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OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDERS F2005-017 & H2005-001

June 19, 2006

CALGARY HEALTH REGION

Review Number 3353 & H0307

Office URL: http://www.oipc.ab.ca

Summary: The Applicant made an access request to the Calgary Health Region ("CHR") for information pertaining to psychological questionnaires in her daughter's hospital records. The CHR responded to the request under the *Health Information Act* ("HIA"). The CHR refused to provide the records to the Applicant, saying the records contained standardized diagnostic tests or assessments under section 11(1)(e) of HIA.

The Applicant said the CHR improperly applied section 11(1)(e) of HIA to the records. The Applicant also said the CHR failed to respond openly, accurately and completely and thereby breached its duty to assist under section 10(a) of HIA. The CHR then raised section 16 of the *Freedom of Information and Protection of Privacy Act* ("FOIP"), saying disclosure of the records would reveal trade secrets of a third party.

At Inquiry, the issue arose as to whether the Applicant had the authority to exercise the rights or powers of her daughter under section 104(1) of HIA. The authority to exercise the rights or powers of another individual is a jurisdictional issue, so at Inquiry, the Commissioner initially considered whether he had jurisdiction to decide the inquiry issues. The Commissioner requested further written submissions from the parties on the application of section 104(1) and, in particular, on the application of section 104(1)(b) (mature minor) and section 104(1)(c) (guardian of a minor) of HIA in the circumstances of this case.

The Commissioner found that the information at issue was health information and therefore fell under HIA. The Commissioner found there was no evidence the Applicant fell into any of the categories under section 104(1) of HIA, including the guardian of a minor that does not

understand the nature of the right or power and the consequences of exercising the right or power under section 104(1)(c) of HIA. Consequently, the Applicant did not have the authority to exercise the rights or powers conferred on her minor daughter by HIA. Therefore, the Commissioner found he did not have jurisdiction to decide the inquiry issues.

Statutes Cited: *Health Information Act*, R.S.A. 2000, c. H-5, ss. 1(1)(i), 1(1)(k), 2(d), 3(a), 7, 10(a), 11(1)(e), 34, 35(1)(b), 35(1)(c), 35(1)(d), 35(1)(d.1), 35(1)(h), 35(1)(i), 35(1)(m), 35(1)(n), 73(1), 79, 80, 104, 104(1), 104(1)(b), 104(1)(c); *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 4(1)(u), 16, 16(1), 71, 72, 84(1)(a), 84(1)(d); *Interpretation Act*, R.S.A. 2000, c. I-8, s. 10; *Personal Information Protection Act*, S.A. 2003, c. P-6.5, s. 61(1)(b)(c); *Personal Information Protection Act Regulations*, B.C. Reg. 473/2003, s. 2(2); *Personal Health Information Act*, S.M. 1997, c. 51, s. 60(e); *Health Information Protection Act*, S.S. 1999, c. H-0.021, s. 56(3)(4)); *Personal Health Information Protection Act, 2004*, S.O 2004, c. 3, Schedule A, s. 23(3); *Freedom of Information and Protection of Privacy Regulation*, B.C. Reg. 323/93, s. 3(a); *An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*, R.S.Q., c. A-2.1, s. 83; *An Act Respecting the Protection of Personal Information in the Private Sector,* R.S.Q., c. P-39.1, s. 38; *Data Protection Act 1998*, UK 1998, c. 29, ss. 66(1)(2); *Health Records and Information Privacy Act 2002,* No. 71, New South Wales, s. 7; *Health Records (Privacy and Access) Act 1997,* Australian Capital Territory, s. 25, s. 4; *Health Records Act 2001,* Act No. 2/2001, Victoria, s. 85.

Cases Cited: *Bell Express Vu Limited Partnership v. Rex*, 2002 SCC 42 (CanLII), para 27; *Johnston v. Wellesley Hospital,* [1971] 2 O.R. 103, 17 D.L.R. (3d) 139 (Ont. H.C.J.); *Gillick v. West Norfolk and Wisbech Area Health Authority,* [1985] 3 All ER 402 (HL), paras 183, 369,; *C.(J.S.) v. Wren*, [1987] 2 W.W.R. 669, (1986) A.R. 115, [1986] A.J. No. 1166 (AB CA), on appeal from *C. v. Wren,* [1986] A.J. No. 1167 (AB QB), pp. 2-3; *B.H. v. Alberta (Director of Child Welfare*), 2002 AB CA 109 (CanLII) (on appeal from *B.H. v. Alberta (Director of Child Welfare*), 2002 AB QB 371 (CanLII), para 30, on appeal from *(Alberta (Director of Child Welfare) v. H. (B.),* 2002 AB PC 39 (CanLII), leave to appeal to the SCC refused, *B.H. v. Alberta (Director of Child Welfare),* [2002] S.C.C.A. No. 196 (SCC); *C.U. v. McGonigle*, 2003 AB CA 66 (CanLII) (AB CA), para 29, (on appeal from the Court of Queen's Bench [2000] A.J. No. 1067, on appeal from the Provincial Court, April 15, 1999, leave to appeal to the SCC refused, para 29.

Orders Cited: AB: Orders F2004-005 and H2004-001 (paras 46-51, 77-90), Order H2004-005, H2002-004, 2001-026 (para 54), 99-037 (para 31), 98-004 (para 28).

Authorities Cited: *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), pp. 1-2; *Black's Law Dictionary*, 7th ed., 1999, p. 1527; Katherine Barber, Ed., *The Canadian Oxford Dictionary,* 1998, p. 1581; Canadian Medical Association, *Code of Ethics*, updated 2004, 25; College of Physicians and Surgeons of Alberta, *Competency Assessment and Surrogate Decision Making: Responsibilities and Roles of a Physician*, CPSA Guideline, November 2002; Alberta Health and Wellness, *Health Information Act: Guidelines and Practices Manual*, 2001, pp. 29-30; Lord Nathan, *Medical Negligence*, London, 1957, p. 176; Ellen Picard and Gerald Robertson, *Legal Liability of Doctors and Hospitals in Canada*, 3rd ed., 1996, pp. 71-73; Lorne Rozovsky, *The Canadian Law of Consent to Treatment*, 3rd ed., 2003, pp. 8-9.

I. BACKGROUND

[para 1] The Applicant made multiple requests to the Calgary Health Region (the "CHR" or "Custodian" or "Public Body") for information in hospital records. The Applicant made requests for her own hospital records as well as for her daughter's

hospital records. The CHR responded to the Applicant's requests under the *Health Information Act*, R.S.A. 2000, c. H-5 ("HIA") and provided the Applicant with most of her own information and with some of her daughter's information.

[para 2] The request that is before the Inquiry pertains to questionnaires in the Applicant's daughter's hospital records. The Applicant made the request in a letter, dated September 21, 2002, which says:

> I have two more information requests in association with my other requests, that we have already discussed by phone. They are as follows:
> …
> 2. I would like to have copies of all questionnaires that were completed by myself, my ex-husband [name of husband] and my daughter [name of daughter], that were used by Dr. [name of psychologist] in his "Psychological Assessment" of my daughter [name of daughter].

[para 3] The CHR responded to the request by withholding all of the information pertaining to the questionnaires, saying the information contains standardized diagnostic tests and assessments under section 11(1)(e) of HIA. The Applicant requested a review of the CHR's decision and alleged that the CHR failed to respond openly, accurately and completely and breached its duty to assist under section 10(a) of HIA.

[para 4] Mediation was authorized but the parties were unable to reach a resolution. The matter was set down for a written inquiry. The CHR then raised section 16(1) of the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 ("FOIP"), saying disclosure of the information would reveal trade secrets of a third party. Both parties provided written initial submissions and rebuttal submissions.

[para 5] In its written initial submission, the CHR provided a separate submission, which I accepted 'in camera'. The 'in camera' submission consists of (a) an unsevered copy of the daughter's records that have previously been disclosed with some severing (these are *not* the records at issue), and (b) a copy of the daughter's records that have been withheld in their entirety (these *are* the records at issue).

[para 6] The CHR's initial submission included the Affidavit of an Access and Privacy Coordinator and the Affidavits of two Chartered Psychologists. The CHR's rebuttal submission included a further Affidavit. The initial and rebuttal submissions were exchanged between the parties with the exception of the 'in camera' submission, which includes the records at issue.

[para 7] At Inquiry, the issue arose as to whether the Applicant had the authority to exercise the rights or powers of her minor daughter under section 104(1) of HIA. The rights or powers that pertain to the circumstances of this case include the right to make an access request under section 7 of HIA, the right to request review of a custodian's response under section 10(a) and the right to request review of a custodian's decision under section 73(1) of HIA.

[para 8] Consequently, during the Inquiry I asked the parties to provide me with further written submissions in regard to the Applicant's authority to exercise the rights or powers of her daughter under section 104(1) and in particular on the application of section 104(1)(b) (mature minor) and section 104(1)(c) (guardian of a minor) of HIA. Both parties provided further written submissions on that issue.

II. RECORDS AT ISSUE

[para 9] In its initial submission, the CHR provided copies of the severed records that were previously disclosed to the Applicant. The CHR numbered these pages from one to 80. The CHR provided a copy of these records to provide context for the request at issue at the Inquiry. These records were exchanged between the parties as part of the CHR's submission and are *not* at issue in the Inquiry.

[para 10] As part of its initial submission the CHR provided a separate 'in camera' submission containing all responsive information in the daughter's hospital records. The 'in camera' records include a second set of pages numbered one to 80, which are the unsevered records that are *not* at issue. The 'in camera' records also include pages 81 to 186, which *are* the records at issue. These 105 pages were withheld in their entirety. For purposes of the Inquiry, I will refer to pages 81 to 186 as "the records at issue".

[para 11] In its initial submission, the CHR described the records at issue as "completed questionnaires, raw data, scaled scores and narrative analysis of results" and "diagnostic tests, individual raw responses to tests and narratives explaining the results and their meanings." The records at issue pertain to the following types of questionnaires:

- Parent-Child Relationship Inventory (PCRI);
- Behavior Assessment System for Children: Parent Rating Scales – Adolescent (BASC-PRS-A);
- Family Assessment Measure – III: General Scale (Fam III);
- Aggregate Neurobehavioral Student Health and Educational Review – Parent Questionnaire (ANSER);
- Behavior Assessment System for Children: Self Report of Personality – Adolescent (BASC-SRP-A); and
- Millon Adolescent Clinical Inventory (MACI).

III. ISSUES

[para 12] I have added the following preliminary issue to the issues before me at the Inquiry:

A. Does the Applicant have the authority to exercise the rights or powers of her daughter under section 104(1) of HIA?

[para 13] The following issues are also before me at the Inquiry:

B. Did the CHR meet its duty to the Applicant as provided in section 10(a) of HIA (reasonable effort to assist and to respond openly, accurately and completely)?

C. Did the CHR properly apply section 11(1)(e) of HIA (standardized diagnostic tests or assessments) to the records?

D. Does section 16(1) of FOIP (business interests of a third party) apply to the records?

[para 14] When a custodian or a public body refuses to provide an applicant with access to all or part of a record, the custodian or public body has the burden of proof to show that the applicant has no right of access to the record (HIA section 79, FOIP section 71). The exceptions include section 104(1) of HIA where the individual purporting to exercise another individual's rights or powers has the burden and section 16 of FOIP where the third party has the burden of proof.

IV. DISCUSSION OF THE ISSUES

ISSUE A: Does the Applicant have the authority to exercise the rights or powers of her daughter under section 104(1) of HIA?

A. General

[para 15] An applicant must fall within one of the categories in section 104(1) of HIA to have the authority to exercise a right or power conferred on another individual. In this case, I will be considering section 104(1)(b) and section 104(1)(c) of HIA, which say:

> 104(1) Any right or power conferred on an individual by this Act may be exercised
> …..
> (b) if the individual is under 18 years of age and understands the nature of the right or power and the consequences of exercising the right or power, by the individual,
> (c) if the individual is under 18 years of age but does not meet the criterion in clause (b), by the guardian of the individual.

[para 16] The Applicant must meet the criteria of section 104(1)(c) of HIA to have the authority to exercise the rights or powers of her daughter as her minor daughter's guardian. Section 104(1)(c) of HIA requires that the Applicant show that her daughter is under 18 years of age and does not understand the nature of the right or power and the consequences of exercising the right or power. Section 104(1)(b) of HIA otherwise applies to prevent the Applicant from exercising the rights or powers conferred on her daughter by HIA.

B. Argument and Evidence

[para 17] In its further written submission, the CHR said:

> The CHR notes that over 3 years has transpired since the Applicant's first request and as such the Applicant's daughter is now 17 years of age. As such the CHR submits that, if a similar request were made today, the Applicant would not be entitled to exercise power on behalf of her now 17 year old daughter under Section 104(1)(c) of the *Health Information Act*.

[para 18] In her further submission, the Applicant said she and her ex-husband had joint custody of her daughter in a Divorce Judgment and Corollary Relief Order dated January 12, 2000. The Order gave the Applicant day-to-day care and control over her daughter, who was then living with the Applicant, and gave her ex-husband access to her daughter.

[para 19] The Applicant says that in March of 2000 her daughter was referred to Children's Hospital for a mental health assessment. The physician's notes of the referral were dated March 20, 2000 and state:

> Her mother [name of Applicant] has been discussing with me episodes of "rage" in [name of daughter]. Verbal and physical outbursts lasting 4-5 hours and then suddenly resolving with [name of daughter] not disclosing any memory of the episode. These have been occurring for years but have worsened recently with the death of her grandmother.

[para 20] The Applicant says on June 14, 2000, a multidisciplinary team assessment was conducted at Children's Hospital followed by a written psychiatrist report. The Applicant took issue with that report and requested a second opinion, so a further mental health assessment was initiated. In preparation for the further assessment, a psychologist mailed the Applicant questionnaires for completion under a covering letter dated June 30, 2000. The Applicant, the Applicant's ex-husband and the daughter completed the questionnaires. Those questionnaires are now the records at issue.

[para 21] In a letter to the CHR dated September 21, 2002, the Applicant made the request for access to copies of all questionnaires that "were used by Dr. [name of psychologist] in his "Psychological Assessment" of my daughter", which is the subject of the Inquiry.

[para 22] In an October 1, 2002 letter from the Applicant to her ex-husband, the Applicant said, "It is agreed that you will give your consent for yours and [name of daughter's] questionnaires (that were completed for a psychological assessment at Children's Hospital in August 2000)." In a letter dated October 2, 2002, the Applicant's ex-husband gave his "permission" for the release of questionnaires to the Applicant.

[para 23] On December 20, 2002, the court issued a Consent Variation Order that continued the joint custody arrangement but gave the Applicant's ex-husband the day-to-day care and control over the Applicant's daughter. The order established parental

responsibility for matters such as joint payment for medical and dental procedures for their two minor children. In a letter dated September 9, 2003, the Applicant made the request for review of the CHR's decision to refuse access to the records the Applicant requested on September 21, 2002.

[para 24] It is in the above-described milieu that the Applicant requested access to the questionnaires in her daughter's hospital records. I have not previously interpreted sections 104(1)(b) and 104(1)(c) of HIA. In considering whether the Applicant has the authority to exercise her minor daughter's rights or powers under section 104(1)(c) of HIA, I must interpret what is meant by "understands the nature of the right or power and the consequences of exercising the right or power" in section 104(1)(b) of HIA.

C. Approach to Interpretation

[para 25] The "modern principle" has been adopted by the Supreme Court of Canada as the preferred approach to the interpretation of legislation. The "modern principle" says I must read the words in HIA "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), p. 1).

[para 26] Following the "modern principle", I must read the words of the Act as part of the "entire context", which includes the evolving norms found in legislation and common law (*Ibid*., p. 2). In regard to context, I will consider "the surroundings that colour the words" (*Bell Express Vu Limited Partnership v. Rex,* 2002 SCC 42 (CanLII), para 27). I must give the words the "fair large and liberal construction" that best ensures the attainment of its objects (*Interpretation Act*, R.S.A. 2000, c. I-8, s. 10). I have canvassed the "modern principle" in Order F2004-005 and H2004-001 (paras 46-51); there is no need to repeat that discussion here.

Scheme and Objects

[para 27] One of the purposes of HIA is to give individuals the right of access to health information about themselves (section 2(d)). Section 104(1) of HIA prescribes the situations where individuals can exercise their own rights and powers, or alternatively where another person can exercise the rights and powers of the individual. The individual's authority to exercise their own rights or powers is a substantive right that should not be lightly interfered with.

[para 28] Section 104(1)(b) of HIA authorizes individuals who are under 18 years of age and who understand the nature of the right or power and the consequences of exercising the right or power, to exercise their own rights or powers. Where individuals are under 18 years of age but do not understand the nature and consequences of exercising their own rights or powers, section 104(1)(c) of HIA authorizes the guardian of the minor to exercise the individual's rights or powers.

Intention of the Legislature

[para 29] Applying the "modern principle" of statutory interpretation, I must consider the intention of the Legislature. Although I have no direct evidence before me as to the intention of the Legislature, a manual published by the Ministry of Alberta Health and Wellness says:

> *By a Mature Minor (Section 104(1)(b))*
> If the individual is under 18 years of age, and understands the nature of the right or power and the consequences of exercising the right or power, he or she may exercise that right or power. Even children younger than 12 years may be capable of understanding and making personal decisions or choices.
>
> This provision leaves discretion in the hands of the custodian. … some factors to consider when deciding if a youth might emotionally and intellectually have the capacity to give consent are: maturity; economic status (i.e., self-supporting or not); living arrangements; mental state; risk assessment; and the complexity and intrusiveness of the treatment situation and treatment modality.
>
> Similar factors might be helpful in determining whether a youth has the capacity to exercise the right of access to his/her own health information. The fact that a 14 year old girl seeks health care on her own may lead a custodian to believe that the girl might be considered a mature minor. The opinions and views of the minor are just one of the facts that must be taken into account in making a decision about who may exercise access rights. The custodian will also have to consider the context of each request to determine whether the right of access may be exercised by the minor or by a guardian (Alberta Health and Wellness, *Health Information Act: Guidelines and Practices Manual*, 2001, pp. 29-30).

Grammatical and Ordinary Sense

[para 30] Applying the "modern principle" of statutory interpretation, I must read the words in HIA in their grammatical and ordinary sense. The key word in sections 104(1)(b) and 104(1)(c) of HIA is "understand", which has been defined as follows:

> Understand (verb) - To apprehend the meaning of; to know <the testator did not understand what he was signing>; …..
>
> Understanding (noun) – The process of comprehending; the act of a person who understands something (*Black's Law Dictionary*, 7th ed., 1999, p. 1527).

[para 31] *The Canadian Oxford Dictionary* says that "understand" means:

> Understand (verb) – Perceive the meaning of (words, a person, etc.); perceive the significance, explanation, or cause (Katherine Barber, Ed., *The Canadian Oxford Dictionary*, 1998, p. 1581).

[para 32] The Canadian Medical Association Code of Ethics (Updated 2004) says:

> 25. Recognize the need to balance the developing competency of minors and the role of families in medical decision-making. Respect the autonomy of those minors who are authorized to consent to treatment.

[para 33] In regard to the assessment of the individual's ability to understand, the College of Physicians and Surgeons of Alberta ("CPSA") says:

> Competency is the mental ability to understand the nature and consequences of a decision in one or more areas of life under consideration, such as financial management or health care decisions.
> The focus is a process standard, assessing the patient's exercise of particular decision-making abilities, not the decision's content. The determination should be time limited and reassessed periodically.
> The physician should make task-specific assessments of risk, doing so objectively, openly and fairly. The key element is the patient's ability to make and execute choices. There may need to be collateral information from other professionals, family, or co-workers (College of Physicians and Surgeons of Alberta, *Competency Assessment and Surrogate Decision Making: Responsibilities and Roles of a Physician*, CPSA Guideline, November 2002).

Entire Context (Evolving Legal Norms)

[para 34] Applying the "modern principle" of statutory interpretation, I must consider the evolving legal norms. In so doing, I will consider some of the leading legal authorities, court decisions, administrative law decisions and legislation.

Legal Authorities

[para 35] Legal authorities have discussed the common law and the factors to consider when determining whether minor individuals understand the nature and consequences of exercising their own rights or powers. However, both the legal authorities and the courts to date have focused on the issue of consent to treatment rather than on rights that pertain to health information. Notwithstanding this difference in the object of the exercise of the right or power, parallels do exist in the factors to be considered when determining whether an individual has the requisite level of understanding to be a mature minor.

[para 36] Lord Nathan has described the evolving right of minors to consent to medical treatment, as follows:

> It is suggested that the most satisfactory solution of the problem is to rule that an infant who is capable of appreciating fully the nature and consequences of a particular operation or of a particular treatment can give an effective consent thereto, and in such cases the consent of the guardian is unnecessary; but where the infant is without that capacity, any apparent consent by him or her will be a nullity, the sole right to consent being vested in the guardian (Lord Nathan, *Medical Negligence*, London, 1957, p. 176).

[para 37] Canadian courts have adopted Lord Nathan's view. For example, the above statement was quoted with favor in *Johnston v. Wellesley Hospital*, [1971] 2 O.R. 103, 17 D.L.R. (3d) 139 (Ont. H.C.J.); that court found the minor was capable of understanding the nature and consequences of the surgical operation and therefore capable of consenting the medical treatment.

[para 38] Justice Ellen Picard and Gerald Robertson described the common law and the approach to be taken when determining whether a minor can consent to treatment, as follows:

> Some provinces have a statutory age of consent to medical treatment. …In those provinces that do not have legislation, the issue is governed by the common law. Despite some uncertainty in the past, Canadian law is now fairly clear. …It is evident from these cases that the test of capacity is a highly functional one, and its application will vary from child to child and from procedure to procedure. For example, a 12-year-old may have capacity to consent to relatively minor medical procedures but not to more complex ones. Likewise, one 12-year-old may have capacity to consent while another may not, depending on their respective levels of maturity and understanding. The assessment is a subjective one. The doctor (and ultimately, if necessary the court) must decide whether *this* particular child is capable of consenting to *this* particular procedure, having regard to the age, maturity and understanding of the child and the nature and complexity of the procedure (Ellen Picard and Gerald Robertson*, Legal Liability of Doctors and Hospitals in Canada*, 3rd ed., 1996, pp. 71-73).

[para 39] In his recent text, Lorne Rozovsky states:

> What the law seems to favour now is the "mature minor" rule. Rather than relying on the chronology of age, the law determines in a case-by-case fashion whether a child is capable of understanding the nature and consequences of a treatment decision. If the child can do so at age 12, his or her decision should be respected. … Suffice it to say that at this point, in the absence of legislation to the contrary, if a minor is capable of discerning the nature, purpose, risks and benefits of treatment, that individual should be treated as a mature person capable of giving consent to treatment (Lorne Rozovsky, *The Canadian Law of Consent to Treatment*, 3rd ed., 2003, p. 8-9).

Court Decisions

[para 40] The cardinal common law case was decided 20 years ago by the House of Lords in *Gillick v. West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402 (HL). The *Gillick* case said the parental right to decide ends when the child achieves the legal capacity to consent to treatment; legal capacity to consent to treatment arises when the minor has sufficient maturity and intelligence to understand the nature and implications of the proposed treatment. This has become known as "Gillick competence".

[para 41] In *Gillick*, Lord Fraser quoted Lord Denning's description of the interface of parental and developing mature minor rights in *Hewer v. Bryant* [1971] QB 357 (Eng. CA), which Lord Denning described as follows:

> …a dwindling right which the courts will hesitate to enforce against the wishes of the child, the more so the older he is. It starts with a right of control and ends with little more than advice (*Gillick*, p. 369).

[para 42] In *Gillick*, Lord Scarman said a minor achieves capacity at what he referred to as the "age of discretion", which is to be determined based on an underlying principle that:

> …was exposed by Blackstone and can be seen to have been acknowledged in the case law. It is that parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision (*Gillick*, p. 183).

[para 43] The leading Alberta decision is *C.(J.S.) v. Wren*, [1987] 2 W.W.R. 669, (1986) A.R. 115, [1986] A.J. No. 1166 (AB CA), on appeal from *C. v. Wren* [1986] A.J. No. 1167 (AB QB). In *Wren*, the Alberta Court of Appeal considered whether a 16-year old girl was a mature minor, that is, whether she had the understanding or capacity to consent to surgery. The minor was pregnant and had decided to have a therapeutic abortion. The minor's parents opposed her decision and sued the physician. Justice Kerans, of the Alberta Court of Appeal, stated:

> The law in Alberta is that a surgeon may proceed with a surgical procedure immune from suit for assault if she or he has informed consent from the patient. That test was applied by the learned trial judge, and he found on the evidence before him that this child was capable of giving consent and had done so. Without more, that is an end to the matter. …this expectant mother and her parents had fully discussed the ethical issues involved and, most regrettably, disagreed. We cannot infer from that disagreement that this expectant mother did not have sufficient intelligence and understanding to make up her own mind. Meanwhile, it is conceded that she is a "normal intelligent 16 year old". We infer that she did have sufficient intelligence and understanding to make up her own mind and did so. At her age and level of understanding, the law is that she is to be permitted to do so (*Wren*, pp. 2-3).

[para 44] Among other issues the concept of mature minors was again addressed by the Alberta courts in *B.H. v. Alberta (Director of Child Welfare),* 2002 AB CA 109 (CanLII) (on appeal from *B.H. v. Alberta (Director of Child Welfare),* 2002 AB QB 371 (CanLII), on appeal from (*Alberta (Director of Child Welfare) v. H. (B.)* 2002 AB PC 39 (CanLII), leave to appeal to the SCC refused, *B.H. v. Alberta (Director of Child Welfare*), [2002], S.C.C.A. No. 196 (SCC)). The *B.H.* case involved a 16-year old Jehovah's Witness patient who was diagnosed with acute myeloid leukemia.

[para 45] Justice Kent, of the Court of Queen's Bench, described the common law as it pertains to mature minors in Alberta, as follows:

> …it is helpful to understand the principle upon which the concept of mature minor is built. First, adults have a right to make decisions on their own and of any nature with respect to medical treatment. …Second the common law recognized that there comes a time in the maturation process where teenagers should have more and more say over their bodies. When they have reached a point where they have sufficient intelligence and

> understanding to appreciate the nature and consequences of what is proposed, they are mature minors: see *Gillick v. West Norfolk and Wisbeck Area Health Authority*, [1985] 2 All E.R. 402 (H.L.). The common law concept of mature minor was acknowledged to be part of the law of Alberta in *J.S.C. v. Wren* (1986), 76 A.R. 115 (CA), (para 30). (*B.H. v. Alberta (Director of Child Welfare),* 2002 AB QB 371 (CanLII)).

[para 46] In *C.U. v. McGonigle*, 2003 AB CA 66 (CanLII) (on appeal from the Court of Queen's Bench [2000] A.J. No. 1067, on appeal from the Provincial Court, April 15, 1999, leave to appeal to the SCC refused, *C.U. v. McGonigle*, [2002] S.C.C.A. N. 445 (SCC), a 16½-year old Jehovah's Witness was diagnosed with dysfunctional menstrual bleeding. She consented to surgery but refused blood transfusions although her doctors advised her that she could die without transfusions. In *McGonigle,* the Alberta Court of Appeal described the mature minor rule as follows:

> In this case, no one disputes that a mature minor can provide an informed consent nor that a parent cannot overrule such consent. The parental right to determine whether or not a minor child will receive medical treatment terminates when the child achieves a sufficient understanding and intelligence to provide an informed consent: *Gillick v. West Norfolk & Wisbech Area Health Authority*, [1985] 3 W.L.R. 830; [1985] 3 All E.R. 402 at 423 (H.L.). This Court endorsed that view in *C. (J.S.) v. Wren*, 1986, 76 A.R. 115; [1987] 2 W.W.R. 669 (para 29).

Administrative Law Decisions

[para 47] In Order 98-004, the former Commission considered the requisite amount of proof that is required under FOIP for the person who is purporting to exercise the rights or powers of the individual. In that Order, the former Commissioner found the applicant was not entitled to exercise the rights of the individual due to the lack of sufficient evidence of authority to act as the individual's personal representative, as follows:

> …a public body is entitled to insist on evidence of an applicant's authority to administer a deceased individual's estate, before it permits an applicant to exercise the rights or powers of a deceased individual to access that individual's personal information under the Act. I have already stated what that evidence may consist of. In my view, evidence consisting of an applicant's stated belief in his or her authority, whether by affidavit or otherwise, or evidence that an applicant actually administered the estate, is not sufficient (para 28).

[para 48] In Order 99-037, the former Commissioner found that a child's paternal grandfather had been granted a power of attorney and had authority to exercise the individual's rights under the equivalent of section 84(1)(d) of FOIP (para 31). In Order 2001-026, the applicant exercised the rights or powers of the deceased individual as Administrator of the Estate under the earlier equivalent of section 84(1)(a) of FOIP (para 54).

[para 49] I have previously considered the authority to exercise the rights or powers of another individual who was a deceased minor under HIA. In Order H2002-

004, I considered whether the applicants (the minor's father and the minor's father's wife) were entitled to exercise the rights or powers of the deceased minor under section 104(1) of HIA. In that case, I found that the applicants did not fall within any of the (then) categories in section 104(1) of HIA; therefore the applicants were not authorized to exercise the individual's rights or powers.

Legislation

[para 50] The recent private sector legislation in Alberta (*Personal Information Protection Act*, S.A. 2003, c. P-6.5, s. 61(1)(b)(c)) and in British Columbia (*Personal Information Protection Act Regulations*, B.C. Reg. 473/2003, s. 2(2)) take an identical approach to mature minors as HIA. These enactments allow the guardian of a minor to exercise personal information rights or powers but only if the minor is incapable of exercising those rights or powers.

[para 51] The health sector legislation in Manitoba allows guardians of minors to exercise the rights of individuals where minors do not have capacity to make health care decisions (*Personal Health Information Act*, S.M. 1997, c. 51, s. 60(e)). In Saskatchewan, minors can exercise their own rights or powers where the individual understands the nature of the right or power and the consequences of exercising the right or power (*Health Information Protection Act*, S.S. 1999, c. H-0.021, s. 56(3)(4)). In Ontario, competent minors less than 16 years of age can exercise their own rights or powers (*Personal Health Information Protection Act, 2004*, S.O 2004, c. 3, Schedule A, s. 23(3)).

[para 52] Similarly, the public sector legislation in British Columbia allows parents or guardians to exercise the rights of minors where individuals are incapable of exercising those rights (*Freedom of Information and Protection of Privacy Regulation*, B.C. Reg. 323/93, s. 3(a)). However, in Alberta, FOIP takes a different approach where the guardian may exercise the individual's rights or powers where the exercise "would not constitute an unreasonable invasion of the personal privacy of the minor" (s. 84(1)(e)).

[para 53] At the age of 14 years in Quebec, minors have long exercised their own rights or powers. This is the case under both public and private sector privacy legislation (*An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*, R.S.Q., c. A-2.1, s. 83 and *An Act Respecting the Protection of Personal Information in the Private Sector,* R.S.Q., c. P-39.1, s. 38).

[para 54] In Scotland, a person under 16 years of age has the capacity to exercise rights when there is a "general understanding of what it means to exercise that right" (*Data Protection Act 1998*, UK 1998, c. 29, s. 66(1)). At twelve years of age in Scotland, minors are entitled to exercise their own rights as there is a legislative presumption of capacity as a "person of twelve years or more shall be taken to have that capacity where he has a general understanding of what it means to exercise that right" (*Ibid.*, s. 66(2)).

[para 55] In health sector legislation in New South Wales, Australia, an authorized representative may not act on behalf of an individual who is capable of "understanding

the general nature" of an act (*Health Records and Information Privacy Act 2002,* No. 71, New South Wales, s. 7). In Australian Capital Territory (*Health Records (Privacy and Access) Act 1997*, Australian Capital Territory, s. 25, Effective April 9, 2004), a guardian can exercise a right or power of a "young person", which is a person under 18 years of age *other than* an individual who is of sufficient age and mental and emotional maturity to understand the nature of a health service and to give consent to a health service (*Ibid*., s. 4). A similar provision also exists in Victoria in Australia (*Health Records Act 2001,* Act No. 2/2001, Victoria, s. 85).

[para 56] Mature minors have the authority to exercise their own rights and powers under the privacy legislation in many jurisdictions. All four provincial jurisdictions with health sector privacy legislation in Canada give mature minors the right to exercise their own health information rights and powers with similar provisions in health sector privacy in jurisdictions outside of Canada. All three provincial jurisdictions with private sector privacy legislation in Canada give mature minors the right to exercise their own personal information rights and powers with this right explicitly arising at the age of 14 years in Quebec; similar provisions exist in private sector privacy legislation outside of Canada. With the exception of the FOIP provision in Alberta, the mature minor provision in HIA is consistent with evolving legislative norms.

D. Application

Type of Information

[para 57] In order to consider whether section 104(1) of HIA applies to the Applicant in the circumstances of this case, I must first consider whether the information at issue is health information. Section 1(1)(k) of HIA says "health information" includes diagnostic, treatment and care information". "Diagnostic, treatment and care information" is defined in section 1(1)(i) of HIA as:

> 1(1) In this Act,
>
> …..
>
> (i) "diagnostic, treatment and care information" means information about any of the following:
>
> (i) the physical and mental health of an individual;
>
> (ii) a health service provided to an individual;
>
> …….
>
> and includes any other information about an individual that is collected when a health service is provided to the individual, but does not include information that is not written, photographed, recorded or stored in some manner in a record.

[para 58] The parties did not explicitly address the type of information that is at issue. However in their submissions, both parties treated the information at issue as health information, with the exception of the CHR's claim that FOIP applies to the information. The CHR responded to the Applicant's request under HIA. In the letter of June 30, 2000, the psychologist at CHR requested the information that is now at issue in

order to conduct a further mental health assessment of the Applicant's daughter, stating "[T]he purpose of this assessment is to understand better [name of daughter's] personality, behaviour and emotions".

[para 59] The context in which the information is collected must be considered when determining whether the records contain health information under HIA, or alternatively, personal information under FOIP; I must consider "the surroundings that colour the words" (*Bell Express Vu).* If the information is health information under HIA, the information is carved out of FOIP. I have previously described the proper approach to the categorization of information and the interface of HIA and FOIP in Order F2004-005 and H2004-001 (paras 77-90); there is no need to repeat that discussion here.

[para 60] In the Applicant's access request, she asked for all questionnaires that "were used by Dr. [name of psychologist] in his "Psychological Assessment" of my daughter." The psychologist requested the questionnaires to be completed in order to conduct a further assessment of the Applicant's daughter. It is not in dispute that the information in the questionnaires was requested and provided for the purpose of providing psychological health services to the Applicant's daughter.

[para 61] The sole purpose the information at issue was requested, compiled and collected was for providing a health service to the Applicant's daughter. There was no other reason for collecting this information. This is the case whether the questionnaires were completed by the Applicant, the Applicant's ex-husband or the Applicant's daughter. The information in the questionnaires pertained to the physical and mental health of the Applicant's daughter.

[para 62] In my view, the information at issue was information about the "mental health of an individual" and "any other information about an individual that is collected when a health service is provided to the individual". Therefore, I find that the information at issue is "diagnostic, treatment and care information" under section 1(1)(i) and consequently "health information" under section 1(1)(k) of HIA.

[para 63] As discussed in Order F2004-005 and H2004-001, health information is carved out of FOIP by virtue of section 4(1)(u) of FOIP. Therefore, the information at issue remains under HIA.

Guardian of a Minor

[para 64] In order for the Applicant to have the authority to exercise her minor daughter's rights or powers as her daughter's guardian, the Applicant must show that she falls within section 104(1)(c) of HIA. Section 104(1)(c) of HIA has two requirements:

- The individual must be under 18 years of age, and

- The individual must *not* understand the nature of the right or power and the consequences of exercising the right or power under section 104(1)(b) of HIA.

[para 65] The questionnaires in the records at issue were completed in July and August of 2000. From July 13, 2000 onwards, the Applicant's daughter was no longer with her mother and therefore lived independently from her mother. The Applicant's daughter was just over 13 years of age when those questionnaires were completed.

[para 66] On September 21, 2002, the Applicant made the access request. At that time the Applicant's daughter was 15 ½ years of age and had been living independently from her mother for over two years. The date the access request was made is the critical date. The date of the access request is when the authority of the Applicant to exercise the rights or powers of her daughter must be considered.

[para 67] The first question under section 104(1)(c) of HIA is: Was the Applicant's daughter under 18 years of age? The daughter was just over 15 ½ years old when the Applicant's access request was made on September 21, 2002. Therefore, I find that the first part of the test is met.

[para 68] The second question under section 104(1)(c) of HIA is: Did the Applicant's daughter *not* understand the nature of the right or power and the consequences of exercising the right or power under section 104(1)(b) of HIA? Neither party specifically addressed this matter as of the critical date of September 21, 2002.

[para 69] In order for the Applicant to be entitled to exercise her daughter's rights or powers under section 104(1)(c) of HIA, the Applicant has the burden of proof to show that her daughter did not understand the nature and consequences of exercising her rights or powers under section 104(1)(b) of HIA.

[para 70] The Applicant did not provide any evidence to indicate that her daughter did not understand the nature and the consequences of exercising her own rights or powers under section 104(1)(b) of HIA. Notwithstanding the lack of evidence provided, do the records speak for themselves? I have carefully reviewed the hospital records and find that there is some evidence that the Applicant's daughter was capable of understanding the nature of her rights or powers and the consequences of exercising her rights or powers under section 104(1)(b) of HIA, as follows.

[para 71] When the Applicant's daughter attended at Children's Hospital in the summer of 2000 at just over 13 years of age, her daughter was described in the records as having an "unremarkable" mental status, reasonable comprehension for her age and as being "a good student". The Applicant's daughter was depicted in the records as strong willed, an independent thinker and as having a mind of her own; indeed these qualities were involved in the conflict between the Applicant and her daughter.

[para 72] The CHR letter dated August 1, 2002 was written to the Applicant shortly before the access request at issue was made. This letter described the Applicant's daughter as a "mature minor" who "can consent to and control the release of her patient

record." The psychologist who wrote the letter of August 1, 2002, explicitly told the Applicant that her daughter would need to be involved in any decisions about her hospital records.

[para 73] When the access request was made on September 21, 2002 the Applicant's daughter was 15 ½ years of age. By that time, her daughter was more than two years older than she was at the time when the questionnaires at issue were completed and when most of the notations in the CHR hospital records were made. By the time the access request was made, the Applicant's daughter had been living independently from her mother for more than two years.

[para 74] In order to determine whether the Applicant's daughter is capable of understanding the nature and consequences of exercising her rights or powers under HIA, I must have regard to factors such as the individual's age, maturity, independence, level of understanding and the nature and complexity of the HIA rights or powers. In my view, the level of understanding that is required for an individual to understand the nature and consequences of exercising rights or powers under HIA is not a particularly onerous standard.

[para 75] What is the effect of the Applicant's ex-husband's letter of "permission" for disclosure of the information at issue to the Applicant? The ex-husband's letter clearly did not meet the consent criteria under section 34 of HIA. The letter is consistent with parental obligations to cooperate in matters pertaining to joint custody of minor children rather than any purported exercise of the individual's rights or powers under HIA by the Applicant's ex-husband.

[para 76] Does the lack of authority for parents to exercise the rights or powers of their mature minor children under section 104(1) of HIA mean that parents cannot obtain health information about their children? No, this is not the case at all. In fact, the CHR previously provided the Applicant with some of her daughter's information. The only health information the CHR withheld was consistent with the exceptions to the right of access. This means (if the CHR properly applied the legislation) that even the individual would not be entitled to access the information withheld.

[para 77] HIA allows custodians to disclose health information without consent of the individual in a number of situations that could involve the parents of mature minor children. For example: HIA section 35(1)(b) (to person responsible for providing continuing treatment and care to the individual), section 35(1)(c) (current information to family members), section 35(1)(d) (to family members where the individual is injured, ill or deceased) and section 35(1)(m) (to avert or minimize imminent danger). Where an individual lacks the mental capacity to consent, custodians can also disclose health information in the best interests of the individual (HIA, s. 35(1)(n)).

[para 78] What is the affect of the above-described court orders on the exercise of the individual's HIA rights or powers? The initial Divorce Judgment and Corollary Relief Order was issued before HIA was in force and addressed child support and payment of the children's expenses such as for sports activities and uninsured medical,

prescription, dental and optical expenses and made provision for child support even after the children turned 18 years of age.

[para 79] The Consent Variation Order did not change the above-described arrangements but gave the Applicant's ex-husband day-to-day care and control of the Applicant's daughter. Both orders were silent about the exercise of rights or powers of mature minors. In my view, these court orders did not address and did not alter the usual exercise of rights or powers of mature minors.

[para 80] In addition to the above-described HIA disclosure provisions, custodians are allowed to disclose health information as available by law to a party to legal proceedings (s. 3(a), Order H2004-005) for court and quasi-judicial proceedings (s. 35(1)(h) and to comply with subpoenas, warrants and court orders (s. 35(1)(i)). As HIA allows the disclosure of health information pursuant to court orders, HIA and the Applicant's court orders peacefully co-exist.

[para 81] In my view, the HIA approach to guardians and to mature minors is consistent with the longstanding common law right of mature minors to consent to medical treatment. Otherwise, mature minors would have the common law right to consent to medical treatment but lack the right of access to the health information that pertains to the treatment decision.

E. Conclusion

[para 82] Based on the evidence of the Applicant's daughter's understanding and the Applicant's failure to discharge her burden of proof to show that her daughter lacked understanding of the nature and consequences of exercising her own rights or powers under section 104(1)(b) of HIA, I find that the Applicant does not have the authority to exercise the rights or powers of her minor daughter under section 104(1)(c) of HIA.

[para 83] Therefore, the Applicant did not have the authority to make the September 21, 2002 access request and consequently, does not have the authority to ask me to review the CHR's refusal to give access. I have not considered any other circumstances in which a guardian may access a minor's health information. My conclusion in this case is confined to an access request.

ISSUE B: Did the CHR meet its duty to the Applicant as provided in section 10(a) of HIA (reasonable effort to assist and to respond openly, accurately and completely)?

[para 84] As a result of the above determination that the Applicant does not have the authority to exercise her daughter's rights or powers, I do not have jurisdiction to decide whether the CHR met its duty to assist under section 10(a) of HIA.

ISSUE C: Did the CHR properly apply section 11(1)(e) of HIA (standardized diagnostic tests or assessments) to the records?

[para 85] As a result of the above determination that the Applicant does not have the authority to exercise her daughter's rights or powers, I do not have jurisdiction to decide whether the CHR properly applied section 11(1)(e) of HIA to the records.

ISSUE D: Does section 16(1) of FOIP (business interests of a third party) apply to the records?

[para 86] As a result of the above determination that the Applicant does not have the authority to exercise her daughter's rights or powers, I do not have jurisdiction to decide whether section 16(1) of FOIP applies to the records.

V. ORDER

[para 87] I make the following Order under section 80 of HIA and section 72 of FOIP:

- I find that the Applicant does not have the authority to exercise her daughter's rights or powers under section 104(1) of HIA.
- Given my decision under section 104(1) of HIA, I do not have jurisdiction to decide the inquiry issues. In particular, I do not have jurisdiction to decide whether:
    - The CHR met its duty to assist under section 10(a) of HIA,
    - The CHR properly applied section 11(1)(e) of HIA to the records, and whether
    - Section 16(1) of FOIP applies to the records.

Frank Work, Q. C.
Information and Privacy Commissioner