Federal Court Cour fédérale

Date: 20240501

Docket: T-603-23

Citation: 2024 FC 667

2024 FC 667 (CanLII)

Ottawa, Ontario, May 1, 2024

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

JOHN PARKER
VIKAS AGARWAL
RICHARD DAVIES

Applicants

and

ONTARIO MEDICAL ASSOCIATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Dr. John Parker, Dr. Vikas Agarwal and Dr. Richard Davies [collectively the Applicants] are specialist physicians in the Province of Ontario. They are members of the Ontario Specialists Association [OSA]. They are also members of the Ontario Medical Association [OMA], the Respondent in this proceeding.

[2] The Applicants have brought an application for judicial review under s 14 of the *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 [PIPEDA] concerning a study commissioned by the OMA regarding the overhead expenses incurred by physicians. The OMA commissioned the study to support negotiations with the Province regarding physicians' financial compensation.

[3] On March 29, 2022, the Office of the Privacy Commissioner of Canada [OPC] dismissed a complaint by the OSA regarding the proposed study. The OPC concluded that the study would not constitute "commercial activity" within the meaning of the PIPEDA, and was therefore beyond the scope of the legislation.

[4] The OMA's disclosure of physicians' personal information to Statistics Canada [StatCan] for the purposes of the proposed study will not involve the "exchange, trade, buying and selling" of anything. The physicians who bill for their services may ultimately engage in commercial activity within the meaning of the PIPEDA, but the OMA itself will derive no profit or financial benefit from the proposed study or its negotiations with the government.

[5] The proposed study is therefore not "commercial activity" within the meaning of the PIPEDA, and the legislation does not apply. The application for judicial review is dismissed.

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II. Background

[6] The OMA is a not-for-profit corporation recognized by statute: *Ontario Medical Association Dues Act*, *1991*, SO 1991, c 51. It is the exclusive representative of Ontario physicians to advocate before the Minister of Health and Long-Term Care [Minister] for physicians' professional and personal well-being. The OMA represents approximately 43,000 physicians, medical students, and retired physicians in Ontario.

[7] The OMA's advocacy on behalf of physicians is funded by dues paid by its members. It does not receive funding from the government or corporate interests.

[8] The OMA's advocacy includes negotiating compensation and billing arrangements with the Minister, specifically the Physician Services Agreement [PSA], which sets billing rates for healthcare services across the Province. The PSA is renegotiated approximately every three years. One of the considerations that informs the negotiations is the objective of "income relativity". Income relativity is intended to ensure equality in physician net pay for similar work.

[9] The most recent negotiations did not result in an agreement, and the matter was referred to arbitration. A panel of arbitrators was appointed, chaired by William Kaplan [Kaplan Panel]. The Kaplan Panel was asked by the OMA and the Minister to consider, *inter alia*:

- Economic indicators that the arbitration board considers relevant, including, but not limited to, the costs of physician practice;
- Evidence-based relativity and appropriateness considerations.

[10] The Kaplan Panel issued its award on February 18, 2019, and made the following observation about the difficulty of ascertaining overhead costs:

> Parenthetically, the matter of overhead costs is of concern given the delta between the Ministry and OMA estimates. On the one hand, the Ministry's methodology raises concerns, but there are also flaws in the results relied on by the OMA (they are largely self-reported and some of the underlying assumptions raise more questions than answers among other issues). We believe the parties must jointly, collaboratively and comprehensively address this issue prior to their next PSA. An objective and professional study could actually determine what overhead costs were in different practice models and specialties.

[11] In November 2019, the OMA announced its intention to commission a study into physicians' overhead costs. The data would be drawn by StatCan from the taxation records of OMA members, as well as their professional corporations, cost associations or partnerships, held by the Canada Revenue Agency [CRA]. The personal information disclosed by the OMA to StatCan would comprise first name, last name, date of birth, gender, primary address, and physician speciality.

[12] Despite opposition from the OSA and others, in November 2020 the OMA's Governing Council voted 159 to 12 in favour of proceeding with the study.

[13] Prior to the vote, the OMA conferred with the OPC regarding the proposed study. On June 4, 2020, the OPC informed the OMA that it would take no action regarding the study, because the personal information would be used for "statistical, or scholarly study or research, for purposes that cannot be achieved without its use" (PIPEDA, s 7(2)(c)).

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[14] The OMA also conferred with the University of Toronto Research Ethics Board, which expressed its support of the proposed study.

III. Determination of the Office of the Privacy Commissioner

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[15] On October 30, 2020, the OSA filed a complaint with the OPC alleging that the OMA's proposed study would contravene s 6.1 and Principle 4.3 of the PIPEDA. On March 29, 2022, the OPC determined that it lacked jurisdiction over the complaint:

> It is our understanding that the OMA is a not-for-profit organization whose mission is to advocate on behalf of Ontario physicians, including through negotiations for physician compensation with the MOH. Our Office does not typically consider non-profit and/or advocacy organizations to be engaged in commercial activities. While not-for-profit organizations are not exempt from the operation of PIPEDA, the absence of a profit motive is a factor to consider when assessing whether any particular activity undertaken by such an organization has a commercial character. There is no evidence to suggest that the OMA profits from negotiations with the MOH. While we understand that the OMA does have for-profit subsidiaries, there is no evidence to suggest a link between the subsidiaries and the activity in question so as to render it commercial in nature under the Act.
>
> The OMA's advocacy activities are wholly funded through membership fees, which Ontario physicians are required by law to pay to the OMA, and it does not receive "funding from either the government or corporate interests." As indicated by the Ontario Superior Court in *Rodgers v. Calvert*, the payment of membership fees in exchange for the benefit of membership is not in itself an indication that an organization is engaged in commercial activities.
>
> Further, there is no evidence to suggest that the OMA sold, bartered or leased its membership list (or associated information) to make a profit when it disclosed personal information to StatCan. The objective of the use and disclosure of personal information to StatCan was so it could link the information to tax information in its data holdings to produce anonymized and aggregated data for

> the purposes of determining overhead expenses for different practice models and specialties. That objective was underscored by a recommendation from an arbitration panel to undertake the study in order to advance negotiations with the MOH.
>
> In light of all of the above, in the specific context of the activity in question in this case, we find that OMA was not engaged in commercial activity and our Office does not have jurisdiction to investigate this matter. We will, therefore, take no further action on the complaint.
>
> [Footnotes omitted.]

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IV. Issue

[16] The fundamental issue raised by this application for judicial review is whether the OMA's proposed study constitutes "commercial activity" for the purposes of the PIPEDA.

V. Analysis

[17] Applications under s 14(1) of PIPEDA are determined *de novo*. No deference is owed to the OPC's prior determination of the issues (*Barrett v Royal Bank of Canada*, 2022 FC 1534 at para 36).

[18] Paragraph 4(1)(a) of the PIPEDA provides as follows:

This Part applies to every organization in respect of personal information that	La présente partie s'applique à toute organisation à l'égard des renseignements personnels :
(a) the organization collects, uses or discloses in the course of commercial activities;	a) soit qu'elle recueille, utilise ou communique dans le cadre d'activités commerciales;

[19] “Personal information” is defined in s 2(1) of the PIPEDA as “information about an identifiable individual”. Its scope is “very far reaching” (*Wyndowe v Rousseau*, 2008 FCA 39 [*Wyndowe*] at para 40).

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[20] There can be no serious question that the information the OMA proposes to disclose to StatCan about its members is “personal information” within the meaning of the PIPEDA. As Justice Frederick Gibson held in *Gordon v Canada (Health)*, 2008 FC 258 (at para 34):

> Information will be about an identifiable individual where there is a serious possibility that an individual could be identified through the use of that information, alone or in combination with other available information.

[21] Here, the information the OMA wishes to disclose to StatCan is intended to permit the identification of its members. It includes members’ names, dates of birth, gender, primary address, and area of speciality. The OMA argues that, with the exception of a physician’s speciality, StatCan already has access to this information from the CRA. But the fact remains that the OMA intends to disclose its members’ personal information to StatCan for the purpose of the study. This is necessary for StatCan to match the names of the OMA’s members with corresponding tax records held by the CRA.

[22] It is less clear whether the anonymized data that StatCan will prepare regarding physicians’ overhead costs will also constitute “personal information” for the purposes of the PIPEDA, but it is unnecessary to decide this question in the present application. The OMA’s disclosure of physicians’ personal information to StatCan is sufficient to potentially attract the protection of the PIPEDA.

[23] “Commercial activity” is defined in s 2(1) of the PIPEDA as follows:

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.*

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[24] Negotiations regarding the PSA implicate the Minister’s exercise of provincial jurisdiction over property and civil rights, because they concern physicians’ compensation for provincially-funded health services. As Associate Chief Justice Jocelyne Gagné explained in *Reference re Subsection 18.3(1) of the Federal Courts Act*, 2021 FC 723 [*Reference re Google*], aff’d, 2023 FCA 200 (at para 47):

> […] PIPEDA’s privacy protections were created within a regulatory scheme relying on the federal “general trade and commerce” power. Provincial legislatures may exclusively make laws in relation to property and civil rights, pursuant to section 92 of the *Constitution Act* […]. The requirement that PIPEDA only apply to commercial activity is therefore a critical constitutional guardrail. That is why subsection 4(1) specifically excludes non-commercial activities, provincially regulated workplaces and other entities beyond the reach of federal regulation. As held in *State Farm*, at paragraph 40, under PIPEDA, “personal information is regulated only insofar as it relates to how the Canadian economy functions and operates.”

[25] Only information an organization collects because it has a commercial need for it is captured by the PIPEDA (*Johnson v Bell Canada (FC)*, 2008 FC 1086 at para 33). The primary characterization of the activity is the dominant factor in assessing its commercial character, not

the incidental relationship between the one who seeks to carry out the activity and third parties (*State Farm Mutual Automobile Insurance Company v Privacy Commissioner of Canada*, 2010 FC 736 at para 106).

[26] In *3510395 Canada Inc v Canada (Attorney General)*, 2020 FCA 103, the Federal Court of Appeal held in the context of anti-spam legislation that “commercial activity” should be assessed from the perspective of the average person, *i.e.*, whether an average person would consider the activity to involve “exchange, trade, buying and selling” (at paras 140-141). This approach may also be applied to the PIPEDA (Timothy M. Banks, *The Privacy Officer’s Guide to Personal Information Protection and Electronic Documents Act*, 2022 Ed., chapter 1(B)(1) at paras 3-4).

[27] According to the OMA, an average person would not perceive the proposed study as involving the “exchange, trade, buying and selling” of anything. Neither the OMA nor StatCan will derive any profit or financial benefit. The OMA maintains that the study is “at least five degrees of separation away from anything commercial”:

(a) the OMA discloses limited personal information of its members to StatCan;

(b) StatCan conducts the study using the data received from the OMA as well as tax information obtained from the CRA;

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(c) StatCan provides the OMA with aggregated, anonymized data regarding physicians’ overhead costs;

(d) the OMA and the Minister may make use of the data in negotiating the PSA;

(e) physicians deliver healthcare services to Ontario residents and bill the government for their services; and

(f) physicians receive payment for those services from the government in accordance with the rates stipulated in the PSA.

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[28] The Applicants rely on *Wyndowe*, in which the Federal Court of Appeal found that a doctor’s performance of a medical examination of an insured person at the insurer’s request did not defeat the commercial nature of the overall transaction (at para 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 [independent medical examination].

[29] The Applicants argue that the proposed study is merely a step in a broader commercial transaction. The transaction begins with the physicians' payment of dues to the OMA, and ends with the negotiation of a PSA that permits physicians to be paid by the government for the provision of health services.

[30] As the OPC noted in its rejection of the complaint submitted by the OSA, the payment of dues to an association, without more, is not commercial in nature (citing *Rodgers v Calvert*, 2004 CanLII 22082 (ON SC) at paras 51-55). The OMA's disclosure of physicians' personal information to StatCan for the purposes of the proposed study will not involve the "exchange, trade, buying and selling" of anything. The physicians who bill for their services under the PSA may ultimately engage in commercial activity within the meaning of the PIPEDA, but the OMA itself will derive no profit or financial benefit from the proposed study or the negotiation of the PSA. *Wyndowe* is therefore distinguishable.

[31] The Applicants also rely on *Legal Aid Society of Alberta (Re)*, 2013 CanLII 6291 (AB OIPC) [*Legal Aid*]. In that case, the Alberta Office of the Information and Privacy Commissioner [AB OIPC] held that, when the Legal Aid Society of Alberta used or disclosed personal information, it did so in connection with a commercial activity. The AB OIPC noted that profit is not determinative or even relevant when deciding whether an organization was carrying out a commercial activity for the purposes of the Alberta legislation. However, the AB OIPC also observed that the organization in question was already a "non-profit" organization, unlike organizations under PIPEDA, which refers to the notion of "commercial activity" to decide whether an organization is subject to that legislation (at para 23).

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[32] The AB OICP continued (*Legal Aid* at para 24):

> […] when – as in this inquiry – an organization collects, uses and/or discloses the personal information of a client in order to establish or possibly establish a relationship with him or her, the organization is not acting on behalf of the client, but rather *vis-à-vis* him or her. To put it differently, the relationship under review in this inquiry is not the one between the Applicant and, for example, a third party being sued or otherwise involved with him in a legal matter. In such a case, it might be argued that the Organization is assisting its client in a domestic or personal matter when it collects, uses and/or discloses the personal information of the third party (or even the client's own personal information) on the client's behalf for the purpose of advancing the legal matter. Here, the question to be answered is not whether opposing parties in a legal matter, along with their lawyers, are engaged in a commercial activity, but whether the Organization is engaged in a commercial activity when it is deciding whether to establish a relationship, or does establish a relationship, with a client who comes to it seeking assistance.

[33] The AB OICP's finding that the Legal Aid Society was acting in a manner akin to a law firm in establishing a commercial relationship was key to the result in *Legal Aid* (at para 34):

> In my view, there is nothing that significantly distinguishes, from an operational or service standpoint, The Legal Aid Society, as the Organization here, from a private law practice or business. It meets with prospective clients and decides whether to provide legal services, which might be performed by a private lawyer engaged by the Organization or by one of its own staff lawyers.

[34] By contrast, the OMA does not act on behalf of the government in receiving or paying physicians' invoices. Nor does it refer patients to physicians for treatment. The proposed study is intended to support negotiations with the government that may ultimately result in a framework that establishes the basis for physicians' future payments. Those payments will be made directly by the government to physicians. The OMA will not act as an intermediary.

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[35] Finally, the Applicants rely on the OPC's report of its findings in *Kluge v Law School Admission Council, PIPEDA Report of Findings #2008-389* [*Kluge*], which concerned the Law School Admission Council [LSAC]'s administration of the Law School Admission Test [LSAT]. The OPC held this constituted commercial activity (*Kluge* at para 40):

> […] By centralizing admissions testing, LSAC operates to alleviate administrative burdens that would otherwise fall to individual law schools that want assessed specific analytical abilities of prospective law students. LSAC members benefit from savings in time, cost and other resources, and the realization of economies of scale that centralized testing permits. The costs of LSAC's activities are offset by the fees it charges to prospective law students who are required by most Canadian law schools to write the LSAT in order to pursue a professional career as a lawyer. The centralized administration of the LSAT by LSAC constitutes a valuable service to the professional schools that are LSAC's members. In the circumstances, I am of the view that LSAC's core activities serve, primarily, the administrative and organizational needs of its members and not educational or other public purposes. […]

[36] *Kluge* is readily distinguishable from the present case, because the LSAC was itself engaged in commercial activity. It was neither an intermediary nor a proxy for a commercial actor, nor did it complete a step in a larger commercial transaction. Where organizations have been found to engage in commercial activity for the purposes of the PIPEDA, this Court has ordinarily found the engagement to be direct (see, for example, *Reference re Google*; *AT v Globe24h.com*, 2017 FC 114).

[37] While the OMA advocates on behalf of physicians for their compensation in a manner that is ultimately to their financial benefit, the proposed study is intended to support negotiations with the government leading to a PSA. I agree with the OMA that this is many degrees removed

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from commercial activity. The purpose of the proposed study is only to provide insight into physicians' overhead costs, and promote greater "income relativity" in the next PSA.

[38] The proposed study is therefore not "commercial activity" within the meaning of the PIPEDA, and the statute does not apply.

[39] In light of this conclusion, it is unnecessary to consider the OMA's alternative arguments that its members' consent is not required before their personal information is disclosed to StatCan pursuant to s 7(2)(c) of the PIPEDA ("statistical, or scholarly study or research, purposes that cannot be achieved without using the information"). Nor is it necessary to consider whether the OMA's members have given implicit consent to the disclosure of their personal information for the purpose of the proposed study.

VI. Conclusion

[40] The application for judicial review is dismissed.

[41] By agreement of the parties, there will be no award of costs.

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JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed without costs.

"Simon Fothergill"
Judge

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FEDERAL COURT

SOLICITORS OF RECORD

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