

**Privacy Legislation May Mandate Production
of Medical Expert's Working Notes**

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Increasingly, Courts are applying privacy legislation to grant a litigant's request to compel production of portions of documents which contain any degree of "personal information." The recent case of *Rousseau v. Wyndowe*¹ demonstrates this trend, and the decreasing role that common law from the pre-PIPEDA² era will play whenever "information about an identifiable individual³" is involved. *Rousseau* demonstrates that the working notes of a medical expert retained by an insurer to see and assess an individual will likely (at least in part) fall into the vast ocean of material which PIPEDA mandates must be produced at the relevant individual's request.

In *Rousseau*, an individual in receipt of long-term disability benefits underwent an Independent Medical Examination (IME) at the request of his insurer. The insurer discontinued benefits after reviewing the IME report, and when the individual requested a copy of the doctor's working notes, the doctor refused. The federal Privacy Commissioner found an ensuing complaint to be valid, and recommended that the doctor release the notes. The doctor continued to refuse production, and the complainant pursued the matter at the Federal Court, as allowed by PIPEDA.⁴

The Federal Court⁵ granted the complainant access to the notes, and in upholding that ruling, the Federal Court of Appeal concluded that the doctor's handwritten notes (made during the IME) constituted "personal information," and were thus specifically producible, regardless of the context in which they were generated. It further ruled that the portions of the notes that contained no personal information could be withheld. The Privacy Commissioner was empowered to determine which portions of the notes were subject to production.

The Court ruled that the Ontario privacy legislation which is specifically aimed at the healthcare sector⁶ does not apply to doctors asked to perform an IME, because those doctors do not qualify as "personal health information custodians" in the way that a

¹ 2008 FCA 39.

² *The Personal Information Protection and Electronic Documents Act*, S.C. 2000, c.5.

³ As "personal information" is defined in PIPEDA.

⁴ As allowed by section 14(1) of PIPEDA, which states: "A complainant may, after receiving the Commissioner's report, apply to the Court for a hearing in respect of any matter in respect of which the complaint was made, or that is referred to in the Commissioner's report"

⁵ *Rousseau v. Wyndowe*, 2006 FC 1312.

⁶ *The Personal Health Information Protection Act, 2004*, S.O. 2004, c.3.

typical physician would in respect of his or her patients. Accordingly, PIPEDA, the federal Act governing the private sector, applied.

Not surprisingly, the Federal Court of Appeal rejected the doctor's contention that the common law should be applied to determine a patient's quest to access his own personal health information, finding instead that more specific privacy legislation existed, and should therefore govern.⁷ The Privacy Commissioner had, in its submissions, also cited case law touching upon claims of litigation privilege over information collected for an insurer-driven IME,⁸ and:

“even stricter case law which holds that an insurer's investigation of a claim for benefits under an insurance policy does not attract litigation privilege, until litigation is anticipated and therefore reports from an insurance adjuster to the insurer, prior to counsel being retained, are not subject to litigation privilege.”⁹

Ultimately, the Court did not need to rest its decision on that body of law.

In coming to its ruling, the Court considered the threshold question of whether the IME was a transaction of a “commercial nature” (a necessary prerequisite for PIPEDA to apply in any given situation). It concluded that a commercial relationship existed on two levels: between the insurer funding the IME and the doctor receiving payment for the service, and between the complainant and his insurance company, based upon the payment of premiums in exchange for a policy of insurance. The Court rejected any notion that a commercial nexus was needed between the patient and the doctor:

“In the context of these two commercial relationships ... 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”

⁷ The doctor had raised an argument (supported by case law) that the common law right of patients to access their medical records arises from a fiduciary relationship between patient and physician; that as a physician retained to conduct an IME, he was not in a treating physician / patient relationship; and that there is therefore no fiduciary relationship between the insured and the insurer's doctor performing an IME. The Court of Appeal was not convinced of this, but found that in any event, “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.” (at paragraph 27).

⁸ Specifically, *Lavers v. Weeks Estate* (1997), 151 Nfld & P.E.I.R. 196 (Nfld. S.C.), *Halteh et al. v. McCoy* (1975), 6 O.R. (2d) 512 (H.C.), *Dwyer et al v. Chu et al.* (1980), 29 O.R. (2d) 156 (H.C.)).

⁹ Quotation taken from paragraph 14 of the Federal Court's decision. Specifically, the Commissioner raised *Breau v. Naddy*, [1995] P.E.I.J. No. 108 (T.D.)) as authority in this regard.

At the Federal Court trial level, the insurer had raised the following PIPEDA provisions, which allow refusals to access requests in limited situations:

9(3) Despite the note¹⁰ that accompanies clause 4.9 of Schedule 1, an organization is not required to give access to personal information only if

(a) the information is protected by solicitor-client privilege;

...

(d) the information was generated in the course of a formal dispute resolution process;

...

The Federal Court held that the exemption in subsection 9(3)(a) did not apply, based upon application of the well-known two-part test for litigation privilege (which asks was “there was a reasonable prospect of litigation at the time of the communication at issue” and whether “litigation was the dominant purpose for the creation of such communication”)¹¹. That element of the ruling was not challenged on Appeal.

The Federal Court also found that subsection 9(3)(d) had no application. It concurred with the Privacy Commissioner, who had submitted that assessing an insurance claim does not amount to a dispute; rather, it had argued:

“A dispute involves two parties who differ with one another in respect of some position or claim and at the time of the examination, Maritime Life had not yet decided to terminate (the) benefits so there was no dispute.”¹²

The matter was ultimately referred back to the Privacy Commissioner, who the Court directed to review the working notes for the purposes of separating the producible from the non-producible portions; only those portions of the notes which contained personal information needed to be produced, and notes revealing the “process of getting to [a]

¹⁰ The note says: “In certain situations, an organization may not be able to provide access to all the personal information it holds about an individual. Exceptions to the access requirement should be limited and specific. The reasons for denying access should be provided to the individual upon request. Exceptions may include information that is prohibitively costly to provide, information that contains references to other individuals, information that cannot be disclosed for legal, security, or commercial proprietary reasons, and information that is subject to solicitor-client or litigation privilege.”

¹¹ At paragraph 12 of its decision, the Federal Court accepted *Commercial Union Assurance Co. plc. v. M.T. Fishing Co.* (1999), 244 N.R. 297 (F.C.A.) as Federal Court authority on this point.

¹² At paragraph 16 of the Federal Court’s decision.

final opinion from the [individual's] initial personal information ..."¹³ belonged to the doctor and did not constitute "personal information."

Implications of *Rousseau* for Insurers

For insurers retaining experts to review coverage matters, the *Rousseau* case illustrates that:

- Privacy legislation likely mandates production of an expert's working notes which include "personal information," about the individual seeking production, but this is likely only if the working notes arise from direct contact with the individual (ie: an IME). If the working notes merely reflect the expert's process of applying information gleaned from other sources (ie: medical records produced as part of litigation), then privacy legislation will not likely apply;
- Privacy legislation will supercede the common law, insofar as it dictates that in the absence of limited exceptions, individuals have a right to access their personal information, regardless of the context in which it was generated;
- Common law will still be relevant in determining if the solicitor-client privilege exception provided in PIPEDA may protect the expert's working notes;
- In provinces (particularly B.C.) with privacy legislation that has been deemed substantially similar to PIPEDA, a "work product" exception may apply to protect working notes from the reaches of privacy legislation. In jurisdictions where PIPEDA applies, no such "work product" exception presently exists.
- It is likely advisable for an insurer to retain an expert separate and apart from the practitioner selected to conduct an IME, and who does not meet directly with the insured to obtain fresh personal information.

In February, 2008, the Supreme Court of Canada heard the matter of *Privacy Commissioner of Canada v. Blood Tribe Department of Health*.¹⁴ The Court's forthcoming decision will have important implications for the continuing encroachment of privacy legislation upon the jealously guarded territory of solicitor-client privilege. Further commentary will undoubtedly follow fast upon the heels of the *Blood Tribe* decision.

¹³ At paragraph 49 of the Appellate decision.

¹⁴ SCC Docket 31755, on appeal from 2006 FCA 334 (decision dated October 18, 2006).