COURT OF APPEAL FOR ONTARIO

CITATION: Hopkins v. Kay, 2015 ONCA 112
DATE: 20150218
DOCKET: C58403

Sharpe, van Rensburg and Pardu JJ.A.

BETWEEN

~~Jessica Hopkins~~, Heike Hesse,
Erkenraadje Wensvoort on Behalf of Themselves and
All Others Similarly Situated

Respondent (Plaintiff)

and

Andrea Kay, Dana Gildon Cormier, Mandy Edgerton Reid,
Dawn Deciocci, Jane Doe “A”, Jane Doe “B”, Jane Doe “C”,
Peterborough Regional Health Centre ~~and~~
~~Sir Sanford Fleming College~~

Appellants (Defendants)

Patrick J. Hawkins and Daniel Girlando, for the appellant Peterborough Regional Health Centre

Jonathan C. Lisus and Ian C. Matthews, for the appellant Mandy Edgerton-Reid

Jean-Marc Leclerc, Michael A. Crystal and Norman Mizobuchi, for the respondent

Daniel Michaluk and Mitchell Smith, for the intervener Ontario Hospital Association

Linda Rothstein and Jodi Martin, for the intervener The Information and Privacy Commissioner of Ontario

Heard: December 15, 2014

On appeal from the order of Justice Mark L. Edwards of the Superior Court of Justice, dated January 31, 2014.

Sharpe J.A.:

[1] In this proposed class proceeding, the named plaintiff (respondent on appeal) alleges that her records as a patient at the Peterborough Regional Heath Centre (the "Hospital") were improperly accessed. She bases her claim on the common law tort of intrusion upon seclusion, recognized by this court in *Jones v. Tsige*, 2012 ONCA 32, 108 O.R. (3d) 241.

[2] This appeal arises from the Hospital's Rule 21 motion to dismiss the claim on the ground that the *Personal Health Information Protection Act*, S.O. 2004, c. 3, Sch. A ("PHIPA") is an exhaustive code that ousts the jurisdiction of the Superior Court to entertain any common law claim for invasion of privacy rights in relation to patient records.

[3] For the following reasons, I conclude that PHIPA does not create an exhaustive code. The respondent is not precluded from asserting a common law claim for intrusion upon seclusion in the Superior Court.

BACKGROUND

(1) Facts

[4] As this is an appeal from a decision made on a Rule 21 motion, the legal issues are to be determined on the basis of the facts as pleaded in the statement of claim.

[5] While three representative plaintiffs were named when this proposed class action was commenced, there is now only one – the respondent, Erkenraadje

Wensvoort. The statement of claim alleges that the respondent attended the Hospital on several occasions for treatment of injuries inflicted by her ex-husband. She eventually left her husband, but still feared for her safety and took steps to safeguard her identity.

[6] The respondent received two notices from the Hospital, as required by PHIPA, indicating that the privacy of her personal health information had been breached. Two hundred and eighty patients were also notified of these breaches. The respondent pleads that she feared that her ex-husband had paid someone to access her patient records in order to find her.

[7] The appellant Mandy Edgerton-Reid is a registered practical nurse who worked at the Hospital and was terminated as a result of allegations that she improperly accessed patient records. The statement of claim states that she and the other individual defendants, who were all Hospital employees when the breaches occurred, improperly accessed and disclosed patient records. The statement of claim also alleges that the appellant Hospital failed to adequately monitor its staff and implement policies and systems to prevent improper access to patient records.

[8] The respondent initially relied on breaches of PHIPA to assert a cause of action against the appellants. The statement of claim was subsequently

amended to contain only the common law cause of action identified in *Jones v. Tsige*.

(2) Decision of the motion judge

[9] The motion judge held that it was not plain and obvious that the claim based on *Jones v. Tsige* could not succeed. He noted that the existence of PHIPA and other privacy legislation had been brought to the court's attention in *Jones v. Tsige*. He refused to strike the claim under Rule 21.

(3) Motion to quash

[10] The respondent's motion to quash this appeal on the basis that the order is interlocutory in nature was dismissed on the ground that the refusal to stay or dismiss an action based on lack of jurisdiction is a final order: *Hopkins v. Kay*, 2014 ONCA 514.

ISSUE

[11] The issue on appeal is whether the respondent is, or should be, in the discretion of the court, precluded from bringing a common law claim for intrusion upon seclusion in the Superior Court because PHIPA creates an exhaustive code. The Ontario Hospital Association (the "OHA") intervenes to support the position of the appellants. The Information and Privacy Commissioner (the "Commissioner") intervenes to support the position of the respondent.

ANALYSIS

(1) The legislative scheme

[12] PHIPA was adopted in 2004 following a lengthy process of proposals, draft bills and consultations triggered by Justice Horace Krever's *Report of the Commission of Inquiry into the Confidentiality of Health Information in Ontario* (Toronto: Queen's Printer, 1980).

[13] The purposes of PHIPA, stated in s. 1, are:

> (a) to establish rules for the collection, use and disclosure of personal health information about individuals that protect the confidentiality of that information and the privacy of individuals with respect to that information, while facilitating the effective provision of health care;
>
> (b) to provide individuals with a right of access to personal health information about themselves, subject to limited and specific exceptions set out in this Act;
>
> (c) to provide individuals with a right to require the correction or amendment of personal health information about themselves, subject to limited and specific exceptions set out in this Act;
>
> (d) to provide for independent review and resolution of complaints with respect to personal health information; and
>
> (e) to provide effective remedies for contraventions of this Act.

[14] PHIPA is a lengthy and detailed statute comprised of seven parts and seventy-five sections dealing with the collection, use, disclosure, retention and

disposal of personal health information. Part II specifies the required practices to be followed by custodians of personal health information to ensure accuracy and to protect confidentiality. If personal health information is stolen, lost or improperly accessed, subject to certain "exceptions and additional requirements", the custodian is required to notify the individual at the first reasonable opportunity (s. 12(2)).

[15] Detailed requirements for obtaining consent to the collection, use and disclosure of personal health information are set out in Part III. Collection, use and disclosure are the subject of Part IV. Rights of access and correction are addressed in Part V.

[16] The provisions in Part VI deal with administration and enforcement. It is the purpose and effect of those provisions that lie at the heart of this appeal.

[17] The Commissioner is responsible for the administration and enforcement of PHIPA. The Commissioner is appointed under s. 4(1) of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("FIPPA"), and is an officer of the legislature. In addition to PHIPA and FIPPA, the Commissioner is also responsible for the administration and enforcement of the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56.

[18] The Commissioner has a broad mandate of public protection that enables him or her to conduct reviews under PHIPA in relation to the collection, use,

disclosure, retention and disposal of records, as well as access to and correction of records. An individual who has reasonable grounds to believe that another person has or is about to contravene a provision of PHIPA may complain to the Commissioner (s. 56). Upon receipt of a complaint, the Commissioner may "inquire as to what means, other than the complaint, that the complainant is using or has used to resolve the subject-matter of the complaint" (s. 57(1)(a)), require the complainant "to try to effect a settlement" (s. 57(1)(b)), or authorize a mediator to review the matter and attempt to effect a settlement (s. 57(1)(c)).

[19] If the Commissioner takes none of these steps or if these steps fail to achieve a resolution of the complaint, the Commissioner has two options. First, "the Commissioner may review the subject-matter of a complaint made under this Act if satisfied that there are reasonable grounds to do so" (s. 57 (3)). The second option is specified in s. 57(4):

> The Commissioner may decide not to review the subject-matter of the complaint for whatever reason the Commissioner considers proper, including if satisfied that,
>
> > (a) the person about which the complaint is made has responded adequately to the complaint;
> >
> > (b) the complaint has been or could be more appropriately dealt with, initially or completely, by means of a procedure, other than a complaint under this Act;
> >
> > (c) the length of time that has elapsed between the date when the subject-matter

> of the complaint arose and the date the complaint was made is such that a review under this section would likely result in undue prejudice to any person;
>
> (d) the complainant does not have a sufficient personal interest in the subject-matter of the complaint; or
>
> (e) the complaint is frivolous or vexatious or is made in bad faith.

[20] The Commissioner also has the power to conduct a self-initiated review of any matter where there are reasonable grounds to believe that there has been or is about to be a contravention of the Act (s. 58).

[21] The Commissioner is given extensive procedural and investigative powers in relation to complaints (ss. 59-60) and the power to make a variety of orders following a s. 57 or 58 review (s. 61). The Act gives the complainant the right to make representations to the Commissioner (s. 60(18)) but does not contemplate a formal adversarial hearing for the resolution of complaints. An appeal from the Commissioner's order on a question of law lies to the Divisional Court (s. 62).

[22] Orders of the Commissioner may be filed with the Superior Court whereupon they become enforceable as a judgment of the court (s. 63).

[23] The possibility of recovering damages as a result of a breach of PHIPA is the subject of s. 65:

> 65. (1) If the Commissioner has made an order under this Act that has become final as the result of there being no further right of appeal, a person affected by the order may commence a proceeding in the Superior

> Court of Justice for damages for actual harm that the person has suffered as a result of a contravention of this Act or its regulations.
>
> (2) If a person has been convicted of an offence under this Act and the conviction has become final as a result of there being no further right of appeal, a person affected by the conduct that gave rise to the offence may commence a proceeding in the Superior Court of Justice for damages for actual harm that the person has suffered as a result of the conduct.
>
> (3) If, in a proceeding described in subsection (1) or (2), the Superior Court of Justice determines that the harm suffered by the plaintiff was caused by a contravention or offence, as the case may be, that the defendants engaged in wilfully or recklessly, the court may include in its award of damages an award, not exceeding $10,000, for mental anguish.

[24] The Commissioner is also given broad general powers to conduct research and provide information to the public in relation to the matters covered by PHIPA (s. 66).

[25] Part VII, headed “General”, contains two provisions relevant to the issue raised on this appeal. Section 71 confers immunity upon entities or individuals exercising (or intending to exercise) powers and duties under PHIPA for good faith acts or omissions that were reasonable in the circumstances:

> 71. (1) No action or other proceeding for damages may be instituted against a health information custodian or any other person for,
>
> > (a) anything done, reported or said, both in good faith and reasonably in the circumstances, in the exercise or intended

> exercise of any of their powers or duties under this Act; or
>
> (b) any alleged neglect or default that was reasonable in the circumstances in the exercise in good faith of any of their powers or duties under this Act.
>
> (2) Despite subsections 5(2) and (4) of the *Proceedings Against the Crown Act*, subsection (1) does not relieve the Crown of liability in respect of a tort committed by a person mentioned in subsection (1) to which it would otherwise be subject.

[26] Finally, s. 72 makes it a summary conviction offence to, *inter alia*, wilfully collect, use or disclose personal health information in contravention of the Act (s. 72(1)(a)), punishable by fine of up to $50,000 for individuals and $250,000 for institutions (s. 72(2)). Pursuant to s. 72(5), only the Attorney General or agent for the Attorney General may commence such a prosecution.

(2) Does PHIPA create an exhaustive code governing patient records that precludes common law claims for breach of privacy and ousts the jurisdiction of the Superior Court?

[27] The Hospital and Ms. Edgerton-Reid, supported by the OHA, submit that PHIPA amounts to a comprehensive code that reflects a careful legislative attempt to balance various conflicting interests. They contend that PHIPA's careful balance would be disturbed if claims based on *Jones v. Tsige* were entertained by the courts in relation to personal health information. Permitting these common law claims would, according to the appellants, contradict the

statutory scheme, defeat the intention of the legislature and undermine the policy choices embodied in PHIPA.

[28] My analysis is two-fold. First, I consider whether a legislative intention to create an exhaustive code can be inferred from the language of PHIPA. Second, I address the jurisprudence raised by the appellants in support of their contention that PHIPA ousts the jurisdiction of the Superior Court.

(i) Did the legislature intend to create an exhaustive code?

[29] Ruth Sullivan, in *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis Canada, 2014), at para. 17.20, explains the characteristics of an exhaustive code as follows: “The key feature of a code is that it is meant to offer an exclusive account of the law in an area; it occupies the field in that area, displacing existing common law rules and cutting off further common law evolution.” She notes, at para. 17.34, that “if legislation constitutes a complete code, resort to the common law is impermissible.” See also *Beiko v. Hotel Dieu Hospital St. Catherines,* 2007 ONCA 860, at para. 4; *Cuthbertson v. Rasoulli*, 2013 SCC 53, [2013] 3 S.C.R. 341, at paras. 2-4. If PHIPA does constitute an exhaustive code, the court has no jurisdiction to entertain the claim advanced by the respondent and it must be struck.

[30] An intention to create an exhaustive code may be expressly stated in the legislation or it may be implied. As there is nothing explicit in PHIPA dealing with

exclusivity, the question is whether an intent to exclude courts' jurisdiction should be implied. In *Pleau v. Canada* (A.G.), 1999 NSCA 159, 182 D.L.R. (4th) 373, leave to appeal refused, [2000] S.C.C.A. No. 83, Cromwell J.A. explained, at para. 48: "Absent words clear enough to oust court jurisdiction as a matter of law, the question is whether the court should infer… that the alternate process was intended to be the exclusive means of resolving the dispute."

[31] Cromwell J.A. identified three factors that a court should consider when discerning whether there is a legislative intent to confer exclusive jurisdiction. First, a court is to consider "the process for dispute resolution established by the legislation" and ask whether the language is "consistent with exclusive jurisdiction". Courts should look at "the presence or absence of privative clauses and the relationship between the dispute resolution process and the overall legislative scheme": *Pleau*, at para. 50 (emphasis in original).

[32] Second, a court should consider "the nature of the dispute and its relation to the rights and obligations created by the overall scheme of the legislation". The court is to assess "the essential character" of the dispute and "the extent to which it is, in substance, regulated by the legislative… scheme and the extent to which the court's assumption of jurisdiction would be consistent or inconsistent with that scheme": *Pleau*, at para. 51 (emphasis in original).

[33] The third consideration is "the capacity of the scheme to afford effective redress" by addressing the concern that "where there is a right, there ought to be a remedy": *Pleau*, at para. 52 (emphasis in original).

[34] These three factors provide a useful framework for considering the question posed on this appeal.

(a) The language of PHIPA and the process it establishes

[35] There can be no doubt that PHIPA lays down an elaborate and detailed set of rules and standards to be followed by custodians of personal health information. I accept former Commissioner Ann Cavoukian's description of PHIPA as a "comprehensive set of rules about the manner in which personal health information may be collected, used, or disclosed across Ontario's health care system": *Commissioner's PHIPA Highlights* (Toronto: Information and Privacy Commissioner/Ontario, March 2005).

[36] PHIPA also includes among its purposes the "independent review and resolution of complaints with respect to personal health information" and the provision of "effective remedies for contraventions" of the Act. The Act gives the Commissioner certain powers in this regard.

[37] While PHIPA does contain a very exhaustive set of rules and standards for custodians of personal health information, details regarding the procedure or mechanism for the resolution of disputes are sparse. At para. 28 of the

Commissioner's factum, the review process is described as "inquisitorial in nature". The Act essentially leaves the procedure to be followed to the discretion of the Commissioner. Reviews are generally conducted in writing. There is no requirement to hold an oral hearing, and therefore the fundamental features of an adversarial system, such as cross-examination, are absent. The Act gives complainants no procedural entitlements beyond the right to make representations. Pursuant to s. 59(1) of the Act, the usual procedural rights pertaining to administrative hearings granted by the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, do not apply.

[38] The nature of the process established by PHIPA indicates that it was designed to facilitate the Commissioner's investigation into systemic issues. While that process can be triggered by an individual complaint, the procedure is not designed for the resolution of all individual complaints. This coincides with the Commissioner's policy, discussed in greater detail below, to give priority to complaints raising systemic issues.

[39] I now turn to the specific language of the Act. Section 57(4)(b) provides that one of the factors to be considered by the Commissioner when deciding whether or not to investigate a complaint is whether "the complaint has been or could be more appropriately dealt with, initially or completely, by means of a procedure, other than a complaint under this Act." On its face, s. 57(4)(b) specifically contemplates the possibility that complaints about the misuse or

disclosure of personal health information may properly be the subject of a procedure that does not fall within the reach of PHIPA. In my view, the language of s. 57(4)(b) is difficult to reconcile with the proposition that the complaint procedure under PHIPA is exhaustive and exclusive.

[40] The appellants argue that s. 57(4)(b) contemplates proceedings such as complaints to a professional college where a doctor or nurse has misused patient information. No doubt, professional complaints of that nature are covered by s. 57(4)(b). However, the very fact that PHIPA contemplates the resolution of disputes regarding personal health information by other tribunals undermines the argument in favour of exclusivity. Moreover, the appellants offer no explanation as to why we should limit the language of s. 57(4)(b) to one kind of tribunal and exclude the Superior Court, especially in relation to a claim that is not based on any rights conferred by PHIPA.

[41] I also read s. 71, the immunity provision, as explicit recognition that there could be proceedings relating to improper use or disclosure of personal health information other than those specifically contemplated by PHIPA. That provision provides immunity in an “action or other proceeding for damages” where there has been an attempt at good faith compliance with the provisions of the Act. In my view, this language indicates that the legislature did contemplate the possibility of a common law action for damages in the courts.

[42] Further, to the extent PHIPA does provide for individual remedies, it turns to the courts for enforcement. The Commissioner has no power to award damages. It is only by commencing a proceeding in the Superior Court following an order of the Commissioner that an individual complainant can seek damages, pursuant to s. 65.

[43] The appellants and the OHA argue that s. 65 demonstrates that the legislature turned its attention to the role of the courts and specifically limited their jurisdiction to assessing damages, hearing appeals on points of law and entertaining applications for judicial review.

[44] I disagree. In my view, the only conclusion that can be drawn from the role recognized for the courts under s. 65 is that the Commission was not intended to play a comprehensive or expansive role in dealing with individual complaints.

[45] I conclude that PHIPA provides an informal and highly discretionary review process that is not tailored to deal with individual claims, and it expressly contemplates the possibility of other proceedings.

(b) Essential character of the claim

[46] This factor involves an assessment of the extent to which the “essential character” of the claim is regulated by PHIPA, and whether the court’s assumption of jurisdiction would be consistent with the PHIPA scheme.

[47] The respondent's claim does not rely on a breach of PHIPA. The claim as now pleaded is based solely upon the common law right of action identified in *Jones v. Tsige*. However, the appellants argue that in essence, the respondent's allegations overlap with obligations and duties prescribed under PHIPA. They contend that allowing the respondent to proceed with her common law claim in the Superior Court would permit her to circumvent PHIPA and thereby avoid the statutory restrictions and limitations the Act imposes.

[48] I disagree with that position. Proving a breach of PHIPA falls well short of what is required to make out the *Jones v. Tsige* claim. The elements of the common law tort identified in that case, at para. 71, require a plaintiff to establish (1) intentional or reckless conduct by the defendant, (2) that the defendant invaded, without lawful justification, the plaintiff's private affairs or concerns and (3) that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish. The first and third elements of the common law claim represent significant hurdles not required to prove a breach of PHIPA.

[49] The appellants point to two aspects of the common law claim that are arguably more lenient. Proof of actual harm is not an element of the tort of intrusion upon seclusion. In contrast, under PHIPA, where an individual claims damages in the Superior Court pursuant to s. 65, it is necessary to prove "actual

harm that the person has suffered as a result of a contravention of this Act or its regulations."

[50] The significance of this apparent difference is reduced considerably by two factors. First, *Jones v. Tsige* holds that without proof of actual harm, damages for the common law tort are limited to a "modest conventional sum": at para. 71. Second, the third element of the common law tort requires a plaintiff to show that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or *anguish*. Section 65(3) of PHIPA provides that the court may include it in its award damages for mental *anguish* not exceeding alone $10,000. It is not at all clear to me that there is a significant difference between the damages recoverable in a common law action and the damages the Superior Court can award under s. 65(3) for mental anguish.

[51] The other difference between the two causes of action involves the applicable limitation period. Under the *Limitations Act, 2002*, S.O. 2002, c. 24, the limitation period for a common law claim is two years. Conversely, s. 56(2)(a) of PHIPA contemplates a one year limitation period for initiating a complaint. The significance of this difference, however, should not be overstated. Section 56(2)(b) allows the Commissioner to extend the one-year period if satisfied that there would be no prejudice to any person. Moreover, since a claim for damages under PHIPA requires a separate proceeding, PHIPA claims will almost always,

as a practical matter, be brought to court well after the expiry of the one-year period. There is also no time limit on self-initiated reviews by the Commissioner.

[52] The above comparison leads me to conclude that allowing actions based on *Jones v. Tsige* to proceed in the courts would not undermine the PHIPA scheme. The elements of the common law cause of action are, on balance, more difficult to establish than a breach of PHIPA, and therefore it cannot be said that a plaintiff, by launching a common law action, is "circumventing" any substantive provision of PHIPA. The aspects of the common law that may at first glance appear more lenient are not, upon closer consideration, significantly advantageous.

[53] Allowing common law actions to proceed in the courts would, however, allow plaintiffs to avoid PHIPA's complaint procedure, and I now turn to the issue of whether that procedure is sufficient to ensure effective redress.

(c) Effective redress

[54] The position taken on this appeal by the Commissioner in relation to his discretion to deal with individual complaints has a direct bearing on the issue of whether PHIPA's dispute resolution procedure provides effective redress.

[55] PHIPA confers on the Commissioner a very wide discretion to decide whether or not to investigate a complaint. As I have noted, s. 57(4) provides that "the Commissioner may decide not to review the subject-matter of the complaint

for whatever reason the Commissioner considers proper" (emphasis added). The informal and discretionary review procedure reflects the statutory focus on systemic issues.

[56] The Commissioner has submitted to this court that granting him exclusive jurisdiction over individual claims would impair his ability to focus on these broader issues. As it is put in the Commissioner's factum, at para. 44:

> The respective mandates of the courts and the [Commissioner] are different. The courts are focused on providing remedies to individuals, including compensation for tortious conduct, while the [Commissioner] is focused on prevention, containment, investigation and the systemic remediation of contraventions of PHIPA.

[57] I recognize that the Commissioner has, in the past, taken up individual complaints and made orders that could form the basis for a s. 65 claim for damages. However, those cases appear to be the exception rather than the rule.

[58] It is, of course, for this court, not the Commissioner, to decide the legal issue on this appeal. Nonetheless, I do not think that we can or should ignore the clear indication from the Commissioner as to how he intends to exercise the discretion conferred by the statute.

[59] It appears entirely likely that many individual complaints that could give rise to a proper claim in common law will not result in an order from the Commissioner. Where a complaint does not raise systemic issues or where any

systemic issues have been addressed to the satisfaction of the Commissioner, he may decline to conduct a review or decline to make an order that could form the basis for a claim for damages. Even if the Commissioner investigates a complaint, his primary objective in achieving an appropriate resolution will not be to provide an individual remedy to the complainant, but rather to address systemic issues.

[60] The broad discretion conferred on the Commissioner by PHIPA means that complainants would face an expensive and uphill fight on any judicial review challenging a decision not to review or proceed with an individual complaint.

[61] It was suggested in oral argument that an individual complainant could always ask the Attorney General to launch a prosecution pursuant to s. 72 and then use the conviction as a basis for claiming damages under s. 65(2). I am not persuaded that this argument alleviates the problem. First, it would subject the individual complainant to yet another discretionary hurdle. Second, it is hardly a persuasive argument supporting the exclusivity of the PHIPA process to say that individuals can obtain redress by resorting to the courts by way of a prosecution.

(d) Intention to create an exhaustive code: Conclusion

[62] For these reasons I am unable to agree with the contention that we should imply a legislative intention to confer exclusive jurisdiction on the Commissioner to resolve all disputes over misuse of personal health information.

(ii) Authorities relied on by the appellants

[63] The appellants rely on three discrete lines of authority in support of their argument that PHIPA creates a comprehensive code that ousts the jurisdiction of courts from hearing common law breach of privacy claims. For the reasons that follow, I conclude that these cases are distinguishable and do not alter my conclusion that the legislature did not intend for PHIPA to constitute an exhaustive code.

[64] First, the appellants invoke *Seneca College v. Bhadauria*, [1981] 2 S.C.R. 181, where the Supreme Court of Canada held that the *Ontario Human Rights Code*, R.S.O. 1970, c. 318 ("the *Code*"), constituted a comprehensive statutory scheme, precluding the recognition of a civil action for discrimination based on either the common law or a breach of the *Code*. Though there are some similarities between PHIPA and the *Code* considered in *Bhadauria* – for instance, both statutes gave the overseeing administrative body the discretion not to hear a complaint – the two schemes are distinguishable.

[65] The most telling difference is that PHIPA explicitly contemplates the possibility of other proceedings in relation to claims arising from the improper use or disclosure of personal health information. There was no such statutory language in the *Code*. Further, unlike the *Code*, PHIPA does not allow the

Commissioner to award damages, and instead requires individuals to bring an action in Superior Court to seek compensation for any harm caused. This undermines the argument that the legislature intended to exclude courts from resolving disputes governed by PHIPA. Finally, though both schemes vest the overseeing administrative body with discretion, there was no indication in *Bhadauria* that this discretion would be exercised in a routine manner that would impede dealing with individual complaints. Indeed, it is difficult to fathom how a body enforcing human rights legislation could legitimately take such a position given the inherently individual nature of the human rights context. That is quite different from the position taken before us by the Commissioner, who has interpreted his discretion as enabling him to prioritize systemic issues.

[66] Second, the appellants rely on two cases from the labour relations context, *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, and *Vaughan v. Canada*, 2005 SCC 11, [2005] 1 S.C.R. 146. In *Weber*, the Supreme Court considered a provision in the *Labour Relations Act*, R.S.O. 1990, c. L.2 which required all collective agreements to provide for final and binding arbitration of any dispute between the parties arising from the agreement. The majority held that this provision conferred exclusive jurisdiction on labour tribunals to deal with such disputes.

[67] In *Vaughan*, a federal government employee sued the Crown over its failure to pay him an early retirement benefit to which he was entitled under the

Public Service Staff Relations Act, R.S.C. 1985, c. P-35. This statute established a grievance mechanism to resolve any related disputes and vested the final decision with the Deputy Minister. Writing for the majority, Binnie J. accepted that the language in the legislation was not strong enough to oust the jurisdiction of courts to entertain the claim, but held that they should nonetheless defer to the grievance procedure, which provided an adequate and expeditious remedy.

[68] Counsel for Ms. Edgerton-Reid concedes that *Weber* does not apply and that PHIPA does not oust the jurisdiction of the courts, but he urges us to adopt the approach taken in *Vaughan* and hold that the courts should decline to exercise jurisdiction.

[69] In my view, both *Weber* and *Vaughan* are distinguishable. Labour grievances and arbitrations represent an accessible mechanism for comprehensive and efficient dispute resolution, and consequently form an important cornerstone of labour relations. By contrast, the complaints procedure under PHIPA is not tailored to deal with individual complaints. Its invocation depends upon the Commissioner's discretion, and he has made it clear that he gives priority to systemic issues. To obtain damages under PHIPA, an individual is required to wait for an order of the Commissioner or a conviction, and then launch a court action. Importantly, PHIPA contains no language comparable to the mandatory arbitration provision in the *Labour Relations Act*, but rather expressly contemplates other proceedings.

[70] Third, the appellants reference decisions from other jurisdictions – namely, British Columbia and Alberta – where courts have held that privacy statutes occupy the field and preclude resort to common law remedies: See *Mohl v. University of British Columbia*, 2009 BCCA 249, 271 B.C.A.C. 211; *Facilities Subsector Bargaining Association v. British Columbia Nurses' Union,* 2009 BCSC 1562.

[71] In my view, these decisions do not assist the appellants. The provincial privacy legislation in British Columbia and Alberta establishes a statutory cause of action for breach of privacy. As described in *Jones v. Tsige*, at para. 54, courts in these jurisdictions are left to define the contours of the statutory right to privacy within the parameters of that legislation. In contrast, there is no general statutory cause of action for breach of privacy in Ontario. The respondent's claim is not based upon a breach of PHIPA, but on a distinct common law tort. The wrong contemplated by the common law tort of intrusion upon seclusion differs in its essential character from a claim that a statutory provision has been breached.

[72] Other cases cited by the appellants, including *Macaraeg v. E Care Contact Centers Ltd.*, 2008 BCCA 182, 255 B.C.A.C. 126, *Martin v. General Teamsters, Local Union No. 362*, 2011 ABQB 412, and *Beiko*, are distinguishable on the same grounds. In each of these cases, the plaintiffs' claims depended on an underlying benefit or obligation conferred by a statute. The statutes at issue provided for specific complaint procedures, which had not been followed.

Therefore, the plaintiffs were precluded from pursuing a common law remedy at first instance. As the respondent in this case does not need to rely on PHIPA to prove her claim, these decisions are not applicable to the issue at hand.

CONCLUSION

[73] For these reasons, I conclude that the language of PHIPA does not imply a legislative intention to create an exhaustive code in relation to personal health information. PHIPA expressly contemplates other proceedings in relation to personal health information. PHIPA's highly discretionary review procedure is tailored to deal with systemic issues rather than individual complaints. Given the nature of the elements of the common law action, I do not agree that allowing individuals to pursue common law claims conflicts with or would undermine the scheme established by PHIPA, nor am I satisfied that the review procedure established by PHIPA ensures that individuals who complain about their privacy in personal health information will have effective redress. There is no basis to exclude the jurisdiction of the Superior Court from entertaining a common law claim for breach of privacy and, given the absence of an effective dispute resolution procedure, there is no merit to the suggestion that the court should decline to exercise its jurisdiction.

[74] Accordingly, I would dismiss the appeal. The respondent is entitled to her costs of the appeal, fixed in the amount agreed to by the parties, namely, $24,000, inclusive of disbursements and taxes.

Released: “R.J.S.” February 18, 2015

“Robert J. Sharpe J.A.”
“I agree K. van Rensburg J.A.”
“I agree G. Pardu J.A.”