Office of the Saskatchewan Information and Privacy Commissioner

Submission to the Workers' Compensation Act Committee of Review

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SUMMARY OF RECOMMENDATIONS

The Saskatchewan Information and Privacy Commissioner submits the following recommendations to the Workers' Compensation Act Committee of Review:

1) ***The Workers' Compensation Act, 1979*** **(WCA) should be clarified to confirm that in addition to the provisions of section 171.1 (which typically only comes into play when a review of a claim decision has been requested) an injured worker has the right to request access to the information that the Workers' Compensation Board (WCB) has collected about them and that is in the WCB's possession or control.**

2) **WCA should be clarified to confirm that injured workers may raise a concern about denial of their access to information request or about an alleged breach of their privacy with the Information and Privacy Commissioner.**

3) **Although it may not be necessary to amend sections 171.2 of WCA, there would be value in clarifying that an employer is entitled to only that personal information/personal health information of the injured worker which is necessary and relevant for purposes of the employer's limited role in any particular compensation claim.**

4) **Amend section 171 to clarify that the WCB may disclose information in its possession or control as contemplated by** ***The Freedom of Information and Protection of Privacy Act*** **(FOIP).**

5) **Reconsider and repeal the WCB's exclusion from Parts II, IV and V of** ***The Health Information Protection Act*** **(HIPA).**

INTRODUCTION

In 2006 this office prepared a submission for the consideration of the Workers' Compensation Act Committee of Review (Committee of Review). Our analysis and recommendations made at that time are largely the same as what is contained in this document. The Committee of Review at that time appeared to accept our recommendations. The following are two of their recommendations. Unfortunately, these recommendations were not acted upon, and the same issues remain today. The following quotations are taken from the Committee of Review's Report wherein they addressed some of our concerns and recommendations:

> Currently, there is a difference over the extent to which sections 171 to 171.2 are paramount over *The Freedom of Information and Protection of Privacy Act*. This difference contains the seeds for much dispute and costly litigation, which should be forestalled.
> …
> The Committee can find no compelling public policy purpose or basis for the Board to continue to be exempt from, or have a special position with respect to, the legislation and administration protecting information or personal health information that applies generally in Saskatchewan.
>
> The Committee recognizes the unique mandate and decision-making role of the Board in the administration of justice, but does not consider the Board's mandate and role to be so unique or special that the law and remedies that apply to other administrative agencies and public bodies should not apply to the Board.
>
> ***Recommendation:***
> **Amend the Act to specify the Board is subject to the *The Freedom of Information and Protection of Privacy Act*. (sic)**
>
> The Board collects, compiles and uses extensive personal health information. There is a regime in *The Health Information Protection Act* that addresses the protection of this information while preserving access and sharing of the information by "trustees" for diagnosis, treatment and care, which the Board involves itself in through the Early Intervention Program and other case management endeavours.
>
> The general rules and processes in many parts of *The Health Information Protection Act* apply to the Board, but it is exempt from Parts II (Rights of the Individual), IV (Limits on Collection, Use and Disclosure of Personal Health Information by Trustees) and V (Access of Individuals to Personal Health Information).
>
> The Committee has concluded there is no overriding purpose or reason that the Board should be exempt from these parts.
>
> ***Recommendation:***
> **Repeal the exemption *The Workers' Compensation Act, 1979* has from Parts II, IV and V of *The Health Information Protection Act*.**

Once these recommendations are enacted, the Board will have to review and adopt new processes and procedures for the collection, use and disclosure of personal information that will respond to the submissions the Committee received.

OUR AUTHORITY

Our authority for making recommendations is found in FOIP. Section 33 reads as follows:

Privacy powers of commissioner

33 The commissioner may:

(a) offer comment on the implications for privacy protection of proposed legislative schemes or government programs;

(b) after hearing the head, recommend that a government institution:

(i) cease or modify a specified practice of collecting, using or disclosing information that contravenes this Act; and

(ii) destroy collections of personal information that is collected in contravention of this Act;

(c) in appropriate circumstances, authorize the collection of personal information in a manner other than directly from the individual to whom it relates;

(d) from time to time, carry out investigations with respect to personal information in the possession or under the control of government institutions to ensure compliance with this Part.

Furthermore, the general powers of the commissioner are set out in section 45 of FOIP:

General powers of commissioner

45 The commissioner may:

(a) engage in or commission research into matters affecting the carrying out of the purposes of this Act;

(b) conduct public education programs and provide information concerning this Act and the commissioner's role and activities;

(c) receive representations concerning the operation of this Act.

ISSUES IDENTIFIED WITH THE WCB

Last fiscal year our office received more than 3,130 requests for summary advice. Since 2009 we have received (per year) more than 200 formal requests for review of a decision of a government institution, local authority or health trustee regarding an access to information request, or for complaints about an improper collection, use or disclosure of an individual's personal information or personal health information.

Our office receives a significant number of requests for review and complaints involving the WCB; 41 WCB related files have been opened since July 2003.[1] We also receive numerous inquiries about the WCB which do not result in a file being opened.

In recent years, we have issued two Investigation Reports involving a breach of privacy on the part of the WCB. In Investigation Report F-2009-001, the Commissioner determined that the WCB disclosed the complainant's personal information to an independent claims advisor without authority and that the WCB failed to satisfy its obligations under section 27 of FOIP to ensure that the complainant's personal information in its possession was accurate and complete.

In Investigation Report F-2007-001, the Commissioner found that the WCB disclosed to the complainant's employer more personal information and personal health information than was necessary. We further found that the WCB failed to adequately safeguard the complainant's information when it sent copies of his personal information and personal health information to the complainant by ordinary mail, which was not received by the complainant and could not be accounted for.

Overall, the complaints and concerns we hear regarding the WCB include the following:

- WCB demands personal health information that is not relevant to the compensable injury;
- WCB shares more information about an injury with the employer than is necessary or relevant;
- Employers are given easy access to claim files, but injured workers are denied access to their own personal information/personal health information;
- WCB does not let claimants see their own case management files unless and until an appealable issue has been identified[2], and even then may not allow the claimant to view their entire file; and

We are also concerned about the WCB's position that the Office of the Saskatchewan Information and Privacy Commissioner (OIPC) does not have jurisdiction in many cases that involve the WCB. The WCB claims that an injured workers' access to their personal information/personal health information is solely governed by section 171.1 of WCA and that FOIP thus has no application.

We have also experienced difficulty at times getting a copy of the records at issue. The WCB appears to take the position that section 171(1) of WCA prevents release of the injured workers' claim file to our office, seemingly ignoring this office's inherent jurisdiction over such issues and our clear authority under FOIP and HIPA to acquire copies of documents necessary for our reviews and investigations.

[1] As of March 31, 2011.
[2] We understand that WCB has broadened their policy somewhat to allow for access to a claim record in certain other circumstances, such as when the information is needed for a CPP disability claim or for a civil action. However, as we understand it, WCB does not allow for the broad right of access provided for in FOIP.

BACKGROUND

(a) *The Freedom of Information and Protection of Privacy Act*

Saskatchewan residents enjoy the right to access information about them held in government data banks, and benefit from limits on the government's ability to collect, use and disclose their personal information. These rights are defined in FOIP. FOIP has been in force since 1992.

FOIP governs bodies described as "government institutions".[3] This includes all provincial government ministries, Crown Corporations, agencies and boards including the WCB.

Fundamental to FOIP is the right of appeal to an independent Information and Privacy Commissioner who reports to the Legislative Assembly and not to the Government.[4] The Commissioner oversees the activities of the various public bodies in terms of compliance with FOIP.

FOIP has an expansive definition of "personal information".[5] At least some of the information routinely collected, used and disclosed under WCA will include personal information as defined by FOIP. FOIP has specific provisions for collection, use and disclosure of personal information. Personal information can be used and disclosed under FOIP without consent for the purpose for which the information was obtained or compiled by the public body or for a use that is consistent with that purpose.[6] FOIP enumerates more than twenty circumstances when personal information can be disclosed without consent.[7] FOIP permits an individual to obtain access to their own information[8] and to request that errors be corrected.[9]

FOIP is similar to the federal *Access to Information Act*[10] and the federal *Privacy Act.*[11]

Former Supreme Court Justice Gerard V. La Forest, as special advisor to the federal Minister of Justice, issued in 2005 his report: "The Offices of the Information and Privacy Commissioners: The Merger and Related Issues". He stated that:

> The *Access to Information Act* gives the individuals a right of access to government information. The *Privacy Act* permits them to gain access to information about themselves held in government data banks, and limits government's ability to collect, use and disclose such information.
>
> **The rights protected by both Acts are of the highest importance in the functioning of a modern democratic state.**

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[3] See section 2(1)(d) of FOIP.
[4] See section 49 of FOIP.
[5] See sections 2(1)(g) and 24 of FOIP.
[6] See sections 28 and 29(2)(a) of FOIP.
[7] See section 29(2) of FOIP and FOIP Regulations sections 14 to 17.
[8] See section 30 of FOIP.
[9] See section 31 of FOIP.
[10] *Access to Information Act*, R.S. 1985, c. A-1
[11] *Privacy Act*, R.S. 1985, c. P-21

> ...
> **So important is the right to government information that some have come to refer to it as "quasi-constitutional" in nature.**
> ...
> The courts have also described the Privacy Act as carrying a "quasi-constitutional mission".[12]
>
> [emphasis added]

In Saskatchewan, the importance of FOIP is affirmed by paramountcy provisions that ensure that in the event there is a conflict, unless otherwise stated, FOIP will prevail.[13]

(b) *The Health Information Protection Act*

Since September 1, 2003 HIPA has been in force in Saskatchewan. It applies to health information "trustees"[14] that have custody or control of "personal health information".[15] The list of trustees captures every government institution including the Saskatchewan WCB, every regional health authority and health professionals such as physicians and psychologists in their private offices and clinics. HIPA sets out the rules for the collection, use and disclosure of personal health information.[16] Personal health information includes information with respect to the physical or mental health of an individual; information with respect to a health service provided to the individual; registration information and information collected in the course of providing health services to someone.

Clearly, much of the information collected, used or disclosed by the WCB will qualify as personal health information. Usually, when personal health information is in the custody or control of a government institution, the applicable law will be HIPA and not FOIP.

HIPA permits a great deal of use and disclosure of personal health information among persons and bodies involved in providing diagnosis, treatment and care to an individual without any requirement for consent from the individual.[17] All uses and disclosures are subject to a set of general rules which must be met before the use and disclosure provisions can be relied upon. These general rules include sections 9 (right to be informed), 10 (right to information about disclosures without consent), 16 (duty to protect), 19 (duty to collect accurate information), and 23 (collection, use and disclosure on need-to-know basis).

As with FOIP, there is a right of appeal to an independent Information and Privacy Commissioner.[18] The Commissioner also has broad powers to oversee the activities of trustees in terms of HIPA compliance.[19]

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[12] La Forest, Gérard V., *The Offices of the Information and Privacy Commissioners: The Merger and Related Issues - Report of the Special Advisor to the Minister of Justice*, November 2005.
[13] See section 23 of FOIP.
[14] See section 2(t) of HIPA.
[15] See section 2(m) of HIPA.
[16] See Part III and Part IV of HIPA.
[17] See sections 26-30 of HIPA.
[18] See sections 42 and 14 of HIPA.
[19] See section 52(d) of HIPA.

(c) ***Application of Access and Privacy Legislation across Canada***

In every jurisdiction across Canada except the Yukon, the provincial workers' compensation scheme is subject to oversight by the provincial OIPC. Each provincial OIPC office has advised us that their compensation board works closely with the OIPC to resolve access requests and breach of privacy complaints.

ANALYSIS

Application of FOIP and HIPA to the WCB

Section 3 of the FOIP Regulations states that the prescribed boards, commissions, Crown corporations or other bodies included as a "government institution" are set out in Part I of the Appendix. The Appendix specifically lists the WCB as a government institution subject to the provisions of FOIP. Accordingly, the WCB is also a trustee subject to the provisions of HIPA.

Application of HIPA

Section 4(4)(h) of HIPA states that, subject to subsections (5) and (6), Parts II, IV and V of HIPA do not apply to personal health information obtained for the purposes of WCA.

Section 4(6) states:

> *The Freedom of Information and Protection of Privacy Act* and *The Local Authority Freedom of Information and Protection of Privacy* Act apply to an enactment mentioned in subsection (4) unless the enactment or any provision of the enactment is exempted from the application of those Acts by those Acts or by regulations made pursuant to those Acts.

This section operates to completely exclude WCA from the application of Parts II (rights of the individual), IV (limits on collection, use and disclosure of personal health information by trustees) and V (access of individuals to personal health information) of HIPA. However, the WCB remains subject to Parts III (duty of trustee to protect personal health information), VI (review and appeal), VII (commissioner), and VIII (general) of HIPA.

Section 4(6) of HIPA operates to ensure that FOIP applies to an Act exempted under section 4(4) unless it is further exempted from FOIP. Therefore, FOIP applies where HIPA does not unless exempted under section 23 of FOIP.

Section 19 of HIPA, to which the WCB is subject, imposes a positive duty on trustees:

> In collecting personal health information, a trustee must take reasonable steps to ensure that the information is accurate and complete.

The most reasonable and least complicated method to ensure accurate and complete information is to allow the injured worker to review his file and indicate if corrections or amendments are required. Further, section 47 in Part VI of HIPA imposes the onus on the trustee "to prove that the individual has no right of access to the records". The WCB has provided no substantive reason to support its position that injured workers are not entitled to see their individual claim files. The WCB has only provided reference to its policies in support of the position that a review or an appeal of a WCB decision is required prior to the injured worker viewing any portion of the claim file.

Application of FOIP

The WCB is a government institution to which FOIP applies. However, section 23 of FOIP, a paramountcy clause, applies in this instance. Sections 23(1) and (2) combine to, in effect, ensure that FOIP would prevail over other paramountcy clauses unless the records fall within the enumerated list of exclusions in section 23(3) of FOIP or unless another Act's paramountcy clause specifically addresses FOIP so as to exclude that Act or parts of that Act from the application of FOIP. Section 23(3)(k) of FOIP appears to exclude sections 171 to 171.2 of WCA from the application of FOIP.

Sections 171.1 and 171.2 of WCA address accessing information during the appeal process. These sections guarantee access to information "respecting the worker for the purposes of this Act" if an appeal is involved. The WCB has indicated that this means only the information related to the appeal would be disclosed.

Paramountcy

In Saskatchewan, the importance of access and privacy legislation is affirmed by paramountcy provisions that assert that unless otherwise stated the access and privacy legislation will prevail in a conflict with other statutes. This paramountcy clause ensures that the fundamental rights enshrined in the access and privacy legislation are given proper deference when interpreting legislative intent as to its application in conjunction with other statutes. A paramountcy clause is a strong expression of legislative intent and a tool for ensuring public policy objectives are met. In the event of a contest between two statutes, the legislature is presumed to not intend conflict between the statutes. Therefore, if an interpretation allows a concurrent application, that interpretation should be adopted.

In the event of a potential conflict or inconsistency between two valid provincial statutes, a legislative paramountcy analysis would be required.

This would entail a thorough examination of the relevant legislation. If the record is subject to access and privacy legislation, but exempted under a paramountcy clause, it must be determined whether the access and privacy legislation and the other statutes that apply to the records have conflicting obligations. If the statutes are complementary, they can coexist and the records would be subject to the highest standard.

Pursuant to section 23, FOIP prevails over another Act that conflicts with FOIP:

Confidentiality provisions in other enactments

23(1) Where a provision of:

(a) any other Act; or

(b) a regulation made pursuant to any other Act;

that restricts or prohibits access by any person to a record or information in the possession or under the control of a government institution conflicts with this Act or the regulations made pursuant to it, the provisions of this Act and the regulations made pursuant to it shall prevail.

(2) Subject to subsection (3), subsection (1) applies notwithstanding any provision in the other Act or regulation that states that the provision is to apply notwithstanding any other Act or law.

(3) Subsection (1) does not apply to:

...

(k) sections 171 to 171.2 of *The Workers' Compensation Act, 1979*;

…

and the provisions mentioned in clauses (a) to (m) shall prevail.

Section 23(3) is slightly different from other jurisdictions in that section 23(1) "does not apply" to the Acts listed, but instead those Acts "prevail". Alberta reads that FOIP applies unless expressly provided that the other Act "prevails". The WCB may argue that section 23(3) is exclusionary; therefore, FOIP does not apply prima facie to access during appeals or case management files generally. However, section 23(3) effectively states that in the event of a conflict instead of FOIP prevailing, as per section 23(1), the specified Act prevails.

This is quite different from a provision that states that FOIP does not apply to sections 171 to 171.2 of WCA, rather it states that the clause instructing that FOIP is paramount does not apply. There must still be an examination of whether there is conflict, otherwise what would WCA be prevailing over. Further, a consideration of whether two laws conflict and a paramountcy analysis is a standard part of legislative interpretation, regardless of whether a paramountcy clause exists in each piece of legislation. As we understand it, WCB's position is that because of section 23(3), it is not even necessary to consider whether there is a conflict between WCA and FOIP. We disagree for the reasons just discussed and reiterate that in order for the WCA provisions to "prevail" there must first be a consideration of whether the two laws actually conflict.

<u>Sections 171.1 and 171.2 of WCA</u>

These sections of WCA read as follows:

Worker's access to information

171.1(1) Where:

(a) a worker or any person whom he has authorized in writing to be his representative; or

(b) in the case of a deceased worker, any of his dependants;

has requested reconsideration of or applied for a review of a decision made pursuant to this Act, the board shall, at the written request of the worker, his representative or his dependant, as the case may be, allow the worker, his representative or his dependant, as the case may be, access to information respecting that worker for the purposes of this Act, but the person receiving the information shall use that information only for the purposes of that reconsideration or review.

(2) Where the board is of the opinion that any medical report which the worker or his representative has requested contains information of a sensitive nature which, if provided directly to the worker or his representative, would cause injury to the worker or any other person, the board shall provide the information to the worker's treating physician instead of providing it to the worker or his representative.

(3) Where a physician receives information pursuant to subsection (2), he shall explain to the worker or his representative, as the case may be, the contents of the medical report to assist the worker or his representative in his request for reconsideration of or application for a review of the decision of the board.

Employer's access to information

171.2(1) Where an employer has requested reconsideration of or applied for a review of a decision made pursuant to this Act with respect to a worker's claim for compensation, notwithstanding that the employer is not a party to the reconsideration or review, the board may on written request, in accordance with this section, grant the employer, or a representative of the employer on presentation of the employer's written authorization, access to the information that the board used to make its decision with respect to:

(a) the facts of the situation in which the injury occurred; or

(b) the percentage of the cost of compensation which has been assigned by the board to the injury cost record of that employer with respect to the injury the worker suffered out of and in the course of his employment with that employer;

that is obtained on or after the date this section comes into force for the purposes of this Act, but the person receiving the information shall use that information only for the purposes of that reconsideration or review.

(2) Where a request is made pursuant to subsection (1), the board shall notify the worker or any person whom he has authorized in writing to be his representative of the request and the information that it will grant access to and inform the worker or his representative that he may make any objection to the release of the information within the time specified in the notice.

(3) On the expiration of the time mentioned in subsection (2), the board shall, after consideration of any objections, determine what information it will grant the employer or his representative access to and so notify the worker or his representative in writing sent by registered mail.

(4) The worker may, within 21 days of the date that the notice pursuant to subsection (3) is mailed, request the board to reconsider its decision made pursuant to subsection (3).

(5) The board shall not grant the employer or his representative access to any information until the expiration of the time allowed for a request pursuant to subsection (4) or the determination of the request, whichever is later.

(6) The board shall inform the worker or his representative of all information it has granted an employer or his representative access to pursuant to this section.

(7) An employer may request the board to reconsider its decision with respect to the information the board has granted access to within 21 days of the date of that decision.

Since FOIP's provisions regarding protection of personal information would appear to conflict with the employer's ability to participate fully in the appeal process, the section 171.2 disclosure provision of WCA would be paramount. The employer perspective is thoroughly analyzed in British Columbia (BC) Investigation Report P96-006. This is relevant as the BC legislation parallels the Saskatchewan WCA. In the event of a conflict, and in accordance with section 23(3) of FOIP, WCA appeal provisions would prevail. However, the employer does not require, and should not have, access to all the information in the case file.

It is vitally important to note that section 171.1 only comes into play when the worker has requested some form of reconsideration of a decision made by the WCB. In those cases where the worker has not requested a review or appeal of a WCB decision, there still remains a right of access under FOIP. This will be discussed in more detail below.

These sections are also discussed in more detail below when considering the three part test to determine whether a conflict exists and a paramountcy clause takes effect.

Section 171 of WCA

As discussed above, paramountcy clauses only apply when there is a true conflict between legislation. It is our contention, as supported by BC case law, that no such conflict actually exists between section 171 of WCA and FOIP. As such, section 23(3) of FOIP would not be invoked and the relevant access to information provisions of FOIP would apply.

Section 171 of WCA reads:

171(1) Subject to sections 171.1 and 171.2, no officer of the board and no person authorized to make an inspection or inquiry under this Act shall divulge or allow to be divulged, except in the performance of his duties or under the authority of the board, any information obtained by him or that has come to his knowledge in connection with that inspection or inquiry.
(2) Every person who contravenes subsection (1) is guilty of an offence and liable on summary conviction to a fine of not more than $1,000.

Conflict or Inconsistency

There are three tests used to determine whether the two laws can coexist or are inconsistent or in conflict. While these tests were developed in relation to federal paramountcy, the same analysis applies to determination of conflict or inconsistency between two provincial enactments.

(1) The first test is that of pure conflict. Does compliance with one law involve the breach of the other?

(2) The second test is whether one law is supplemental to the other by adding something to the regulation of workers' compensation claims. If the one law is "supplemental," then it will be valid concurrently with the other law.

(3) The third test involves whether one law duplicates another such that there is not an actual conflict or contradiction. Mere duplication without actual conflict or contradiction is normally not sufficient to invalidate a law. It would simply mean that the Board would be held to the higher standard of the competing statutes.

An analysis of each of these three tests follows:

(1) Is there pure conflict between FOIP and WCA?

We need to determine whether a conflict or an inconsistency exists between the provisions of FOIP and sections 171 to 171.2 of WCA. In an analysis of the obligations under WCA, there is no conflict or inconsistency with the requirements of FOIP. Section 171 affirms the duty to not disclose personal information outside the need to know purview of managing the case file. This is further delineated in the appeal process identified in section 171.1 and 171.2. In fact it seems apparent that FOIP codifies the high standards of procedural fairness and natural justice as well as the common law fiduciary duties required of the WCB.

There must be a conflict between the requirements of the Acts before an exclusionary provision would apply. Ontario Order PO-2092-F affirmed Order P-344 where the Commissioner considered the federal legislative paramountcy and reached the conclusion:

> The case law appears to establish that "express contradiction" includes both an express conflict in wording of a federal and provincial statute, as well as a conflict in the operation of the two legislative schemes in a way which interferes with the functioning of the federal scheme.[20]

Following Alberta Orders,[21] a two part analysis examines the following questions specific to the issue at hand:

[20] Ontario Information and Privacy Commissioner Report P-344 at p. 4.

[21] See Alberta (AB) Order 99-034: [40] In determining whether section 5(2) is engaged, it is necessary to find a provision of FOIP and a provision of the enactment that is inconsistent or in conflict ... [48] Therefore, for section 5(2) to be engaged in this case, two criteria must be met: 1) the information withheld must fall within a provision of a statute (or its regulations) listed in section 15(2) of the FOIP Regulation; and 2) there must be an inconsistency or a conflict between a provision of FOIP and the provision of the statute (or its regulations), in relation to the information withheld. See also: BC Order 04-01, AB Order 2001-005 and AB Order 2001-036.

1. Is information requested under the control of a government institution and within the ambit of section 171 of WCA?
2. If yes, is a provision of FOIP inconsistent or in conflict with section 171 of WCA?

If we assume the information is within the ambit of section 171 of WCA, we would next analyze whether there is an inconsistency or conflict between FOIP and WCA requirements. If there is a conflict or inconsistency, WCA prevails and the OIPC would have no jurisdiction. For example, conflict with FOIP requirements may exist in determining an employer's right to access employee information during the appeal process under WCA. In that case, WCA would prevail and FOIP provisions would not apply. However, disclosure of the employee's information should be limited to that necessary for the employer to know the case to be met for the appeal. In the case of a worker accessing his own case management file, we see no conflict with the provisions of FOIP and maintain that the WCB should be held to the higher standard of FOIP. This is because section 171.1 of WCA is limited to cases where the worker has requested a review of a WCB decision, while FOIP establishes a broader right of access.

(2) Is one law supplemental to the other?

While access and privacy legislation is considered by the courts to carry quasi-constitutional status,[22] it could be argued that the provisions of FOIP "supplement" the right of the injured worker under WCA. Although FOIP codifies a higher standard, it does not conflict with the requirements under WCA, but rather expands a more narrow right. Black's Law Dictionary defines "supplemental" as "supplying something additional; adding what is lacking."[23] In a very real way, FOIP supplements WCA to elevate the access and privacy rights within WCA to those to which an ordinary individual would anticipate and expect.

In fact, section 4 of FOIP expressly states that FOIP "complements and does not replace existing procedures for access to government information or records" and "does not in any way limit access" to records that are normally available. FOIP operates to ensure that access is provided where it did not previously.

(3) Is there duplication without actual conflict or contradiction?

Current case law indicates that even where one piece of legislation is clearly paramount, unless there is "express conflict," both Acts can apply concurrently and the individual is held to the higher standard. This follows through in a provincial legislation paramountcy analysis of the application of FOIP and WCA. If section 171 does not conflict with the provisions of FOIP, both can apply concurrently. Section 171 of WCA could arguably be a more general statement of the principles encoded and defined in FOIP. Neither FOIP nor WCA explicitly negate the injured worker's common law fiduciary rights. Therefore, the WCB should be held to the higher standard as encoded in FOIP.

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[22] See *Lavigne* v. *Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, (2002) SCC 53 at [25]; *R.* v. *Dyment*, [1988] 2 S.C.R. 417; *R.* v. *Mills*, [1999] 3 S.C.R. 668; *Dagg* v.*Canada (Minister of Finance)*, [1997] 2 S.C.R. 402; *R.* v. *Plant*, [1993] 3 S.C.R. 281; and *R.* v. *Duarte*, [1990] 1 S.C.R.

[23] *Black's Law Dictionary*, 9th Ed., USA: Thomson West, 2009, at p. 1577.

COMMON LAW

A brief review of the application of natural justice and fiduciary duties at common law support our position with regards to the interaction of FOIP and WCA.

Natural Justice

The rules of natural justice provide a framework to ensure that relationships with inherent imbalances of power are not misused. Of particular note to Saskatchewan's situation is a case out of BC, Re Napoli and Workers Compensation Board, wherein provisions identical to those in WCA were analyzed by the courts. The following comments from the Court are relevant and helpful:

> With respect, these [policies] do not amount to any kind of legal authority binding on a Court of law. It is sufficient to say that the debate about whether or not evidence should be kept secret in a judicial or quasi-judicial inquiry was settled years ago by the common law. It quite wisely came out against the concept of secrecy and in favour of disclosure. Openness is the rule and secrecy the exception. My task is to ascertain whether or not this principle of law has been modified by the Legislature in any of the sections of the Workers Compensation Act.
> …
> Apparently the W.C.B. is prepared to let everyone else involved in these proceedings examine the petitioner's file except the petitioner himself. The compensation consultant has seen it, the board of review has seen it, the commissioners have seen it, counsel for the W.C.B. has seen it, and now it has been offered to me. But the W.C.B. says, under no condition is the petitioner to have a look at it. And yet, he is the subject of its contents.
>
> What statutory instruments are there which expressly or by necessary implication nullify this common law rule of disclosure?[24]

The Court examined section 95, which parallels section 171 of the Saskatchewan WCA, and determined:

> Section 95 states that persons authorized to make inquiries (such as a board of review) may not divulge the contents of the information contained in the petitioners file "except in the performance of their duties". One of the duties of a board of review is to conduct a hearing in compliance with the rules of natural justice. Therefore, it seems to me that in the performance of this duty it must show to the worker the contents of the file delivered to it by the W.C.B. To do otherwise would deny the worker "a fair opportunity to correct or contradict" what is in the file and it would amount to hearing one side (the W.C.B.) in the absence of the other (the worker). It follows that s. 95 does not allow a board of review to keep confidential material given to it by the W.C.B.
>
> This section does not "expressly or by necessary implication" destroy the rule of openness.
> …

[24] Re Napoli and Workers Compensation Board, [1981] B.C.J. No. 2223 at [53-56].

> The W.C.B. has no legislative authority to establish a practice of non-disclosure at a quasi-judicial inquiry such as a hearing before a board of review.[25]

As such, the rules of natural justice have not been sufficiently nullified expressly or by necessary implication in the wording of the Saskatchewan WCA provision. The duties under FOIP, including section 27 (ensure information is accurate and complete); section 31 (individual entitled to own personal information in government record); and section 32 (right of correction), all support the rules of natural justice which the courts have held continue to apply to the WCB in BC. While this analysis deals with appeals, the logic also applies to decisions being made at the case management adjudicator level.

The Office of the Information and Privacy Commissioner for BC investigated the practices of the BC WCB with respect to disclosing personal information about injured workers to employers in Investigation Report P96-006. This case provides a historical perspective of the development of BC's WCB access procedures post Napoli. The BC WCB took the position that natural justice demanded disclosure of the entire claim file to the employer. In fact, the Commissioner found that the WCB had moved to the following position post Napoli:

> The WCB responded to Napoli in Decision No. 338, which granted disclosure to the worker and/or the employer only after either the worker or the employer had launched an appeal. Workers were entitled to **full** disclosure of the claim file, **while employers were provided with copies of the documents that the WCB considered to be relevant to the issue at appeal**.
> …
> In 1987 the Ombudsman of BC published the Compensation System Study Public Report No. 7, which concerned "fairness to individual workers and employers affected by the administration of workers' compensation in BC.
>
> One of the Ombudsman's primary concerns was the fact that workers were not permitted access to their files **until an appealable decision had been made**. The WCB justified this practice on the grounds that "allowing disclosure at any time would unduly hamper the activities of the Board's departments in their routine administration." The Ombudsman recommended that **workers be given access to their files at any point in time**, stating:
>
> > Reasonable access on request would have some important benefits for the W.C.B. and claimants. Secrecy breeds suspicion and a lack of confidence in the system. Reasonable access on request would counteract this. There would also be an increased accountability of the W.C.B. to its claimants and an increased understanding by claimants; it would provide positive public relations for the W.C.B. as it would be in the vanguard promoting greater access to information for individuals; and it would contribute toward improved adjudication... Administrative difficulty is an inadequate reason for the W.C.B. to restrict full access to information which concerns an individual's health and income... The W.C.B. has the discretion under the Act to provide disclosure of claim files to workers upon request, and there is no adequate reason not to do so. If disclosure would interfere

[25] Ibid at [58-62].

with or delay a decision on the claim, the worker could be informed of this and thus have the option of deciding whether disclosure was worth the inconvenience.[26]

[emphasis added]

The BC WCB then decided to eliminate the distinction between claimants and employers with respect to disclosure. The BC Information and Privacy Commissioner considered the WCB's position and found:

> Were I to accept the WCB's argument that both workers and employers are "parties to a proceeding" from the moment the first decision is made on a claim, the entire workers' compensation system would be essentially exempt from the privacy protections set out in Part 3 of the Act. That was clearly not the intent of the Legislature.
> ...
> It is my view that the practice of disclosing a **worker's entire file to an employer** prior to the launching of an appeal **exceeds the requirements of natural justice** and is a breach of the Freedom of Information and Protection of Privacy Act**.**
> …
> Once an appeal has been filed with one of the WCB's appellate bodies, section 3(2) of the Act applies, and the WCB has the authority to design its own policy on disclosure, which the courts oversee. Thus, if the WCB (including Medical Review panels and the Appeal Division) and the Review Board decide they must disclose an entire file at that point, I have no jurisdiction to review this decision. If the appellate bodies choose to disclose more information than the worker believes is necessary, that decision or policy could be challenged through a judicial review. Before an appeal is filed, however, I am of the considered opinion that the FOIPPA Act fully applies to the WCB's disclosure policies.[27]
>
> [emphasis added]

This fully supports our position with regard to sections 171.1 and 171.2 of the Saskatchewan WCA. Much of the same language as exists in Saskatchewan's WCA continues to be utilized in BC's WCA. Further, the logic behind the analysis provided here applies to our jurisdiction with regard to the application of FOIP and WCA.

From the inquiries and complaints received in our office, it seems the Saskatchewan WCB is of the same opinion as that of the BC WCB prior to the review by their Information and Privacy Commissioner. We believe that the BC WCB's current practices are more compliant with both FOIP requirements and the requirements of the common law.

Fiduciary Duties

The common law has determined that fiduciary duties attach to the physician/patient relationship and to the collection, use, disclosure and retention of personal health information as the nature of such information is extremely sensitive. The physician/patient fiduciary duty as defined by the courts can be

[26] BC Investigation Report P96-006 at p.12. Available at: http://www.oipc.bc.ca/investigations/reports/WCB.html.
[27] Ibid at p. 18-19.

readily analogized to apply to an injured worker and the WCB and should be taken into account in implementing appropriate access and disclosure policies and practices.

A leading authority on health care fiduciary duties at common law is *McInerney* v. *MacDonald*.[28] Justice La Forest confirmed the fiduciary relationship between a physician and a patient. He then considered the patient's right of access to his own medical records in the possession of the physician. He stated:

> … a patient has a right to be advised about the information concerning his or her health in the physician's medical record. In my view, however, the fiducial qualities of the relationship extend the physician's duty beyond this to include the obligation to grant access to the information the doctor uses in administering treatment.

An analogy is readily made to the WCB collecting personal health information for the purpose of providing benefits and the corresponding fiduciary relationship imposing a duty to grant access to the information upon which benefit entitlement decision are or could be made. In fact, LaForest, J. found,

> [Disclosure] serves to reinforce the faith of the individual in his or her treatment. … In my view, the trust reposed in the physician by the patient mandates that the flow of information operate both ways.

A reasonable individual would feel more comfortable that the WCB was making sound decisions if the injured worker had access to his complete case file to ensure the decisions are being made on accurate and complete information. The injured worker has exchanged some of his right to personal privacy for entitlement to WCB benefits. However, access to the medical information upon which the benefit entitlement is decided should be "met with a corresponding openness and full disclosure."[29] La Forest concedes that the right of access is not absolute. However, he places the onus on the doctor to justify an exception to the general rule of access. Justice La Forest's position directly translates to impose a fiduciary relationship on the WCB with regards to the injured worker and juxtaposes nicely with FOIP and HIPA in intent and implementation.

The WCB accepts that FOIP applies to general, administrative records in its organization, but treats case management files differently by restricting access to personal information and personal health information. While protecting the privacy of the injured workers is appropriate, the information does not need to be protected from the worker to whom the information relates without sufficient, specific reason in individual cases.[30] The WCB seems to misunderstand the application of the right to access your own personal information portion of FOIP and has imposed a blanket policy to deny injured workers access to their personal information in the hands of a government institution, namely the WCB, without sufficient reason or individual consideration of the specific circumstances in each case.

WCA was not intended to abrogate the common law fiduciary right of access to medical information which is further supported and encoded in the legislation of FOIP and HIPA and is, in fact, an

[28] [1992] 2 S.C.R. 138, 1992 at [21].
[29] Ibid at [27].
[30] FOIP and HIPA already provide for such cases, see, for example, section 38 of HIPA and FOIP section 21.

affirmation of the rights set out in FOIP and HIPA. In the instance of the WCB, the interest of the individual in his medical information exceeds a personal interest to reflect an additional monetary interest. Section 171 is a general confidentiality statement which could easily encompass the procedures set out in FOIP. Compliance with FOIP section 5 (right of access) and Part IV (protection of privacy), especially sections 31 (individual's access to personal information) and 32 (right of correction), will not involve breach of the provisions of WCA. In fact, these provisions reinforce the WCB's common law fiduciary obligations.

CONCLUSION

We appreciate the opportunity to discuss our concerns with the Committee of Review during the public Hearings, and your consideration of our recommendations.

All of which is respectfully submitted,

R. Gary Dickson, Q.C.
Saskatchewan Information and Privacy Commissioner