Date: 20080201

Docket: A-551-06

Citation: 2008 FCA 39

CORAM: **DÉCARY J.A.**
NADON J.A.
TRUDEL J.A.

BETWEEN:

JEFFREY P. WYNDOWE
(Psychiatric Assessment Services Inc.)

Appellant
(Respondent)

and

JACQUES ROUSSEAU

Respondent
(Applicant)

and

THE PRIVACY COMMISSIONER OF CANADA

Respondent

Heard at Toronto, Ontario, on January 22, 2008.

Judgment delivered at Ottawa, Ontario, on February 1, 2008.

REASONS FOR JUDGMENT BY: DÉCARY J.A.

CONCURRED IN BY: NADON J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

DÉCARY J.A.

[1] This appeal raises the following issue: whether the handwritten notes of a doctor, taken during an independent medical examination (IME) of an insured person performed in Ontario by the doctor at the request of an insurance company, are personal information under the *Personal Information Protection and Electronic Documents Act* (the PIPED Act) (S.C. 2000, c.5). If they are, the insured person has the right to access the notes.

Background

[2] Mr. Rousseau (the insured person) was receiving long-term disability benefits from Maritime Life (the insurer). As part of his insurance policy, Maritime Life was entitled to have Mr. Rousseau subjected to an IME. A dispute arose regarding Mr. Rousseau's continued eligibility for benefits. Maritime Life retained the services of Dr. Wyndowe (through his corporation, Psychiatric Assessment Services Inc.) to perform an IME of Mr. Rousseau. Dr. Wyndowe explained the purpose and nature of the insurer's examination to Mr. Rousseau and Mr. Rousseau signed a "Form 14" consent whereby he consented to the disclosure of the doctor's report to the insurer.

[3] Following completion of the IME, Dr. Wyndowe sent a formal written report to Maritime Life. A copy of that report was eventually sent to Mr. Rousseau, at his request, by Maritime Life. Mr. Rousseau also requested a complete copy of Dr. Wyndowe's file. The file was composed only of the doctor's notes taken during the IME. Dr. Wyndowe refused to grant access to the notes. The insurer, as far as we know, did not have access to the notes.

[4] Subsequent to, and because of the doctor's report, Maritime Life terminated Mr. Rousseau's long-term benefits.

[5] Mr. Rousseau complained to the Office of the Privacy Commissioner (the Privacy Commissioner) with respect to Dr. Wyndowe's refusal to disclose the notes. The complaint was allowed and the Privacy Commissioner recommended that Dr. Wyndowe disclose his notes to Mr. Rousseau. Dr. Wyndowe refused.

[6] Pursuant to section 14 of the PIPED Act, Mr. Rousseau applied to the Federal Court for an order that Dr. Wyndowe's notes be provided to him. The Privacy Commissioner was granted, under paragraph 15(*c*), leave to be added as a party respondent.

[7] Mr. Justice Teitelbaum granted Mr. Rousseau's application and ordered he be given access to the notes (2006 FC 1312).

[8] Hence the within appeal.

Preliminary observations

[9] a) the motivation of Mr. Rousseau

We have been informed at the hearing that as a result of a successful claim filed by Mr. Rousseau with the Ontario Superior Court of Justice, the matter between Mr. Rousseau and his insurer was settled. However, Mr. Rousseau is still seeking access to the notes. He is entitled to or he has a right under the PIPED Act to pursue his application, regardless of motivation. (see *Canada (Information Commissioner) v. Canada (Minister of Citizenship and Immigration)* 2002 FCA 270 at para. 9). He did not file any representations in this appeal and his interests are defended by the Privacy Commissioner.

[10] b) the personal information at issue

In her factum and at the hearing, the Privacy Commissioner recognized that she is not seeking access to the totality of the notes made by Dr. Wyndowe. She is seeking access rather to

parts of the notes which record Mr. Rousseau's answers to Dr. Wyndowe's questions or which record Dr. Wyndowe's observations of the behaviour of Mr. Rousseau. That concession had not been made before Mr. Justice Teitelbaum.

[11] Counsel for both parties agreed that if the Court ended up ordering access to only parts of the notes, the severance process would be undertaken by the Privacy Commissioner with the full cooperation of counsel for the appellant.

[12] c) the section 9(3) exemption

Before the Federal Court, the insurer relied on the exemptions for "solicitor-client privilege" (para. 9(3)(*a*)) and for an ongoing "formal dispute resolution process" (para. 9(3)(*d*)). The exemptions were found by Justice Teitelbaum to be inapplicable. This finding was not appealed.

[13] d) constitutional issue

Despite the fact that Dr. Wyndowe argues in his factum that general legislative jurisdiction over health belongs to the provinces subject to Parliament's ancillary or emergency powers (see *Schneider v. The Queen*, [1982] 2 S.C.R. 112 at 137; *Bell Canada v. Québec (Commission de la santé et de la sécurité du travail du Québec)*, [1988] 1 S.C.R. 749 at 761 and *Chaoulli v. Québec (Attorney General)*, [2005] 1 S.C.R. 791, at paras. 16-18), he falls short of arguing that personal health information of the type at issue in this appeal could not, for constitutional reasons, be regulated by federal legislation. I, therefore, express no opinion on this issue.

[14] e) Ontario legislation

Subsection 30(1) of the PIPED Act provides that Part I does not apply "to any organization in respect of personal information that it collects, uses or discloses within a province whose legislature has the power to regulate the collection, use or disclosure of the information". A province is allowed three years from the entry into force of section 30 (i.e. January 1, 2001), under subsection 30(2), to adopt such legislation. If it does not, Part I will apply.

[15] Subsection 30(1.1) of the PIPED Act provides that Part I does not apply "to any organization in respect of personal health information that it collects, uses or discloses", but only for a year from the entry into force of section 30 (i.e. January 1, 2001) (subsection 30(2.1)).

[16] Paragraph 26(2)(*b*) of the PIPED Act empowers the Governor in Council, if satisfied that legislation of a province that is substantially similar to Part I of the PIPED Act applies to an organization or an activity, to exempt by order that organization or activity from the application of Part I within that province.

[17] Subsequent to the events that led to this appeal, Ontario adopted the *Personal Health Information Protection Act*, 2004 (S.O. 2004, c. 3, Sched. A). The Act applies to health care and to "health information custodians". It is common ground that it does not apply to doctors performing an IME.

[18] On November 28, 2005, the Governor in Council, being "satisfied" that the Ontario Act was "substantially similar to Part I of PIPEDA", adopted an Order exempting from the application of Part I of the PIPED Act "any health information custodian to which the [Ontario Act] applies", (SOR 2005-399). It is common ground that this exemption does not apply to doctors performing an IME in Ontario.

[19] f) work product information

Dr. Wyndowe has not directly argued that the notes can be described as what is known in privacy law as "work product information".

[20] A useful definition of "work product information" is found in section 1 of the *Personal Information Protection Act* of British Columbia (SBC 2003, c. 63):

> "work product information" means information prepared or collected by an individual or group of individuals as a part of the individual's or group's responsibilities or activities related to the individual's or group's employment or business but does not include personal information about an individual who did not prepare or collect the personal information."

[21] British Columbia has excluded "work product information" from the definition of "personal information". Alberta has declined to do so, "reasoning that the current contextual approach allows for greater flexibility than a categorical exclusion" (Final Report, dated November 2007, of the Alberta Select Special Personal Information Protection Act Review Committee, p. 25, 26).

[22] On the federal stage, the Standing Committee on Access to Information, Privacy and Ethics, in its Fourth Report tabled in the House of Commons on May 2, 2007, made the following recommendation:

> Work Product Information
> **Recommendation 2**
> "The Committee recommends that PIPEDA be amended to include a definition of 'work product' that is explicitly recognized as not constituting personal information for the purposes of the Act. In formulating this definition, reference should be made to the definition of 'work product information' in the British Columbia *Personal Information Protection Act*, the definition proposed to this Committee by IMS Canada, and the approach taken to professional information in Quebec's *An Act Respecting the Protection of Personal Information in the Private Sector*".

[23] In its Response to the Report, the Government opted for further consultation before accepting the recommendation:

> **Response**
> The government recognizes that the issue of work product information is of great significance to a number of stakeholders. In its Report, the Committee has acknowledged the call from private sector interests to provide more clarity and certainty to PIPEDA in this area in order to facilitate business planning and to assist them in their efforts to comply with the Act.
>
> At the same time, the government must consider the concerns expressed by the Privacy Commissioner and others regarding the risk of any unintended negative consequences to privacy that may result from an exemption of work product information.
>
> In keeping with the general approach of PIPEDA, it is important to balance the need for a business-friendly privacy regime with the need for maintaining the existing level of privacy protection currently provided by the Act. In light of this, the government will commit to consult further and consider how organizational needs respecting collection, use, and disclosure of work product information can be accommodated in a manner that poses the least degree of risk to privacy protection.
>
> As proposed by the Committee, consideration will be given to various approaches, including those proposed in submissions to the Committee and those contained in provincial privacy laws.

[24] In these circumstances, it would have been at least premature for the appellant and unwise for this Court to rely on an implicit exclusion of "work product information" from the definition of "personal information".

Analysis

[25] To the extent that the questions before us are either pure questions of law (the interpretation of the statute) or questions of law extricable from questions of mixed law and fact, the standard of review of correctness applies.

[26] A) the common law

The appellant first submits that as the PIPED Act does not clearly and unambiguously override the common law respecting the right of access to one's personal health record, the common law should apply. At common law, as the argument goes, the right to inspect one's medical records is only recognized where there is a fiduciary relationship between physician and patient (see *McInerney v. MacDonald*, [1992] 2 S.C.R. 138. As there is no fiduciary relationship between the insured and the insurer's doctor performing an IME (see *X(Minors) v. Bedfordshire County Council*, [1995] 3 All E.R. 353 (H.L.), the insured has no right of access to his medical records.

[27] I am not persuaded that at common law an insured has no right of access to his medical records. In any event, it is my view that the common law should not prevail where the very purpose of the PIPED Act is to provide new privacy protections to Canadians not otherwise enjoyed under the common law.

[28] The PIPED Act has expressly addressed "personal health information", first in the definition section, then in the transitional provisions section (section 30), and finally in Principle 9 – Individual Access, where Principle 4.9.1 in Schedule I provides that "…the organization may choose to make sensitive medical information available through a medical practitioner". If there was common law on this issue, it was clearly overridden by the statute.

[29] B) commercial activity

According to paragraph 4(1)(*a*) of the PIPED Act, Part I applies to personal information collected, used or disclosed "in the course of commercial activities".

[30] "Commercial activity" is defined in subsection 2(1):

"commercial activity" means any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists.	« activité commerciale » Toute activité régulière ainsi que tout acte isolé qui revêtent un caractère commercial de par leur nature, y compris la vente, le troc ou la location de listes de donneurs, d'adhésion ou de collecte de fonds.

[31] The appellant questions the commercial character of an IME, and whether it is sufficient to bring Dr. Wyndowe's notes within the realm of the PIPED Act. The appellant relies on *Canada (Information Commissioner) v. Canada (Transportation Accident Investigation and Safety Board)*, 2006 FCA 157 at paragraph 69, where Desjardins J.A. was considering the paragraph 20(1)(*b*) third party information exemption to the disclosure obligation of the *Access to Information Act*, and where she stated:

> [69] Common sense with the assistance of dictionaries (Air Atonabee Ltd v. Canada (Minister of Transport) (1989), 37 Admin. L.R. 245 (F.C.T.D.) (Air Atonabee), at page 268) dictates that the word "commercial" connotes information which in itself pertains to trade (or commerce). It does not follow that merely because NAV CANADA is in the business of

providing air navigation services for a fee, the data or information collected during an air flight may be characterized as "commercial".

[32] Paragraph 20(1)(*b*) of the *Access to Information Act* states:

20. (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains . . . (*b*) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;	20. (1) Le responsable d'une institution fédérale est tenu, sous réserve des autres dispositions du présent article, de refuser la communication de documents contenant : (…) *b*) des renseignements financiers, commerciaux, scientifiques ou techniques fournis à une institution fédérale par un tiers, qui sont de nature confidentielle et qui sont traités comme tels de façon constante par ce tiers;

[33] Obviously, paragraph 20(1)(*b*) of the *Access to Information Act* is very different from the "commercial activity" term found in section 4 of the PIPED Act. Keeping in mind the principles in *Englander v. Telus Communications Inc.*, 2004 FCA 387, it would simply not be appropriate to apply an interpretation of paragraph 20(1)(*b*) to a PIPED Act provision which is, in any event, not couched in the same terms.

[34] There is no doubt on the record that Dr. Wyndowe collected the information from Mr. Rousseau while conducting the IME for the insurer. In this case Dr. Wyndowe seems to fit exactly the definition in paragraph 4(1)(*a*): he collected Mr. Rousseau's information "in the course of" conducting his IME.

[35] The question is whether the IME transaction was of a "commercial nature", as defined in section 2. The transaction between Dr. Wyndowe's corporation and Maritime Life, who was paying

for the IME, is of a commercial nature. Mr. Rousseau's relationship between himself and Maritime Life is also clearly of a commercial nature: it is governed by a contract between Mr. Rousseau and his insurer, where Mr. Rousseau presumably paid some premiums (or his employer paid the premiums as part of Mr. Rousseau's compensation for employment) and he therefore may or may not be entitled to benefits.

[36] In the context of these two commercial relationships – between Dr. Wyndowe's corporation and Maritime Life on the one hand and between Mr. Rousseau and Maritime Life on the second hand – I find it hard to believe that by introducing a third relationship – between Dr. Wyndowe and Mr. Rousseau – the commercial nature of the overall transaction is defeated. In my view, Dr. Wyndowe is merely the medical agent of Maritime Life. If Dr. Wyndowe worked as a full time doctor for Maritime life, there would be no question the transaction is commercial; being examined by him would merely be a step which Mr. Rousseau had to follow to collect his benefits. In that sense the examination would be akin to filling out a form required by Maritime Life in order to begin collecting benefits. Just because Dr. Wyndowe is an independent consultant hired by Maritime Life does not change the fact that the overall transaction retains its commercial nature. It also does not change the fact that Mr. Rousseau was only doing what his contract with Maritime Life required him to do to maintain his benefits, i.e. submitting to an IME.

[37] It is clear from the Debates of the Senate on November 4, 1999 (2nd Session, 36th Parliament, Volume 138, Issue 6) and from the Proceedings of the Standing Senate Committee on Social Affairs, Science and Technology, on November 25, 1999 (Issue 1), that members of Parliament

were concerned both with the constitutional implications of the PIPED Act and the propriety of applying the Act to the health care sector. Concerns were also expressed with respect to the practicability of separating, in the health care sector, commercial from non-commercial activity. Ms. Perrin, from Industry Canada, acknowledged that the bill "covers organization engaged in commercial activity" and "that would include such players as insurance companies who, at this time, have not been covered by medical privacy bills at the provincial levels…". She added :

> "…it is very important to cover that entire medical file when it arrives in the insurance company's dossiers. That is what this bill will do". (November 25, 1999)

[38] Mr. Binder, Assistant Deputy Minister at Industry Canada, added:

> "We are talking about data in commercial enterprises. Medical activities that are not involved in commercial activity are not covered by this bill".

[39] My conclusion that notes taken by a doctor in the course of an IME made at the request of an insurance company are taken "in the course of a commercial activity" is not, therefore, at odds with what appears to have been contemplated by Parliament.

[40] C) <u>personal information</u>

Personal information is defined in subsection 2(1) of the PIPED Act as meaning "information about an identifiable individual". The Act is therefore very far reaching.

[41] "Personal health information" is also defined:

"personal health information" «renseignement personnel sur la santé » "personal health information" , with respect	«renseignement personnel sur la santé » "personal health information" «renseignement personnel sur la santé » En

to an individual, whether living or deceased, means (*a*) information concerning the physical or mental health of the individual; (*b*) information concerning any health service provided to the individual; (*c*) information concerning 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; (*d*) information that is collected in the course of providing health services to the individual; or (*e*) information that is collected incidentally to the provision of health services to the individual.	ce qui concerne un individu vivant ou décédé : *a*) tout renseignement ayant trait à sa santé physique ou mentale; *b*) tout renseignement relatif aux services de santé fournis à celui-ci; *c*) tout renseignement relatif aux dons de parties du corps ou de substances corporelles faits par lui, ou tout renseignement provenant des résultats de tests ou d'examens effectués sur une partie du corps ou une substance corporelle de celui-ci; *d*) tout renseignement recueilli dans le cadre de la prestation de services de santé à celui-ci; *e*) tout renseignement recueilli fortuitement lors de la prestation de services de santé à celui-ci.

This definition, particularly paragraph (*a*), is remarkably encompassing.

[42] Even though the two expressions are defined in the Act without reference one to another, it is clear that "personal health information" is a subset of "personal information".

[43] The only place other than in the definition section where "personal health information" is referred to in the PIPED Act is in subsections 30(1.1) and 30(2.1), which are transitional provisions delaying the application of the PIPED Act to "personal health information" until one year after section 30 comes into force. The reason for the delay, one can easily assume, was to allow practitioners who were to be covered by the provision to prepare for the application of the PIPED Act.

[44] That “personal health information” is a subset of “personal information” is confirmed, also, by Principle 9 which deals with individual access. As previously noted, Principle 4.9.1 allows an organization to “choose to make sensitive medical information available through a medical practitioner” (my emphasis). Clearly, therefore, “medical information”, which is “personal health information”, is “personal information”.

[45] There is also no doubt, and I have not heard the appellant suggest otherwise, that the notes taken by a doctor in the course of an IME form part of the medical records of the person being examined. And there is no doubt that “personal health information” includes the medical records of a person.

[46] Counsel for the appellant relies heavily on the decision of the Federal Court in *Canada (Privacy Commissioner) v. Canada (Labour Relations Board) (T.D.)*, [1996] 3 F.C. 609 where it was found that working notes taken by Board members during a Canada Labour Relations Board hearing were not “personal information” for the purposes of the Privacy Act. That decision was confirmed by the Federal Court of Appeal, but on another ground (2000) 180 F.T.R. 313 (C.A.).

[47] The thrust of that decision is that the disclosure of the notes would offend the adjudicative privilege, also termed judicial immunity, that could be claimed by administrative tribunals and would compromise the operation of the Board and be injurious to the conduct of lawful investigations within the meaning of the exemption found in paragraph 22(1)(*b*) of the *Privacy Act*.

[48] This decision, therefore, is hardly applicable to the facts of this case.

[49] In light of the Privacy Commissioner's recognition that there are in the notes information which is personal to Mr. Rousseau and information which is not, it may be said that in the end, Mr. Rousseau has a right of access to the information he gave the doctor, and to the final opinion of the doctor in the form of the report to the insurer. In accordance with Principle 4.9.1. of Schedule I to the PIPED Act, this enables Mr. Rousseau to correct any mistakes in the information he gave the doctor or which the doctor noted, as well as any mistakes in the doctor's reasoned final opinion about his medical condition. But the process of getting to that final opinion from the initial personal information of Mr. Rousseau belongs to the doctor.

[50] This Court, in *Canada (Information Commissioner) v. Canada (Minister of Citizenship and Immigration)* (above, at para. 8), has recognized that "the same information can be "personal" to more than one individual" (at para. 15). It may well be, in the end, that some information in the notes will be personal to both Mr. Rousseau and Dr. Wyndowe. A balancing exercise similar to that proposed in our ruling in *Canada (Information Commissioner)* would then need to be performed.

Conclusion and Disposition

[51] I therefore reach the conclusion that Mr. Rousseau has the right to access the portions of the notes taken by Dr. Wyndowe which constitute his personal information.

[52] I would allow the appeal in part, set aside in part the decision of the Federal Court, allow in part the application of Mr. Rousseau and grant Mr. Rousseau access to the notes to the extent that they constitute his "personal information".

[53] I would return the matter back to the Privacy Commissioner so that she, in consultation with counsel for Dr. Wyndowe, determines which parts of the notes should be communicated to Mr. Rousseau.

[54] No costs were sought by either party.

"Robert Décary"
J.A.

"I agree.
M. Nadon J.A."

"I agree.
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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