

# The Importance of Privacy of Health Information for People Living with HIV/AIDS

*This info sheet outlines why it is important to protect the right of people living with HIV/AIDS to keep their health information private. It also explains how the right to privacy may impose a legal duty on some people who have information about a person's health to keep it confidential. Other info sheets in this series explain the details of how Canadian law protects privacy of health information, and the limits of that protection.*

This is one in a series of seven info sheets on HIV/AIDS and the Privacy of Health Information.

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2. Privacy, Confidentiality, and Privilege: Related Legal Concepts
3. Legal Protection of Privacy and Confidentiality in Canadian Law
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6. Patient Confidentiality and Preventing Harm to Others
7. Privacy Protection under Québec Law



Canadian  
Strategy on  
HIV/AIDS

## Impact of unauthorized disclosure on people living with HIV/AIDS

People living with HIV/AIDS themselves, as well as public health researchers, lawyers, and community-based AIDS service organizations, have highlighted the importance of protecting the confidentiality of health information, particularly for people living with HIV/AIDS. People living with HIV/AIDS suffer discrimination as a result of the unauthorized disclosure of their HIV status. They have been deprived of housing, have lost their jobs, and their social relationships have been compromised as a result of the disclosure of health information to third parties without consent.

It is fundamental that people living with HIV/AIDS control access to their personal health information. People living with HIV/AIDS have a right to:

- decide to whom, when, how, and to what extent they will disclose their personal health information;
- control the use and disclosure of their personal health information, and who has access to that information; and
- know how their personal information is going to be used and safeguarded.

## Privacy is a human right

The International Guidelines on HIV/AIDS and Human Rights recognize that the right to privacy of people living with HIV includes respect for the confidentiality of all information relating to their HIV status. From a human rights perspective, people are entitled to enjoy the conditions that would enable them to realize their health and well-being. This means that under international law, governments are obliged to respect, protect, and fulfill the rights of people – including the right to privacy. Protecting the right to privacy, and enforcing the duty of confidentiality regarding health information, are fundamental to treating people with autonomy, dignity, and respect.

When the privacy rights of people living with HIV/AIDS are not promoted and protected, the impact of the epidemic on individuals and communities is worse. A breach of the right to privacy often leads to breaches of other human rights, such as the right to life, liberty, security of the person, the right to work and free choice of employment, and the right to adequate housing and medical care.

## PRIVACY OF HEALTH INFORMATION FOR PEOPLE LIVING WITH HIV/AIDS

### Protecting privacy promotes health and well-being

In the HIV/AIDS epidemic, human rights and health are fundamentally linked. The promotion and protection of human rights protect the inherent dignity of people affected by HIV/AIDS and contribute to the public health goals of minimizing HIV transmission and lessening the impact of HIV/AIDS on individuals and communities. When the privacy of medical information is put at risk, our ability to reduce health risks, ensure early detection of illnesses, and ensure that patients receive appropriate medical treatment is weakened.

People will be reluctant to seek HIV testing and counselling if they believe their HIV status will be disclosed without consent to employers, insurance companies, the government, and relatives. If fewer people find out that they are HIV-positive through testing (accompanied by appropriate pre- and post-test counselling), the risk of further HIV transmission is increased.

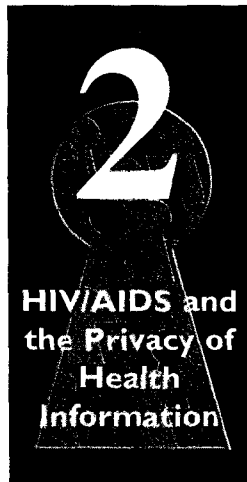
Some people with HIV/AIDS may choose not to seek medical care for fear that their personal health information will be disclosed without their consent. This fear is particularly serious for people living with HIV/AIDS in small geographic or ethnocultural communities. People living with HIV/AIDS come into contact with doctors, pharmacists, and complementary medical practitioners as well as government agencies, including home care and income support services. It is critical that a relationship of trust, based on the duty of confidentiality, exist between each person living with HIV/AIDS and the people who provide health and social services to him or her. Without this relationship of trust, people living with HIV/AIDS will not be able to fully realize their right to access health-care and social services.

Where adequate privacy safeguards do not exist, people living with HIV/AIDS may be reluctant to participate in research studies to enhance treatment and ultimately discover a cure for HIV infection.

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# Privacy, Confidentiality, and Privilege: Related Legal Concepts

*This info sheet explains the relationship between the human right to privacy, the duty of confidentiality, and the legal rule of privilege, and how these different legal concepts can work together to protect privacy of health information.*

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## Right to privacy

Privacy is a fundamental right recognized in international human rights law and under Canada's constitution. Governments must respect the individual's right to privacy by not interfering with it. Governments can be held accountable for not respecting the right to privacy, unless they have adequate justification for limiting or overriding it in some way.

But governments must also take steps to protect that right from being breached by others. Therefore, governments have imposed legal duties on certain people regarding the collection, use, and disclosure of personal information. Beyond such legal duties, the law also recognizes that sometimes a person should be entitled to prevent someone from disclosing information without his or her consent.

## Duty of confidentiality

The duty of confidentiality is one way the law protects a person's right to keep his or her personal information private. From the perspective of people living with HIV/AIDS, the most important duty is the duty placed on certain people to keep personal health information confidential, except in exceptional circumstances and under specified conditions. There are both legal and ethical duties of confidentiality. In Canada, the ethical duty of confidentiality has also been recognized as a legal duty for health-care professionals.

## Rule of privilege

The rule of privilege is a rule of evidence. It prevents the disclosure of confidential information in a legal case, based on policy reasons. Where the rule applies, someone who has confidential information about another person cannot be forced to disclose that information. The person cannot be forced to testify in a legal case about that information, nor can the person be forced to disclose written communications (or other recorded information she or he has) for use as evidence in the case.

Québec, where the Civil Code rather than the common law applies, is the only province that has created by statute a privilege for communications between a physician and patient. In every other jurisdiction, a court must determine on a case-by-case basis if confidential information shared by a patient with a physician (or other health-care professional) is privileged. The Supreme Court has said that, in order for the privilege to apply in a given case, four conditions must be met:

## PRIVACY, CONFIDENTIALITY, AND PRIVILEGE: RELATED LEGAL CONCEPTS

- the patient disclosed the information in confidence that it would not be divulged;
- the confidentiality must be essential to the relationship;
- the community believes that the relationship should be protected and fostered; and
- disclosing the information would do more harm to the relationship than the benefit gained by deciding the legal case correctly based on more information.

The communications between a person living with HIV/AIDS and his or her pharmacist, physician, social worker, counsellor, or psychologist will only be privileged if these four criteria are met. However, at the time someone meets with his or her health-care professional there is no way to know for certain if a court will decide that what he or she tells the health-care professional is privileged.

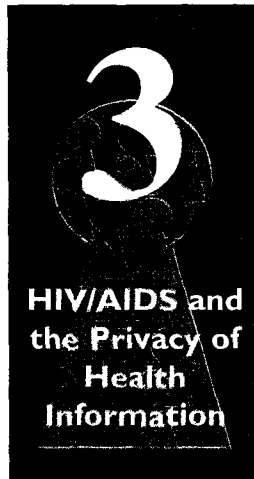
### **Different legal concepts work to protect privacy**

A person living with HIV/AIDS can rely on his or her own right to privacy, the duty of confidentiality that may exist for certain other people, and the legal rule of privilege to control the disclosure of his or her personal health information. Each can be relied upon to achieve this goal in different yet mutually reinforcing ways. The right to privacy can be invoked directly to prevent the government, or sometimes others, from gaining access to personal health information, or to hold them legally accountable if they gain access improperly. The duty of confidentiality owed to a person protects that person's right to privacy regarding personal information. And the rule of privilege can prevent the person who owes a duty of confidentiality from disclosing another person's health information without that person's consent.

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# Legal Protection of Privacy and Confidentiality in Canadian Law

*This info sheet explains some of the laws in Canada that protect people's privacy and that impose duties on some people not to breach other people's confidentiality. It also explains the legal actions people can take if their privacy is violated or the duty of confidentiality owed to them is breached.*

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## A patchwork of rules

The Canadian laws that protect the privacy of personal health information have been described as a “patchwork,” a “hodgepodge,” “comparatively undeveloped,” and “excessively complicated.” These laws include:

- the Canadian Charter of Rights and Freedoms;
- the Québec Charter of Human Rights and Freedoms;
- the common law and the Civil Code of Québec;
- laws governing health professionals and health facilities;
- privacy acts;
- health information privacy acts; and
- general privacy of information acts.

## Canadian Charter of Rights and Freedoms

The pre-eminent source of human rights protection in Canada is the Charter. In both civil and criminal cases, Canadian judges have accorded great value to the notion of privacy, elevating it to a constitutional right under the Charter. The word “privacy” does not appear in the Charter, but the Supreme Court has stated that the respect for dignity that underlies the Charter finds expression in fundamental rights such as privacy, equality, and protection from state compulsion. People living with HIV/AIDS can use the Charter to prevent unconstitutional actions by the government that breach their privacy.

Section 7 of the Charter says that everyone has the rights to “liberty” and to “security of the person” and the right not to be deprived of these rights except “in accordance with the principles of fundamental justice.” These constitutional rights protect an individual’s privacy to some degree. In the *Morgentaler* case (challenging restrictions on a woman’s access to abortion services), one Supreme Court judge stressed that “the liberty interest is rooted in fundamental notions of human dignity, personal autonomy, privacy, and choice in decisions regarding an individual’s fundamental being.”

Section 8 of the Charter says that everyone has a right “to be secure against unreasonable search or seizure.” The Supreme Court has said that this section protects “a reasonable expectation of privacy.” Medical information is given a high degree of constitutional protection under section 8 of the Charter. In the case of *R v Plant* (1993), the Supreme Court wrote:

## LEGAL PROTECTION OF PRIVACY AND CONFIDENTIALITY IN CANADIAN LAW

In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the Charter should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual.

### **The common law**

The "common law" is a body of law that is developed over time through court decisions. This is different from "statutory law," which refers to the acts passed by legislatures and the regulations made by the executive under the authority of those acts. The common law recognizes various "torts." A tort is a civil wrong (other than breaching a contract) that can be the basis of a lawsuit for damages (such as "negligence"). The extent to which the common law has recognized tort lawsuits as a way to compensate for the loss of people's privacy in their personal health information is limited.

The common law does not strictly apply in Québec, because Québec has a civil code. For specific information about privacy protection in Québec, see info sheet 7, "Privacy Protection under Québec Law."

### ***Tort of "invasion of privacy"***

A "tort" is a civil wrong (other than breaching a contract) that can be the basis of a lawsuit for damages. Neither the Supreme Court of Canada nor a provincial court of appeal has yet recognized the tort of "invasion of privacy." While a number of lower-court decisions have recognized the tort of invasion of privacy, people suing have only been awarded nominal to modest damages. Judges in Canada have tended to rely upon existing torts such as negligence, nuisance, trespass, and defamation to compensate people for violations of their privacy.

### ***Health professionals' fiduciary duty of confidentiality***

Health-care professionals have a "fiduciary" obligation not to breach patient confidentiality. The law will impose a fiduciary obligation where one person (eg, a physician) must act in another person's (eg, the patient's) best interest by virtue of the relationship between the two. The law holds the fiduciary to a strict standard of conduct.

In *McInerney v MacDonald* (1992), the Supreme Court stated that a fundamental characteristic of the doctor-patient relationship is its fiduciary nature, in

which the patient places "trust and confidence" in the physician. The physician has the duty to act with utmost good faith and loyalty, and to hold information received from or about a patient in confidence. Other health-care professionals (such as nurses, psychologists, dentists) may also owe a fiduciary duty to their patients in certain circumstances.

When a physician breaches the fiduciary duty of confidence owed to a patient, the patient can sue the physician. To prove that there has been a breach of confidence, the patient must show: (1) that the information conveyed was confidential; (2) that it was communicated in confidence; and (3) that it was misused by the physician.

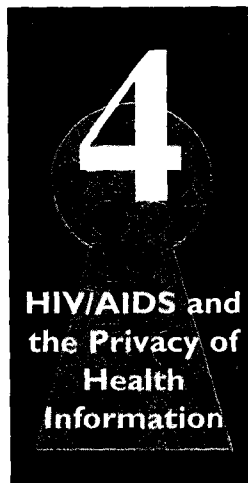
### **The right to sue under provincial legislation: general privacy acts**

Four common law provinces (British Columbia, Manitoba, Saskatchewan, and Newfoundland) have enacted general privacy acts that give a right to sue for violations of privacy. Typically, the statutes state that "it is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another." Few legal actions have been initiated under these provincial laws. Where cases have been brought, the person suing has lost in approximately three out of four cases. Where the person suing has won, the damages awarded have generally ranged from nominal to moderate.

### **Laws governing specific health professionals and health-care facilities**

Some provincial laws that regulate health-care professionals and health-care facilities set out duties of confidentiality owed to the patient by the health-care professional or facility. These acts apply to physicians, nurses, dentists, hospitals, and nursing homes, to name a few. Generally, these laws also recognize exceptions to the duty of confidentiality, allowing the professional or facility to disclose confidential patient information in some circumstances.

Where a regulated health-care professional breaches the duty of confidentiality owed to a patient, the patient can file a complaint with the professional's regulatory body. Professional regulatory bodies do not have the power to award monetary damages. They do have the power to discipline health-care professionals for incompetence or misconduct, and can impose sanctions such as revoking, suspending, or placing conditions on the professional's licence to practise, reprimanding the professional, or imposing a fine.



# Privacy Principles

*This info sheet looks at the general principles that should be reflected in legislation protecting the right to privacy with regard to personal information, including health information. It explains what those principles should mean for legislation protecting the privacy of people living with HIV/AIDS.*

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## CSA Model Code for the Protection of Personal Information

The Canadian Standards Association (CSA) is a not-for-profit membership-based association. It works in Canada and around the world to develop standards that address needs such as enhancing public safety and health, advancing quality of life, helping to preserve the environment, and facilitating trade. In 1996 the Canadian Standards Association released the Model Code for the Protection of Personal Information. The Model Code is based on ten fundamental principles that apply to organizations that collect personal information.

### 1. Accountability

An organization is responsible for personal information under its control and shall designate people to be accountable for the organization's compliance with the principles.

### 2. Purposes of Collection

A person must be told about the purpose(s) for which his or her information is being collected, before the information is collected.

### 3. Consent

An organization cannot collect, use, or disclose personal information without the knowledge and consent of the person to whom the information relates, except where obtaining consent would be impossible, impracticable, or inappropriate.

### 4. Limiting Collection

Organizations shall only collect personal information that is necessary for the purposes identified by the organization. Information shall be collected by fair and lawful means.

### 5. Limiting Use, Disclosure, and Retention

An organization shall not use or disclose personal information for purposes other than those for which it was collected, except with the consent of the individual or as required by law. Personal information shall be retained only as long as necessary for the fulfillment of those purposes.

### 6. Accuracy

Personal information shall be as accurate, complete, and up to date as is necessary for the purpose for which it is used.

### 7. Safeguards

Personal information shall be protected by security safeguards appropriate to the sensitivity of the information.

## PRIVACY PRINCIPLES

### 8. Openness

An organization shall make readily available to people specific information about its policies and practices regarding how it manages personal information.

### 9. Individual Access

Upon request, a person shall be informed of the existence, use, and disclosure of his or her personal information. He or she shall also be given access to that information. A person has a right to challenge the accuracy and completeness of the information and have it amended as appropriate.

### 10. Challenging Compliance

A person has a right to challenge an organization's compliance with these principles by making a complaint to the person responsible for the organization's compliance.

For more information about the *CSA Model Code for the Protection of Personal Information*, see [www.csa.ca/standards/privacy/Default.asp?language=English](http://www.csa.ca/standards/privacy/Default.asp?language=English).

### The ten principles in legislation

The federal Personal Information Protection and Electronic Documents Act (PIPEDA) includes privacy protections based on the CSA Model Code. In fact, the ten principles are included in a schedule of the PIPEDA. As well, some provinces have incorporated a number of principles from the Model Code into laws that protect health information privacy.

### Applying the principles for people living with HIV/AIDS: how should the law treat unauthorized disclosure of health information?

A person has the right to know who is collecting his or her personal information, when that information is being collected, how it is going to be used and stored, when and how it will be disclosed, and how to access it.

In exceptional circumstances, it may be impossible, impracticable, or inappropriate for an organization to obtain a person's consent before releasing that person's health information. For example, in certain circumstances the law permits or requires a person or organization to release a person's information with-

out that person's consent. In these exceptional circumstances, a person or organization who holds information should take steps to prevent, as far as possible, any harm that may result to the person as a result of the unauthorized disclosure of his or her personal information.

The CSA Model Code can serve as a guide to limit the potential for people living with HIV/AIDS to be harmed as a result of the disclosure of their health information. For people living with HIV/AIDS, the principles that should guide any unauthorized disclosure of health information permitted by law are as follows.

*First*, as a general rule, a person or organization holding the information must inform the person living with HIV/AIDS of the anticipated disclosure. This will give the person living with HIV/AIDS the opportunity to make a formal objection before the information is disclosed.

*Second*, before the information is disclosed, the person who holds the health information must ensure that the information is complete, accurate, and not misleading. The information should be provided to the person living with HIV/AIDS so that he or she can review and correct it, if necessary.

*Third*, the disclosure must be limited to the minimum amount of information necessary to accomplish the purpose of the disclosure.

*Fourth*, where possible, disclosures without consent must be limited to information that will serve the relevant purpose without identifying the person living with HIV/AIDS.

*Fifth*, the custodian should be required to maintain a record of every disclosure of health information.

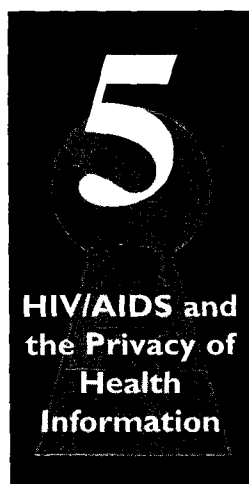
*Sixth*, the legislative clauses that give permission to certain people to disclose personal information without consent should be exhaustive. Health-care professionals, hospital administrators, and other people who hold personal health information should not be given the power to disclose information without consent beyond the circumstances the legislature has decided upon and written into law.

The *seventh* and final principle is that the highest level of protection offered by law should apply to the personal health information of people living with HIV/AIDS.

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# Limits on Privacy and Confidentiality of Health Information

*This info sheet identifies the other values that compete with protecting the right to privacy, and how the law sometimes requires or permits the disclosure of a person's confidential health information without his or her consent. It recommends that laws creating discretion to disclose health information without a person's consent should be limited, so as to properly protect the fundamental right to privacy.*

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## Competing social and community interests

The right to privacy and the duty of confidentiality are not absolute. Competing social or community values and interests may trump a person's right to privacy, and the duty of confidentiality owed to him or her. For example, the goal of stopping the transmission of HIV or of research to establish more effective treatment for HIV/AIDS may be seen as more important than preserving the absolute confidentiality of personal health information of people living with HIV/AIDS. A counsellor or health-care professional might disclose a client's HIV status to prevent harm to a third party. The search for truth in criminal investigations, and in criminal and civil court proceedings, may require disclosure of a person's health information, including HIV status. These competing social interests are recognized in laws that require or permit disclosure of health information without consent in certain circumstances.

## Mandatory disclosure in investigations and court proceedings

Investigations and legal proceedings are a potential threat to the confidentiality of health information of people living with HIV/AIDS. In legal investigations and proceedings, courts can order that personal health information be disclosed without consent. Legislation can also give administrative investigators, decision-makers, and tribunals the power to order the disclosure of information, including personal health information. Investigations and the production of evidence in legal proceedings (criminal, civil, and regulatory) can result in the disclosure of confidential health information of people living with HIV/AIDS.

The Criminal Code, public health laws, and other legislation all permit police or other state actors to search for and seize information of a private nature without the consent of the person to whom the information relates. The fact that a person is involved in a court proceeding does not entitle him or her to greater privacy protections. On the contrary, subpoenas and summonses issued in criminal and civil proceedings require individuals to attend court to testify or to produce records. The effect is that otherwise confidential information may enter the public domain and is at great risk of being spread through, for example, the media. In some circumstances, it may be possible to get a court or tribunal to order that certain information cannot be published, in order to protect a person's legitimate privacy rights.

## Discretionary disclosure clauses

Four provinces (Alberta, British Columbia, Manitoba, and Saskatchewan) have passed laws that protect the privacy of health information. The Alberta Health Information Act and Manitoba Personal Health

## LIMITS ON PRIVACY AND CONFIDENTIALITY OF HEALTH INFORMATION

Information Act apply specifically to health information. The British Columbia Personal Information Privacy Act applies to all personal information. The Saskatchewan Health Information Protection Act applies only to health information, but is not yet in force.

These laws regulate the collection, use, and disclosure of personal health information. They contain "discretionary disclosure" clauses. These clauses permit people who hold health information to disclose that information without the consent of the person to whom the information relates, in a number of circumstances:

1. to contact a relative or friend of the person, if the person is injured or ill;
2. to any person if the disclosure will avert or minimize an imminent danger to the health or safety of any person;
3. when disclosure is necessary for monitoring, preventing, or revealing fraudulent, abusive, or dangerous use of publicly funded health services;
4. for the purposes of determining or verifying the person's eligibility under a provincial or federal act to receive health care or health-related benefits;
5. for conducting investigations, disciplinary proceedings, reviews, or inspections regarding members of a health profession or health discipline;
6. for public health surveillance, health system management, health-policy development, planning, and resource allocation;
7. for the purposes of research;
8. to a jail, penitentiary, or other institution in which the person is being lawfully detained if the purpose of the disclosure is to allow the person to access health services;
9. in court proceedings or a proceeding by a quasi-judicial body where the person who holds the information is directly involved; and
10. to a municipal or provincial police service for the purpose of investigating an offence under a law of Canada, a province, or territory.

### Recommendations for reform

Many of these discretionary disclosure clauses

infringe the privacy rights of people living with HIV/AIDS or undermine the duty of confidentiality owed to people living with HIV/AIDS. In some instances, health information privacy legislation provides fewer protections for privacy and confidentiality than the courts have imposed in similar circumstances. And many of the discretionary disclosure clauses do not follow widely accepted privacy principles.

Provincial and territorial governments should amend (or enact) legislation so that discretionary disclosure clauses are limited. Only in exceptional and circumscribed situations should a person who holds another person's health information be permitted to disclose that information without his or her express and informed consent. Legislation that applies to personal health information should provide at least the protections afforded under the Canadian Charter and existing common law (or, in Québec, the Charter of Human Rights and Freedoms and the Civil Code).

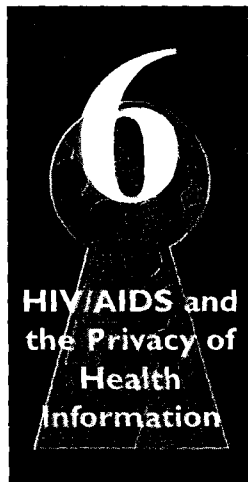
Specific recommendations concerning discretionary disclosure clauses in health information privacy legislation include:

- legislation should include purpose clauses and guiding principles and procedures for disclosure under discretionary disclosure clauses;
- health-care professions must educate their members about their legal and ethical obligations of privacy and confidentiality; clauses that allow for disclosure in investigations and court proceedings should be removed;
- clauses allowing disclosure to prevent harm to third parties must reflect the principles enunciated by the Supreme Court of Canada in *Smith v Jones* [described in info sheet 6, Patient Confidentiality and Preventing Harm to Others];
- audits and quality assurance reviews must be conducted without identifiable information of the patient/client;
- only non-identifiable personal health information should be transferred between federal/provincial/territorial government officials for public policy purposes; and
- health custodians should be prohibited from disclosing health information to family and friends without the consent of a competent person except

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# Patient Confidentiality and Preventing Harm to Others

*This info sheet outlines the ethical and legal duty of health-care professionals to keep patient information confidential and how that duty may sometimes conflict with duties owed to another person.*

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## An ethical duty of confidentiality

Health-care professionals have an ethical obligation to maintain patient confidentiality. The ethical codes of the various health-care professions treat as sacred the duty of confidentiality owed to a patient. On becoming a physician, a person takes the Hippocratic Oath, which includes the following duty:

What I may see or hear in the course of treatment or even outside of treatment in regard to the life of men, which on no account one must spread abroad, I will keep to myself holding such things shameful to be spoken about.

The Code of Ethics of the Canadian Medical Association requires that physicians:

Respect the patient's right to confidentiality except when this right conflicts with *your responsibility to the law*, or when the maintenance of confidentiality would result in a *significant risk of substantial harm* to others or to the patient if the patient is incompetent; in such cases, take all reasonable steps to inform the patient that confidentiality will be breached. [emphasis added]

In the two situations noted (responsibility to the law, significant risk of substantial harm), the CMA Code of Ethics requires the physician to take reasonable steps to inform the patient that he or she will breach confidentiality.

## The legal duty of confidentiality

In Canada, a physician owes a legal duty of confidentiality to his or her patients. This duty has been recognized in the common law by courts, and is also set out in provincial legislation.

In *McInerney v MacDonald* (1992), the Supreme Court of Canada stated that a fundamental characteristic of the doctor-patient relationship is its fiduciary nature, whereby the patient places "trust and confidence" in the physician. The physician has the duty to act with utmost good faith and loyalty, and to hold information received from or about a patient in confidence. The fiduciary duty described in *McInerney* was confined to the physician-patient relationship. However, there is no reason in principle why it should not apply to other health-care professionals such as nurses, psychologists, and dentists.

Under provincial legislation, physicians, nurses, dentists, and psychologists are members of self-regulating professions. Other health-care professionals may be self-regulating. The governing bodies of self-regulating professions are given the power to set professional standards and license members to practise. In most provinces, health-care professionals'

## PATIENT CONFIDENTIALITY AND PREVENTING HARM TO OTHERS

obligation to maintain patient confidentiality has been fixed in law. For example, under Ontario's Medicine Act, 1991, the following constitutes misconduct:

Giving information concerning the condition of a patient or any services rendered to a patient to a person other than the patient or his or her authorized representative except with the consent of the patient or his or her authorized representative or as required by law.

In Québec, where the civil law applies, professional privilege is protected under the Civil Code, the Québec Charter of Human Rights and Freedoms, and the Medical Act.

A health-care professional who breaches patient confidentiality may face disciplinary proceedings, in addition to a lawsuit by the patient.

### The "public safety exception" to confidentiality

A health-care professional's duty of confidentiality to a patient is not absolute. In *Smith v Jones* (1999), the Supreme Court of Canada found that a physician's duty of confidentiality is subject to a "public safety exception." A physician (or counsellor or other health-care professional) may breach a duty of confidentiality owed to a client or patient where:

1. there exists a clear risk to an identifiable person or group of persons;
2. the risk is that serious bodily harm or death may occur;
3. the danger is imminent; and
4. the proposed disclosure will minimally impair the privacy right of the patient.

But the physician is not required by law to breach confidentiality even if these four criteria are met. Rather, he or she is permitted to do so. In Québec, a public safety exception has been incorporated in legislation.

Disclosure of confidential information about someone to minimize danger or prevent harm to another person is often referred to as a "duty to warn." Used in this way, the phrase "duty to warn" is misleading. It is more accurate to refer to a duty to take reasonable steps to prevent harm to another party. A health-care professional who is given confidential information by

a patient may be able to prevent harm to another person by "warning" (in other words, disclosing information directly to) the person who is at risk of harm. However, in most cases, the health-care professional can prevent harm, and thus fulfill any duty he or she may have, by disclosing some confidential information to someone other than the person who is at risk of harm.

As it stands, there is no clear legal duty on a health-care professional to breach a patient's confidentiality to prevent harm to another person. And in no Canadian case has a health-care professional been ordered to pay damages in a lawsuit for failure to do so. However, the law is not fixed on this. Various court decisions suggest that, in the right circumstances, a court could decide the health-care professional was legally obliged to breach a patient's confidentiality to prevent harm to someone else.

### Preventing HIV transmission and the duty of confidentiality

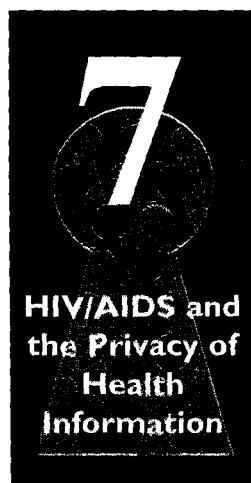
The legal and ethical duty of confidentiality may come into conflict with the ethical duty to take steps to prevent harm. For a health-care professional caring for a person living with HIV/AIDS, the conflict can arise where the person living with HIV/AIDS engages in behaviours that risk transmitting HIV to another person (eg, having unprotected anal or vaginal sex, or sharing injection drug equipment). If the health-care professional takes steps to warn a sexual or injection drug use partner, he or she breaches the confidentiality of his or her patient. If the person living with HIV/AIDS terminates the relationship because his or her confidentiality was breached, his or her health will likely suffer. As well, the health professional's ability to help change that person's behaviour, to prevent or reduce the risk of HIV transmission, will be lost.

Health-care professionals should consider developing policies and guidelines about counselling HIV-positive clients and confidentiality of health information. These policies and guidelines should clearly state the sources, scope, and limits of the health-care professional's duty of confidentiality. People living with HIV/AIDS should be provided with these guidelines at the outset of the health-care professional-patient relationship.

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# Privacy Protection under Québec Law

*Québec law offers unique and significant privacy protections. Québec is the only province or territory that has legislation in force, applicable to the private sector as well as the public sector, that protects personal information, including health information. This info sheet explains some of the unique features of Québec laws that protect privacy.*

This is one in a series of seven info sheets on HIV/AIDS and the Privacy of Health Information.

1. The Importance of Privacy of Health Information for People Living with HIV/AIDS
2. Privacy, Confidentiality, and Privilege: Related Legal Concepts
3. Legal Protection of Privacy and Confidentiality in Canadian Law
4. Privacy Principles
5. Limits on Privacy and Confidentiality of Health Information
6. Patient Confidentiality and Preventing Harm to Others
7. Privacy Protection under Québec Law



The Canadian Charter of Rights and Freedoms, which protects privacy rights, applies in Québec. Like other provinces and territories, Québec has enacted privacy protections in statutes governing specific health-care professionals and health-care facilities. For more information on the Canadian Charter and statutes governing specific health professionals and health-care facilities, see info sheet 3, Legal Protection of Privacy and Confidentiality in Canadian Law. But Québec also has additional, different laws that protect people's right to privacy, including with respect to their health information.

## Civil Code of Québec

The common law (including torts such as invasion of privacy and breach of confidence) does not apply in Québec. Québec is the only civil law jurisdiction in Canada, governed by the Civil Code of Québec. The Civil Code applies to persons, relations between persons, and property. It is the foundation of all other laws enacted by the Québec legislature, although other laws may complement the Civil Code or make exceptions to it.

The Civil Code contains a chapter on the respect for reputation and privacy. The chapter begins by stating that "No one may invade the privacy of a person without the consent of the person unless authorized by law." Using correspondence, manuscripts, or other personal documents without consent is considered an invasion of privacy. The Civil Code gives people the right to examine, receive copies of, and correct files that contain information about them. It provides for a legal action for civil liability, akin to a common law tort or action in negligence. The Civil Code also contains a rule of evidence that protects confidential information shared by a person with a professional from becoming evidence in a court case.

## Québec Charter of Human Rights and Freedoms

The Québec Charter of Human Rights and Freedoms, like other human rights codes and acts in other provinces, has "quasi-constitutional" status. This means that it is more important than regular acts passed by the legislature. A law cannot infringe the rights and freedoms guaranteed in the Charter of Human Rights and Freedoms unless the legislature explicitly states that the law applies despite it. [Note: The Québec Charter is not the same as, nor does it replace, the Canadian Charter, which applies across the country and is part of the constitution of Canada.]

## PRIVACY PROTECTION UNDER QUÉBEC LAW

The Québec Charter is unique among Canadian human rights codes and acts because it contains explicit privacy protections. Section 5 states that "Every person has a right to respect for his private life." Section 9 states that "Every person has a right to non-disclosure of confidential information." Section 9 also establishes a duty of professional secrecy for information given to professionals, including health professionals:

No person bound to professional secrecy by law and no priest or other minister of religion may, even in judicial proceedings, disclose confidential information revealed to him by reason of his position or profession, unless he is authorized to do so by the person who confided such information to him or by an express provision of law. The tribunal must, *ex officio*, ensure that professional secrecy is respected.

The Québec human rights and youth rights commission is given the power to investigate breaches of privacy and foster settlement of complaints. Where no settlement is reached, a tribunal may hold a hearing and order that the breach of privacy be stopped. The tribunal can also award compensation for the moral and material prejudice suffered and, in addition, award damages for the unlawful and intentional interference with a right.

Québec courts have treated professional privilege as relative rather than absolute, and have ordered the disclosure of physician-client communications in the interests of justice. It is important to note that the protection of physician-client privilege under Québec law does not apply in criminal proceedings. In Canada, criminal law is a matter of federal jurisdiction, and federal criminal law does not recognize a physician-client privilege. In the end, the law about physician-client privilege in Québec is not very different than in other Canadian jurisdictions.

### **Privacy protection and the public sector**

As its title suggests, An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information applies to public bodies in Québec, including health and social service institutions governed by legislation. It also applies to private institutions that operate with government funding. The Act governs people's access to documents held by a public body, and the collection, storage, and use of personal information. It also gives powers to a commission to administer the provisions of the

Act relating to access to information and protection of confidentiality.

The system of protection of personal information defines "nominative information" as information that is not public and that allows the person to be identified. As a general rule, a public body may not release nominative information without a person's consent. However, the Act does recognize a number of circumstances as exceptions to this rule, where nominative information may be released without consent by a public body.

### **Privacy protection and the private sector**

The obligations of the private sector to protect the privacy of personal information are set out in An Act Respecting the Protection of Personal Information in the Private Sector. This law establishes rules with respect to personal information that a person collects, stores, uses, or communicates to third persons in the course of carrying on an enterprise. An enterprise is any economic activity and could include enterprises that provide health services. The Act is intended to secure for persons the privacy rights set out in articles 35 to 41 of the Civil Code.

Every person carrying on an enterprise who collects, stores, uses, or communicates personal information about other persons must establish and apply safety measures to ensure the confidentiality of the information. Generally, information in a person's file may be used only for a purpose consistent with the purpose for which the file was established, or with the person's consent. However, the Act does recognize exceptions to this rule and sets out a number of circumstances where a person carrying on an enterprise may, without the consent of the person concerned, release information from a person's file without that person's consent. The Act also contains safeguards respecting nominative lists (containing a person's name, address, or telephone numbers) used for commercial or fund-raising purposes.

### **Discretionary disclosure clauses**

Discretionary disclosure clauses in legislation permit people who hold health information to disclose that information without consent of the person to whom the information relates, in a wide variety of circumstances. The Québec personal information protection acts take a different approach to discretionary disclosure clauses than other provincial legislation. The Québec acts contain fewer exceptions to the general rule that consent is required for disclosure, but the exceptions are broadly worded. In some circum-

## PRIVACY PROTECTION UNDER QUÉBEC LAW

stances, preconditions must be met before personal information can be released. In other circumstances, a commission must approve a written agreement before information can be released. And all disclosures of personal information by public bodies must be recorded.

Of the existing and proposed provincial acts that apply to health information, the Québec acts come the closest to incorporating the CSA Model Code privacy principles and limit to the greatest extent the unauthorized disclosure of health information. Yet

there is room to improve the Québec legislation so that it provides comprehensive privacy protection for the health information of people living with HIV/AIDS.

For more information on the CSA Model Code principles, see info sheet 4, *Privacy Principles*. For more information on discretionary disclosure clauses, the problems with them, and recommendations for reform, see info sheet 5, *Limits on Privacy and Confidentiality of Health Information*.

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