

## Memorandum on Jurisdictional Issues

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## **MEMORANDUM ON JURISDICTIONAL ISSUES**

**Elaine Gibson, Jan Sutherland & Lorian Hardcastle**

This memorandum is structured around some of the questions that may arise within the context of the Action for Health project. It should be noted that this memorandum deals with legal issues at the level of legal principles and, as in many other fields, it is impossible to predict with any degree of certainty how principles will be applied in any particular situation. Many of the issues discussed below have not yet been litigated in Canada. **Nothing contained herein is intended to constitute legal advice and anyone who has specific questions should consult with a lawyer.**

### **JURISDICTION**

#### **ISSUES**

1. When the patient is in one jurisdiction and the practitioner is in another, does the physician only have to be licensed in his or her jurisdiction or the patient's as well? (5)
2. Would a case involving the practice of telemedicine be heard in the patient's or the physician's jurisdiction? (5)
3. Because the CMPA rates vary in different provinces, could the CMPA refuse to pay a judgment on the grounds that the physician was not insured in the patient's province? (5)
4. Does the provider bill his or her own province when providing a service via telemedicine, which then seeks reimbursement from the patient's province, or could the provider bill the patient's province directly for service without a billing number? (5)
5. If a doctor does a consultation with another doctor outside the hospital, can that doctor outside the hospital give advice without having privileges within the hospital where the patient is situated? (5)
6. Where health information is moving across provincial borders, which legislation would apply? (5, 8, 9)

#### **ANALYSIS**

##### **1. Would the physician require a license the patient's jurisdiction?**

Health is a provincially regulated matter and, so, health care providers have to be licensed in the province or territory where they practice. Physicians, as members of a self-regulating profession, are governed by the provincial licensing body that has jurisdiction over them. For example, in Nova Scotia the *Medical Act* holds that physicians must be

registered with the Nova Scotia College of Physicians and Surgeons. The College is tasked with the responsibility of determining whether an applicant meets the qualifications necessary to practice within the province and, if the physician is deemed duly qualified, the physician's name is entered in the registry; only then is the person able to practice medicine in Nova Scotia.<sup>1</sup> Failure to maintain the standards required or to meet the rules set out by the professional bodies can result in the license to practice being rescinded by the licensing body.

Where a practitioner is licensed is an important matter. While there are some differences between provinces regarding qualifications of applicants, generally, the rules and regulations regarding licensing of doctors ensures that all who are deemed qualified are reasonably competent doctors; the province of licensing should not indicate anything positive or negative about the physician's competence. For our purposes, however, the reason why we are concerned with where physicians are licensed has to do with control over the physicians. Doctors are a self-regulating profession in Canada and, in order to practice in Canada, a physician has to fall under the regulatory authority of a provincial or territorial licensing body. Thus, the Nova Scotia College of Physicians and Surgeons has authority over all doctors in Nova Scotia but has no authority over doctors in New Brunswick. The key question with respect to telemedicine, then, is when a doctor engages in cross-jurisdictional telehealth practices, who has authority over the physician?

As telemedicine allows health care providers from different parts of the country to have a significant role in a patient's care, question arises as to whether physicians must be licensed in the patient's jurisdiction. As it stands at present, the potential exists for physicians who engage in cross jurisdictional telehealth practices to be charged with practicing medicine without a license in the province where they are not licensed to practice. Pong and Hogenbirk enumerate several options that could resolve this issue.<sup>2</sup> The options are:

1. A dual licensure system where the physician would hold a provincial license and a national one. Acquisition of a national license would depend on having a valid provincial license.
2. A system where the physician would hold a provincial license but be permitted to practice telehealth in the other jurisdiction under a special or limited license.
3. Mutual recognition between provinces where they agree to recognize the licensing process and guidelines in the other jurisdiction and, so, allow physicians to offer services without seeking licensure in the non-resident location
4. Licensure by endorsement where one province recognizes the standards of the other and the physician would seek to have his or her license endorsed by the other jurisdiction
5. A system where a physician licensed in one province would notify the authority in the other location that they intend to practice telemedicine in that

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<sup>1</sup> *Medical Act*, S.N.S. 1995-96, c. 10.

<sup>2</sup> R.W. Pong & J.C. Hogenbirk, "Licensing Physicians for Telehealth Practice: Issues and Policy Options" (1999) 8:1 Health L. Rev. 3.

province. While the physician would not be required to meet the licensing requirements of the province in which they wish to practice telemedicine, he or she would agree to be under the legal authority of the province.<sup>3</sup>

Various organizations have also made suggestions regarding this topic. The National Initiative for Telehealth in Canada noted in 2003 that the cross-jurisdictional licensing issue needs to be resolved but recommends that, in the interim, licensing bodies consider entering into agreements with each other to permit the provision of telehealth services or that licensing authorities utilize temporary licensing mechanisms to permit telehealth services to be available. They also recommend that “[a] process be established to explore the feasibility of a pan-Canadian accommodation mechanism or approach to facilitate cross-jurisdictional licensure that is acceptable to, and administered by, the individual health professional regulatory/licensing bodies in each jurisdiction.”<sup>4</sup>

Various provinces have also addressed the issue. The bylaws of the College of Physicians and Surgeons of Alberta,<sup>5</sup> for example, stipulate that physicians wishing to practice telemedicine in Alberta must be registered with in Alberta and pay the required fee. Physicians wishing to practice telemedicine in Alberta must “unconditionally attorn to the jurisdiction of the College concerning any and all matters arising from or relating to that registered practitioner’s practice of telemedicine in Alberta.” There are three exceptions to the licensure requirement: 1) in the case of an emergency, 2) where the physician practices telemedicine in Alberta less than three times in a year, and 3) if the physician provides telemedicine services without compensation. If a physician in Alberta wishes to practice telemedicine in another jurisdiction, the bylaws state that the physicians must conform to any licensing or registration requirements in the other jurisdiction; failure to properly register according to the requirements of the other location is considered conduct unbecoming in Alberta. Interestingly, the bylaws also state that physicians are not to provide telehealth services (including issuing prescriptions) unless “the physician has obtained a history and physical examination of the patient adequate to establish a diagnosis and identify underlying conditions and/or contrary indications to the treatment recommended or provided” except in the case of an emergency where there except in the following circumstances”. The exceptions to this is where there is an emergency situation and there is another physician who “has an ongoing relationship with the patient” who is supervising the treatment” or in on-call or cross-coverage situations where the physician providing telemedicine services has access to the patient’s records.

British Columbia does not have a formal policy with respect to this issue. They have not required licensure in BC for telemedicine as long as the physician holds a valid licence in

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<sup>3</sup> *Ibid*, at 8-10. In their article, Pong and Hogenbirk outline the pros and cons of the various options but I shall not address those here. Our purpose in providing them is to demonstrate the range of options that policy maker have with regard to this issue which still remains unsettled.

<sup>4</sup> National Initiative For Telehealth, *National Initiative for Telehealth Framework of Guidelines* Ottawa: NIFTE (2003) online: <http://cst-sct.org/resources/FrameworkofGuidelines2003eng.pdf>

<sup>5</sup> College of Physicians and Surgeons of Alberta, *Bylaws of the College of Physicians and Surgeons of Alberta* (4 January 2005) s. 106, online: <http://www.cpsa.ab.ca/aboutus/attachments/2005%20bylaws.doc>

his or her resident province. If a complaint arose with respect to a telehealth physician, the College would refer the matter to the provincial College where the physician resides. It was indicated by the Deputy Registrar of the College that their practice may change as a result of discussion occurring at the national Federation of Medical Regulatory Authorities of Canada.<sup>6</sup>

According to the Fall 2005 edition of newsletter of the College of Physicians and Surgeons of Saskatchewan, the Council of the College has recently given direction to legal council to draft bylaws with respect to telemedicine.<sup>7</sup>

The College of Physicians and Surgeons of Manitoba have also added telemedicine provisions into their bylaws.<sup>8</sup> According to these bylaws, when the College receives a complaint respecting the conduct of a member practicing telemedicine, they will process the complaint irrespective of the jurisdiction where the patient resides. In addition, when the College receives a complaint from a Manitoba resident regarding a telehealth practitioner not registered in Manitoba, the College will seek the consent of the complainant to forward the complaint to the licensing body in the jurisdiction where the physician is registered.

The bylaws of the College of Physicians and Surgeons of Manitoba do not address licensing issues but the Terms of Reference for the Complaints committee states:

1. Where the College receives a complaint respecting the conduct of a Member [i.e., a physician licensed to practice in Manitoba] practising telemedicine, the College will process the complaint irrespective of the jurisdiction where the patient resides.
2. Where the College receives a complaint from a Manitoba resident respecting the conduct of a person who is not registered in Manitoba but who is alleged to be practising telemedicine in Manitoba, the College will seek the consent of the complainant to forward the complaint to the licensing body in the jurisdiction where the person alleged to be practising telemedicine in Manitoba is registered.<sup>9</sup>

Moreover, guidelines issued by the college require that a physician licensed in Manitoba who wishes to provide telemedicine services out of province must verify and comply with the licensing requirements in the other jurisdiction.<sup>10</sup> Presumably, that this is a guideline is binding on Manitoba physicians could mean that a physician who fails to

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<sup>6</sup> Personal communication from Dr. E. Phillips Deputy Registrar, College of Physicians and Surgeons of BC (18 July 2003).

<sup>7</sup> College of Physicians and Surgeons of Saskatchewan, *College Newsletter* (Fall 2005) at 2, online: [http://www.quadrant.net/cpsc/pdf/CPSS\\_Fall\\_2005\\_Newsletter.pdf](http://www.quadrant.net/cpsc/pdf/CPSS_Fall_2005_Newsletter.pdf)

<sup>8</sup> Manitoba, Bylaw 1, *The College of Physicians and Surgeons of Manitoba Bylaws* (4 October 1996), article 11.5.2.

<sup>9</sup> College of Physicians and Surgeons of Manitoba, "Complaints Committee Terms of Reference" (May 2005) online: [www.cpsm.mb.ca/about/committees\\_governance/committees/complaints/ComplaintsTOF](http://www.cpsm.mb.ca/about/committees_governance/committees/complaints/ComplaintsTOF)

<sup>10</sup> The College of Physicians and Surgeons of Manitoba, Guidelines and Statements 166, "Telemedicine" (revised: 2002).

comply with licensing requirement of another province may be subject to disciplinary action by the Manitoba authority.

While the regulatory body in New Brunswick has not passed bylaws dealing with telemedicine, the regulations of the College have provisions which through which a physician could be licensed to practice in New Brunswick. Physicians who are in good standing and licensed to practice in Maine, Quebec, Prince Edward Island and Nova Scotia can apply for a “Border Area License”. Moreover, physicians who provide consulting services to a hospital, commission, or institution may apply for a “Courtesy License.” The “Courtesy License” appears to address the kinds of services that most telemedicine encounters would require.<sup>11</sup> Similar to Manitoba, it is also a violation of New Brunswick regulations if a physician registered in New Brunswick were to practice in another jurisdiction without being authorized in that jurisdiction.

The College of Physicians and Surgeons in Nova Scotia has issued guidelines respecting telemedicine.<sup>12</sup> Among other things, the guidelines state that they will assert jurisdiction over Nova Scotia physicians for services they provide outside of the province. If, however, a physician from outside of Nova Scotia provides treatment to a patient inside the province, the College may forward the complaint to the authority in the jurisdiction where the physician resides. The guidelines exclude doctor-to-doctor consultations and, so, a sizable area is left for telemedicine.

Nova Scotia has another policy with respect of prescribing medications which may be relevant to telemedicine. According to this policy, prescribing for a patient solely on the basis of mailed or faxed information, or an electronic questionnaire, or countersigning a prescription issued by another physician without direct patient contact, is unacceptable. The only exception to this are generally accepted hospital and call group practices. The policy also states that prescribing should only be done after the usual elements of clinical assessment, such as taking a medical history, conducting a physical examination and any necessary investigations, and reaching a provisional diagnosis. This policy also explicitly states non-residents who hold a Nova Scotia license cannot use the Nova Scotia license to prescribe for patients outside of the province.<sup>13</sup>

The situation with respect to telemedicine is quite clear in Quebec. The Collège des Médecins du Québec issued a thorough position paper regarding telemedicine and this document was adopted by the Bureau of the Collège.<sup>14</sup> Unlike some other provinces, Quebec stipulates that the place where the physician is located is where the medical act

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<sup>11</sup> New Brunswick, Regulation 2(4), *College of Physicians and Surgeons of New Brunswick Regulations* (revised: December 2004) online: <http://www.cpsnb.org/english/Regulations/regulation-2.html>

<sup>12</sup> The College of Physicians and Surgeons of Nova Scotia, “Guidelines for the Provision of Telemedicine Services” (February 2001), online: [http://www.cpsns.ns.ca/publications/telemedicine\\_guidelines.htm](http://www.cpsns.ns.ca/publications/telemedicine_guidelines.htm)

<sup>13</sup> College of Physicians and Surgeons of Nova Scotia, “Policy regarding Prescribing Practices/Countersigning Prescriptions/Internet Prescribing” & “Notice to non-resident physicians concerning cross-border prescribing” (March 2003), online: <http://www.cpsns.ns.ca/publications/policy-internet-prescribing.htm>

<sup>14</sup> Collège des Médecins du Québec, Background Paper, “Telemedicine” (May 2000), online: <http://www.cmq.org/DocumentLibrary/UploadedContents/CmsDocuments/positiontelemedecineang00.pdf>

occurs. This means, then, that there is no issue regarding whether a Quebec physician practicing telehealth is required to register in another jurisdiction or whether physician from another jurisdiction must register in Quebec. The document states:

it is clearly established that physicians registered on the Roll of the CMQ who practise remote medicine are subject to the regulations of the Collège, whereas physicians from outside of Québec are accountable for their competence and their acts to the authorities governing them, notably when they practice medicine for patients located in Québec.<sup>15</sup>

The paper, however, warns Quebec physicians that their view with respect to Quebec physicians practicing in other jurisdictions may not be accepted in other jurisdictions. Thus they advise physicians to verify the requirements in other jurisdictions.

Prince Edward Island would require a physician from out of province who wished to provide telehealth services in PEI to be registered with the College.<sup>16</sup>

We can find no information regarding telemedicine from the regulatory bodies in Ontario Yukon, NWT and Nunavut.

The information just provided has been restricted to looking at telemedicine in a strictly Canadian context. Dealing with telemedicine in an international context would be daunting and, possibly, the subject of several volumes. As such, we make the following brief remarks about the international contexts.

Malaysia is regarded as one of the pioneers in enacting telemedicine legislation. In 1997, the legislative body enacted the *Telemedicine Act* which specifically addresses medical information crossing Malaysian borders.<sup>17</sup> The legislation strikes a balance between allowing the Malaysian population to benefit from foreign healthcare expertise, while protecting its citizens from unregulated practice. The *Telemedicine Act* restricts the practice of medicine within its borders to Malaysian licensed physicians, but allows physicians located outside the country to treat patients through telemedicine consultations, provided Malaysian physicians take ultimate responsibility for the patient.

Although it does not explicitly address telemedicine, a Directive of the European Communities establishes the free movement of physicians between the members of the European Economic Community. This directive includes mutual recognition of qualifications, and allows physicians to practice in any affiliated member state.<sup>18</sup> The member states make mutual recognition of a physician's right to practice contingent on

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<sup>15</sup> Ibid. at 2.

<sup>16</sup> Personal communication with Melissa MacDonald, College of Physicians and Surgeons of PEI, December 12, 2006. Ms. MacDonald also informed me that PEI is not at present contemplating any guidelines with respect to telehealth.

<sup>17</sup> Malaysia, "Telemedicine Act 1997" online: <<http://www.geocities.com/tokyo/9239/telem.html>>.

<sup>18</sup> Council of the European Communities, "Council Directive 93/16/EEC of 5 April 1993 to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualification" (1998).

the state's standardization of medical education and their willingness to adhere to predefined disciplinary procedures.

In Australia, physician licensure is also a state matter and physicians cannot practice where they are not licensed. However, all states recognize most professional registrations in another state without re-examination.<sup>19</sup>

A number of jurisdictions in the United States have also passed telemedicine legislation. Most of these states require a full license to offer medical services in another state, but the majority also contains consulting exceptions which allow a physician who is unlicensed to practice medicine with a referral from another physician. In addition, regular or frequent consultation may require a license. However, some states have interpreted these consultation exceptions to preclude telemedicine.<sup>20</sup>

## **2. In which jurisdiction would a telemedicine case be heard?**

If a practitioner from different jurisdiction was involved with a patient's treatment via technology and acts in a negligent manner, the fact that the practitioner was not licensed in the patient's jurisdiction would not shield the practitioner from potential liability. Thus, as far as tort liability is concerned, the licensing jurisdiction is somewhat irrelevant. What is important for liability purposes is determining where the tort is found to occur.<sup>21</sup> Thus, if an Ontario physician practicing telemedicine with a patient in Manitoba, it is possible that a suit could be heard in either Ontario, where the doctor allegedly undertook some wrong action, or Manitoba, where the alleged damage occurred.

Irrespective of whether the injuries occurred as a result of telemedicine or not, the issue of where a suit may be brought is a fairly common one in Canadian law; that is to say that a telemedicine transaction does not add any unique complications. Parties to actions might seek a change of venue for a number of reasons including convenience, access to key witnesses, more favourable court rules (e.g., longer limitation periods, more expansive civil procedure rules regarding who and what can be examined), and the possibility of a higher quantum of damages being assigned.

Courts generally apply a test to determine whether they are the proper authority to hear a matter. First, in order to determine where the suit should be brought, courts look to see whether there is a real and substantial connection between the jurisdiction and the action.<sup>22</sup> Secondly, the court will consider (upon a motion of *forum non conveniens* being made by the party who favours another jurisdiction) whether another forum would be "more convenient and appropriate for the pursuit of the action and for securing the ends

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<sup>19</sup> Pong & Hogenbirk, "Licensing Physicians for Telehealth Practice" at 5.

<sup>20</sup> Steinecke Maciura LeBlanc, "Grey Areas" May 2002, online: QL (HLPA).

<sup>21</sup> We are not aware of any malpractice cases involving telemedicine let alone telemedicine in a cross-jurisdictional application and, so, these remarks are speculative.

<sup>22</sup> *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077.



of justice.”<sup>23</sup> It should be fairly clear that the facts of each case will determine where the action is best brought.

In a hypothetical telemedicine case, arguments which might incline a court to accept or surrender jurisdiction might include:

- Their jurisdiction is the place that the injury occurred because it is where they were treated subsequent to the physician’s negligent advice.
- Practitioners who treated the patient’s injuries would be located in the plaintiff’s jurisdiction.
- The treating physicians who acted on the advice of the telemedicine practitioner all reside in the patient’s jurisdiction.
- The majority of the medical records would probably be located in the patient’s jurisdiction.
- Witnesses to the injury are in the patient’s jurisdiction.
- A number of witnesses testifying to quantify damages would probably live in the patient’s jurisdiction. For example, the plaintiff’s employer may provide evidence as to lost wages, or an operator of a local long-term care facility may testify to assist in quantifying future care expenses.
- The patient may not be well enough to travel to the practitioner’s jurisdiction, or it may impose undue financial hardship to do so.

In response, a physician could argue that:

- The negligent act occurred in the physician’s jurisdiction when they provided the advice.
- The location is relevant to determining standard of care, so the physician’s witnesses would be from his or her jurisdiction.
- Witnesses testifying about that physician’s practice would be located in his or her jurisdiction.
- Witnesses to the physician examining the transmitted patient information and making recommendations on it would be located in the defendant’s jurisdiction.

The court would weigh these factors to determine where the case would best be heard. Clearly both parties have some facts that show a real and substantial connection between the action and the jurisdiction but the court might well conclude that, with the factors cited above, the plaintiff reasons for wanting the matter heard in one jurisdiction rather than the other outweighs the physicians reasons for wanting it moved. Because the physician would have the burden of proving that the case should not be heard in the forum selected by the patient,<sup>24</sup> this hypothetical cases would probably be heard where the patient was treated.

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<sup>23</sup> Here the doctor would argue that the jurisdiction chosen by the plaintiff according to the doctrine of a *forum non conveniens*. In this case, the court asks whether there is another forum “more convenient and appropriate for the pursuit of the action and for securing the ends of justice.” *Amchen Products Inc. v. British Columbia (Workers’ Compensation Board)*, [1993] 1 S.C.R. 897 at 900.

<sup>24</sup> *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, [2003] S.C.J. No. 39.

One matter to keep in mind is that, although the rules allow some flexibility in choosing the appropriate forum, courts generally frown on ‘forum shopping.’ The idea of choosing which province’s laws are to govern was dealt with in the cases of *Tolofson v. Jensen* and *Lucas v. Gagnon*, which were heard simultaneously by the Supreme Court of Canada.<sup>25</sup> The Court ruled that, generally, people cannot choose which jurisdiction’s laws they want to apply, despite a minority opinion advocating a flexible exception to this rule. These cases involved car accidents in which the plaintiffs were residents of one province, while the accident occurred in another. Both plaintiffs’ wanted to sue in their own province rather than in the province where the accident occurred. In one case, the rules regarding limitation periods were more favourable to the plaintiff and, in the other, there was a no-fault regime. In these cases, the Court concluded that the *lex locus delicti* (law of the place of the tort) would govern.

There have been some developments in the case law regarding jurisdiction cases and the internet. In the Canadian decision of *Braintech, Inc. v. Kostiuk*, the B.C. Court of Appeal adopted American jurisprudence in addressing the issue of whether to exercise jurisdiction over a plaintiff outside the country.<sup>26</sup> In this case, the Court found that passively providing information online to parties in another jurisdiction is insufficient to establish jurisdiction. Presumably there has to be something more involved than mere presence in a location in order for a forum to claim jurisdiction. Although this case has not been adopted in other Canadian jurisdictions yet, courts have articulated various other tests which share the view that jurisdiction is exercised where the defendant aimed his or her activities at the jurisdiction. Takach outlines a number of these tests, which include “something more” than interactivity, whether there are “effects” in the jurisdiction, whether defendants purposefully avails themselves of the jurisdiction, “targeting” a particular location, and “deliberate action.”<sup>27</sup>

### **3. Because Canadian Medical Protective Association (CMPA) rates vary in different provinces, could the CMPA refuse to defend a physician on the grounds that the physician was not insured in the patient’s province?**

The CMPA will not defend a physician who provides telehealth service internationally. The CMPA will, however, assist in the defence of a physician who provides telehealth services in another province. While the CMPA strongly recommends that physicians comply with all of the regulations regarding registration in the province where they seek to offer services and in acquiring credentials in the facilities where they assist, even if the physician fails to do so, the CMPA will assist in their legal defence.<sup>28</sup>

The CMPA charges different rates to physicians depending on what their practice area is and where they practice. For example, according to their 1996 fee schedule, the fees for an endocrinologist in Ontario are \$4,500 whereas if they practiced in Nova Scotia

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<sup>25</sup> [1994] 3 S.C.R. 1022.

<sup>26</sup> [1999] B.C.J. No. 622 (C.A.).

<sup>27</sup> George S. Takach, *Computer Law* 2<sup>nd</sup> ed. (Toronto: Irwin Law, 2003)(QL).

<sup>28</sup> Personal communication with Dr. Patrick Ceresia of the CMPA, December 9, 2005.

the fee would be \$1,860.<sup>29</sup> With respect to offering services outside of the province where one normally practices, a Nova Scotia physician who wished to offer telehealth services in Ontario would be required to pay fees at the Ontario rate.<sup>30</sup>

**4. Does the provider bill his or her own province when providing a service via telemedicine, which then seeks reimbursement from the patient's province, or could the provider bill the patient's province directly for service without a billing number?**

Pong and Hogenbirk write that “[t]he absence of policies regarding physician reimbursement for engaging in telehealth practice could stifle the development of telehealth.”<sup>31</sup> Like licensing, the issue of reimbursements for telehealth services has no easy answers. Currently, all provinces have some mechanisms in place for paying for some telehealth services provided within the province. Other provinces have addressed this issue but in a more limited manner. In British Columbia, telemetry (the electronic transmission of data such as X-rays) can be billed to the provincial health plan under certain conditions.<sup>32</sup> Manitoba,<sup>33</sup> Nova Scotia,<sup>34</sup> and Newfoundland<sup>35</sup> also provide some insurance coverage for telemedicine services. The Ontario government has no reimbursement for the practice of telemedicine.<sup>36</sup> New Brunswick has no fee schedule for telemedicine services though some services, such as telemedicine radiology, are reimbursed using existing fee codes.<sup>37</sup> The question is also not merely whether reimbursement will be provided for telemedicine services, but also what type of services will be covered. For example, the Quebec insurance plan only covers radiologists using teleradiology.<sup>38</sup>

Even with respect to in intra-provincial reimbursements, difficulties remain. In an article dealing with telemental services,

Most jurisdictions now have policies to reimburse physicians for telehealth (including telemental health), but these are generally considered inadequate for attracting service providers to telemental health. For example, as indicated by the key informants, in Alberta, physicians receive the same fee for a telehealth session as for face-to-face care, when in reality a telehealth session takes longer, according to key informants. Saskatchewan's physician payment schedule does include payments to compensate physicians for delays caused by technical

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<sup>29</sup> Canadian Medical Protective Association, “Fee Schedule for 2006”, online: [www.cmpa-acpm.ca](http://www.cmpa-acpm.ca).

<sup>30</sup> Personal communication with Dr. Patrick Ceresia of the CMPA, December 9, 2005.

<sup>31</sup> Raymond W. Pong & John C. Hogenbirk, “Reimbursing Physicians for Telehealth Practice: Issues and Options” (2000) 9 Health L.R. 3 at 4.

<sup>32</sup> *Ibid.* at para. 13.

<sup>33</sup> *Ibid.* at para. 16.

<sup>34</sup> *Ibid.* at para. 21.

<sup>35</sup> *Ibid.* at para. 23.

<sup>36</sup> *Ibid.* at para. 18.

<sup>37</sup> *Ibid.* at para. 20.

<sup>38</sup> *Ibid.* at para. 19.

problems. In Newfoundland, child psychiatry is the only telemental health service for which there is any fee-for-service reimbursement. In Manitoba, the fee schedule omits case conferences. In Quebec, the legislation specifically provides that telehealth is not an insured service. In British Columbia and Ontario, there are no fee-for-service provisions for patient/provider consultation through videoconferencing. In order to recruit service providers, project and program managers have attempted to mitigate the impact of inadequate fee-for-service policies by using contract agreements, salaried physicians and session fees paid out of project/program budgets.<sup>39</sup>

The matter becomes even more unsettled when dealing with cross-provincial telehealth. As Pong and Hobenkirk note, there is no national fee schedule or reimbursement policy in Canada and the province have varying kinds of coverage.<sup>40</sup>

In Alberta, for example, out of province physicians providing telehealth services in Alberta can bill through their provincial health ministry provided that it is an insured service in the other province and the physician has the patient's Alberta health number.<sup>41</sup> In Saskatchewan, reimbursement for telehealth consultation must be pre-approved by the Ministry of Health and the physician then bills the province directly.<sup>42</sup>

According to Hobenkirk, Pong & Liboiron, as of 2001, 11 jurisdictions allowed fee for service reimbursements for telehealth within their jurisdiction (all provinces and territories except for Ontario and PEI) and 8 jurisdictions (Alberta, New Brunswick, NWT, Nova Scotia, Nunavut, Saskatchewan and Yukon) allowed for fee for service reimbursements for telemedicine services provided in another jurisdiction.<sup>43</sup>

There is no question that billing and reimbursement issues will present a challenge to the success of cross-border telehealth ventures.

##### **5. If a doctor does a consultation with another doctor outside the hospital, can that doctor outside the hospital give advice without having privileges within the hospital where the patient is situated?**

Generally physicians require privileges in the hospital where they are practicing medicine. The hospital's ability to grant or revoke privileges is connected to the non-delegable duty they owe patients to select competent personnel. According to Picard, a

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<sup>39</sup> Health Canada, *Telemental Health in Canada: A Status Report* Ottawa: Health Canada: 2004, online: [http://www.hc-sc.gc.ca/hcs-sss/pubs/ehealth-esante/2004-tele-mental/index\\_e.html](http://www.hc-sc.gc.ca/hcs-sss/pubs/ehealth-esante/2004-tele-mental/index_e.html).

<sup>40</sup> Pong & Hogenbirk, "Reimbursing Physicians for Telehealth Practice" at 4.

<sup>41</sup> Health Canada, Canada's Health Infostructure: Provincial and Territorial Plans and Priorities--2003: Alberta, online: [www.hc-sc.gc.ca/hcs-sss/ehealth-esante/infostructure/pt/2003/ab\\_e.html#rei](http://www.hc-sc.gc.ca/hcs-sss/ehealth-esante/infostructure/pt/2003/ab_e.html#rei).

<sup>42</sup> Health Canada, Canada's Health Infostructure: Provincial and Territorial Plans and Priorities--2003: Saskatchewan, online: [www.hc-sc.gc.ca/hcs-sss/ehealth-esante/infostructure/pt/2003/sk\\_e.html#rei](http://www.hc-sc.gc.ca/hcs-sss/ehealth-esante/infostructure/pt/2003/sk_e.html#rei).

<sup>43</sup> John C. Hogenbirk, Raymond W. Pong & Linda J. Liboiron, "Fee-for-Service Reimbursement for Telehealth Service in Canada, 1999/2000" online: [www.cranhr.ca/pdf/reimburse.pdf](http://www.cranhr.ca/pdf/reimburse.pdf).

hospital has a duty to “review and monitor qualifications and competence.”<sup>44</sup> The main way that hospitals carry out this duty in relation to physicians is by granting privileges, which includes things like reference letters, a check of qualifications, etc. If physicians were able to contact physicians at other hospitals, it would be arguable that this duty is not being carried out although, clearly, physicians from different facilities have acted as consultants on matters for years. However, if a physician was going to offer more on-going kinds of service, they should seek privileges in the facility from where they wish to provide service. It is certainly the recommendation of the CMPA that physicians who provide telehealth services at a facility should ensure that they are properly credentialed in that facility.<sup>45</sup>

## **6. Where health information is moving across provincial borders, which legislation would apply?**

Health information generally remains within a province. Nevertheless one of the main points in favour of electronic patient records is the ease with which the information can flow from one location to distant locations. This poses some issues with respect to how health information is managed.

Virtually all provinces have legislation dealing with protection of personal information in the public sector (like government departments and hospitals). Alberta, Manitoba, and Saskatchewan have legislation dealing specifically with health information. Physicians in private practice would be deemed to be engaged in a commercial activity and so the *Personal Information and Electronic Documents Act* (PIPEDA) would apply. PIPEDA will apply to all provinces unless they have enacted legislation that is substantially similar to PIPEDA. To date, Quebec, Alberta, and B.C. have enacted legislation that is substantially similar.

To reduce all of these various legislative schemes to a nutshell, all seek to apply rules and safeguards to the collection, use, and disclosure and retention of personal information of individuals. While there is some variation in the rules, they are somewhat similar with respect to the collection, use, and disclosure of personal information.

Generally, all of the various legislative efforts require that consent be sought for the collection and disclosure of personal information. With respect to the collection of the data, individuals must be apprised of the use of the information. As far as disclosure goes, individuals must consent to the disclosure of their information. There is some leeway with respect to disclosure without consent to information conveyed to members of the health team.<sup>46</sup> How far the ambit of “members of the health care team” can stretch

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<sup>44</sup> Ellen Picard & Gerald Robertson, *Legal Liability of Doctors and Hospitals in Canada*, 3<sup>rd</sup> ed. (Toronto: Thomson Canada Limited, 1996) at 368.

<sup>45</sup> Personal communication with Dr. Pat Ceresia, CMPA, December 9, 2006.

<sup>46</sup> For example, the *Alberta Health Information Act* R.S.A. 2000, c. H-5 holds at s. 35(1)(b):

would depend on the facts of the situation. Generally, patients may understand that their information will be shared amongst the people they know to be on the team but it may not occur to patients that their information may be shared with someone in another province. Suffice it to say that if it is possible to get the consent of the patient to the sharing of their information, then consent should be sought. In an emergency, there may not be time to get the consent and an exception will be made.

It is possible to speculate what legislation would apply in a case where private information crossed provincial borders. Efforts to harmonize the various legislative efforts should address confusions in this regard as there may be no significant difference between the schemes in the relevant jurisdictions. As well, much of this would be determined by where the action is brought (as discussed above).

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A custodian may disclose individually identifying diagnostic, treatment and care information without the consent of the individual who is the subject of the information  
(b) to a person who is responsible for providing continuing treatment and care to the individual.