

Information and Privacy Commissioner,  
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,  
Ontario, Canada

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## ORDER PO-4455

Appeal PA21-00545

Champlain LHIN o/a Home and Community Care Support Services – Champlain

October 30, 2023

**Summary:** The appellant submitted a request under the *Act* to the Champlain LHIN (the LHIN) for access to general records relating to oversight of a specified health service provider. The LHIN responded stating that the requested records are not within its custody or under its control. The LHIN forwarded the request to the specified health service provider, pursuant to section 25(1) of the *Act*.

The appellant appealed the LHIN's decision to forward the request, challenging the LHIN's assertion that the records he is seeking are not in its custody or control. In this order, the adjudicator finds that the requested records are not within the custody or control of the LHIN within the meaning of section 10(1) of the *Act* and that the LHIN discharged its duty under section 25(1) by forwarding the request to the health service provider.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990., c. F31, as amended, sections 10(1) and 25(1), *Local Health and Safety Integration Act*, S.O. 2006, c 4.

**Order Considered:** Order PO-2103.

**Cases Considered:** *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 (CanLII), *Nova Scotia (Workers' Compensation Board) v. Martin* 2003 SCC 54, *Eldridge v. British Columbia (Attorney General)* [1997] 2 S.C.R. 624.

## **OVERVIEW:**

[1] This appeal determines the issues of custody or control of records and an institution's duty to forward a request to another institution with custody or control under section 25(1) of the *Freedom of Information and Protection of Privacy Act* (the *Act*).

[2] By way of background, pursuant to the *Local Health System Integration Act*, 2006, in 2020 the local health integration networks in Ontario became responsible for planning, funding and reintegrating the local health system, the placement of persons into long-term care homes and the provision of home and community care services. Through service accountability agreements (SAAs), the local health integration networks had oversight of certain aspects of health service provision.

[3] The requester made a request under the *Act* to Champlain Local Health Integration Network, operating as Home and Community Care Support Services – Champlain (the LHIN) for access to the following general records:

... any records that relate in any way to standards, protocols, guidelines, performance obligations, risks to performance that [a specified health service provider] is required to comply with when accepting or rejecting a doctor's referral for a mental illness assessment that is covered by [the Ontario Health Insurance Plan (OHIP)] which could lead to treatment covered by OHIP.

[4] The LHIN issued a decision advising the requester that it was forwarding the request to the health service provider specified in the request (the HSP), pursuant to section 25 of the *Act*.

[5] Section 25(1) of the *Act* requires an institution to forward a request when it determines that another institution has custody or control of the records being sought.

[6] In its letter to the requester, the LHIN indicated that the records being sought were in the custody of the HSP to which it had forwarded the request and payment in accordance with section 25 of the *Act*. The LHIN advised the requester to direct any questions regarding the request to the Director of Clinical Records and Chief Privacy Officer of the HSP, whose contact information was set out in the decision letter.

[7] In response to the LHIN's decision letter, the requester asked the LHIN to "recall" the forwarded request. The LHIN subsequently obtained confirmation from the HSP that the forwarded request would not be processed.

[8] The requester also provided background and context for the request and clarified the information he is seeking. The requester stated that he is seeking access to information relating to specified assessments and assessment programs of the HSP. The requester asked the LHIN to review its decision in light of this clarification. The LHIN

declined to do so.

[9] The requester, now the appellant, appealed the LHIN's decision letter to the Information and Privacy Commissioner of Ontario (IPC). A mediator was appointed to explore resolution and spoke to the parties about the issues in the appeal.

[10] The appellant advised that he believes that the records he is seeking are within the custody or control of the LHIN. The LHIN maintained that the records are within the custody or control of the HSP to which it had forwarded the request.

[11] At the end of the mediation, the appellant submitted a Notice of Constitutional Question (NCQ) to the IPC. The issues raised in the NCQ were added to the appeal.

[12] As a mediated resolution was not achieved, the file was transferred to the adjudication stage of the appeal, where an adjudicator may conduct an inquiry.

[13] I decided to conduct an inquiry and sought and received representations from the parties. Upon receipt of the appellant's representations, I determined that I had the information necessary to adjudicate the appeal.

[14] In this order, I find that the records that the appellant is seeking to access are not within the custody or under the control of the LHIN and that the LHIN discharged its duty under section 25(1) of the *Act* by forwarding the appellant's request to the HSP. For the reasons that follow, I exercise my discretion to refuse to consider the appellant's NCQ. I dismiss the appeal.

## **ISSUES:**

- A. Are the requested records "in the custody" or "under the control" of the LHIN under section 10(1) of the *Act*?
- B. Has the LHIN discharged its duty under section 25(1) of the *Act*?

## **DISCUSSION:**

### **Issue A: Are the requested records "in the custody" or "under the control" of the LHIN under section 10(1)?**

[15] Before I begin my analysis of the issue of custody or control of the records that the appellant is seeking, it is important to note that when he was notified that the LHIN had forwarded his request to the HSP, the appellant asked that his request be "recalled." In accordance with the appellant's instructions, the LHIN informed the HSP that the forwarded request was being withdrawn and the HSP confirmed that the request was not processed.

[16] Accordingly, the issue before me in this appeal is whether the requested records are within the custody or control of the LHIN. As the appellant “recalled” the request, the issue of whether the HSP has custody or control of the requested records is outside the scope of this appeal. For the reasons that follow, I am satisfied that the records sought by the appellant are not within the custody or under the control of the LHIN.

[17] Section 10(1) provides a general right of access to records that are within the custody or under the control of an institution governed by the *Act*. It reads, in part:

Every person has a right of access to a record or part of a record in the custody or under the control of an institution unless...

[18] Under section 10(1), the right to access applies to a record that is in the custody *or* under the control of an institution; the record need not be both.<sup>1</sup>

[19] There are exceptions to the general right of access set out in section 10(1).<sup>2</sup> The record may be excluded from the application of the *Act* by section 65, or may be subject to an exemption from the general right of access.<sup>3</sup> However, if a record is not in the custody or under the control of an institution, none of the exclusions or exemptions need to be considered since the general right of access in section 10(1) is not established.

[20] The courts and the IPC have applied a broad and liberal approach to the custody or control question.<sup>4</sup> In deciding whether a record is in the custody or control of an institution, the IPC has developed a non-exhaustive list of factors to be considered in the particular context of a request and in light of the purposes of the *Act*.<sup>5</sup> These factors include the circumstances in which a record is created and by whom, its use and whether the content of a record relates to an institution’s mandate and functions.<sup>6</sup> Also relevant to the issue is whether an institution has physical possession and whether possession of the record is more than “bare possession”.<sup>7</sup>

[21] The factors applicable to a particular case will depend upon the facts. In addition to these factors and relevant to this appeal is the two-part test articulated by the

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<sup>1</sup> Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

<sup>2</sup> Order PO-2836.

<sup>3</sup> The exemptions are set out in sections 12 to 22 and section 49 of the *Act*.

<sup>4</sup> *Ontario (Criminal Code Review Board) v. Hale*, 1999 CanLII 3805 (ON CA), [1999] O.J. No. 4072; *Canada Post Corp. v. Canada (Minister of Public Works)*, 1995 CanLII 3574 (FCA), [1995] 2 FC 110; and Order MO-1251.

<sup>5</sup> *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011, Doc. M39605 (C.A.)).

<sup>6</sup> *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited in footnote 1; *City of Ottawa v. Ontario*, cited above.

<sup>7</sup> Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

Supreme Court of Canada to determine institutional control of a record in cases where a record is not held by the institution. In these cases, the two questions to be considered are:

1. Do the contents of the record relate to a departmental matter?
2. Could the government institution reasonably expect to obtain a copy of the record upon request?<sup>8</sup>

[22] Additional factors may be relevant considerations where an individual or organization other than the institution holds the record. These additional factors include the reasons for another entity having physical possession of the record<sup>9</sup> and whether that other entity is an “institution” for the purposes of the *Act*; ownership of the record;<sup>10</sup> the circumstances surrounding the creation, use and retention of the record;<sup>11</sup> any contractual arrangement giving the institution an express or implied right to possess or otherwise control the record and arrangements relating to the record’s confidentiality.<sup>12</sup>

### ***The LHIN’s representations***

[23] The LHIN’s position is that the records that the appellant is seeking to access under the *Act* are not within its custody or under its control. The LHIN states that it does not have possession of the requested records, which it believes are in the possession of the HSP.

[24] As the LHIN’s position is that it does not hold the requested records, it submits that the issue is whether it has control of records that are not in its physical possession. Applying the two-part test from the Supreme Court of Canada’s decision in *National Defence*, the LHIN submits that the requested records are not related to a departmental matter and it could not reasonably be expected to obtain copies of the records from the HSP upon request. The LHIN’s position is that the two-part test in *National Defence* is not met.

[25] The LHIN’s representations also address other factors relevant to determining the issue of custody or control when another organization holds the requested records, for example whether the party, individual, agency or group with physical possession of the record is an “institution” for the purposes of the *Act*. The LHIN submits that the records being sought are in the possession of the HSP, which is an institution for the purposes of the *Act*. The LHIN’s position is that this fact and the additional factors to be

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<sup>8</sup> *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 (CanLII).

<sup>9</sup> Order PO-2683.

<sup>10</sup> Order M-315.

<sup>11</sup> Order PO-2386.

<sup>12</sup> *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, 1999 CanLII 6922 (BC SC), Orders M-165 and MO-2586.

considered demonstrate that it does not have custody or control of the requested records.

### ***The appellant's representations***

[26] The appellant's position is that the records he is seeking are within the LHIN's custody or control. In support of his position, the appellant relies upon the terms of the SAA and the provisions of various statutes including the *Health Care and Community Services Act* and the *Health Insurance Act*.

[27] The appellant lists a number of tools used by health service providers when making clinical assessments. In his representations, the appellant makes submissions regarding records that are created by the LHIN and which the LHIN has the "jurisdiction to transfer" to the HSP. The appellant also makes submissions regarding other documents that are referenced in the SAA to demonstrate that the LHIN has custody of the records he is seeking.

[28] In support of his representations on custody or control, the appellant cites Order M-365 and the use of the expression "custody or control" in other legislation, including Part X of the *Child Youth and Family Services Act*.

[29] The appellant provided me with copies of the SAA and its amendments, the Ministry of Health and Long Term Care's accountability agreement with the LHIN and the relevant memorandum of understanding. In addition, the appellant has provided me with a request for records that he has made to the HSP, which is also an institution under the *Act*, and correspondence relating to that request and records of his personal health information.

[30] This is a summary of the appellant's representations and supporting documentation, which are extensive and comprise more than 250 pages. I assure the parties that I have reviewed their representations in full.

### ***Analysis and findings***

[31] For the reasons that follow, I find that the records sought by the appellant are not within the custody or under the control of the LHIN.

#### *LHIN's oversight of the HSP*

[32] I accept the LHIN's submission that it does not provide oversight of the HSP's clinical decision making. In its representations, the LHIN sets out the legislative context for the role of Ontario's local health integration networks. This role includes planning, funding and reintegration of local health systems in Ontario. Service agreements set out the terms of funding accountability of local health systems and health service providers to the LHIN. As noted in the background section above, the LHIN became responsible for funding health service providers pursuant to the *Local Health System Integration*

*Act*, 2006. This legislation also sets out the prescribed requirements for accountability agreements and reporting duties.

[33] From my review of the request giving rise to this appeal and the clarification that the appellant provided in correspondence with the LHIN, I am satisfied that the appellant is seeking access to records that relate to the oversight of the HSP's decision to accept or reject a physician's referral for a mental health assessment. In my view, the decision to accept or reject a physician's referral for an assessment is a decision that relates to the provision of health care to a patient. There is no reasonable basis for me to find that the decision to accept or reject a physician's referral for an assessment is a decision that relates to the planning, funding or reintegration of a local health system as provided for in the provisions of the *Local Health System Integration Act*, 2006.

[34] I have reviewed the documentation provided by the appellant. From my review of the SAA, I am satisfied that this agreement reflects a funding arrangement for the services to be provided by the HSP, in accordance with an agreed service plan and operational and budgetary commitments. I note that the SAA includes for oversight by the LHIN with reference to performance criteria in the form of performance standards, indicators and targets, which are defined in the SAA.

[35] From my review of the SAA, I am satisfied that this agreement provides for the LHIN's oversight of the HSP in relation to funding alone and that the performance criteria that it requires the HSP to meet are with respect to service volume and health service access targets. There is no evidence before me that the LHIN's mandate includes accountability for the HSP's clinical decision making in respect of health care services provided to patients, which is the subject matter of the appellant's request.

#### *Possession of requested records*

[36] I have considered the question of custody or control of the requested records in the context of the LHIN's relationship with the HSP under the local health integration scheme that I describe above. The LHIN states that it does not have possession of the records that the appellant is seeking. The appellant does not directly address the question of possession but maintains that he believes the records are in the LHIN's custody. As I am satisfied that the LHIN's relationship with the HSP is primarily one of funding, there is no reasonable basis for me to find that the LHIN has possession of records relating to the standards, protocols, guidelines, performance obligations and risks of the HSP's decision to accept or reject a doctor's referral for a patient assessment.

[37] As I am satisfied that the requested records concern a matter that is not related to the LHIN's oversight of the HSP, I accept the LHIN's submission that the records being sought are not in its possession.

*National Defence test*

[38] As noted above, where the records being sought are held by an institution other than the one to which the request is made, the two-part test articulated in the Supreme Court of Canada's decision in *National Defence* applies to the issue of custody or control.

[39] With respect to the first question, the records that the appellant is seeking relate to the oversight of the HSP's decision to accept or reject a doctor's referral for a patient assessment. As explained above, I find that the subject matter of the request is not one that is within the LHIN's oversight of the HSP.

[40] The appellant does not directly address the question of whether the subject matter of the records he is seeking relate to a "departmental matter" but he makes submissions referring to various statutes and assessment tools in support of his position that the records are in the LHIN's control.

[41] I have reviewed the appellant's materials but am not persuaded that they assist in my analysis of the issue of control of records relating to the subject matter of his request. For example, my determination of control of records for the purposes of the *Act* is not assisted by reference to the meaning of "control" in relation to the offence of criminal negligence in section 219 of the *Criminal Code*, cited widely by the appellant. Similarly, I am not assisted by the appellant's reference to the application of Part X of the *Children, Youth and Family Services Act* to records held by service providers. Part X provides a right of access to personal information held by certain service providers in relation to children and youth. The appellant's request is for general records regarding a health care service provider's decision making and the request is made under the access regime of the *Act*.

[42] I find that the subject matter of the records that the appellant seeks does not relate to a "departmental matter" as the records do not concern an aspect of the LHIN's oversight of the HSP. Accordingly, the first part of the *National Defence* test is not satisfied.

[43] With respect to the second question, I accept the LHIN's submission that it could not reasonably expect to obtain copies of the records upon request to the HSP. The LHIN states that it only has access to records relating to the HSP's financial accountability for LHIN funding and I find this is consistent with the SAA.

[44] The appellant does not directly address the second question from the test in *National Defence* but refers to the LHIN's reporting and auditing obligations in the SAA. I understand the appellant's submission to be that these reporting and auditing obligations empower the LHIN to require the HSP to produce the records that he is seeking. As I have found that the LHIN's oversight in relation to the SAA does not extend to the HSP's clinical decision-making, I am not persuaded by the appellant's



submission.

[45] I note that the LHIN has authority to require production of records pursuant to its audit and review powers under the *Local Health System Integration Act*, 2006. The IPC has previously held that the fact that an institution may demand the production of records pursuant to a statutory inspection power does not lead to the conclusion that the institution has a right to possess the records.<sup>13</sup> In Order PO-2103, the adjudicator found that there was a qualitative difference between a ministry's statutory power to demand production of records for inspection purposes and the right to "possess" records in a situation where an agent is carrying out a statutory function on the ministry's behalf. I agree with this approach and adopt it in this appeal. As I have found that the subject matter of the records being sought by the appellant is not a function of the HSP over which the LHIN has oversight as part of its auditing or reporting responsibilities, I am satisfied that the LHIN does not exercise control over the records so that it can reasonably expect them to be produced upon request to the HSP.

[46] Considering the two questions in *National Defence* therefore supports a finding that the records being sought by the appellant are not within the LHIN's control.

*Additional factors relevant to custody or control of records*

[47] Some additional factors relevant to the issue of custody or control of records have already been considered in the analysis above. For example, the agreement between the LHIN and the HSP and the absence of any contractual provisions giving the LHIN a right to possess or otherwise control records relating to the HSP's clinical decision making.

[48] The LHIN states that it does not have knowledge of facts relevant to other additional factors, for example, the circumstances surrounding the creation, use or retention of the records being sought by the appellant. The LHIN submits that this lack of knowledge is because it is not involved in the provision of clinical services at the HSP, a fact that points to the records being outside of its control. As there is no evidence before me that the HSP is accountable to the LHIN for its clinical decision making, I accept the LHIN's submission that its lack of knowledge about the creation, use or retention of records relating to standards, protocols and guidelines concerning the HSP's decision to accept or reject a referral for mental illness assessment weighs against a finding that such records are within its control.

[49] A final factor to be considered is whether the individual, agency or group with physical possession of the records is an "institution" for the purposes of the *Act*.

[50] It is the LHIN's position that the records being sought are in the possession of the HSP. The HSP is a hospital and therefore an institution for the purposes of the *Act*. Notwithstanding that the appellant asked the LHIN to "recall" his request when it was

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<sup>13</sup> Order PO-2103.

forwarded to the HSP, he has submitted a separate access request to the HSP under the *Act*.

[51] As a result of the appellant's instructions to the LHIN to "recall" the forwarded request, the HSP has not had an opportunity to respond to the request giving rise to this appeal. Accordingly, I make no determinations about whether the HSP has physical possession of the records as this issue is not before me in this appeal. However, the fact that the HSP is an institution under the *Act* is relevant, as I explain below.

[52] Together with the factors developed by the IPC in relation to custody or control, I have also considered the purposes of the freedom of information legislation. One of the purposes of the *Act* is to provide a right of access to information held by institutions. The fact that the records being sought may be in the possession of another institution means that a finding that the records are not within the LHIN's control would not deny the appellant an opportunity to exercise his access rights. This is consistent with the *Act's* purpose.

[53] Accordingly, I am satisfied having considered the factors developed by the IPC, in the context of the appellant's request, and in light of the purposes of the *Act*, that the records sought are not in the LHIN's custody or control within the meaning of section 10(1) of the *Act*.

**Issue B: Has the LHIN discharged its duty under section 25(1) of the *Act*?**

[54] Section 25(1) is designed to facilitate the processing of an access request where a requester may not have submitted their request to the appropriate institution. Section 25(1) states:

Where an institution receives a request for access to a record that the institution does not have in its custody or under its control, the head shall make all necessary inquiries to determine whether another institution has custody or control of the record, and where the head determines that another institution has custody or control of the record, the head shall within fifteen days after the request is received,

(a) forward the request to the other institution; and

(b) give written notice to the person who made the request that it has been forwarded to the other institution.

[55] The *Act* does not allow an institution to tell a requester to "try again" with another institution. Rather, the original request is kept alive and it is for the institution in receipt of the original request to determine which provincial or municipal institution (if any) has the requested record. The original institution has 15 days to forward the request to the institution it determines has the requested record.

[56] The section 25(1) obligations on an institution in a situation where another institution has custody or control of responsive records are mandatory.<sup>14</sup>

[57] The LHIN's position is that it made all necessary inquiries to determine whether another institution has custody or control of the requested records and forwarded the request in accordance with section 25(1) of the *Act*.

[58] In its representations, the LHIN sets out the steps it took upon receipt of the appellant's request. The LHIN states that when it received the appellant's request, the Privacy Office understood that the type of records requested would not be held by the LHIN. The Privacy Office consulted with the LHIN's Health System Accountability Division to determine if it held any responsive records. The LHIN explains that the Health System Accountability Division is responsible for maintaining the SAA with the HSP.

[59] The LHIN states that the Health System Accountability Division confirmed that the records that the appellant was seeking would not be held by the LHIN and that clinical decisions, including acceptance of referrals and patients, would fall within the HSP's domain.

[60] The LHIN states that, having determined that another institution would have the requested records, it forwarded the request to the HSP, pursuant to section 25(1)(a) of the *Act*. The LHIN states that it advised the appellant that the request had been forwarded in its decision letter dated July 21, 2020.

[61] As noted above, in the decision letter, the LHIN provided the contact information of the HSP's Chief Privacy Officer for the appellant to follow up with directly. The LHIN states that the appellant responded to this information by asking for the forwarded request to be "recalled." The LHIN states that it contacted the HSP's privacy office and asked for the forwarded request to be withdrawn. The LHIN states that it subsequently wrote to the appellant advising that the HSP had confirmed that the forwarded request would not be processed.

[62] The LHIN states that, in response, the appellant provided additional information regarding his request and asked the LHIN to change its decision. The LHIN understood the additional information to be a description of a "subset" of the records that the appellant was seeking in the request and that it did not impact its decision to forward the request.

[63] The appellant does not directly address the issue of whether the LHIN discharged its duty under section 25(1) of the *Act* in his representations. The appellant's position is that the LHIN has control of the records he seeks to access so that the correct procedure is for the LHIN to issue a notice of refusal under section 29

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<sup>14</sup> Order P-1268.

of the *Act*.<sup>15</sup> As I find that the records being sought are not within the LHIN's custody or control, I do not agree with the appellant's submission that the correct procedure for the LHIN's response to the request is to issue a notice of refusal under section 29 of the *Act*.

[64] I am satisfied that the LHIN made the necessary inquiries to determine which institution has custody or control of the records that the appellant is seeking. I accept the LHIN's submission that its privacy office concluded that it did not have the records being sought and that it took steps to identify the subject matter of the requested records and decided that they related to the LHIN's relationship with the HSP. I also accept the LHIN's submission that its privacy office then reached out to the division with responsibility for maintaining the service agreement with the HSP for confirmation about whether it held the records. The Health System Accountability division identified that the request related to records concerning governance of the HSP's clinical decision-making and that this would fall within the HSP's domain.

[65] As already noted, the appellant has "recalled" the forwarded request from the HSP. Accordingly, the HSP has not had an opportunity to respond to the request and it is beyond the scope of this appeal for me to consider whether the requested records are within the HSP's custody or control. However, for the purposes of my review of the LHIN's response to the appellant's request and the discharge of its duty under section 25(1), I am satisfied that it made the necessary inquiries to determine which institution has custody or control of the requested records and appropriately forwarded the appellant's request.

## **OTHER ISSUES:**

[66] The IPC has authority to decide constitutional questions.<sup>16</sup> In *Nova Scotia (Workers' Compensation Board) v. Martin*<sup>17</sup>, the Supreme Court of Canada stated that:

Administrative tribunals which have jurisdiction – whether explicit or implied – to decide questions of law arising under a legislative provision are presumed to have concomitant jurisdiction to decide the constitutional validity of that provision. This presumption may only be rebutted by showing that the legislature clearly intended to exclude Charter issues from the tribunal's authority over questions of law.<sup>18</sup>

[67] The appeal provisions in the *Act* authorise the IPC to determine issues on appeal, including the interpretation and application of exemptions and exclusions. The power to determine issues on appeal includes the power to decide questions of law. There is no

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<sup>15</sup> Section 29 sets out the form of a notice where an institution decides to deny access to records.

<sup>16</sup> See Order PO-3686.

<sup>17</sup> 2003 SCC 54.

<sup>18</sup> Above, at para 3.

evidence that the Legislature intended to exclude *Charter* considerations from the IPC's mandate.<sup>19</sup>

[68] Constitutional questions can take two forms. This was confirmed by the Supreme Court of Canada in *Eldridge v. British Columbia (Attorney General)*<sup>20</sup>, where it stated that:

There is no question, of course, that the Charter applies to provincial legislation; see *RWDSU v Dolphin Delivery Ltd.* [1986] 2 S.C.R. 573. There are two ways, however, in which it can do so. First, legislation may be found to be unconstitutional on its face because it violates a Charter right and is not saved by s. 1. In such cases, the legislation will be invalid and the Court compelled to declare it of no force or effect pursuant to section 52(1) of the *Constitution Act*, 1982. Secondly, the Charter may be infringed, not by the legislation itself, but by the actions of a delegated decision-maker in applying it. In such cases, the legislation remains valid, but a remedy for the unconstitutional action may be sought pursuant to s. 24(1) of the Charter.

[69] These two forms of constitutional questions are reflected in section 2 of IPC *Practice Direction 9*, which provides that an NCQ must be served where a party to an appeal intends:

(a) to raise a question about the constitutional validity or applicability of legislation, a regulation or a by-law made under legislation, or a rule of common law, or

(b) to claim a remedy under the *Charter*.

[70] As noted above, at the end of the mediation stage of the appeal process, the appellant filed an NCQ. The issues raised in the NCQ were added to the appeal. The appellant also served the NCQ on the offices of the Attorney Generals of Ontario and Canada.

[71] Neither Attorney General's office has advised the IPC of its wish to participate in the appeal process to make representations addressing the issues raised by the appellant in the NCQ.

[72] Section 12.01 of the IPC *Code of Procedure* provides that an appellant may only raise a constitutional question in an appeal within 35 days of giving the IPC notice of appeal. The appellant's notice of appeal was filed with the IPC on July 30, 2020. The appellant filed the NCQ on June 27, 2022.

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<sup>19</sup> Order PO-3686.

<sup>20</sup> [1997] 2 S.C.R. 624 at para 20.

[73] Section 5 of IPC *Practice Direction 9* gives an adjudicator discretion to refuse to consider a constitutional question raised after the time limit in section 12.01. I have considered whether to exercise my discretion to refuse to consider the appellant's constitutional question. A factor relevant to this decision is whether the constitutional question that has been raised has a reasonable prospect of success.

[74] For the reasons that follow, I am not satisfied that the appellant's NCQ raises a constitutional question to be answered. Accordingly, I refuse to consider it.

[75] In the appellant's NCQ and his representations, the appellant states that the LHIN has acted in bad faith and "acted unconstitutionally" in its response to his request for access to records. It is the appellant's position that by denying custody or control of the records and deciding to forward his request to the HSP, the LHIN has defrauded him of his rights under the *Act*. The appellant's submissions are premised upon his belief that the LHIN has control of the requested records.

[76] The appellant refers to the following sections of the *Charter* and constitutional principles:

- Breaches of sections 7 (life, liberty and security of person), 8 (search or seizure), 9 (detention or imprisonment), 10 (arrest or detention), 12 (treatment or punishment), 15 (equality rights) and 24 (enforcement);
- *Constitution Act 1867*, section 52(1);<sup>21</sup>
- *Canada Bill of Rights*, 1960, section 2(b) and (e) (construction of the law so as not to infringe rights and freedoms);
- Constitutional rule of law against arbitrary application of public power;
- Constitutional rule of law against abuse of process;
- Constitutional rules of law against overbroad and/or over narrow statutory interpretation;
- Constitutional rule of law against grossly disproportionate application of statutory power; and
- Constitutional rule of law against abuse of process application of statutory power.

[77] In addition, the appellant cites the *Victims Bill of Rights*, the *Ontario Human*

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<sup>21</sup> There is no section 52(1) to the *Constitution Act, 1867*. I have understood this reference to mean section 52(1) of the *Charter*, which is the section that provides for the supremacy of the constitution and by which legislation that is inconsistent with the Charter may be challenged and declared to be of no force or effect.

*Rights Code, the Canadian Criminal Code, the United Nations Declaration on Human Rights, the American Declaration, American Conventions and the Social Charter of the Americas.*

[78] The appellant's submissions are extensive. The appellant repeats his representations addressing the issue of custody or control of records with reference to the SAA, summarised above, and makes complaints about parties and institutions who are not involved in this appeal. The appellant also makes substantive complaints about the HSP's response to a referral for clinical assessment. I understand that the appellant makes these submissions to provide context for his request for access to records relating to the standards, protocols and guidelines applicable to the HSP's clinical decision making.

[79] The appellant's submissions raising complaints about third parties are outside the scope of this appeal.

### **Constitutional question(s) to be answered**

[80] As I explain in my analysis above, I am satisfied that the records responsive to the appellant's request giving rise to this appeal are not in the LHIN's custody or control for the purposes of section 10(1) of the *Act* and that the LHIN has discharged its duty under section 25(1) of the *Act*.

[81] These are the provisions of the *Act* that I have considered in this appeal and should be the focus of any constitutional question raised by the parties, either in the form of a constitutional challenge or a claim for a remedy under the *Charter*. From my review of the NCQ and the appellant's representations, I am not satisfied that the appellant raises a constitutional question to be answered.

[82] In my view, the appellant is attempting to use the IPC's process for deciding a constitutional question to reframe his submissions on the issues in this appeal. In the NCQ, the appellant reformulates his submissions addressing whether the LHIN has custody or control of the records he is seeking. In this reformulation of his submissions, the appellant does not challenge the constitutional validity of the right to access records within an institution's custody or control that is provided for in section 10(1) of the *Act*. Rather, the appellant challenges the LHIN's position that it does not have control of the records sought.

[83] Similarly, the NCQ discloses no claim of a breach of the appellant's *Charter* rights by the LHIN in its response to the request submitted under the *Act*. The appellant claims that his section 7 *Charter* right (life, liberty and security of the person) is engaged because of the LHIN's refusal to provide a "complaint response." The appellant's submissions regarding a complaint to the LHIN is a matter beyond the scope of this appeal, which is concerned with the determination of issues arising from the appellant's request for access to records under the *Act*. The NCQ discloses no cogent

submission to explain how the LHIN's response to the appellant's request by forwarding it to the institution that it had determined had custody or control of the responsive records, constitutes an infringement of his *Charter* rights.

[84] I also note the appellant states that he is seeking the following declaratory relief, that:

- i. in light of the SAA, it is unreasonable to conclude that the LHIN has no information regarding the performance obligations that apply to the HSP's clinical decision making;
- ii. the LHIN has failed to present evidence disputing the appellant's assertions; and
- iii. the LHIN should immediately disclose all requested information without redactions or fees.

[85] The "relief" sought by the appellant is disclosure of the records responsive to his request. This is not a constitutional remedy but a right available to the appellant through the access regime and appeal provisions of the *Act*. In my view, the outcome sought by the appellant in his representations belies the fact that the submissions he makes do not raise a constitutional question but are a reiteration of his position on the issues relating to custody or control and the forwarding of his request under the *Act*. These are the issues that I have determined in this appeal.

[86] Notwithstanding the appellant's reference to sections of the *Charter* and his use of language drawn from constitutional legal principles, I find that the NCQ provides no challenge to the constitutional validity or applicability of the provisions of the *Act* nor does it claim a remedy under the *Charter*. I have determined the issues of whether the LHIN has custody or control of the responsive records for the purposes of section 10(1) and whether the LHIN discharged its duty under section 25(1) of the *Act*. Accordingly, I exercise my discretion to refuse to consider the appellant's NCQ.

## **ORDER:**

I dismiss this appeal.

Original signed by: \_\_\_\_\_  
Katherine Ball  
Adjudicator

October 30, 2023 \_\_\_\_\_