QUEEN'S BENCH FOR SASKATCHEWAN

Crombie Stebner v Office of the Information and Privacy Commissioner 2019, SKQB 91

EXTRACTS FROM FIAT – Justice Danyliuk J.

March 28, 2019

Circle of Care outdated

[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.

Need-to-Know prevails over circle of care in privacy law

[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 RIPA:

> 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 SRA'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.

The Nature of the Office of the IPC

Link to Legislative Assembly

[55] 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 unmistakable.

Non-compellable

[56] Section 47 of *The Freedom of Information and Protection of Privacy Act* (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.

Can make any recommendations

[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) *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP), and s. 48(2) of *The Health Information Protection Act* (HIPA).

IPC – servant or agent of the Crown?

[60] The authorities appear to hold that the Crown itself cannot be enjoined. 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.

Privacy Ombudsmen

[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.

Cannot be unduly fettered

[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.

Deference

[64] This is a principle of long standing. For example, see Maltby v Saskatchewan Attorney General (182), 2 CCC (3d), 153 (Sask Q.B.). …

> [20]…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 matter. *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 in appropriate.

[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). …

> [28]…**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 Acts' 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.

Independence

[67] …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.

[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.

Parties trying to control what is in our reports

[33] Finally, counsel seeks to enter into negotiations with the Information and Privacy Commissioner (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.

Trying to change outcome

[165] … 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] … 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.

Publication Bans

Open Court Principle

[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]… 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]… 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.*

Test for publication bans

[85] …*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.

Public embarrassment usually not sufficient

[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.

Opinions in affidavits

[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:…

[90] In *J.LM 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]

[99] … In addition to those authorities I note *Adlair v Nunavut*, 2016 NUCJ 23, where Justice Bychok said:

> [15]… 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]

IPC not protected from Crown Immunity

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

[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.

[109] … 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.

Prima Facie

[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.

[123] … 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]… 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….

Balance of Convenience

Impact on IPC

[156] … 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.

3. Should a publication ban be granted or continued?

A certain irony

[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.