

Health Law Bulletin

The Year 2005 In Review

Dear Reader,

As we embark on a new year, we hope the following highlights of the health law developments in 2005 will help to inform and assist you in your activities in 2006.

If you have any questions or comments about the topics covered in this Newsletter, we invite you to contact any member of the Davis & Company Health Law Practice Group.

Yours truly,

Linda I. Parsons,

Partner & Chair,

Davis & Company LLP Health Law Practice Group

1. U.S. PATRIOT Act Update

The **USA PATRIOT** Act has been the source of much discussion and debate in British Columbia. This American legislation empowers American law enforcement officials to exercise broad powers to seize personal information falling within the jurisdiction of U.S. courts. Concerns that the security of personal health information of British Columbians might be jeopardized by

the ***PATRIOT Act*** led to the passage of significant amendments to the privacy provisions in the ***Freedom of Information and Protection of Privacy Amendment Act*** (Bill 73) in October 2004.

Some proponents of the ***PATRIOT Act*** have answered concerns about this legislation by pointing out that the legislation was enacted as a temporary measure following the terrorist attacks of September 11, 2001. The key provisions of the ***USA PATRIOT Act*** giving rise to privacy concerns were set to expire December 31, 2005.

However, in early 2005 President Bush called for a full renewal of the Act, and proposed to renew it in its current form for seven years. This announcement was met by strong opposition by both Republicans and Democrats, and heated political debate throughout 2005 has resulted in no consensus on any amendment or renewal of the Act. The controversial surveillance provisions of the Act expired on February 3, 2006. At this time no renewal or amendment of the ***PATRIOT Act*** has been passed. The issue is still under debate.

2. Case Law

A. *Supreme Court of Canada Rules Prohibition on Private Medical Insurance Violates Quebec Charter of Human Rights and Freedoms*

In ***Chaoulli v. Quebec*** a much anticipated decision of the Supreme Court of Canada, the Court ruled that prohibitions against private medical insurance violated the Quebec Charter of Human Rights and Freedoms. What this case means for private sector health care in the rest of Canada remains an open question.

Background

The case involved a legal challenge brought jointly by George Zeliotis, a 73 year old patient facing long surgical wait times, and Dr. Chaoulli, a physician, who had tried unsuccessfully to obtain a license to operate an independent private hospital. The two joined forces to contest the validity of a prohibition on private health insurance for private health care services in Quebec. They argued that the prohibition deprived citizens of access to health care services free of the waiting times so prevalent in the public system. They asked the court to issue a declaration that the prohibition on private health insurance violated their rights to life, liberty and security of the person in s.7 of the ***Canadian Charter of Rights and Freedoms*** (the “Charter”) and under s.1 of the ***Quebec Charter of Human Rights and Freedoms*** (the “Quebec Charter”).

Decision

Although the decision has generated much debate across Canada, it does not resolve for all Canadians the extent of the government’s obligations in respect of accessibility to health care.

The Supreme Court of Canada concluded that the Quebec legislation violated the rights of Quebec residents to “personal inviolability” under section 1 of the Quebec Charter. However, the Court was split on whether section 7 of the ***Charter***, applying broadly to all Canadians, was violated by the prohibition.

For Canadians outside of Quebec, the decision in ***Chaoulli*** does not definitively establish that governments must either address lengthy wait times or permit the establishment of privately funded health

care alternatives. In the wake of the decision, some governments may nevertheless pledge to make change.

What is significant about the decision is that the Court agreed that issues of accessibility to health care can and do engage and risk violation of fundamental rights in the **Charter**. Specifically, the court concluded that section 7 of the **Charter**, protecting life, liberty and security of the person, is threatened when health care wait times endanger a person's life or trigger significant physical or psychological suffering or give rise to a risk of permanent injury.

However, in order to establish a violation of section 7 of the Charter, the laws prohibiting private insurance must also be contrary to the "principles of fundamental justice". It is on this question that the Court was divided. Three members of the panel

concluded that the Quebec legislation was contrary to principles of "fundamental justice" on the basis that the law was arbitrary and lacked a real connection to the purpose that it was designed to serve, namely the protection of the public health care system. Three other members of the panel concluded that the law was not arbitrary, accepting expert evidence that permitting a parallel private health care system would divert resources away from and thereby endanger the public system. The seventh member of the panel declined to answer the question.

While for many the decision in **Chaoulli** leaves an unsatisfying ambiguity, we can no doubt expect that it has opened the door to numerous new legal challenges to the operation and administration of the public health care system and the opportunities available to privately funded health care providers. ●

Tax Tip - Private Clinics

In the wake of both the **Chaoulli** decision and the recent election of a Conservative government that promises support for more flexible involvement of the private sector in health care, it seems likely that 2006 will witness significant growth for private clinics and health services.

Given that private clinics are often engaged in offering a complicated combination of publicly funded services and elective or non-insured services, clinic operators need to develop familiarity with the application of the Goods and Services Tax (GST) to all of their different services.

For example, while the supply of a health care service by a medical practitioner is generally exempt from GST, there are a number of procedures that are excluded from this exemption (e.g. cosmetic non-medical services). Likewise, the application of the GST to the supply of equipment may or may not be tax exempt depending upon whether a clinic is set up as a "health care facility".

Operators should consult the **Excise Tax Act** (the "Act") and its regulations in order to understand when GST might be applicable to certain services, as this will depend on several factors, including the nature of the service and the circumstances in which the service is being provided.

**B. B.C. Supreme Court Finds Ministry Policy
Discriminated Against Parent as Caregiver**

On October 12, 2005, the B.C. Supreme Court upheld a 2004 decision of the B.C. Human Rights Tribunal finding that a Ministry of Health policy prohibiting a parent from qualifying as a paid caregiver under the **Choices in Support for Independent Living** (CSIL) program was discriminatory.

Background

Cheryl Hutchinson, a 35 year old woman with cerebral palsy, required the assistance of a personal caregiver for all aspects of her daily life. Ms. Hutchinson's father had been her primary caregiver for several years. In 1998, Ms. Hutchinson was accepted into the CSIL, a program designed by the Ministry of Health to give control to people requiring care over the hiring, training, paying and management of their caregivers. Seeking to hire her father under the CSIL program, Ms. Hutchinson asked for an exemption to a policy prohibiting participants from hiring family members. Her request was refused. She and her father challenged that decision as discriminatory before the B.C. Human Rights Tribunal (the "Tribunal").

The Tribunal's Decision

The Tribunal concluded that the blanket prohibition against the hiring of family members by adults

receiving Ministry funding for long-term, in-home care was discriminatory against both the family member, who was denied employment, and the person requiring care, who lost the freedom to choose the most appropriate caregiver for their needs. The Tribunal directed the Ministry of Health to tailor a rule which allowed for exceptions under the CSIL on a case-by-case basis, and ordered the Ministry to pay compensation to Ms. Hutchinson and her father. The Province of B.C. sought a judicial review of the decision in the B.C. Supreme Court.

The Court Decision

The Court upheld the Tribunal's decision and found that the Ministry could create exceptions to the CSIL policy without incurring undue hardship. It also affirmed the Tribunal's finding that this was a case in which the exception should be granted. The Court was clear that it was applying the **Human Rights Code** to the specific case of the Hutchinsons to rectify the discriminatory effect in **their** case only, and declined to comment on whether the CSIL policy was generally discriminatory.

The effect of the decision is that the Ministry must amend its policy, and future applicants seeking to hire family members as caregivers will have an ability to apply for an exception in the same manner as the Hutchinsons. ●

Human Rights Comment

In the business world anti-nepotism policies are generally regarded favourably, protecting against perceptions of bias and favouritism in the workplace. However, the **BC Human Rights Code**, which applies to employment and to the provision of services to the public, prohibits discrimination on the basis of family status. Blanket prohibitions against hiring family members are therefore contrary to the **Code**. The **Hutchinson** case serves as a useful reminder that anti-nepotism policies should be reviewed carefully for compliance with the **Code**.

C. *Ensuring Adequate Destruction of Personal Health Information Essential In Wake of Ontario Privacy Commissioner's Decision*

Health care facilities should take particular care to ensure that all reasonable steps are taken to destroy personal health information following an October 31, 2005 decision of the Ontario Privacy Commissioner that found a Toronto clinic had breached Ontario's ***Personal Health Information Protection Act*** earlier in the month.

The Commissioner investigated the clinic after the ***Toronto Star*** reported that patient health records were strewn across Toronto streets as part of a movie set, recreating the September 11, 2001 World Trade Centre attacks. The records had been sold to a special-effects company by the agency hired by the clinic to safely destroy documents, but, without advising the clinic, it recycled rather than destroyed

the records. The Commissioner concluded that the ultimate responsibility for the privacy of the records lay with the clinic, and that it had a direct responsibility to ensure that the records were irreversibly destroyed, whether or not it used a contractor to carry out the destruction.

Under the Ontario ***Personal Health Information Protection Act*** "health information custodians" are required to take "reasonable" steps to dispose of the health information in a secure manner. The Commissioner concluded that this responsibility cannot be discharged by delegating it to a contractor and disclaiming further accountability.

While the Ontario legislation has no application in British Columbia, the ***Freedom of Information and Protection of Privacy Act*** and the ***Personal Information Protection Act*** impose similar requirements to undertake "reasonable" measures to protect personal information. ●

Privacy Law

The years 2004 and 2005 have witnessed a great deal of public concern about the privacy and security of personal health information. Indeed, health information is clearly among the most sensitive personal information entrusted to public bodies. The October 2004 Amendments to the ***Freedom of Information and Protection of Privacy Act*** (Bill 73) has also ensured that health officials and their private sector service providers will be scrutinized and held accountable for their privacy practices. Our legislation provides broadly that public bodies and their partners must ensure "reasonable" security measures. What is "reasonable" depends on the circumstances, but the increasing expectation is that authorities will be proactive in discharging this obligation, for example through the use of contractual provisions, employment policies, technology and other available measures.

3. Legislative Update

A. *British Columbia*

Amendments to the Health Professions Act

On August 19, 2005, the Registered Nurses Association of British Columbia was continued as the College of

Registered Nurses of British Columbia, and brought under the auspices of the ***Health Professions Act*** to regulate the practice of nurses and nurse practitioners in British Columbia. The College of Licensed Practical Nurses was brought under the legislation in September 2005, and the College of Midwives was brought under the Act as of June 2005. A comprehensive list of

occupations regulated under the Act can be obtained from the Ministry of Health's website at <<http://www.healthservices.gov.B.C.ca>>.

Amendments to the Freedom of Information and Protection of Privacy Act ("FOIPPA")

On November 24, 2005, amendments to FOIPPA provisions on the storage, access and disclosure of information, came into force. The following changes will affect how public bodies manage information.

s. 33(1)(i.1)

Section 30.1 of the FOIPPA requires public bodies to store and access personal information only in Canada, unless there is consent or if storage and access in or from another jurisdiction is otherwise permitted by FOIPPA.

The amendments have included a new exception to the prohibition against foreign access and storage to facilitate payments being made to or by government. Specifically, banking and credit card transactions frequently trigger the transfer of information about that transaction to international finance service providers. Potentially some or all of the transaction information is stored outside of Canada. Without the amendment, public bodies may have been precluded from dealing with financial institutions which rely on such international processing services.

Section 33.1(1)(c.1)

This provision clarifies that a public body may disclose personal information inside or outside of Canada, if that information has been made available to the public under an enactment that authorizes or requires the information to be made public. For example, the

amendment clarifies that information lawfully made public in B.C. that appears on a B.C. website (and is therefore accessible outside of B.C.) does not now breach FOIPPA requirements prohibiting information access and storage outside of Canada.

Section 33.2(d)

This provision clarifies that public bodies may disclose personal information to other public bodies if the disclosure is necessary to deliver common or integrated programs or activities.

Nurse Practitioners Excluded from Bargaining Units

The ***Health Authorities Amendment Act***, coming into force on November 24, 2005, removed nurse practitioners from the nurses' bargaining unit. The purported reason for this change is that nurse practitioners exercise a higher level of autonomy and independence (like physicians), and are not appropriately included in bargaining units for registered nurses.

B. Federal

Private Label Medical Devices

Effective June 1, 2005, the federal ***Medical Devices Regulations*** (the "Regulations") were amended to require all entities that sell (but do not manufacture) medical devices to apply as a "private label manufacturer" for new device licenses¹ for the products they sell. A growing number of retail businesses, particularly drugstore chains, are selling "store brand" medical devices under their name or trademark, while having limited or no control over the manufacturing process. The Regulations refer to these businesses as

“private label manufacturers” and have imposed regulatory requirements to ensure the devices sold and marketed by these retail businesses comply with the requirements of the federal

Medical Devices Regulations ●

(Footnotes)

¹ Or an amendment to an existing device license for Class II, III and IV medical devices.



Health Law Group

Members of Davis & Company's Health Law Group have a wide range of experience in providing legal services in the health-care field. We have acted on behalf of both public and private sector health-care clients on matters involving government relations, administrative and regulatory controls; corporate governance; professional negligence; patient rights; employment law and freedom of information and protection of privacy issues.

We also have an extensive commercial practice involving health-care clientele. In this connection, we provide general corporate/commercial advice, as well as assistance on taxation and real estate issues.

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This bulletin is intended to provide our general comments on developments in the law. It is not intended to be a comprehensive review nor is it intended to provide legal advice. Readers should not act on information in the bulletin without seeking specific advice on the particular matter. The firm will be pleased to provide additional details or discuss how this information is relevant to a specific situation.

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