

# **OTLA Submission to the College of Physicians and Surgeons of Ontario**

## *Protecting Personal Health Information*

November 22, 2019

The Ontario Trial Lawyers Association appreciates the opportunity to make submissions to the College of Physicians and Surgeons of Ontario (the “CPSO”) on its review of the policy on Protecting Personal Health Information.

The Ontario Trial Lawyers Association (OTLA) was formed in 1991 by lawyers acting for plaintiffs. Our purpose is to promote access to justice for all Ontarians, preserve and improve the civil justice system, and advocate for the rights of those who have suffered injury and losses as the result of wrongdoing by others, while at the same time advocating aggressively for safety initiatives.

Our mandate is to fearlessly champion, through the pursuit of the highest standards of advocacy, the cause of those who have suffered injury or injustice. Our commitment to the advancement of the civil justice system is unwavering.

OTLA’s members are dedicated to the representation of wrongly injured plaintiffs across the province and country. OTLA is comprised of lawyers, law clerks, articling students and law students. OTLA frequently comments on legislative matters, and has appeared on numerous occasions as an intervener before the Court of Appeal for Ontario and the Supreme Court of Canada.

## **OTLA’s Position**

OTLA commends the CPSO for recognizing the importance of protecting patients’ personal health information (PPHI) as well as including guidelines with respect to the access by and transfer of records to third parties.

### **Consent or Court Order for Third Party Access**

The CPSO Policy Statement provides some guidance to physicians with respect to the disclosure of medical records when required by law (i.e., a Court Order) or when circumstances provide for the assumption of implied consent of the patient to collect, use, or disclose the patient’s file or PPHI. OTLA suggests that the guidelines consider the form of consent that may be required to transfer or provide access to medical records or PPHI to third parties on behalf of the patient where such circumstances do not apply, such that there is a need for express consent or disclosure by Court Order. OTLA also recommends that the CPSO guidelines clarify that any communications with third parties require the consent of the patient or a Court Order (other than implied consent). For example, no communications with counsel should take place unless the patient has given consent or there is an Order of the Court permitting the communication or PPHI disclosure.

To this end, OTLA suggests that the guidelines expressly provide for the necessity to obtain written consent from the patient that notes: (1) the name of the patient, (2) the name(s) of the third party to receive the disclosure, (3) confirms the nature of the information or medical records to be transferred or accessed, and (4) is duly executed by the patient or a proper guardian (e.g., power of attorney for care).

OTLA also suggests clarifying in the guidelines that when disclosure is being requested as required by law, such disclosure is to be made to the Court and not to a Third Party, unless there is an Order of the Court granting third party such disclosure. It is recommended that the CPSO emphasize in the Advice to the Profession Document a reminder to Physicians that they should look carefully at

the Court Document received that purports to require disclosure by law to a Third Party. For example, a *Summons to Witness* does **not** permit the Physician to disclose PPHI or records to a Third Party and only permits the Physician to attend Court at the time specified with the medical record to be disclosed to the Court. A *Court Order* is a judicial pronouncement that can require disclosure to a Third Party, without the consent of the patient. However, there may be limitations to such an Order and it requires a careful read of the document (Order). If there is uncertainty about disclosure requirements, it is recommended that the physician contact the patient to obtain consent to disclose to the Third Party requesting the information or documents.

For guidance on these issues, OTLA would direct the CPSO, and its members, to the cases of *Burgess (Litigation guardian of) v. Wu* [2003] O.J. No. 4826<sup>1</sup>; *Smith v. Muir*, 2019 ONSC 2431<sup>2</sup> and *Roy v. Primmum Insurance Company*, 2019 ONSC 6361<sup>3</sup>.

## **Conclusion**

OTLA thanks the CPSO for inviting us to provide input on this initiative. OTLA supports the CPSO's initiative to ensure physicians understand the important of PPHI issues. OTLA would be pleased to discuss our position and recommendations further should the need arise.

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<sup>1</sup> *Burgess (Litigation guardian of) v. Wu* [\[2003\] O.J. No. 4826](#) at paras 69 to 77.

<sup>2</sup> *Smith v. Muir*, [2019 ONSC 2431](#). I

<sup>3</sup> *Roy v. Primmum Insurance Company*, [2019 ONSC 6361](#) at para. 32