COURT OF APPEAL FOR ONTARIO

CITATION: Ontario Medical Association v. (Ontario) Information and Privacy Commissioner, 2018 ONCA 673
DATE: 20180803
DOCKET: C64567, C64568 & C64569

Hoy A.C.J.O., Rouleau and Benotto JJ.A.

BETWEEN

C64567

Ontario Medical Association

Applicant (Appellant)

and

Information and Privacy Commissioner for Ontario, The Honourable Eric Hoskins, Minister of Health and Long-Term Care, The Ministry of Health and Long-term Care and Theresa Boyle

Respondents (Respondents)

AND BETWEEN

C64568

Several Physicians Affected Directly By the Order

Applicants (Appellants)

and

Information and Privacy Commissioner for Ontario, The Honourable Eric Hoskins, Minister of Health and Long-Term Care, The Ministry of Health and Long-term Care and Theresa Boyle

Respondents (Respondents)

AND BETWEEN

C64569

Affected Third Party Doctors

Applicants (Appellants)

and

Theresa Boyle (Requestor), Information and Privacy Commissioner of Ontario, The Honourable Eric Hoskins, Minister of Health and Long-Term Care, (Respondent Head), Ministry of Health and Long-term Care (Institution)

Respondents (Respondents)

Joseph Colangelo and Jennifer Gold, for the Ontario Medical Association

Chris Dockrill, for Several Physicians Affected Directly By the Order

Linda Galessiere, for Affected Third Party Doctors

Paul Schabas, Iris Fischer and Skye Sepp, for Theresa Boyle

Heather Burnett, for the Minister of Health and Long-Term Care

William Challis, for the Information and Privacy Commission of Ontario

Heard: June 12, 2018

On appeal from the orders of the Divisional Court (Justices Frances P. Kiteley, Ian V.B. Nordheimer and David L. Edwards), dated June 30, 2017, with reasons reported at 2017 ONSC 4090, affirming an order of the Information and Privacy Commissioner of Ontario, dated June 1, 2016, with reasons reported at [2016] O.I.P.C. No. 99.

REASONS FOR DECISION

Overview

[1] A reporter for the Toronto Star requested access to information from the Ministry of Health and Long-Term Care (the "Ministry") pursuant to the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 (the "Act"). She sought access to the names of the top 100 physician billers to the Ontario Health Insurance Program ("OHIP") for the 2008 to 2012 fiscal years and a breakdown of the physicians' medical specialties and the dollar amounts billed.

[2] An adjudicator assigned by the Information and Privacy Commissioner (the "IPCO" and the "Adjudicator") directed the Ministry to disclose the physicians' names, the amounts billed and the physicians' fields of specialization, if applicable. The Divisional Court upheld the Adjudicator's order on judicial review.

[3] The Ontario Medical Association ("OMA") and two groups of physicians now appeal. They argue that a physician's name is "personal information" and thereby exempt from disclosure by s. 21(1) of the Act.

[4] Section 21(1) states, in part: "A head shall refuse to disclose personal information to any person other than the individual to whom the information relates" (emphasis added). Section 21(1)(f) of the Act permits disclosure of personal information "if the disclosure does not constitute an unjustified invasion of personal privacy."

[5] Section 2(1) of the Act defines "personal information" as follows:

> 2 (1) In this Act,
>
> "personal information" means recorded information about an identifiable individual, including,
>
> > (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
> >
> > ...
> >
> > (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;
>
> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

Decisions Below

[6] The Adjudicator determined that the requested information did not constitute "personal information" within the meaning of s. 2(1) and, therefore, the s. 21(1) exemption from disclosure did not apply.

[7] In analyzing whether the records at issue constituted personal information, the Adjudicator applied the two-step test set out in *Order PO-2225; Ontario (Rental Housing Tribunal)*, [2004] O.I.P.C. No. 8:

> (1) In what context do the names of the individuals appear?

> (2) Is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual?

[8] At the first step, the Adjudicator determined that the context was the provision of medical services. He concluded that this was a professional or business activity because submitting bills to OHIP, and receiving payment, occurred in a context removed from the personal sphere.

[9] At the second step, the Adjudicator concluded that the information did not reveal something of a personal nature about the physicians. He emphasized that the payments received were in relation to a business or profession and the amounts billed and received do not reflect actual personal income.

[10] The Divisional Court determined that the Adjudicator's decision was reasonable and dismissed the application for judicial review.

Analysis

[11] On appeal to this court, the appellants agree that the standard of review is reasonableness and that it was appropriate for the Adjudicator to apply the two-step test from *Ontario (Rental Housing Tribunal)*.

[12] They submit, as they did before the Divisional Court, that the Adjudicator's application of the two-step test was unreasonable because: (i) he departed from long-standing IPCO decisions concluding that physicians' names are personal information and therefore did not apply *stare decisis*; (ii) he failed to consider a

report the Honourable Peter deC. Cory prepared for the Minister of Health and Long-Term Care in 2005 (the "Cory Report"), which resulted in amendments to the *Health Insurance Act*, R.S.O. 1990, c. H.6; (iii) he failed to consider *Charter* values; and (iv) the presumption of prejudice in s. 21(3) of the Act makes it clear that disclosure of a name in conjunction with an individual's finances is prohibited.

[13] We do not accept these submissions.

[14] We agree with the Divisional Court's conclusion that the Adjudicator was not bound by the principle of *stare decisis.* As Iacobucci J. explained in *Weber v. Ontario Hydro,* [1995] 2 S.C.R. 929, at para. 14:

> Courts must decide cases according to the law and are bound by *stare decisis*. By contrast, tribunals are not so constrained. When acting within their jurisdiction, they may solve the conflict before them in the way judged to be most appropriate.

[15] We also agree with the Divisional Court that the Adjudicator did not ignore the prior IPCO decisions. He made specific reference to these earlier decisions and observed that there was a split in the IPCO's jurisprudence. His decision addressed this dichotomy.

[16] We reject the appellants' argument that this court's decision in *Ontario (Attorney General) v. Pascoe* (2002), 166 O.A.C. 88 (C.A.) stands for the proposition that a physician's identity cannot be disclosed. In that case, the IPCO was not satisfied that information as to the top ten items billed by the highest paid

general/family practitioner in Toronto was "personal information". The Divisional Court and this court agreed that the IPCO's decision was reasonable.

[17] The appellants submit it is implicit in the courts' decisions that had the physicians' names been requested, this would have constituted personal information. We do not agree. The particular information at issue in *Pascoe* was different from the information sought in this case. The courts' analyses are therefore inapplicable.

[18] The appellants raised the Cory Report for the first time on appeal to the Divisional Court. It was not provided to the Adjudicator, nor argued before him. We agree with the Divisional Court that it is therefore difficult to criticize the Adjudicator for not referring to or relying on it. In any event, the Cory Report dealt with audits of physicians' billings. That issue is not raised in this appeal, nor does it assist in this appeal's determination.

[19] The appellants further rely on the Adjudicator's failure to consider *Charter* values. They argue that the protection of privacy is a fundamental value and the disclosure of physicians' names would be inconsistent with this privacy value.

[20] As the Supreme Court made clear in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 62, when interpreting a statute, *Charter* values are only considered in circumstances of "genuine ambiguity". Far from being ambiguous, the purposes of the Act are clearly set out in s. 1:

> 1. The purposes of this Act are,
>
> > (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
> >
> > > (i) information should be available to the public,
> > >
> > > (ii) necessary exemptions from the right of access should be limited and specific, and
> > >
> > > (iii) decisions on the disclosure of government information should be reviewed independently of government; and
> >
> > (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

[21] The balancing of access to information against the protection of individuals' privacy with respect to personal information is therefore already built into the Act.

[22] Lastly, the appellants submit that the Adjudicator erred by failing to implement the presumption in s. 21(3)(f) that information about a person's finances is private. That section provides:

> Presumed invasion of privacy
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness.

[23] Essentially, the appellants argue that, while s. 21(3) only applies to "personal information" as defined in s. 2(1), it informs the interpretation of "personal information" and the Adjudicator erred by failing to have regard to it. They submit that the billing information sought describes a physician's finances or income and, because s. 21(3)(f) provides that disclosure of such information is presumptively an unjustified invasion of personal privacy, the only reasonable interpretation is that the billing information is "personal information" as defined in s. 2(1). They say that it is of no moment that the billing information reflects the gross revenue of the physician's practice, and not the physician's actual, personal income.

[24] We do not agree.

[25] The Adjudicator applied the second step of the test from *Ontario (Rental Housing Tribunal)* which involves looking to the nature of the information to determine if it would "reveal something of a personal nature about the individual". The information sought was the affected physicians' gross revenue before allowable business expenses such as office, personnel, lab equipment, facility and hospital expenses. The evidence before the Adjudicator indicated, however, that, in the case of these 100 top billing physicians, those expenses were variable and considerable. As a result, applying the second part of the *Ontario (Rental Housing Tribunal)* test, the Adjudicator concluded that disclosure of this billing information would not reveal something of a personal nature about the physician and was therefore not personal information.

[26] In our view, where, as here, an individual's gross professional or business income is not a reliable indicator of the individual's actual personal finances or income, it is reasonable to conclude not only that the billing information is not personal information as per s. 2(1), but also that it does not describe "an individual's finances [or] income", for the purpose of s. 21(3)(f). As a result, we are not persuaded that s. 21(3)(f) demonstrates that the Adjudicator erred in concluding that the billing information was not personal information.

Conclusion

[27] For these reasons, the appeal is dismissed with costs of $25,000.00 all-inclusive to the respondents in accordance with the agreement between the parties.

Alexander Ne A'SO

Paul Rowlands JA

M. L. Benotto J.A.