Court of Appeal for Saskatchewan

Docket: CACV4192

Citation: *Saskatchewan Government Insurance v Giesbrecht*, 2025 SKCA 10

Date: 2025-01-28

Between:

Saskatchewan Government Insurance

Appellant
(Respondent)

And

Damon J. Giesbrecht

Respondent
(Applicant)

And

Government of Saskatchewan

Intervenor
(Non-party)

Before:	Leurer C.J.S., Caldwell and Kalmakoff JJ.A.
Disposition:	Appeal allowed
Written reasons by: In concurrence:	The Honourable Chief Justice Robert W. Leurer The Honourable Justice Neal W. Caldwell The Honourable Justice Jeffery D. Kalmakoff
On appeal from: Appeal heard:	2023 SKKB 80, Regina October 15, 2024
Counsel:	Amanda Quayle, K.C. and Jon Milani for the Appellant Robert Laurie for the Respondent Britannia Mohrbutter and Cameron McCracken for the Intervenor

Leurer C.J.S.

I. INTRODUCTION

[1] Saskatchewan Government Insurance [SGI] administers driver's licences in this province. It represents to the public that it will accept confidential reports that invite scrutiny of others' medical fitness to operate a motor vehicle. The issue in this appeal is whether SGI can fulfill this promise of confidentiality in the face of *The Health Information Protection Act*, SS 1999, c H-0.021 [*HIPA*].

[2] SGI received a report, submitted to it in confidence, that questioned Damon Giesbrecht's medical fitness to drive [Report]. This caused SGI to ask Mr. Giesbrecht to furnish medical evidence to dispel the concern that the Report raised. Mr. Giesbrecht complied with SGI's request, and SGI ultimately decided that there was no reason to restrict Mr. Giesbrecht's licence.

[3] Mr. Giesbrecht and SGI disagree as to whether he is entitled to see the Report. A Court of King's Bench judge accepted Mr. Giesbrecht's arguments in this dispute, and SGI appeals from that decision: *Giesbrecht v Saskatchewan Government Insurance*, 2023 SKKB 80 [*Chambers Decision*].

[4] I would allow SGI's appeal from the *Chambers Decision*. It is entitled to fulfil the promise of confidentiality that it made to the person who submitted the Report. This is because disclosure of the Report "could interfere with a lawful investigation or be injurious to the enforcement of an Act or regulation" (*HIPA*, s. 38(1)(f)). My reasons follow.

II. BACKGROUND

A. *HIPA*

[5] *HIPA* governs the protection and disclosure of "personal health information". This phrase is defined in s. 2(1) of the Act, as follows:

> (m) **"personal health information"** means, with respect to an individual, whether living or deceased:
>
> (i) information with respect to the physical or mental health of the individual;

> (ii) information with respect to any health service provided to the individual;
>
> (iii) information with respect to the donation by the individual of any body part or any bodily substance of the individual or information derived from the testing or examination of a body part or bodily substance of the individual;
>
> (iv) information that is collected:
>
> (A) in the course of providing health services to the individual; or
>
> (B) incidentally to the provision of health services to the individual; or
>
> (v) registration information[.]

[6] SGI and Mr. Giesbrecht agree that the Report constitutes personal health information about Mr. Giesbrecht and that SGI is a *trustee* within the meaning of *HIPA* because it has custody and control of personal health information. As a trustee, SGI is subject to numerous obligations regarding both the protection of the privacy of personal health information and the disclosure of such information to the individuals to whom it relates. The sections of *HIPA* that are most engaged in this appeal are ss. 32, 36 and 38, all of which are found in Part V of that Act, titled "Access of Individuals to Personal Health Information".

[7] Section 32 provides the foundation for Mr. Giesbrecht's claim to have a right to see the Report, providing as follows:

> **Right of access**
>
> **32** Subject to this Part, on making a written request for access, an individual has the *right* to obtain access to personal health information about himself or herself that is contained in a record in the custody or control of a trustee.
>
> (Emphasis added)

[8] Section 36 of *HIPA* directs how a trustee must respond to a request for access to personal health information. It states in relevant parts as follows:

> **Response to written request**
>
> **36**(1) Within 30 days after receiving a written request for access, a trustee must respond to the request in one of the following ways:
>
> (a) by making the personal health information available for examination and providing a copy, if requested, to the applicant;
>
> (b) by informing the applicant that the information does not exist or cannot be found;
>
> (c) by refusing the written request for access, in whole or in part, and informing the applicant:
>
> (i) of the refusal and the reasons for the refusal; and

> (ii) of the applicant's right to request a review of the refusal pursuant to Part VI;
>
> (d) by transferring the written request for access to another trustee if the personal health information is in the custody or control of the other trustee.
>
> …
>
> (3) The failure of a trustee to respond to a written request for access within the period mentioned in subsection (1) or (2) is deemed to be a decision to refuse to provide access to the personal health information, unless the written request for access is transferred to another trustee pursuant to clause (1)(d).

[9] Section 38 limits a trustee's obligation to disclose records containing personal health information in certain circumstances. SGI asserts that it has the discretion to withhold the Report based on s. 38(1)(f) of *HIPA*, which I reproduce in the context of s. 38(1) as a whole:

> **Refusing access**
>
> **38**(1) Subject to subsection (2), a trustee may refuse to grant an applicant access to his or her personal health information if:
>
> (a) in the opinion of the trustee, knowledge of the information could reasonably be expected to endanger the mental or physical health or the safety of the applicant or another person;
>
> (b) disclosure of the information would reveal personal health information about another person who has not expressly consented to the disclosure;
>
> (c) disclosure of the information could reasonably be expected to identify a third party, other than another trustee, who supplied the information in confidence under circumstances in which confidentiality was reasonably expected;
>
> (d) subject to subsection (3), the information was collected and is used solely:
>
> (i) for the purpose of peer review by health professionals, including joint professional review committees within the meaning of *The Saskatchewan Medical Care Insurance Act*;
>
> (ii) for the purpose of review by a standards or quality of care committee established to study or evaluate health services practice in a health services facility or health services agency, including a committee as defined in section 10 of *The Evidence Act*; or
>
> (iii) for the purposes of a body with statutory responsibility for the discipline of health professionals or for the quality or standards of professional services provided by health professionals;
>
> (e) the information was collected principally in anticipation of, or for use in, a civil, criminal or quasi-judicial proceeding; or
>
> *(f) disclosure of the information could interfere with a lawful investigation or be injurious to the enforcement of an Act or regulation.*
>
> (Emphasis added)

B. Administration of driver's licences in Saskatchewan

[10] SGI is designated as *administrator* pursuant to s. 3(1) of *The Traffic Safety Act*, SS 2004, c T-18.1 [*TSA*]. In that capacity, it has the responsibility to issue, suspend or cancel driver's licences, all in accordance with the *TSA*.

[11] Section 51(1) of the *TSA* directs that every Saskatchewan licenced driver "who suffers from a medical condition that may make it dangerous to operate a vehicle shall report that condition" to SGI. The *TSA* then prescribes procedures that SGI is to follow to assess the fitness of the driver and, potentially, to modify, suspend or revoke that person's licence, as circumstances warrant.

[12] Section 283 of the *TSA* imposes an obligation on medical practitioners and optometrists to report to SGI any person of driving age who, in their opinion, is suffering from a condition that will make it dangerous for that person to operate a vehicle:

> **Requirements of medical reports**
>
> **283**(1) Any duly qualified medical practitioner shall report to the administrator the name, address and clinical condition of every person who:
>
> (a) is 15 years of age or over attending on the medical practitioner for medical services; and
>
> (b) in the opinion of the medical practitioner, is suffering from a condition that will make it dangerous for that person to operate a vehicle.
>
> (2) Any optometrist shall report to the administrator the name, address and clinical condition of every person who:
>
> (a) is 15 years of age or over attending on the optometrist for services usually rendered by an optometrist; and
>
> (b) in the opinion of the optometrist, is suffering from a condition that will make it dangerous for that person to operate a vehicle.
>
> (3) No action shall be brought against a medical practitioner or an optometrist who makes a report in good faith in accordance with subsection (1) or (2).
>
> (4) A report made pursuant to this section:
>
> (a) is privileged for the information of the administrator only;
>
> (b) is not open to public inspection; and
>
> (c) is not admissible in evidence in any trial, except to show that the report was made in good faith in accordance with this section.

[13] As part of its administrative oversight of the driver's licence regime, SGI has established a Medical Review Unit [MRU]. The mandate of the MRU is "to make sure all Saskatchewan

licenced drivers have the medical fitness and skills needed to drive a vehicle safely". Through the MRU, SGI has established a mechanism for members of the public at large to report to it any person of driving age who, in the reporting person's opinion, is suffering from a condition that will make it dangerous for that person to operate a vehicle. This mechanism is intended to supplement the obligation resting on medical and optometric professionals under s. 283 of the *TSA*.

[14] SGI does not accept anonymous reports, but it "has at all times represented to the public and Medical Practitioners that their identities will remain *confidential* where that has been requested". Furthermore, SGI "will not disclose the status of an investigation or any other information about the driver to the individual who made the report". SGI also does not suspend or restrict a person's driver's licence in direct response to its receipt of a confidential report, whether made by a medical practitioner, optometrist or other person. When SGI receives a confidential report, it is first reviewed by a member of the MRU staff. If the report is found to be of potential concern, SGI sends the driver a letter advising that a report has been received and providing the context of the concern reported. Finally, the letter will direct the driver to obtain a medical report to address the medical concern that has been raised. SGI will reimburse the driver for the cost of that report.

C. The Report and proceedings before the Commissioner

[15] SGI received the Report in the spring of 2019. As I mentioned earlier, the Report questioned Mr. Giesbrecht's medical fitness to drive.

[16] Prompted by the Report, and acting consistently with the practices I have described, SGI asked Mr. Giesbrecht for a medical report respecting "any underlying medical conditions and use of prescribed or non-prescribed treatments which could be causing impairment of functional ability to drive – such as medical marijuana". SGI's letter warned Mr. Giesbrecht that his licence to drive would be suspended if he did not provide such a medical report by June 22, 2019.

[17] Mr. Giesbrecht complied with SGI's request. After it had reviewed the medical report he provided, SGI decided that there was no need to restrict Mr. Giesbrecht's driving privileges. At no juncture was Mr. Giesbrecht's licence suspended or restricted in any way.

[18] Since 2019, Mr. Giesbrecht has been pursuing disclosure of the Report. Initially, he sought access to it under *The Freedom of Information and Protection of Privacy Act*, SS 1990–91, c F-22.01 [*FOIPPA*]. In that context, SGI at first refused to confirm or deny the existence of the documentation requested by Mr. Giesbrecht, so he took the matter to the Saskatchewan Information and Privacy Commissioner [Commissioner]. The Commissioner provided his review report on August 12, 2020: *Saskatchewan Government Insurance Review Report 261-2019*, 2020 CanLII 57315 (Sask IPC) [*2020 Review Report*]. In it, the Commissioner determined that Mr. Giesbrecht's request engaged the provisions of *HIPA* rather than *FOIPPA*. The Commissioner recorded that SGI was no longer refusing to acknowledge that it was in receipt of a third-party communication. Instead, SGI had "provided [Mr. Giesbrecht] with details of a complaint that the MRU received, without disclosing the confidential source from which the complaint was received" or providing "a copy of an actual complaint" (at para 15). The Commissioner found that, because Mr. Giesbrecht had asked to see the "specific complaint", the letter that the MRU had provided to Mr. Giesbrecht summarizing the complaint "does not satisfy the requirements of section 36 of HIPA" (at para 21). For this reason, the Commissioner "recommend[ed] that SGI provide [Mr. Giesbrecht] with a proper response to the request pursuant to section 36 of HIPA" (at para 27).

[19] In purported fulfilment of the Commissioner's recommendation, SGI wrote to Mr. Giesbrecht on September 9, 2020. In its letter, SGI invoked s. 38(1)(f) of *HIPA* and refused to disclose the Report because "disclosure of the information could interfere with a lawful investigation or be injurious to the enforcement of an Act or regulation".

[20] Mr. Giesbrecht asked the Commissioner to again review SGI's refusal to provide a copy of the Report. Based on this second review, the Commissioner determined that SGI "did not have the authority under section 38(1)(f) of *HIPA* to withhold access to the [Report]" and recommended that SGI provide Mr. Giesbrecht with a copy of the Report: *Saskatchewan Government Insurance Review Report 221-2020* (17 February 2022), 2022 CanLII 11839 (Sask IPC) at para 40 [*2022 Review Report*].

[21] SGI declined to follow the Commissioner's new recommendation. Instead, it continued to refuse to provide Mr. Giesbrecht with a copy of the Report.

D. Proceedings and evidence in the Court of King's Bench

[22] Mr. Giesbrecht exercised the right given to him pursuant to s. 50(1) of *HIPA* to appeal SGI's refusal to comply with the Commissioner's recommendation to the Court of King's Bench. Under s. 51(1) of *HIPA*, the judge hearing such an appeal is to "determine the matter *de novo*". Both Mr. Giesbrecht and SGI filed affidavit evidence that was not before the Commissioner. In practical terms, this means that the judge and, in turn, this Court have more information with which to assess the applicability of s. 38(1)(f) of *HIPA* than was before the Commissioner when the *2020 Review Report* and the *2022 Review Report* were issued.

[23] In support of his appeal, Mr. Giesbrecht initially filed an affidavit in which he explained the history of his attempts to obtain a copy of the Report. He later filed a second affidavit in which he explained that his spouse had been the subject of a similar confidential report questioning her medical fitness to drive. In this second affidavit, Mr. Giesbrecht also stated that he had spoken with a member of the RCMP. According to Mr. Giesbrecht, the officer "instructed [him] that upon the receipt of the complaints filed with SGI [he] was to provide copies to the detachment so that the RCMP could investigate who made the complaints" against Mr. Giesbrecht and his spouse.

[24] SGI also filed two affidavits. These explained the basis for SGI's refusal to provide the Report to Mr. Giesbrecht under s. 38(1)(f) of *HIPA*.

[25] SGI's first affidavit was sworn by Roberta Perrault. Ms. Perrault is SGI's Chief Privacy Officer & Ethics Advisor with its Privacy and Information Management Department, Legal Division. Ms. Perrault's affidavit reviewed in greater detail the procedural history of the matter. She also reiterated that, while SGI had refused to give Mr. Giesbrecht a copy of the Report, it "did disclose the nature of [the] report" to him. Ms. Perrault maintained that, "given the report was made in confidence and under a protective scheme instituted by SGI in the exercise of SGI's investigative powers" under the *TSA*, s. 38(1)(f) of *HIPA* applied.

[26] SGI's second affidavit was sworn by Leann Nixon, its Manager of the MRU. Ms. Nixon provided details of SGI's administration of driver's licences in this province and the bases for the administrative decisions SGI had made in this case. According to Ms. Nixon, "there would be a chilling effect on reporting if the confidentiality of individuals making such reports is not

protected", and the "chilling effect would have an injurious impact on the MRU's ability to investigate such drivers and [SGI's] enforcement of the requirements to drive set out in the TSA". She also provided a basis for this statement of belief. I will review Ms. Nixon's evidence in greater detail later in these reasons.

E. The *Chambers Decision*

[27] In his decision, the judge began by setting out the background to the appeal. As part of this, he noted that he had granted an order allowing SGI to file a copy of the Report with the Court *in camera* and under seal. He recorded that he had reviewed the Report "to ascertain the form in which it was made and its author", but he did not otherwise disclose its content (*Chambers Decision* at para 10). The judge then divided his analysis into a consideration of three questions.

[28] The first question was whether the disclosure of the Report could interfere with a lawful investigation. In this context, he observed that there was "no evidence of a current or impending investigation relating to the matters in the Report". Instead, the Report had "precipitated an investigation into Mr. Giesbrecht's medical fitness to operate a vehicle, but that investigation is long concluded and did not result in any restrictions on Mr. Giesbrecht's driver's licence" (at para 18). After a consideration of the case law and principles of statutory interpretation, the judge held that "a trustee may refuse disclosure of personal health information to the person to whom it relates only if disclosure could interfere with an *existing or identifiable prospective investigation*" (at para 31, emphasis added). His ultimate conclusion on the first issue was that, as "no such investigation is demonstrated in this case, … SGI may not refuse disclosure of the Report on the basis that disclosure could interfere with a lawful investigation" (at para 32).

[29] The second question was whether SGI could properly refuse to provide the Report to Mr. Giesbrecht because its disclosure could be "injurious to the enforcement of an Act or regulation". The judge noted that s. 283 of the *TSA* imposes a mandatory obligation on medical practitioners to report drivers with medical conditions that "*will* make it dangerous for that person to operate a vehicle" (emphasis added by the judge) but does "not cloak driver fitness reports with confidentiality". From this he drew what he described to be the "obvious conclusion … that confidentiality was not considered necessary to achieve the safety objectives of the *TSA* regarding driver fitness reports" (at para 35). He further found that "granting confidentiality to driver fitness

reports would unbalance the competing interests involved in an assessment of a driver's medical fitness" (at para 36). Based on all this, the judge concluded that the "disclosure of the Report would not be injurious to enforcement of the *TSA*" (at para 38).

[30] Finally, the judge addressed the question as to whether there was evidence that a lack of confidentiality would result in fewer driver fitness reports. He stated that he was doing so in case he was "wrong in the above analysis". On this, he concluded that he was "not convinced on the evidence presented that an inability to offer complete confidentiality with respect to driver fitness reports will result in fewer such reports" (at para 39).

[31] In the result, the judge found that SGI had "not demonstrated that it is entitled under s. 38(1)(f) of *HIPA* to refuse disclosure of the Report" to Mr. Giesbrecht (at para 45). The judge therefore ordered SGI to provide the Report in its entirety to Mr. Giesbrecht and awarded costs in his favour. It is from these two orders that SGI now appeals to this Court.

III. ISSUES

[32] The outcome of SGI's appeal is determined by the answers to these three questions:

(a) Did the judge err in law by limiting the application of s. 38(1)(f) of *HIPA* to existing or identifiable prospective investigations?

(b) Did the judge apply the wrong legal test to determine if disclosure of the Report could interfere with a lawful investigation or be injurious to the enforcement of an Act or regulation?

(c) Applying the correct legal test, could the disclosure of the Report interfere with a lawful investigation or be injurious to the enforcement of an Act or regulation?

IV. ANALYSIS

A. The judge erred in law by limiting the application of s. 38(1)(f) of *HIPA* to existing or identifiable prospective investigations

[33] As I have noted, in answer to the first question that he posed, the judge concluded that SGI could not rely on s. 38(1)(f) of *HIPA* because it should be interpreted to mean that "a trustee may refuse disclosure of personal health information to the person to whom it relates only if disclosure could interfere with an *existing or identifiable prospective investigation*" (at para 31, emphasis added). As I will explain, the judge erred when he interpreted the provision in this way.

1. Standard of review and principles of statutory interpretation

[34] The interpretation of a statute by a judge is a question of law demanding that this Court apply the correctness standard in its review of the meaning the judge ascribed to s. 38(1)(f) of *HIPA*. Under this standard of review, "an appellate court must *always* engage in a *de novo* analysis and thereby substitute its own view of the correct answer for a trial judge's legal conclusion" (*R v MacKenzie*, 2013 SCC 50 at para 54, [2013] 3 SCR 250, emphasis in original). This renders the judge's reasons less important than his bottom-line conclusion. Nonetheless, because I disagree with the judge's interpretation of s. 38(1)(f), at various junctures in my own reasons I will identify several of the points of departure between his reasoning and my own.

[35] Section 2-10 of *The Legislation Act*, SS 2019, c L-10.2, states as follows:

> **Acts and regulations remedial**
>
> **2-10**(1) The words of an Act and regulations authorized pursuant to an Act are to be read in their entire context, and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature.
>
> (2) Every Act and regulation is to be construed as being remedial and is to be given the fair, large and liberal interpretation that best ensures the attainment of its objects.

[36] Section 2-10 codifies the modern approach to statutory interpretation endorsed by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para 21 (see *Regina Bypass Design Builders v Supreme Steel LP*, 2021 SKCA 82 at para 23). In short, "the court must interpret the words of this statute in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament" (*Merck Frosst Canada Ltd. v Canada (Health)*, 2012 SCC 3 at para 200, [2012] 1

SCR 23 [*Merck Frosst*]). Or, to put it even more succinctly, the proper interpretation of a statute is derived from a consideration of the "text, context, and purpose" of the Act in question, to use the shortened paraphrase of the modern approach to statutory interpretation referenced in *R v McColman*, 2023 SCC 8 at para 31, 423 CCC (3d) 423.

[37] A key feature of the modern approach is that the interpretative exercise begins with a consideration of the words of the statutory provision that are called into question. These words must be interpreted harmoniously with the statute within which they appear, that is, in a fashion that is consistent with the overall statutory scheme and the statute's purpose. As explained in Ruth Sullivan, *Sullivan on the Construction of Statutes*, 7th ed (Toronto: LexisNexis, 2022) at §3.01[3] [*Sullivan*], "interpretation properly begins with ordinary meaning — with reading words in their grammatical and ordinary sense — but does not stop there" (see also *Oladipo v The College of Physician and Surgeons of Saskatchewan*, 2024 SKCA 94 at para 36; *Hess v Thomas Estate*, 2019 SKCA 26 at para 51, 433 DLR (4th) 60; and *Windels v Reddekopp*, 2023 SKCA 38 at para 102). It is only *after* the ordinary meaning of the words is determined that the interpreter turns to context and purpose. This is not to say that context and purpose do not matter; statutory interpretation has long moved past a sterile reading of the written words. However, the starting point is the grammatical and ordinary meaning of the words of the statutory provision.

2. The correct interpretation of s. 38(1)(f) (types of investigations)

[38] To repeat, s. 38(1)(f) permits a trustee to refuse to grant an applicant access to their personal health information if "disclosure of the information could interfere with a lawful investigation or be injurious to the enforcement of an Act or regulation". In this case the judge correctly recognized that *HIPA*'s preamble, which s. 2-19(2) of *The Legislation Act* identifies as part of the Act, "reflects its intent and purpose" (at para 27). The full preamble is reproduced in the *Chambers Decision* (see para 27). It states in relevant part that the Legislative Assembly recognizes 12 stated principles with respect to personal health information. These include that "individuals shall be able to obtain access to records of their personal health information". This specific principle is implemented by the "*right* to obtain access to personal health information" found in a record that is in the custody or control of a trustee, granted by s. 32 of *HIPA* (emphasis added).

[39] Overall, I have no difficulty with the judge's statement that the "default position under [*HIPA*] is disclosure and accountability to the person to whom the information relates" (*Chambers Decision* at para 28). I can also agree with his observation that "the object of *HIPA* is to place the collection and dissemination of personal health information under the control of the person to whom it relates except in specific instances" (at para 29). However, this proposition simply invites an inquiry into whether this is just such a "specific instance"; it does not answer the question as to the scope of s. 38(1)(f).

[40] The judge gave scant attention to the words of s. 38(1)(f). Rather than examining the words used in the provision, he asserted, rather simply, that "[e]xceptions to the disclosure of personal information are generally narrowly construed" (at para 29). In support of this proposition, he referred to *Lavigne v Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 at para 55, [2002] 2 SCR 773 [*Lavigne*]. The judge then reiterated that "the object of *HIPA* is to place the collection and dissemination of personal health information under the control of the person to whom it relates except in specific instances" (at para 29).

[41] A review of *Lavigne* discloses that the Supreme Court was somewhat more subtle in the direction it gave with respect to the interplay between rights of access and the qualifications to those rights, than the judge's statement that exceptions to disclosure are generally narrowly construed. In this regard, Gonthier J. stated as follows:

> [55] Exceptions to the disclosure of personal information have generally been narrowly construed by the courts. Nonetheless, as McDonald J.A. of the Federal Court of Appeal said, "*[i]f the meaning [of the wording of a provision] is plain, it is not for this Court, or any other court, to alter it*" (*Rubin, supra*, at para. 24; see also *St. Peter's Evangelical Lutheran Church v. City of Ottawa*, [1982] 2 S.C.R. 616, at p. 626). The argument made by the intervener and the respondent, that it is never possible to invoke the exemption from disclosure once the investigation is over, is an interpretation that is not supported by the wording of the provision. The disclosure of personal information may be as damaging to future investigations as to investigations that are underway.
>
> (Emphasis added)

[42] I will return to discuss *Lavigne* shortly. For the moment, the point I draw from this passage is that in a case pitting a right of access against an exception to it, a court must not let the broad purpose of legislation granting rights of access overtake the exercise of properly interpreting provisions that provide exemptions. As always, the modern approach demands that the court must begin the interpretative exercise with attention to the words of the statute, as used in the context

of the statute. It also requires that the interpreter consider statutory purpose in a somewhat broader sense than did the judge in this case. This idea is explained in *Sullivan*, as follows:

> §9.02[1] ***Introduction*.** In its broadest sense, legislative purpose refers not only to the material goals the legislature hoped to achieve but also to the reasons underlying each feature of the implementing scheme. It asks the question why: why this legislation? why this arrangement of powers? why this direction or rule? why this turn of phrase? In purposive analysis every feature of legislation from the overall conception to the smallest linguistic detail is presumed to be there for a reason. It is presumed to address a concern, anticipate a difficulty, or in some way promote the legislature's goals.

[43] In short, in a case like this, the interpreter must have regard not only to the purpose of the legislation as a means to extend rights of access to information but also must be mindful of the objectives that stand behind the exceptions themselves. This is because exemptions, such as found in s. 38(1)(f), are the mechanism chosen by the Legislature to achieve the balance between, on the one hand, rights of access and, on the other hand, society's interest in maintaining the confidentiality of some types of information. In this case, the judge's singular focus on the purpose that lies behind the right of access found in s. 32 of *HIPA* was therefore too narrow.

[44] With this, I return to the specific exemption invoked by SGI in this case. Nothing in the words of s. 38(1)(f) limit it to existing or identifiable prospective investigations. I also see nothing in the broader statutory context that would suggest this interpretation of the provision. Looking past the words of the statute, there is a compelling public policy reason to protect the integrity of all lawful investigations. The purpose that the Legislature had for creating the exception found in s. 38(1)(f) is engaged even where the investigation is not existing or is not specifically identifiable. Therefore, I see no basis, grounded in the idea of adopting a purposive interpretation of *HIPA*, for this Court to read such a qualification into the provision. Instead, the Court should apply the precondition that the provision *does* contain, which is that a trustee has the discretion to refuse to disclose information if the disclosure *could* interfere with a lawful investigation or be injurious to the enforcement of an Act or regulation. The fact that an investigation is not underway or is not identifiable at the relevant time, may be relevant in a specific context to whether the disclosure *could* interfere with an investigation. However, this is not a reason to insert a broad limitation to that effect into s. 38(1)(f).

[45] I find support for these conclusions in *Lavigne* and *Ruby v Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 SCR 3 [*Ruby*].

[46] *Lavigne* concerned the right under the *Privacy Act*, RSC 1985, c P-21, for an individual to obtain access to documents pertaining to an investigation conducted under the *Official Languages Act*, RSC 1985, c 31 (4th Supp). Robert Lavigne had initiated complaints under the latter Act that his language rights had been violated, which led the Commissioner of Official Languages to undertake an investigation. Mr. Lavigne sought and was given disclosure of certain documents created in the course of that investigation on the basis that they constituted personal information. Ultimately, what became contentious were the complete notes taken by investigators in the Office of the Commissioner of Official Languages during the interview of three individuals. The Language Commissioner refused to produce these to Mr. Lavigne because of his concern that "disclosure of the personal information could reasonably be expected to be injurious to his future investigations" (at para 51). In adopting this position, the Language Commissioner relied on s. 22(1)(b) of the *Privacy Act*, which states in relevant part as follows:

> **22.** (1) The head of a government institution may refuse to disclose any personal information requested under subsection 12(1)
>
> …
>
> (b) the disclosure of which could reasonably be expected to be injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigations, including, without restricting the generality of the foregoing, any such information
>
> (i) relating to the existence or nature of a particular investigation,
>
> (ii) that would reveal the identity of a confidential source of information, or
>
> (iii) that was obtained or prepared in the course of an investigation; or
>
> …

[47] Mr. Lavigne was successful in his application for judicial review brought in the Federal Court, Trial Division. The Commissioner's appeal to the Federal Court of Appeal was dismissed. Both courts gave two reasons for this result. The first was that s. 22(1)(b) had no application when the Commissioner's investigation had been concluded. The second was that the Commissioner had not established that the disclosure of the personal information could reasonably be expected to be injurious to the conduct of the Commissioner's investigations. For the moment, my focus is on the Supreme Court's consideration of the first of these conclusions, although I will discuss the second later in my own reasons.

[48] The Supreme Court held that the two lower courts had erred by concluding that s. 22(1)(b) could have no application where the Commissioner had concluded its investigation. Speaking for

the Court, Gonthier J. began by observing that the term "investigation" was not defined in a way that it was "limited to a specific investigation, or an investigation that is circumscribed in time". To the contrary, he noted that "Parliament has not limited the scope of that expression by any qualifier whatever [*sic*]" (at para 52). He also observed that "Parliament made it plain that s. 22(1)(b) retains its broad and general meaning by providing a non-exhaustive list of examples" (at para 53). Justice Gonthier concluded by emphasizing that there was no basis not to ascribe to s. 22(1)(b) the broad and general meaning he had referred to. In this regard, he emphasized that "there is nothing in s. 22(1)(b) that should be interpreted as restricting the scope of the word 'investigation' to investigations that are underway or are about to commence, or limiting the general meaning of that word to specific investigations" and "therefore no justification for limiting the scope of that section" (at para 54).

[49] Section 22(1)(b) of the *Privacy Act* again became an issue in *Ruby*. That case arose out of Mr. Ruby's request for access to personal information he claimed was held by the Canadian Security Intelligence Service [CSIS] in a "personal information bank", which contained information on individuals who may, on reasonable grounds, be suspected of engaging in various activities detrimental to national interests, such as those relating to espionage and so on. CSIS responded that it would neither confirm nor deny the existence of information but, if it did exist, it would claim certain exemptions under the *Privacy Act*. The Federal Court of Appeal held that the exemption prescribed in s. 22(1)(b) was "limited to circumstances where a reasonable expectation of harm could be established to a current specific investigation or identifiable prospective investigation". In so holding, the court reversed the decision of the judge of first instance, MacKay J., who had adopted a less restrictive interpretation of the provision (at para 62). The appeal to the Supreme Court was heard while *Lavigne* was under reserve. Judgment in *Ruby* was issued five months after *Lavigne* was decided.

[50] Much of the Supreme Court's focus in *Ruby* was on constitutional questions that are not at issue in the present appeal. However, in the context of a cross-appeal by the Solicitor General of Canada, the Supreme Court was called upon to address the correctness of the interpretation given by the Federal Court of Appeal to s. 22(1)(b). The Supreme Court held that s. 22(1)(b) of the *Privacy Act* was not restricted to a specific investigation or an identifiable prospective

investigation but instead could be extended to investigations in general. On this occasion, it was Arbour J. speaking for the Court. Her reasons were brief, and were grounded in *Lavigne*:

> [63] In light of this Court's decision in *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, 2002 SCC 53, the cross-appeal must be allowed and the decision of the motions judge restored. The motions judge interpreted s. 22(1)(b) in a manner consistent with this Court's ruling in *Lavigne*. *The exemption in s. 22(1)(b) is not limited to current investigations or an identifiable prospective investigation*. The appellant, respondent on cross appeal, did not challenge the finding of the motions judge that the Solicitor General had established a reasonable expectation of harm. The decision of MacKay J. is therefore restored.
>
> (Emphasis added)

[51] *Lavigne* and *Ruby* provide compelling reasons why s. 38(1)(f) of *HIPA* should not be restricted to circumstances where disclosure of the information could interfere with an existing or identifiable prospective investigation. However, the judge saw things differently. He distinguished these cases because the "wording of s. 38(1)(f) of *HIPA* is different from the wording of s. 22(1)(b) of the *Privacy Act*" (at para 25). He referred to two specific differences that he saw between the two statutes as an explanation for why he should not take guidance from the two Supreme Court decisions. I find neither distinction persuasive.

[52] First, the judge pointed out that s. 22(1)(b) of the *Privacy Act* "refers to investigations in the plural sense thus implying a future element to the phrase" whereas s. 38(1)(f) of *HIPA* "refers to investigation in the singular sense, implying a current investigation or an investigation already in contemplation" (at para 25). However, this reasoning ignores that s. 2-24 of *The Legislation Act* states that in an enactment "words in the singular include the plural and words in the plural include the singular". Section 2-24 is within Part 2 of *The Legislation Act*. According to s. 2-2 of that Act, s. 2-24 applies "unless a contrary intention appears in this Part or in an enactment". There is nothing in *The Legislation Act* that would render inapplicable this general rule, nor do I see anything in *HIPA* that would have this result. Accordingly, the first distinction that the judge drew between s. 38(1)(f) of *HIPA* and s. 22(1)(b) of the *Privacy Act* is not a reason to give those sections different meanings.

[53] The second distinction the judge offered was as follows (at para 25):

> 2. Section 22 of the *Privacy Act* defines "investigation" in a general sense and among the types of investigations that would qualify as "lawful investigations" according to s. 22(1)(b) is a reference in subparagraph (i) to "a particular investigation". The implication of this reference is that a singular particular investigation is a subset of the overall group

> of investigations that would be regarded as "lawful investigations" under the section. Section 38 does not define "investigations" nor identify in any way whether a specific investigation or investigations in general are intended by the section.

[54] Again, I am unpersuaded by this reasoning. I see nothing in the Supreme Court's analysis which would suggest, for instance, that the absence of a list of specific examples following the general reference to investigations in s. 38(1)(f) of *HIPA* is a reason to restrict the meaning of that provision in the way the judge has proposed. Much to the contrary, in *Lavigne* the Supreme Court considered, but rejected, an argument based on the proposition that the fact that Parliament had provided examples of the types of investigations that might be harmed by the disclosure was a reason to restrict the scope of the exemption. In that regard, Gonthier J. stated as follows (at para 53):

> …
>
> *Although s. 22(1)(b)(i) relates specifically to a particular investigation, it in no way alters the generality of the introductory sentence*. In fact, s. 22(1)(b)(ii), which authorizes refusal to disclose information that would reveal the identity of a confidential source of information, contemplates the protection of future investigations as well as existing investigations. A reliable confidential source may be useful beyond the confines of one specific investigation.
>
> (Emphasis added)

[55] Apart from the authority provided by *Lavigne* and *Ruby*, I find further support for the interpretation I have given to s. 38(1)(f) of *HIPA* in two Court of Queen's Bench decisions applying provisions of *FOIPPA* that are analogous to s. 38(1)(f), being *Evenson v Saskatchewan (Ministry of Justice)*, 2013 SKQB 296, 428 Sask R 37 [*Evenson*], and *Leo v Global Transportation Hub Authority*, 2019 SKQB 150 at para 24 [*Leo QB*], rev'd on other grounds 2020 SKCA 91 [*Leo CA*].

[56] At issue in *Evenson* was s. 15(1)(k) of *FOIPPA*. That section allows a *head* – referring generally to a person who exercises executive control over a government agency – to refuse to give access to a record that could "interfere with a law enforcement matter or disclose information respecting a law enforcement matter". In his decision in that case, Gabrielson J. held that it "is not appropriate to read into [s. 15(1)(k)] a limitation on the law enforcement investigation exemption as to only be applicable in respect to ongoing matters" (at para 45). In this case, the judge made no mention of *Evenson*.

[57] Justice Kalmakoff (*ex officio*) reached a similar conclusion in *Leo QB* with respect to s. 15(1)(c) of *FOIPPA*. That section allows a head to refuse to give access to a record that could "interfere with a lawful investigation or disclose information with respect to a lawful investigation". Although *Leo QB* was overturned, this was because s. 15 of *FOIPPA* had not been initially invoked by the party resisting disclosure. On this basis, this Court held that Kalmakoff J.A. should not have considered the question of whether s. 15(1)(c), and several other exemptions, applied to the records in issue in that case (see *Leo CA* at para 50). Here, the judge referred to *Leo CA* to draw the conclusion that he was "not limited to the record before the Commissioner and may consider any additional evidence either party cares to advance" (*Chambers Decision* at para 14). However, he did not consider *Leo QB* at all.

3. Conclusion

[58] Correctly understood, s. 38(1)(f) permits a trustee to refuse to disclose personal health information to the person to whom it relates if disclosure could interfere with *any* lawful investigation. There is no requirement that the investigation be existing or presently identifiable. The judge erred in law when he held otherwise.

B. The judge applied the wrong legal test to determine if the disclosure of the Report *could* interfere with a lawful investigation or be injurious to the enforcement of an Act or regulation

[59] Section 38(1)(f) allows a trustee to refuse to provide a record if its disclosure *could* either interfere with a lawful investigation or be injurious to the enforcement of an Act or regulation. As I will explain, the judge did not properly apply the standard that the use of the word "could" imports into the inquiries that s. 38(1)(f) demands be made.

1. The judge's reasons

[60] The judge answered the second question he posed by concluding that "disclosure of the Report *would not* be injurious to enforcement of the *TSA*" (at para 38, emphasis added). The judge provided a similar answer to the third issue that he identified, namely, "Is there evidence that lack of confidentiality *will* result in fewer driver fitness reports?" In this regard, the judge introduced and concluded his discussion of this issue as follows:

> [39] Even if I am wrong in the above analysis, I am not convinced on the evidence presented that an inability to offer complete confidentiality with respect to driver fitness reports *will* result in fewer such reports.
>
> …
>
> [43] In an attempt to identify the reasons for under-reporting SGI conducted a survey of occupational therapists and optometrists. The survey results are also exhibited to Ms. Nixon's affidavit. Each group was asked, "What are the likely reasons that you would elect to keep your report confidential?" In response to this question, over half of each group identified a negative impact on the patient relationship as a reason to request confidentiality. *While these surveys identify the reasons for requesting confidentiality, they do not address the issue underlying SGI' s argument: would medical practitioners avoid reporting driver fitness to SGI if the practitioner report cannot be made in confidence? This is the evidence SGI must adduce to prove its premise*. The statistics, reports and studies offered into evidence do not provide an answer to this question. On the other hand, 93.6 percent of the practitioner reports made to SGI between 2017 and 2021 were made without the assurance of confidentiality.
>
> (Emphasis added)

[61] These parts of the *Chambers Decision* indicate that the judge required SGI to prove as a matter of fact the certainty of its premise, i.e., that medical professionals and others would avoid reporting on driver unfitness if their reports were not received in confidence. There are, of course, only two standards in Canadian law for the proof of facts: proof beyond a reasonable doubt, which applies in a criminal context, and proof on the balance of probabilities, which applies in civil matters (*F.H. v McDougall*, 2008 SCC 53 at paras 40–44, [2008] 3 SCR 41; *R v Gardiner*, [1982] 2 SCR 368 at 416–417). Reading the *Chambers Decision* as a whole, I take the judge to have found s. 38(1)(f) to be inapplicable because the evidence did not satisfy him that, on the balance of probabilities, there *will* in fact be fewer reports questioning the fitness of drivers if the Report is released to Mr. Giesbrecht. As I will next explain, this was an erroneous interpretation of s. 38(1)(f).

2. The correct interpretation of s. 38(1)(f) (risk of harm)

[62] Correctly interpreted, s. 38(1)(f) of *HIPA* is not limited in its application to situations where, on the balance of probabilities, it can be said that the release of a document will, as a matter of certainty, have one of the consequences referred to in that section, that is, that it *will* interfere with a lawful investigation or be injurious to the enforcement of an Act or regulation. Instead, the provision allows a trustee to withhold personal health information if its disclosure *could* have one

of those effects, which requires simply that there is a *possibility* that this result could follow from a disclosure.

[63] I again approach my explanation of this conclusion by first considering the ordinary meaning of the words used in s. 38(1)(f), that is by reading them in their ordinary and grammatical sense. While ordinary meaning should not be confused with a dictionary definition, dictionaries serve to "reveal the range of senses a word may have or the different ways it may be used" (*Sullivan* at §3.02[4]). In this regard, the present tense of *could* is *can*. One of the meanings that the *Oxford English Dictionary Online* (Oxford University Press, 2024) [OED], gives to the verb *can* is "[e]xpressing objective possibility, opportunity, or absence of prohibitive conditions: be permitted or enabled by the conditions of the case". It is in this sense that s. 38(1)(f) appears to be using the word *could*. Thus, according to the ordinary meaning of the words used in s. 38(1)(f), a trustee is entitled to withhold a document if there is a possibility that its disclosure might interfere with a lawful investigation or be injurious to the enforcement of an Act or regulation. However, when the words used in s. 38(1)(f) are read in isolation they do not serve to define the degree of likelihood of that possibility being realized.

[64] Further clarity is achieved when the words used in s. 38(1)(f) are considered in the broader context of the statute. I have previously reproduced all of s. 38. It contains three different standards to describe the availability of the various exceptions to what would otherwise stand as a right an individual may have to disclosure of a record containing their personal health information based on the possibility of harm. These are the standards of "would", "could" and "could reasonably be expected".

[65] The first of these standards is referred to in s. 38(1)(b). That provision allows a trustee to withhold access if "disclosure of the information *would* reveal personal health information about another person who has not expressly consented to the disclosure" (emphasis added).

[66] Two of the exemptions may be invoked only if the harm "could reasonably be expected" to occur. Thus, s. 38(1)(a) allows a trustee to refuse access to personal health information if "in the opinion of the trustee, knowledge of the information *could reasonably be expected* to endanger the mental or physical health or the safety of the applicant or another person" (emphasis added). Similarly, s. 38(1)(c) allows a trustee to withhold disclosure if it "*could reasonably be expected* to

identify a third party, other than another trustee, who supplied the information in confidence under circumstances in which confidentiality was reasonably expected" (emphasis added).

[67] Finally, there is the standard of "could", which is found in the provision at issue in this appeal. Section 38(1)(f) allows a trustee to refuse to grant an applicant access to their personal health information if "disclosure of the information *could* interfere with a lawful investigation or be injurious to the enforcement of an Act or regulation" (emphasis added).

[68] For completeness, I note that other exemptions found in s. 38 do not depend on any harm at all. Thus, under s. 38(1)(d) disclosure may be refused where it is collected for certain research purposes, and under s. 38(1)(e) there is no right of access if the information was collected principally in anticipation of, or for use in, a civil, criminal or quasi-judicial proceeding.

[69] According to the presumption of consistent expression, "when different terms are used in a single piece of legislation, they must be understood to have different meanings. If Parliament has chosen to use different terms, it must have done so intentionally in order to indicate different meanings" (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 81, [2013] 2 SCR 559). Given the use of these three different standards in the same section of *HIPA*, the Legislature must be taken to have intended that the invocation of the exemptions would depend on three different degrees of likelihood of harm.

[70] The jurisprudence also recognizes a clear distinction between the degrees of likelihood associated with "would", "could" and "could reasonably be expected". I will first analyze the case law considering the degree of likelihood associated with the word "would".

[71] At issue in *Jose Pereira E Hijos S.A. v Canada (Attorney General)*, 2002 FCA 470, was whether the release of information "'would' be injurious to Canada's international relations" within the meaning of s. 38(1) of the *Canada Evidence Act*, RSC 1985, c C-5. The relevant official certified that disclosure "could" have this effect. The Court held that this did not meet the standard because the "statute would seem to require a showing of probability of injury instead of *mere possibility*", which was connoted by the use of the word "could" (at para 14, emphasis added). See also, *Chalk River Technicians and Technologists v Atomic Energy of Canada Ltd.*, 2002 FCA 489 at para 52.

[72] In *Merck Frosst*, the Supreme Court determined the degree of likelihood associated with the phrase "could reasonably be expected to" in the context of s. 20(1)(c) of the *Access to Information Act*, RSC 1985, c A-1. Justice Cromwell wrote as follows:

> [201] I begin with the English text of the provision. *The words "could reasonably be expected to result" seem to avoid either the standard of mere possibility or the standard of probability.* We must assume, I think, that both of those standards would clearly have been known to the drafters. This suggests that some middle ground was intended: something cannot reasonably be expected to occur if it is a mere possibility; but something may be reasonably expected even if it is not more likely than not to occur. The word "expected" derives from the verb "to expect", a primary meaning of which is to "regard as likely" (*The Canadian Oxford Dictionary* (2nd ed. 2004), at p. 523). The word "likely" is more difficult to pin down. While it can mean "probable" it may also mean "such as well might happen" (p. 889). In legal usage, the standard of proof on the balance of probabilities is often expressed by saying that something must be shown to be more likely than not. I conclude that the English text of the statute suggests a middle ground between that which is probable and that which is merely possible. The intended threshold appears to be considerably higher than a mere possibility of harm, but somewhat lower than harm that is more likely than not to occur.

[73] Based on these cases, and the ordinary meaning of the words themselves in the context in which they appear in *HIPA*, I conclude that, for a trustee to withhold access to a document under s. 38(1)(f), the trustee need only show a *possibility* that disclosure of the information could interfere with a lawful investigation or be injurious to the enforcement of an Act or regulation.

[74] The positions taken in the foregoing cases parallel those taken by the Commissioner in connection with provisions that are analogous to s. 38(1)(f) of *HIPA*. In this regard, the Commissioner interpreted the word *could* as used in *FOIPPA* as requiring a lower standard than "a reasonable expectation". Thus, in *Ministry of Health Review Report 342-2019* (14 September 2020), 2020 CanLII 67066 (Sask IPC), the Commissioner wrote this:

> [36] For section 21 of FOIP, the question that must be answered is "*could*" disclosure of the record threaten the safety or the physical or mental health of an individual? The threshold that must be met is "*could*" the harm occur. The threshold for "*could*" is somewhat lower than a reasonable expectation but well beyond or considerably above mere speculation. On the continuum, speculation is at one end and certainty is at the other. The threshold for "*could*" therefore, is that which is possible.
>
> [37] *Speculative* means engaged in, expressing, or based on conjecture rather than knowledge. *Conjecture* is an opinion or conclusion based on incomplete information (Pearsall, Judy, *Concise Oxford Dictionary, 10th Ed.*, (Oxford University Press) at pp. 1379 and 301). Speculation generally has no objective basis. If the harm is fanciful or exceedingly remote, it is in the realm of speculation or conjecture.

> [38] *Possible* means capable of existing, happening, or being achieved; that which is not certain or probable (Pearsall, Judy, *Concise Oxford Dictionary, 10th Ed.*, (Oxford University Press) at p. 1117).
>
> [39] *Probable* means likely to happen or be the case (Pearsall, Judy, *Concise Oxford Dictionary, 10th Ed.*, (Oxford University Press) at p. 1139).

See also *Minister of Health Review Report 082-2019, 083-2019* (17 August 2020), 2020 CanLII 58701 (Sask IPC) at paras 70–73, and *University of Saskatchewan Report LA-2007-001* (1 October 2007), 2007 CanLII 41575 (Sask IPC) at paras 117–118, interpreting *The Local Authority Freedom of Information and Protection of Privacy Act*, SS 1990–91, c L-27.1.

[75] All of this is also now reflected in a guide to *FOIPPA*, which the Office of the Saskatchewan Information and Privacy Commissioner publishes (*Guide to FOIP*, Chapter 4, *Exemptions from the Right of Access* (updated 8 April 2024)). It states in part as follows:

> Section 15 of FOIP uses the word *could* versus "*could reasonably be expected to*" as seen in other provisions of FOIP. The threshold for *could* is somewhat lower than a reasonable expectation. The requirement for *could* is simply that the release of the information *could* have the specified result. There would still have to be a basis for asserting the harm could occur. If it is fanciful or exceedingly remote, the exemption should not be invoked. For this provision to apply there must be objective grounds for believing that disclosing the information *could* result in the harm alleged.
>
> (Emphasis in original)

[76] There may be good reason, in some contexts, to be cautious before decisions and principles applicable to *FOIPPA* and its statutory analogues are extended to *HIPA*. This is because *HIPA* contains a broader set of principles applicable to the rights of individuals to access their own personal health information than is found in at least some other freedom of information legislation. Nonetheless, both *HIPA* and *FOIPPA* have a parallel structure, granting rights of access or disclosure, qualified by exemptions. The Legislature also chose to use similar language to express when the conditions necessary to invoke such exemptions have been met. Considering these broad and important similarities, I can see no reason in principle why the guidance given by the Commissioner in relation to the proper interpretation of the standards of "would", "could" and "could reasonably be expected" as used in *FOIPPA* is not persuasive in the context of the interpretation of *HIPA*.

[77] The Commissioner's writing in relation to *FOIPPA* supports the conclusion that, to justify non-disclosure based on the possibility of harm, the risk must not be speculative and there is a

point at which the harm is too remote to justify non-disclosure. I agree with this proposition at a general level, at least, since, without limitations such as these, there would be no practical boundary to the discretion given to the trustee under s. 38(1)(f). In short, the rule of law demands that there be a foundation for a claim that there is a possibility of harm to justify non-disclosure.

[78] In this judgment, I will use the phrase *objective possibility* to describe what is required to justify non-disclosure under an exemption that depends on the possibility that disclosure *could* cause a stated harm. I would leave the consideration of what might be considered to be too remote, when the risk of harm might be too speculative, or how a harm might be identified objectively in a general sense, to cases where the outcome turns on such a question. As I will later explain, I see no need to be more precise than this to render judgment in this case.

[79] In summary, based on the ordinary meaning of the words in s. 38(1)(f), and reinforced by the use of other expressions of likelihood found in s. 38(1) of *HIPA*, a trustee may justify a refusal to make disclosure under s. 38(1)(f) if there is an objective possibility that the disclosure might interfere with a lawful investigation or be injurious to the enforcement of an Act or regulation.

3. Conclusion

[80] The judge erred in law when he required SGI to prove, on the balance of probabilities, that disclosure of the Report will or would interfere with a lawful investigation or be injurious to the enforcement of an Act or regulation. SGI was only obligated to show that it is *objectively possible* that disclosure might have this effect. This conclusion renders it unnecessary for me to consider if the judge also erred by misapprehending the evidence before him, as is alleged by SGI. Instead, because the judge applied the incorrect standard to his assessment of the evidence, it falls on this Court to undertake the required analysis. I carry out this analysis in the next section of these reasons.

C. Disclosure of the Report could interfere with a lawful investigation or be injurious to the enforcement of an Act or regulation

[81] As already explained, the Commissioner concluded that the threshold for the exemption to disclosure under s. 38(1)(f) of *HIPA* had not been met. However, it will be recalled that this Court has before it evidence that was not available to the Commissioner when he issued the *2022 Review*

Report which contained his recommendation. My review of this evidence convinces me that there is an objective possibility that the disclosure of the Report to Mr. Giesbrecht might interfere with future lawful investigations into a violation of the *TSA* and be injurious to the enforcement of that Act.

1. The evidence

[82] SGI's promise of confidentiality is intended to encourage persons to make reports to SGI of individuals who may be medically unfit to drive. This promise has an obvious laudatory purpose of identifying those who may present a danger to themselves or others but who would not otherwise be brought to SGI's attention, but for the making of such a report. As I have explained, these individuals have an obligation to self-report but have not done so.

[83] In part, SGI justifies the need to receive reports in confidence based on research brought into evidence through Ms. Nixon's affidavit. It says that this research supports the conclusion that medical-condition reporting is critical to ensuring the safety of drivers and the public, and that optimizing processes for eliciting the cooperation of medical professionals is necessary to ensure the effectiveness of mandatory reporting regimes like that found in s. 283 of the *TSA*. In this regard, one of the exhibits to Ms. Nixon's affidavit is published research that would support what many may take to be the common-sense proposition that "Drivers with medical conditions and functional impairments are at increased collision risk" (Tracey Ma *et al*, "Impact of medical fitness to drive policies in preventing property damage, injury, and death from motor vehicle collisions in Ontario, Canada" (2020) 75 Journal of Safety Research 251 at 251). The same research, which examined Ontario policies on the subject, quantifies "net road safety savings resulting from medical fitness to drive policies" based on the number of collisions that were prevented by that province's procedures to evaluate the medical fitness of drivers.

[84] SGI also relies on research that it says supports the conclusion that, even in the face of mandatory reporting requirements such as those found in s. 283 of the *TSA*, medical professionals under-report health concerns about the fitness of their patients to drive (see *Reporting Under Section 157 of The Highway Traffic Act*, Manitoba Law Reform Commission, 2015 CanLIIDocs 267; Donald A. Redelmeir, Vikram Venkatesh & Matthew B. Stanbrook, "Mandatory reporting by physicians of patients potentially unfit to drive" (2008) 2(1): E8-17 Open Medicine 1; A.V.

Louie *et al*, "Assessing fitness to drive in brain tumour patients: a grey matter of law, ethics, and medicine" (2013) 20:2 Current Oncology 90; E. Chan *et al*, "Multidisciplinary assessment of fitness to drive in brain tumour patients in southwestern Ontario: a grey matter" (2013) 20:1 Current Oncology e4; Raymond W. Jang *et al*, "Family Physicians' Attitudes and Practices Regarding Assessments of Medical Fitness to Drive in Older Persons" (2007) Journal of General Internal Medicine 531; Shawn C. Marshall and Nathalie Gilbert, "Saskatchewan physicians' attitudes and knowledge regarding assessment of medical fitness to drive" (1999) 160:12 Canadian Medical Association Journal 1701).

[85] Ms. Nixon's affidavit also explains that, to aid SGI with assessing the risks and reasons for under-reporting by medical professionals, with the assistance of the relevant professional governing bodies, it surveyed the members of the Saskatchewan Society of Occupational Therapists and the Saskatchewan Association of Optometrists. In round numbers, (a) 91 percent of occupational therapists and 90 percent of optometrists who responded to the survey had reported a patient to SGI, (b) 51 percent of occupational therapists and 16 percent of optometrists had occasion to ask for their identity to be kept confidential, and (c) 86 percent of occupational therapists and 88 percent of optometrists stated that among the reasons why they would ask that their identity be kept confidential was the risk that disclosure may engage the mental health or physical health or safety of the patient or another person or have a negative impact on that professional's relationship with their patient or the patient's family.

[86] According to SGI's evidence, between 2017 and 2021, the number of confidential reports made to its MRU unit by private citizens varied from a low of 187 to a high of 313 per year. During the same period, the number of reports from physicians, nurse practitioners, occupational therapists and optometrists varied from a high of 3,474 to a low of 2,525. Significantly, in each year, between 7 and 10 percent of these reports were submitted on a confidential basis.

[87] Mr. Giesbrecht offered no evidence to contradict that which SGI filed. I can easily see the foundation in SGI's evidence for Ms. Nixon's statement that, based on it and "feedback [she has] personally received from Medical Practitioners in delivering the Fitness to Drive Program… there would be a chilling effect on reporting if the confidentiality of individuals making such reports is not protected". I further see the evidentiary basis for her stated conclusion that the "chilling effect

would have an injurious impact on the MRU's ability to investigate such drivers and [SGI's] enforcement of the requirements to drive set out in the TSA". All of this convinces me that, based on the evidence before the Court, there is an objective possibility, rising well above a remote possibility and that is far from being speculative, that the disclosure of the Report to Mr. Giesbrecht might interfere with future lawful investigations into a violation of the *TSA* and might be injurious to the enforcement of that Act.

[88] In the *2022 Review Report*, which contains the Commissioner's recommendation that SGI provide the Report to Mr. Giesbrecht, the Commissioner wrote that "SGI has not provided any examples or circumstances where a medical practitioner expressed an unwillingness to report, or general concerns about reporting to the MRU" (at para 33). However, the material now brought forward in these proceedings provides the evidence that seems to have been lacking when this recommendation was delivered. In short, taken together, the evidence provides an objective basis for SGI's stated belief that, without a promise of confidentiality, even some medical professionals, who enjoy the protections afforded to them under s. 283 of the *TSA*, *might* not in all cases report persons who may be unfit to drive.

[89] Because of the possibility that some medical professionals who enjoy the protections that s. 283 affords may still not report to SGI individuals who, in their opinion, are suffering from a condition that make it dangerous for that person to operate a vehicle, I find it unnecessary to address the arguments that were presented to this Court as to the extent of the protections given to a medical professional under s. 283 of the *TSA*.

[90] Yet, Mr. Giesbrecht argues that whatever justification may exist for the protection of the confidentiality of reports to SGI cannot stand here because the Report was made in bad faith. I accept that there may be reasons why the identity of a person who submits a report in bad faith need not be protected from disclosure. However, I need not decide that issue in this appeal.

[91] The assertion that the Report was made in bad faith rests solely on the evidence that both Mr. Giesbrecht and his spouse became the subject to a report questioning their medical fitness to drive. This simple fact does not establish the bad faith of the reports' maker, assuming that it was the same person in both cases. As has been noted, the confidentiality promise is intended to encourage persons to make reports to SGI. The value of that promise would be significantly

diminished if it could be displaced by a mere allegation that a report has been made in bad faith, which, in this case, is all that exists.

[92] I add to this that there is no evidence whatsoever that SGI itself has acted in any way other than in good faith in connection with the steps it took after receipt of the Report. This is important because it is the proper exercise of SGI's discretion to refuse to disclose the Report based on the possibility of the harm described in s. 38(1)(f) of *HIPA* which is at issue in this appeal. In this regard, SGI received a report that questioned the medical fitness of Mr. Giesbrecht to operate a motor vehicle. It asked Mr. Giesbrecht to provide a medical report answering its concern, at its own expense. It then accepted the medical evidence that was provided as a complete answer to any concerns about Mr. Giesbrecht's ability to drive. There is nothing untoward about those circumstances.

2. Conclusion

[93] In summary, I am satisfied that there is an objective possibility that the disclosure of the Report to Mr. Giesbrecht might interfere with future lawful investigations into violations of the *TSA* and be injurious to the enforcement of that Act. This meets the test under s. 38(1)(f) of *HIPA* and justifies SGI's decision to refuse to provide Mr. Giesbrecht with a copy of the Report.

V. OVERALL CONCLUSION

[94] I would allow SGI's appeal and set aside the order directing it to disclose the Report to Mr. Giesbrecht. I would also set aside the order for costs made in his favour.

[95] In the ordinary course, as the successful party, SGI would be entitled to its taxable costs against Mr. Giesbrecht in this Court and in the Court of King's Bench. However, this matter has been approached throughout as raising issues of broad public importance, transcending the facts of Mr. Giesbrecht's request. For this reason, the Government of Saskatchewan was granted the right to intervene in this appeal. Additionally, the outcome of this case is dictated by the evidence that SGI filed, for the first time, in the proceedings in the Court of King's Bench. It may be that, if SGI had given the Commissioner that same information, the recommendation contained in the *2022 Review Report* would have been different and there may have been no need for any court

proceedings. Considering all these circumstances, I would make no order of costs for or against any party.

"Leurer C.J.S."

Leurer C.J.S.

I concur. "Caldwell J.A."

Caldwell J.A.

I concur. "Kalmakoff J.A."

Kalmakoff J.A.