical information contained in the material she had filed for her application to stay a decision of the Hearing Panel of the Financial and Consumer Affairs Authority to recommence a hearing dealing with certain allegations against her. Her application for a publication ban was dismissed. It is

worthwhile to reproduce much of what Justice Ottenbreit said in that case:

> [10] In Canada there is a constitutional right to the dissemination of information about judicial proceedings. In *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442, at para. 32, the Supreme Court of Canada established that the constitutional right to disseminate information about judicial proceedings can only be restricted when:
>
> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.
>
> This is called the *Dagenais/Mentuck* test.
>
> ...
>
> [16] Litigants should know that if they provide medical information to the court that it is provided to an open and transparent process and that the courts will not automatically restrict its dissemination by the media without being statutorily required to do so and without the *Dagenais/Mentuck* test being satisfied.
>
> [17] Ms. Pastuch argues that *HIPA* and *PIPEDA* require the publication ban. It is my view that these statutes do not apply nor does *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01 ("*FIPPA*") apply. But *FIPPA* makes it clear in s. 23(3)(e.1) and s. 24(1.1) that *HIPA* governs medical information and not *FIPPA*. More importantly, s. 2(2) of *FIPPA* specifically indicates that the government institutions to which the *Act* applies does not include the Court of Appeal, the Court of Queen's Bench or the Provincial Court of Saskatchewan. Similarly, *HIPA* adopts the same definition of government institutions as used in *FIPPA* which means that *HIPA* also does not apply to the courts. Likewise, I am not convinced that *PIPEDA* applies either. It applies to federally regulated organizations and in Saskatchewan to the private sector. *FIPPA* is the Saskatchewan public sector privacy legislation. There is, in

my view, no statutorily mandated confidentiality for Ms. Pastuch's medical information in this case.

[18] That said, in the proper case medical information may form the basis for a ban on publication. Much depends on the circumstances and the particular facts of the case and whether the *Dagenais/Mentuck* test has been met. How the *Dagenais/Mentuck* test is applied has been outlined in *M.E.H. v. Williams*, 2012 ONCA, 35 346 D.L.R. (4th) 668. There must be a public interest at stake. Personal concerns of a litigant standing alone will not satisfy the necessity branch of the *Dagenais/Mentuck* test:

> 25 *Mentuck* describes non-publication and sealing orders as potentially justifiable if "necessary in order to prevent a serious risk to the proper administration of justice". A serious risk to public interests other than those that fall under the broad rubric of the "proper administration of justice" can also meet the necessity requirement under the first branch of the *Dagenais Mentuck* test: *Sierra Club of Canada*, [[2002] 2 SCR 522] at paras. 46-51, 55. The interest jeopardized must, however, have a public component. Purely personal interests cannot justify non-publication or sealing orders. Thus, the personal concerns of a litigant, including concerns about the very real emotional distress and embarrassment that can be occasioned to litigants when justice is done in public, will not, standing alone, satisfy the necessity branch of the test: *A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 185; *Sierra Club of Canada*, at para. 55; *A.B. v. Bragg Communications Inc.*, 2011 NSCA 26, 301 N.S.R. (2d) 34, at paras. 73-75.

[19] The Court went on to say:

> 31 The necessity branch focuses exclusively on the existence of a serious risk to a public interest that can only be addressed by some form of non-publication or sealing order. The potential benefits of the order are irrelevant at this first stage of the inquiry: *Mentuck*, at para. 34. Unless a serious risk to a public interest is established, the court does not proceed to the second branch of the inquiry where competing interests must be balanced.
>
> 32 As there is no balancing of competing interests at the first stage, it is wrong at that stage to consider the extent to which the societal interests underlying and furthered by freedom of expression and the open court principle are engaged in that particular case. Even if those values are only marginally engaged (the respondent's submission in this case), restriction on media access to and publication in respect of court

proceedings cannot be justified unless it is necessary to prevent a serious risk to a public interest. A court faced with a case like this one where decency suggests some kind of protection for the respondent must avoid the temptation to begin by asking: where is the harm in allowing the respondent to proceed with some degree of anonymity and without her personal information being available to the media? Rather, the court must ask: has the respondent shown that without the protective orders she seeks there is a serious risk to the proper administration of justice?

...

[23] I do not find that Ms. Pastuch has proven there is a risk to the proper administration of justice by failing to ban publication of the medical information filed in support of her stay application. Although generally speaking, Ms. Pastuch has a privacy interest and publication of medical information can constitute a serious risk to the proper amendment of justice in some circumstances, in this case it does not. Ms. Pastuch has disclosed only general information in this respect. In this case there are only broad brush strokes with respect to Ms. Pastuch's medical condition with no detailed medical information being provided. The scope of any publication of that information is therefore necessarily general as well. Ms. Pastuch has not satisfied me that a publication ban is a necessity to prevent serious risk to the administration of justice.

[24] However, I am also not convinced that even if necessity were proven that the salutary effects of the publication ban outweigh the deleterious effects within the meaning of the *Dagenais/Mentuck* test:

> 24 The core values of freedom of expression that the *Charter* seeks to protect were articulated by the Supreme Court in *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 S.C.R. 927, at para. 53:
>
> > [53] ... (1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfilment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed ....

> [25] The ability of the media to report on the administration of justice is important to collective rights. The public would benefit from a full and accurate reporting of this case. Such reporting serves to improve the public's understanding of the court process.
>
> [26] There is a high value placed on an open courtroom and the media's ability to disseminate information on what happens in the administration of justice. The open court principle is "inextricably linked to the freedom of expression protected by s. 2(b) of the *Charter* and advances the core values therein" (*Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332, para. 26).
>
> [27] Taking into consideration the *Dagenais/Mentuck* test, the general nature of the medical information, the lack of detail provided, any privacy rights of Ms. Pastuch, the open court principle and the right of the media to report on the administration of justice, I am not satisfied that a ban on publication is warranted.

Contents of Affidavits

[87] As is explored below, counsel for the Commissioner raised a preliminary objection to some of the material filed by Dr. Stebner. In particular, Mr. Watson Q.C. argued that paras. 31, 32 and 33 of Dr. Stebner's affidavit were improper averments and that they should be struck or disregarded by the Court.

[88] The law as to the permissible contents of affidavits is well-settled. It is enshrined in *The Queen's Bench Rules.* Rule 13-30 states:

> 13-30(1) Subject to subrule (2), an affidavit must be confined to facts that are within the personal knowledge of the person swearing or affirming the affidavit.
>
> (2) In an interlocutory application, the Court may admit an affidavit that is sworn or affirmed on the basis of information known to the person swearing or affirming the affidavit and that person's belief.
>
> (3) If an affidavit is sworn or affirmed on the basis of information and belief in accordance with subrule (2), the source of the information must be disclosed in the affidavit.

> (4) The costs of every affidavit that unnecessarily sets forth matters of hearsay or argumentative matter, or copies of or extracts from documents, must be paid by the party filing the affidavit.
>
> (5) If an affidavit based on information and belief is filed and does not adequately disclose the grounds of that information and belief, the Court may direct that the costs of the affidavit shall be paid personally by the lawyer filing the affidavit.
>
> (6) An affidavit filed in a subsequent proceeding for the same action must not repeat matters filed in earlier affidavits, but may make reference to earlier affidavits containing those matters.

[89] It has long been held that in civil or family law matters there is no place in affidavits for opinions, conclusions, arguments, speculation, polemic or unsubstantiated beliefs:

- *Dlouhy v Dlouhy* (1995), 130 Sask R 285 (QB), where Justice Dawson stated at para 9:

  > [9] Affidavits are to be confined to such facts as the deponent is of his or her own knowledge able to swear.... Further, **a deponent is not entitled to express an opinion,** but is confined to deposing the facts of which he is aware ... Where the Rules are not complied with, the objectionable portions should be disregarded by the court.
  >
  > [Emphasis added]

- *Hobin v Hardy* (1996), 140 Sask R 222 (QB).

- *Irving v Kelvington Super Swine Inc.* (1997), 163 Sask R 87 (CA), where certain averments were described as "unsubstantiated, speculative, conjectural and irrelevant".

- *Saskatchewan Veterinary Medical Association v Murray*, 2006 SKQB 316, 282 Sask R 87, which involved a *mandamus* application. Justice Gunn disregarded averments containing opinions.

- *Wanner v Christie,* 2016 SKQB 147. This was a medical negligence case. Some portions of affidavits filed on an application were struck as containing opinion, not fact. For example, where the affiant swore that a person had not fully recovered in a medical sense, that was held to be an opinion.

- *Affinity Credit Union 2013 v Vortex Drilling Ltd.,* 2017 SKQB 228, where certain averments as to potential economic growth or the effects of certain matters on that growth were held to be speculation, thus not admissible in an affidavit.

[90] In *J.I.M. v D.E.C.,* 2014 SKQB 401, 462 Sask R 141, Justice Elson conducted a review of the law pertaining to improper averments within affidavits. While the entire case is germane, at para. 32 he noted:

> [32] The warnings to counsel, contained in both Rules 13-30 and 15-20, exist for good reason. They underscore the professional responsibility and the courts expectation that **counsel will provide more than good advocacy. They are also expected to provide a filter through which their clients' wishes and instructions are screened to remove irrelevant evidence, unreliable material, speculation, argument and unhelpful expressions of opinion.**
>
> [Emphasis added]

2. Should an injunction be granted?

[91] Prior to dealing with any injunctive relief I must deal with two preliminary matters: I must clarify the record, and I must deal with the matter of Crown immunity.

[92] Regarding clarification of the record, I must deal with the IPC's objections to the affidavit of Dr. Stebner and decide whether any portions thereof

should be struck or disregarded. Once the content of the record of evidence is determined I can go on to see if it meets the test for injunctive relief.

[93] The Commissioner objected to paras. 31, 32 and 33 of Dr. Stebner's affidavit. Those paragraphs read as follows:

> *Damage to Reputation*
>
> 31. Since the Reports contain my personal and identifying information, I strongly and sincerely believe that the Reports will significantly and negatively impact my career progression and future opportunities for employment, as well as the trust and confidence my patients have in me, especially considering at the time of the breach I was returning to Humboldt.
>
> 32. Since the Reports have further specified that I viewed the medical records of victims of the Humboldt bus crash, it is my belief that the Report will trigger significant public outrage or distrust towards me in the Humboldt community and the province as a whole.
>
> 33. I believe that the inclusion of both my identifying information and information pertaining to the Humboldt crash in the Report is punitive and will generate a significant personal impact upon me, akin to public and professional shaming.

[94] On behalf of the IPC, Mr. Watson's objection was that these paragraphs are not factual but amount to speculation, argument and/or opinion, which have no place in an affidavit. They should be struck or disregarded.

[95] On behalf of Dr. Stebner, Mr. Vanstone's response was that these paragraphs set out Dr. Stebner's fears or apprehensions. As well, Mr. Vanstone indicated his client "really wanted" to make these statements to the Court.

[96] I find that these three paragraphs do not contain facts. They are the beliefs, fears, arguments and opinions of Dr. Stebner. They are, at best, speculative. She

may well harbour these opinions and views but they are exactly that – her personal and subjective opinions. She sets out no facts to support any of this. She does not recount a single incident where any other person expressed any negativity about this to her, either knowing or not knowing that she was one of the people who improperly accessed confidential patient information with no need (and therefore no right) to do so. There is absolutely nothing in the material to support the notion that publication of the IPC reports (anonymized as they were) has raised any level of "outrage" or "distrust" from the public toward Dr. Stebner. There are absolutely no facts set forth that would support this notion that Dr. Stebner's career will be significantly damaged by the release of the IPC reports.

[97] Paragraphs 31 and 32 are completely without factual foundation. These may be beliefs which Dr. Stebner honestly holds, but there is no doctrine of evidentiary transubstantiation which can elevate those subjective and unsupported beliefs into admissible evidence. An affiant's duty is to provide facts; it is for this Court to draw inferences or conclusions from these facts.

[98] Paragraph 33 is even more troubling. It has the same issues as the other two impugned paragraphs but also ascribes bad motive to the Commissioner. Without any foundation at all, without any facts, Dr. Stebner suggests the Commissioner is trying to harm her through punishment and personal shaming. This part of her affidavit dovetails with her counsel's arguments, to the effect that the Commissioner has "branded her with a scarlet letter". Again, there are no facts which would support such an allegation. Further, she is expressing an opinion on what is in the mind of a third party, which she has no ability to do. This paragraph is clearly improper.

[99] Regarding all three impugned paragraphs I note Mr. Vanstone's assertion in chambers that Dr. Stebner "really wanted" to say these things to the Court. I have

already set out case authority (particularly the extract from Justice Elson's decision in *J.I.M.*) commenting on the impropriety of this practice. In addition to those authorities I note *Adlair v Nunavut*, 2016 NUCJ 23, where Justice Bychok said:

> [15] Lawyers have an ethical and professional duty to ensure that the advice they give a client, and the actions they take, are proper. In other words, every lawyer has a duty to present the case for their client in good faith, according to the *Rules of Court* and the applicable law; in this case the laws of evidence. **An affidavit may be the sworn evidence of the client, but it is the lawyer's duty to ensure that the affidavit is drafted and submitted according to the rules.** In Canada, a lawyer who fails in this basic duty runs the risk that costs shall be imposed against him or her.
>
> [Emphasis added]

[100] It is no answer to such an objection for a lawyer to tell the Court that his client "really wanted" to say things which are clearly inadmissible in evidence. Clients often want to say a lot of things. Many of them cannot be said in court, because they are not admissible into evidence for a variety of reasons. The lawyer knows this, even if the client does not. It is therefore the lawyer's duty to guide his or her client, to act as a filter which screens out improper averments.

[101] Lawyers are not mere mouthpieces, doing and saying whatever a client wishes. Lawyers are expected to bring their knowledge, their skill, their best judgment, and their experience to bear on their clients' issues. In preparing Dr. Stebner's affidavit to include paras. 31 to 33 when they were clearly inadmissible, counsel abdicated his duty to his client, to the other parties, and to this Court.

[102] I am therefore disregarding paras. 31 to 33 of the affidavit of Dr. Stebner because the contents of those paragraphs are improper and inadmissible. In case I am in error on this matter, in my analysis of entitlement to injunctive relief I will conduct an initial analysis without considering that evidence from those paragraphs, then

conduct an alternate analysis as if those paragraphs were properly before me. In both analyses I will determine if the test for injunctive relief has been satisfied.

[103] I now turn to Crown immunity. This was not a matter initially argued by counsel. It is a matter into which I inquired during the oral argument of this matter. Counsel sought, and received, an opportunity to look at this issue and file supplemental briefs. I thank Mr. Vanstone and Mr. Watson Q.C. for their assistance. As well, I apologize if I sent them down a rabbit hole with my inquiry. That was not my intent.

[104] Both parties' briefs opined that the IPC is not protected by statutory Crown immunity. I agree.

[105] I firstly note that given the manner in which this issue was raised, to decide this application did not require me to directly pass upon the concept of the applicability of Crown immunity. I recognize that this renders much of what is said in this regard *obiter*.

[106] While no reported decision could be located in which any IPC was the subject of injunctive relief, it appears to be legally possible. In the case at bar, and as alluded to above, this determination is largely dependent upon whether the IPC is a functionary of the Crown, or part of the Crown, or carries out the rights and duties of the Crown. For the purposes of *The Proceedings against the Crown Act*, "Crown" is defined as "the Crown in right of Saskatchewan" in s. 2.

[107] As noted, the IPC is not a member of the executive branch of government, nor does he function to carry out government policy other than in the broadest sense. He is a creature of statute, mandated to act independently as to privacy concerns. His mandate includes dealing with privacy breaches of government.

[108] The IPC cites two cases supporting (if somewhat indirectly) the notion that injunctive relieve could lie against a privacy official: *Medicentres Canada Inc. v Alberta (Information and Privacy Commissioner)*, 2014 ABQB 489 at paras 53 to 55, and *Canada (Attorney General) v Information Commissioner of Canada*, 1996 CanLII 12363 (FC). I agree both these cases militate against Saskatchewan's IPC holding Crown immunity against injunctive relief.

[109] Dr. Stebner's supplemental brief was helpful. One case cited was *Westeel-Rosco Ltd. v Board of Governors of South Saskatchewan Hospital Centre*, [1977] 2 SCR 238 at 249 to 250: "Whether or not a particular body is an agent of the Crown depends upon the nature and degree of control which the Crown exercises over it."

[110] As a result of the application of these cases to the evidence before me I conclude the IPC is not a Crown official, so closely tied to government that immunity applies. The Commissioner gets his authority from statutes but by the terms of those very statutes he operates independently from government. The arm's length nature of this relationship runs contrary to the notion that the Commissioner somehow implements government policy.

[111] Accordingly, I find Crown immunity does not apply and the IPC is potentially subject to injunctive relief.

[112] I now turn to the consideration of the application for injunctive relief itself.

[113] I propose to review the evidence before me within the legal framework for injunctions as set out by the Court of Appeal in *PCS v Mosaic*. Each component of

the test for interlocutory injunctive relief will be examined in turn, as will a review of the overall equities and justice within the present case. In the end analysis, "the strength of the applicants' case is to be considered as a whole with the ultimate question being whether it is just and equitable in the circumstances to grant the injunction": Justice Ball in *Carlson v Carlson Holdings Ltd.*, 2005 SKQB 189, 264 Sask R 282 (para 7); also see *PCS v Mosaic*.

Serious question to be tried

[114] In the instant case, within this first criterion are two sub-issues. The first is whether the nature of the injunctive relief sought by Dr. Stebner is prohibitory or mandatory, or perhaps some of each. The determination of this sub-issue will partially direct the standard to be met by Dr. Stebner within this criterion. The second sub-issue is whether the evidence adduced meets the applicable standard for each type of relief.

[115] The parties agree on the general law applicable but not on the application of the law to these facts. When a mandatory injunction is considered in the first branch of the test, the requirement of proof was traditionally raised to something akin to a strong *prima facie* case. This is because the relief does not amount to a prohibition or preservation of the *status quo*, but actually requires the subject of the injunction to do something, to take some affirmative action so as to comply with the mandatory injunction granted. The relief sought on a mandatory injunction is far more intrusive than that flowing from a prohibitory injunction.

[116] Even where a party frames a request as a prohibitory injunction, that is not determinative. This Court may look at the true nature of the relief sought to determine which category it belongs in. In this regard I cite the comments of Justice Whitmore (as he then was) in *101111578 Saskatchewan Ltd. v Deemaur Farms Ltd.*,

2008 SKQB 180 at para 5:

> [5] There is some argument whether this is a mandatory injunction or not. The plaintiff alleges that this is a prohibitory injunction merely preventing the defendants from interfering with the plaintiff's use and enjoyment of the land. I find this to be a mandatory injunction requiring the defendants to vacate the land in favour of the plaintiff until the dispute is resolved. Therefore, the plaintiff must show that there is a *prima facie* case to be determined.

[117] For an example of where the plaintiff established such a strong *prima facie* case see *Odegard Farming Ltd. v Spring Valley Feeders (1988) Ltd.,* [1997] SJ No 618 (Sask QB). That involved a factual situation much different than the facts presently before the Court, but, although dated, the Court's analysis there is of use to the discussion herein.

[118] That there is a difference between the standards of "serious question to be tried" and "strong *prima facie* case" cannot be disputed, even within the modern holistic *PCS v Mosaic* approach. Past cases held to this distinction, and in a meaningful way. See the lengthy discussion of Justice Foley in *St. Brieux (Town) v Three Lakes (Rural Municipality No. 400),* 2010 SKQB 73, 354 Sask R 187. In paras. 26 and 27 of that decision he cites *Potash Corporation of Saskatchewan Mining Limited v Todd*, [1987] 2 WWR 481, per Justice Cameron at para. 136 (CanLII) (Sask CA):

> [136] There can be no doubt the two tests differ, and more than just a little. The strong prima facie case test imposes upon a plaintiff the burden of establishing a strong probability that he will succeed should the case go to trial. So the relative strengths of the parties' cases must be considered by the Chambers Judge before whom the application comes; and he must be satisfied, to the extent required by the standard, that: (i) the plaintiff has a right; and (ii) the defendant is infringing it. At one time it was thought that the standard in relation to those two things differed, that while the plaintiff had to make out a prima facie case in relation to his right, he had only to show an arguable case in respect of the infringement of that right. This approach was rejected, however, in *Hubbard v. Vesper*, [1972] 1 All E.R. 1023 (C.A.), and

> rightly so, in my respectful opinion. [Emphasis added by Justice Cameron.]

[119] The phrase "strong *prima facie* case" has been held to mean: a strong probability of success should the case go to trial, or success at trial is more probable than not, or a strong and clear case with a high degree of assurance that an injunction would be rightly granted, or that there is real merit to the claim being advanced.

[120] Regarding the standard for a prohibitory injunction there is no dispute. The plaintiff need only demonstrate there is a serious issue to be tried. Whether "something more" is needed for a prohibitory injunction has been dealt with by *PCS v Mosaic*.

[121] These older authorities have been somewhat modified by *PCS v Mosaic* but the distinction between mandatory and prohibitory injunctions remains in place, in the sense that the nature of the injunction sought must be considered when reviewing the balance of convenience and – likely – in the review of the overall equities of the case. It will still, in most cases, be more difficult to obtain a mandatory injunction even when using the serious issue to be tried standard is used.

[122] This issue was dealt with in *PCS v Mosaic* and while in that case the adoption of a single standard (serious issue to be tried) was set out, the Court dealt with the different types of injunctive relief at paras. 42 to 48:

> [42] It is readily apparent, of course, that the decisions from this Court on this issue were rendered well before the Supreme Court's rulings in *Metropolitan Stores* and *RJR-MacDonald* and without direct reference to the concerns of principle underpinning those two decisions. Accordingly, they are now of questionable authority and must be reassessed. In my view, we must take our cue from the Supreme Court and hold that, going forward, use of the serious issue to be tried approach should be the general rule in relation to all

applications for interlocutory injunctive relief, including applications for mandatory relief.

[43] As an aside here, let me observe that there are also other considerations which recommend moving away from a regime which requires judges to make strict distinctions between prohibitory and mandatory injunctions. The reality is that the line between the two kinds of injunctions is not always easy to chart and a competent wordsmith can often succeed in dressing up a mandatory-type order in a prohibitory-type costume. As a result, much time and energy can be consumed by the challenge of working through the sometimes cloudy question of whether an injunction is, in fact, prohibitory or mandatory in effect. This is a case in point. PCS says the injunction is prohibitory because it prevents Mosaic from acting unilaterally to determine the effect of the Mining Agreement. Mosaic says the injunction is mandatory because it requires Mosaic to continue delivering potash.

[44] There is another consideration as well. The substantive differences between the impact of mandatory and prohibitory injunctions can be easily overstated. This is because a prohibitory order can often have the effect of forcing the enjoined party to take considerable positive actions. For example, as Robert Sharpe points out in *Injunctions and Specific Performance,* [2nd ed. 1992], at para. 1.540, "a negative injunction restraining the continuation of a nuisance in effect usually requires the defendant to take positive steps to correct a situation and these steps may be extremely costly." All of this means that it is more useful for a judge to focus on the practical effects of the injunction than to get bogged down in attempting to make formalistic "all or nothing" distinctions between what is prohibitory and what is mandatory.

[45] This said, I hasten to add that a change of approach in favour of the use of the serious issue to be tried standard should not shift the legal landscape. This is because the meaningful difference between prohibitory and mandatory injunctions in the present context is that mandatory-type injunctions, generally speaking, go beyond maintaining the *status quo*, are more intrusive and have a larger potential to create losses that will be left uncompensated after trial if the plaintiff's claim be unsuccessful. Thus, the real question at play in this regard should be one of how best to account for these realities when deciding whether to grant an interlocutory injunction. My point here is that the business of accounting for the effects of mandatory-type injunctions on defendants does not have to involve the use of a demanding standard in relation to the strength of the plaintiff's case. Indeed, that approach involves the classic "blunt instrument." A more effective and more nuanced way to proceed is to consider the likely effect of a proposed mandatory order on a case-by-case basis and in the context of the balance of convenience analysis.

> [46] In other words, taking the position that the serious issue to be tried approach should be used in connection with applications for mandatory-type injunctions does not mean such injunctions will be easier to obtain than they have been historically. It means only that the analysis of the relevant risks and equities should not end, and the matter be resolved against the plaintiff, if the plaintiff can do no more than make out a serious issue to be tried. The potential burdens of the mandatory injunction on the defendant will, and must be, carefully weighed in the course of the balance of convenience analysis.
>
> [47] As a result, I conclude that the serious issue to be tried standard was applicable here. The Chambers judge acted correctly in employing it. Relatedly, I find the Chambers judge made no error in concluding the standard had been satisfied. Clearly it was and Mosaic, quite properly, does not contend otherwise.
>
> [48] Before leaving this point, let me also say that in endorsing the general use of the serious issue to be tried standard, I do not mean to foreclose the possibility of there being some limited exceptions to its overall applicability. The Supreme Court expressly recognized, in *RJR-MacDonald*, that significant attention to the merits of the plaintiff's case is required (a) where the interlocutory relief will in effect amount to a final determination of the action such as, for example, in an application to enjoin picketing, and (b) where the plaintiff's case presents itself as a simple question of law. There might arguably be other limited circumstances where a higher threshold is still appropriate. Obviously, it would not be wise to attempt to identify or analyze them in the abstract.

[123] There is Saskatchewan judicial authority that this branch of the test may be heightened when a mandatory injunction is sought against a public authority, as set out by Chief Justice Laing (as he then was) in *Metz v Prairie Valley School Division No. 208 of Saskatchewan*, 2007 SKQB 269, 300 Sask R 161 at para 22:

> [22] In Saskatchewan, **this Court has stated in a number of cases where a mandatory injunction is being sought against a public authority plaintiffs must establish on the material filed that they have a strong *prima facie* case on the merits of the claim raised** (Vide: *Young v. Board of Education of Hudson Bay School Division No. 52*, 2001 SKQB 376, 210 Sask.R. 145 (Q.B.), per Smith J. (as she then was) at para. 5, and *Wellington No. 97 (Rural Municipality) v. Ligtermoet*, 2002 SKQB 474, [2003] 3 W.W.R. 339, 228 Sask.R. 135 (Q.B.), at para. 11, reversed on other grounds at 2003 SKCA 48, 232 Sask.R. 207 (C.A.)). **The rationale for requiring the higher**

> **standard when seeking an injunction against a public authority is that the public authority represents the public interest, and should not be temporarily prevented from acting unless there is real merit to the claim being advanced.** Usually in such cases the facts are not much in dispute. In those cases which present complicated factual or legal issues which do not lend themselves to a preliminary assessment, a lower standard of "serious question to be tried" may be appropriate.
>
> [Emphasis added]

While *Metz* was decided prior to *PCS v Mosaic*, the underlying rationale of the former seems to me to still be applicable.

[124] I have, therefore, proceeded on the basis that the proper standard to apply to this first branch of the injunction test is serious question to be tried but have taken into account the fact that at least in some instances, an order containing the relief sought by Dr. Stebner would require the IPC to take positive action in order to comply. That is a more onerous order than a straight prohibition as to conduct.

[125] I now turn to the evidence. Taken as a whole, does it demonstrate that Dr. Stebner has a serious question to be tried before this Court?

[126] For several reasons, I find it does not.

[127] First, at the very heart of this matter is a clear and unequivocal breach by Dr. Stebner of third-party patients' privacy rights. What is resoundingly ignored within her evidence and argument is that she improperly accessed private patient information when she had no need to do so, triggering a HIPA breach. She can talk about her own putative privacy rights and her own fears all she wants, but that does not distract this Court from the root cause of this situation, and the root cause of the Commissioner issuing his reports. With respect to accessing this information, she was in the wrong.

[128] That leads to the second consideration. Dr. Stebner having breached the confidentiality of three patients, the IPC was entitled (and, at least arguably, obligated) to investigate and report on that matter. This was a legal right emanating from statute. Dr. Stebner has no factual or legal basis to argue that the Commissioner was sticking his nose where it did not belong.

[129] In argument, there was no serious challenge to the IPC's right to investigate and report. No issue was taken with whether the IPC could do this. Rather, issue was taken with how he did it. That is a substantially different matter, amounting to a request for the legal right to edit or alter the way the Commissioner's reports were framed. No arguable legal right to do that has been articulated, suggesting there is no serious issue to be tried. Having failed to satisfy that lower standard, Dr. Stebner also has failed to demonstrate a *prima facie* case, if that is required, with respect to her requests for mandatory interlocutory injunctions.

[130] In this case, Dr. Stebner argues that her privacy rights have been, and would be, violated by the public release of the IPC reports. She argues that these rights are "absolutely guaranteed" under ss. 24(1), 24.1 and 28(a) FOIP. During argument her counsel emphasized that Dr. Stebner's entire case deals with protecting her privacy rights. The impugned paragraphs of her affidavit set out personal and professional embarrassment and public perception concerns. The redactions and editing Dr. Stebner requested "just make sense", argued Mr. Vanstone.

[131] I have very carefully examined all of these arguments, and find I cannot accept them. Here's why.

[132] First, Dr. Stebner's privacy rights are not "absolute". She relies on ss. 24.1 and 28(a) FOIP, which state:

> 24.1 Subject to the regulations, a government institution shall establish policies and procedures to maintain administrative, technical and physical safeguards that:
>
> (a) protect the integrity, accuracy and confidentiality of the personal information in its possession or under its control;
>
> (b) protect against any reasonably anticipated:
>
> (i) threat or hazard to the security or integrity of the personal information in its possession or under its control;
>
> (ii) loss of the personal information in its possession or under its control; or
>
> (iii) unauthorized access to or use, disclosure or modification of the personal information in its possession or under its control; and
>
> (c) otherwise ensure compliance with this Act by its employees.
>
> 28 No government institution shall use personal information under its control without the consent, given in the prescribed manner, of the individual to whom the information relates, except:
>
> (a) for the purpose for which the information was obtained or compiled, or for a use that is consistent with that purpose;

[133] In this regard, Dr. Stebner's position appears to be premised on the assumption the office of the IPC is a "government institution" as referenced in these sections. I do not think that is correct.

[134] Section 2 FOIP provides definitions of both "commissioner" and "government institution":

> 2(1) ...
>
> (b) **"commissioner"** means the Information and Privacy Commissioner appointed pursuant to Part VI and includes any acting commissioner appointed pursuant to that Part;
>
> (d) **"government institution"** means, subject to subsection (2):

> (i) the office of Executive Council or any department, secretariat or other similar agency of the executive government of Saskatchewan; or
>
> (ii) any prescribed board, commission, Crown corporation or other body, or any prescribed portion of a board, commission, Crown corporation or other body, whose members or directors are appointed, in whole or in part:
>
> (A) by the Lieutenant Governor in Council;
>
> (B) by a member of the Executive Council; or
>
> (C) in the case of:
>
> (I) a board, commission or other body, by a Crown corporation; or
>
> (II) a Crown corporation, by another Crown corporation.

[135] Section 38(3) provides that the Commissioner is appointed by an order of the Legislative Assembly as a whole. The person holding the post of Commissioner is not appointed under s. 2(d) FOIP. This is a distinction with a difference. As well, s. 39 provides that it is the Legislative Assembly as a whole which can suspend or remove the Commissioner from office. The IPC emanates from the Legislature as a whole, not just the executive branch of government.

[136] I have already discussed the nature of the office of the IPC. It is not that of a "government institution". If it was, Crown immunity might apply. The IPC actually keeps watch over the government and any misuse of private information by government. Further, even if Dr. Stebner could somehow fit the IPC within s. 28(a) FOIP, the use made of her personal information by the Commissioner was entirely consistent with his statutory duties. Once again, I note that he provided her with a chance to review the draft report and agreed to anonymize her within that report, which the University's in-house privacy lawyer believed to be a good result. The use of this

information in this manner does not constitute a privacy breach by the Commissioner.

[137] I am not satisfied that the evidence overall is supportive of Dr. Stebner's position in seeking this injunctive relief. She has not satisfied the first element of the injunction test.

Irreparable Harm

[138] This is the first occasion where my alternate analyses will occur, based on differing treatments of paras. 31 to 33 of Dr. Stebner's affidavit.

[139] Regarding irreparable harm, Justice Richards' analysis in *PCS v Mosaic* determined that the same objects pertain to the assessment of how strictly an applicant must prove the prospect of irreparable harm as apply to the proving of the first branch of the test. He concludes (para. 61) that generally it will be sufficient for a party seeking interlocutory injunctive relief to establish "a meaningful risk of irreparable harm or, to put it another way, a meaningful doubt as to the adequacy of damages if the injunction is not granted". This standard has since been adopted by numerous trial and appellate courts here and elsewhere in Canada.

[140] While arguably this is a relatively low standard, it remains incumbent upon Dr. Stebner to demonstrate what her risks of harm are, and show that this harm is such that damages will not be able to adequately compensate her.

[141] With respect to damages, there is no claim for same even in the alternative. This matter was not commenced by statement of claim, but by originating application. All of Dr. Stebner's litigation eggs are in the injunction/declaration basket. Really, this aspect of the application is about whether she can demonstrate any risks of harm.

[142] With paras. 31 to 33 out of her affidavit (that is, disregarded) there is no evidence of harm arising from the IPC's reports on this privacy breach. To be sure, I am prepared to accept there would be personal embarrassment. That is not proof of a meaningful risk of harm to ground an injunction, especially of the type sought here.

[143] Even with those paragraphs included in the matrix of evidence on this application, a meaningful risk of harm is not established. Those paragraphs prove nothing. They are entirely speculative. They are nothing more than Dr. Stebner's personally held, purely subjective fears and anxieties. Perhaps they are driven by guilt or angst or other emotion; I do not know. But what they are not driven by are facts or evidence. She points to nothing to ground her fears that people in the locale in which she practiced (and elsewhere) will react negatively to her, personally and professionally. Nothing has happened yet. There is no objective basis for these fears, and even if I consider them they do not establish a prospect of irreparable harm within the meaning of the authorities, including *PCS v Mosaic.*

[144] The other issue with the evidence is that it does not demonstrate that Dr. Stebner already has an established positive reputation for provision of health care, which positive reputation would be negatively impacted by the IPC releasing its report as originally drafted (i.e. her name redacted). Her affidavit shows she was a medical resident at the time of her privacy breach but it does not set out her current status. Even assuming she is a full-fledged physician, operating in the marketplace, there is no evidence as to her current reputation, nor as to loss or damage actually suffered, nor any impending harm for which damages would be insufficient compensation.

[145] *Wildman v Kulyk* was a passing off case. An interlocutory injunction granted in chambers was set aside on appeal, for a number of reasons, including a failure to properly consider the aspect of irreparable harm. That harm was argued to be related

to damage to business reputation, for which damages are poor (if any) compensation. The Court of Appeal noted that the applicant in the court below had not established that there was any reputation to be damaged, which was distinct from *PCS v Mosaic*. This evidentiary gap was noted by the Court of Appeal:

> [37] In this case, Ms. Kulyk has not put forward any evidence to establish the existence of reputation or goodwill associated with "Global Healthcare Connections". Her affidavit refers to the various steps that she has taken to launch her business – opening bank accounts, arranging for insurance, obtaining a business number from Canada Revenue Agency and so forth – but there is nothing in the record which suggests or establishes that "Global Healthcare Connections" has a presence of any kind in the marketplace.

[146] In the case at bar the evidence is totally deficient as to Dr. Stebner's current circumstances and current personal or professional reputation. Paragraph 2 of her affidavit establishes that at the time of the breaches and the IPC investigation and reporting she was a medical resident, but her affidavit does not provide her current status, residence or workplace, or reputation within that residence or workplace. A vital component of establishing a meaningful risk of irreparable harm through reputational damage is missing from the evidence in this case. In *PCS v Mosaic* there was substantial evidence as to the market and reputation damage that could result if an injunction was not granted. Here, there is none.

[147] While the standard of proof for irreparable harm was somewhat relaxed by *PCS v Mosaic*, it remains incumbent upon the applicant to show what her risks of harm are, harm that damages will not be able to compensate adequately. She has failed to adduce any cogent evidence on point.

[148] Embarrassment and feared damage to reputation do not always amount to irreparable harm. Cases tend to be somewhat fact-specific, but injunctions have been

denied in circumstances where far more personal issues were extant.

[149] See, for example, *A.B. v Stubbs* (1999), 44 OR (3d) 391 (Sup Ct). The plaintiff had penis enlargement surgery. Things went badly. He wanted to sue, but only if he could do so anonymously due to the embarrassment factor. He sought an injunction permitting his identity within the litigation to be sealed. The injunction was denied. The court found irreparable harm had not been established. The plaintiff led no evidence on this point except as to his concern for his own embarrassment. This was held to be insufficient.

[150] The same result pertained in *Doe v O'Connor*, 2010 ONSC 1830. The plaintiff commenced suit against a physician for improper sexual advances. She wished to remain anonymous. The Court held in that case that irreparable harm was not established even where there was evidence from the plaintiff and from a clinical social worker. There was medical evidence that the plaintiff demonstrated a fragile sense of self, accompanied by very low self-esteem and acute feelings of self-loathing. This was exacerbated by her being ostracized from her family and community due to the allegations of sexual assault. The plaintiff said if her name was associated with a public legal action she would suffer further emotional upset, embarrassment and trauma. The Court held that irreparable harm was not established.

[151] While *PCS v Mosaic* states a weighing of risks is involved, not certainties, it remains for the applicant to provide actual evidence as to what those risks are, and why they might accrue. Here, the material is deficient, with or without a consideration of paras. 31 to 33.

[152] I conclude that Dr. Stebner has not satisfied her onus of demonstrating that irreparable harm will accrue to her if injunctive relief is not granted.

Balance of Convenience

[153] As set out at para. 113 of *PCS v Mosaic*, at this stage it is necessary to balance the factors already reviewed (strength of the applicant's case; risk of irreparable harm; nature and degree of such harm) in light of equitable factors. The "balance of convenience" is aptly named. On the first side of the scale, the Court places the risk of irreparable harm to the applicant if this injunction is denied but she wins at trial. On the other side is placed the irreparable harm to the respondent if this injunction is granted but the respondent succeeds at trial.

[154] It must be noted that the Court of Appeal described the balance of convenience criterion as "compendious". The balance of convenience can "accommodate a range of equitable and other considerations": *PCS v Mosaic*, para 113.

[155] As noted above, there is no evidence of any harm (much less irreparable harm) that will befall Dr. Stebner if the injunction is not granted. Her career will not end. There is no evidence that her career will be damaged. If I deny this injunction now and she wins at trial, will irreparable harm accrue? I do not believe it will. This situation is similar to that faced in *101114752 Saskatchewan Ltd. v Kantor*, 2011 SKQB 446, 387 Sask R 175.

[156] In this factual context, I have asked myself which party could suffer more harm through determination of whether to grant an injunction as set out in *RJR MacDonald*. For Dr. Stebner, that genie is out of the bottle. For the IPC, even short-term limitations on the composition and publication of statutory-mandated reporting could have deleterious effects on his office. The injunction is sought against a public authority, rendering it even more difficult to obtain. This consideration favours refusing the injunction.

[157] I further note that I could not locate an Undertaking as to Damages from Dr. Stebner on the file. The file is voluminous and while it is possible I missed it, I do not believe so. The Local Registrar has no record of an Undertaking being filed. Generally, such an Undertaking is required to support an injunction application. This is not, in itself, fatal. If I were disposed to order an injunction I could make the issuing of same conditional upon the filing of a suitable Undertaking as to Damages.

[158] Even if I am incorrect and an Undertaking was (or in the future would be) filed, this does not end the consideration of this factor. I return to a consideration of the applicant's evidence. There is nothing in her affidavit that provides any information as to her ability to honour any Undertaking as to Damages. There is nothing as to her financial position. Any Undertaking filed could be hollow. It is incumbent upon Dr. Stebner to satisfy this Court that her Undertaking is meaningful. That she has neglected to do so is a factor weighing in the balance of convenience, a factor militating against the granting of injunction relief, even conditionally.

[159] I have therefore concluded that a consideration of the equitable factors within the rubric of balance of convenience does not militate in Dr. Stebner's favour.

Overall Equities

[160] Paragraph 113(d) of *PCS v Mosaic* speaks of a judge's ultimate focus being a consideration of the overall equities and justice of the situation at hand, considering the three criteria already discussed (and the case as a whole) in a holistic fashion. The law no longer sees these three criteria for an interlocutory injunction as a series of hurdles, which an applicant must overcome sequentially in order to succeed. These criteria are "not usefully seen as an inflexible straightjacket" (para. 26 *PCS v Mosaic*). The entire process is now really one of balancing. After consideration of the

three segments of the test, a judge still must take a notional "ten steps back" to look at the big picture, the forest rather than the trees.

[161] Thus while there is not a requirement that Dr. Stebner must show (to a high degree of proof) that each of the three tests has been met with resounding success, the tests still should be met. I have determined that she has not met them. This fact militates against her satisfying this fourth stage of the *PCS v Mosaic* injunction analysis.

[162] I have previously referenced the "clean hands" doctrine. This factor pertains to the overall equities of this case. This legal principle holds that where a party comes to court seeking equitable relief he must disclose all matters within his knowledge, whether favourable to him or not, and that he should be free of misconduct -- in other words, he should have "clean hands". In past times, failure to adhere to this doctrine could lead to a dismissal of the request for relief. However, Robert J. Sharpe in *Injunctions and Specific Performance*, (Toronto: Canada Law Book, 2014) at ¶1.1030 to ¶1.1070, indicates that the better summary of this principle is that wrongdoing or the lack of clean hands on the part of an applicant should not deprive the applicant of a remedy unless the wrongdoing bears directly on the appropriateness of the remedy, and then the refusal of relief should be justifiable on some more precise basis than the "clean hands" maxim.

[163] Similarly, there is an expectation where a party seeks such injunctive relief that he will make full and frank disclosure of all matters within his knowledge. Failure to do so can (but will not always) still lead to the refusal of injunctive relief or, if granted and subsequently reviewed, the dissolution of same. See, for example, *Fonagy v Oasis Trucking Ltd.*, 2006 SKQB 233, 280 Sask R 21, per Justice Ball at para. 6; also see the discussion in *David McKinnon v Red Lily Wind Energy Corp.*, 2012 SKQB 58, 391 Sask R 135. While the *Fonagy* case concerned an application for a

preservation of property order (Mareva injunction) the principle applies more broadly.

[164] In the case at bar the applicant's breach of this principle is certainly not determinative. But her lack of candour and accuracy in her affidavit is another factor militating against the granting of injunctive relief.

[165] Dr. Stebner does not put forth a convincing case that she will somehow be harmed if an injunction is not issued prior to the determination of the main matter. She seeks to restrict, both temporarily and permanently, the Commissioner's ability to control his own reports. She conflates not liking a result or the way the result is expressed with a right to overturn that result or alter the way it is expressed. Her right to relief is far from clear at this stage.

[166] Overall, the equities favour the Commissioner. There is a significant equitable consideration against Dr. Stebner within her own position. She seeks to limit what the Commissioner can find, what he can publish, and how he can report it. I am loathe to do any of that absent a clear breach of statutory duty by the Commissioner. Our Legislature has reposited its trust in the IPC to deal with privacy matters. Generally, it is not for a judge to edit or rewrite the Commissioner's reports. It is not for me to tell him either what to say or how to say it.

[167] I must conclude that taking all relevant factors into account, the interests of justice would be served by denying the injunctive relief sought by Dr. Stebner. On the facts and on the law, she has not met the *PCS v Mosaic* test. The application is therefore dismissed.

3. Should a publication ban be granted or continued?

[168] When considering this issue, I have again conducted alternate analyses

based on whether paras. 31 to 33 of Dr. Stebner's affidavit are in or out of the record of evidence. I have determined that it does not matter; even with those paragraphs before me, the evidence is insufficient to support the continuation of the present *ex parte* publication ban, or the granting of a new one.

[169] Reference must be had to the law concerning publication bans as set out above. The authorities demonstrate that prospective embarrassment or humiliation is insufficient to ground a publication ban. There is a very strong presumption in favour of open courts. Dr. Stebner's case is not sufficient to rebut that presumption.

[170] Counsel for the Media has managed to summarize the applicable law with accuracy and to put forth cogent positions regarding this matter -- remarkably so, in that he had no access to any of the materials filed by Dr. Stebner. He distilled his position into a handful of points:

- The *Dagenais/Mentuck* test applies to all discretionary orders in the nature of a publication ban.
- The party seeking the ban has the onus of adducing evidence to support the application.
- If the test for granting a ban is met, efforts must be made to keep the ban as narrow as possible.
- The applicant must demonstrate that there is a serious risk to the administration of justice if the publication ban is not granted.
- The personal concerns of a litigant are not grounds upon which a ban should be granted. This includes concerns as to privacy, embarrassment or even the release of medical information into the

public domain.

[171] Dr. Stebner's position appears to be that if disclosure of her identity would cause her upset or embarrassment, it should not be disclosed in any circumstances. That is not the law. If she was a witness in a court case her identity would generally be disclosable and could be reported by the media, unless the circumstances fell within a relatively narrow range of exceptions. Dr. Stebner appears to conflate personal embarrassment or distress (real or perceived) with her privacy rights. The two are not synonymous.

[172] The Commissioner did nothing wrong in this case. I do not find that the IPC had a duty to keep Dr. Stebner's personal information out of his reports. When he agreed not to use her name he did so gratuitously. I do not find that the media in general has any obligation to refrain from reporting on this matter using Dr. Stebner's name. It is for Dr. Stebner to justify any restriction on media reporting of a case heard in open court. It is not for the Media to justify that it should have such access and ability to report. Dr. Stebner has not satisfied her onus. There is no basis for any publication ban here. I am not granting such an order, and I am dissolving the order without notice already made.

[173] Finally, during oral argument redaction within this judgment was discussed. I do not find this to be a case warranting redaction within these reasons. That is generally done to protect parties' interests, usually vulnerable parties such as children. Names and other personal information are not routinely redacted in legal decisions. This information is not withheld from the public or media as a default position. Dr. Stebner has not persuaded me in this regard.

[174] For example, see *Law Society of Saskatchewan v Frost-Hinz*, 2012

SKLSS 7. There, an articling student's conduct was reviewed by the Law Society's Admissions and Education Committee. While counsel agreed to some redactions (such as the name of the student's spouse) the student's name was published, as were other identifying features. No doubt this was embarrassing to the student. No doubt the student subjectively believed this could have a negative effect on her, personally and professionally. Nevertheless, her name was reported.

[175] I am aware of the irony herein; had Dr. Stebner simply let the matter lie, her name would likely never have come to the attention of the public and the matter would have simply blown over. She certainly had the right to bring this application and have the Court adjudicate same. However, in doing so the consequences flowing from the lack of success are hers alone to bear.

[176] The applicant must therefore be aware, and must remember, that it is her own application that brings her into the public eye and that any public scrutiny which follows is not the fault of the Commissioner or this Court.

Should any order regarding costs be granted?

[177] Ordinarily, costs follow the event.

[178] Dr. Stebner has unsuccessfully applied for an injunction and has failed in her attempt to obtain any sort of publication ban. In these circumstances it is normally appropriate to award costs of this application to the other parties. However, I do not have submissions on costs from the parties. I therefore grant leave to all parties to contact the Local Registrar to arrange a hearing to deal with costs of this application, should any party desire to do so.

Conclusion

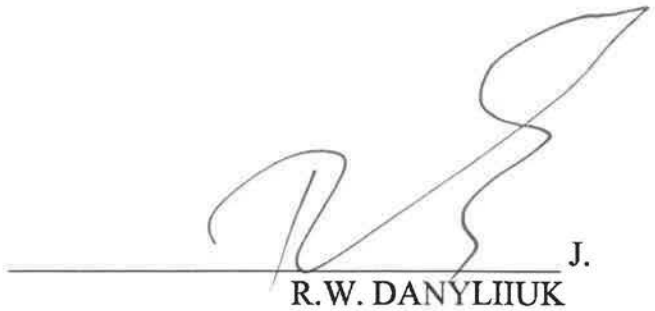
[179] Accordingly, I make the following order:

1. The applicant's application for injunctive relief is dismissed in its entirety.

2. The applicant's application for a publication ban is dismissed.

3. The *ex parte* order granted February 8, 2019 as continued by this Court is hereby dissolved.

4. The parties have leave to speak to costs, by contacting the Local Registrar and arranging a date for a costs hearing before Justice Danyliuk.



J.
R.W. DANYLIIUK