PARLEE McLAWS LLP

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PRIVACY AND THE PROTECTION OF PERSONAL HEALTH INFORMATION IN THE CONTEXT OF COMMERCIAL LEASING AND MEDICAL AND HEALTH CARE TENANTS

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I. INTRODUCTION

In order to facilitate smooth operations within leased premises, lease agreements are tailored to account for the particular requirements of specialty uses. Medical and health care retail settings, such as medical practitioners' clinics, laboratories, diagnostic centers, and pharmacies present specialty issues in leasing concerning privacy as they collect, use, and store client personal health information on a daily basis. Aspects of health information obtained via intake procedures, consultations, and treatment plans between practitioners and patients can be intensely personal, with the information being subject to privacy legislation and information security practices. This subject information can take the form of patient files, charts, biological samples, and drug/medication treatment plans and histories, with health information being increasingly vulnerable to disclosure without consent.

A relatively recent development within the area of healthcare is the multiplicity of actors involved in patient care, leading to a wide range of personnel requiring access to personal health information.[1] Family health teams are primary health care organizations, working within the same retail space, that include a team of family physicians, nurse practitioners, registered nurses, social workers, dietitians, and other professionals who collaborate to provide primary health care for their community.[2] Practitioners with closely-related services often share medical office spaces and, with disclosure consent obtained from clients, collaborate using the same health information files.

This paper shall explore a non-exhaustive list of privacy concerns in the context of commercial leasing and medical health care tenants. It will review some of the key federal and provincial legislation on privacy and personal health information and examine how parties in commercial real estate and leasing contexts balance the landlord's rights, such as the right of entry, inspections, seizures, duress, and taking possession of the premises, with the tenant's responsibilities surrounding client privacy and personal health information. This paper will also cover recommendations on privacy compliance for landlords when entering, inspecting, conducting repairs, providing maintenance services, and/or repossessing the premises.

II. PERSONAL HEALTH INFORMATION AND PRIVACY LEGISLATION

A. HEALTH INFORMATION AND MEDICAL RECORDS

Personal information in a health context is characterized as "personal health information". This term has a detailed definition in provincial statutes as identifying information about an individual in oral or recorded form if it relates to the physical or mental health of the individual, including

[1] Joanna Erdman, Vanessa Gruben & Erin Nelson, *Canadian Health Law and Policy*, 5th ed (Toronto: LexisNexis Canada, 2017).
[2] Ontario Ministry of Health and Long-Term Care, "Family Health Teams" (22 January 2016), online: *Health Care Professionals: Family Health Teams* < http://www.health.gov.on.ca/en/pro/programs/fht/>

the health history of the individual's family, or relates to the provision of health care to the individual. This is meant to capture a broad swath of information, including diagnostic, treatment, and care information (e.g., treatment, medications, or health care aids provided, the amount of health care benefits paid or payable); health care provider information (e.g., provider name, business address, identifier number, education, and competencies); and registration information (e.g., patient demographic information, patient address and contact information, patient eligibility, and billing information).[3]

Health information is regarded as personal information that is collected, used, or disclosed for the purpose of providing a health service to an individual. The terms "health information" and "personal health information" are given broadly consistent definitions in statutes governing health information across Canada. For instance, in British Columbia, "personal health information" is statutorily defined as recorded information about an identifiable individual that is related to the individual's health or the provision of health services to the individual.[4] In Alberta, "health information" is defined as one or both of diagnostic, treatment, and care information and registration information.[5]

Possibly the most significant difference in statutory health information definitions relates to whether the information is recorded or unrecorded. The term "recorded information" in relation to definitions of health information means information that is documented or retained in written, photographic, or other form, but may exclude software or any mechanism that produces records, such as personal computers and fax machines. Health information statutes in British Columbia, Alberta, and Manitoba apply only to recorded information.[6] Both forms of information are covered in applicable statutes throughout the rest of Canada.[7]

Specific kinds of health information include personal details, such as one's name, address, date of birth, demographic information, and information about the person's physical or mental health. Health information may also include genetic or other information retrieved from bodily or biological materials and information supplied when registering to receive a health care service, such as personal health care and insurance numbers. While the terms "health information" and "medical records" are used interchangeably, they do have different meanings. The latter refers to a repository, whether in physical, electronic, or other form, of health information, such as a hospital chart or an electronic database containing health information.[8]

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[3] Michael Power, *The Law of Privacy*, 2nd ed (Toronto: LexisNexis Canada, 2017) at 28.
[4] *E-Health (Personal Health Information Access and Protection of Privacy) Act*, SBC 2008, c 38, s 1.
[5] *Health Information Act*, RSA 2000, c H-5, s 1(1)(k).
[6] In Alberta, non-recorded information may be collected and used, but only for the purpose for which it was provided to the person authorized by law to collect the information. *Health Information Act*, RSA 2000, c H-5, s 29.
[7] Erin Nelson & Ubaka Ogbogu, *Law for Healthcare Providers* (Toronto: LexisNexis Canada, 2018) at 104.
[8] Erin Nelson & Ubaka Ogbogu, *Law for Healthcare Providers* (Toronto: LexisNexis Canada, 2018)

B. LEGISLATIVE MECHANISMS FOR THE PROTECTION OF HEALTH INFORMATION

Personal health information is often entrusted by clients to their healthcare providers in the context of a "relationship of trust and confidence".[9] This relationship comes with the expectation that the information will be kept confidential and secure, and only used or disclosed for authorized purposes. Healthcare providers, therefore, have a duty to handle health information with the "utmost good faith and loyalty"[10] by granting access to the information to the person who provided it and to others who are involved in that person's care.

1. FEDERAL AUTHORITIES

Health information statutes have two general features. First, the statutes deal mainly with access to and collection, use, and disclosure of health information. The rules contained in the statutes regulate the activities of persons and institutions that collect, use, and disclose health information, and specify conditions and circumstances for access to and collection, use, and disclosure of such information. Second, the underlying regulatory objective is to ensure privacy and confidentiality of information disclosed and retained for healthcare purposes.[11]

A. PUBLIC SECTOR PERSONAL INFORMATION LEGISLATION

The first type of information legislation enacted in Canada was aimed at protecting personal information within government hands. The federal *Privacy Act*[12], and its companion *Access to Information Act*[13], were initially brought into force in 1983.[14] These statutes apply to personal information, including health information that is collected, used, retained, or disclosed by the public sector. Personal information is defined as, "information about an identifiable individual that is recorded in any form".[15]

B. PRIVATE SECTOR PERSONAL INFORMATION LEGISLATION

Health information that is collected and held by organizations engaged in trade, business, or profit-making activities is governed federally by the *Personal Information Protection and Electronic Documents Act*[16] (PIPEDA). PIPEDA encompasses personal health information and applies

[9] *McInerney v. MacDonald*, [1992] 2 S.C.R. 138, [1992] S.C.J. No. 57.
[10] *ibid*
[11] Erin Nelson & Ubaka Ogbogu, *Law for Healthcare Providers* (Toronto: LexisNexis Canada, 2018) at 107.
[12] RSC 1985, c P-21.
[13] RSC 1985, c A-1.
[14] David H, Flaherty, "Reflections on Reform of the Federal Privacy Act" (2008), online (PDF): *Office of the Privacy Commissioner of Canada* <https://www.priv.gc.ca/media/2044/pa_ref_df_e.pdf>
[15] *Privacy Act*, RSC 1985, c P-21, s 3.
[16] *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5.

nationwide. Similarly, most provinces have passed legislation dealing with either health information, all personal information in the private sector, or both.[17]

PIPEDA applies to personal information collected, used, or disclosed in the use of commercial activity. Significant quantities of personal health information are collected on a commercial basis. One may consider pharmacies, physiotherapy clinics, and dental offices. Health care providers in private practice such as doctors, dentists, and chiropractors are engaged in a commercial activity and are thus subject to PIPEDA, unless substantially similar provincial legislation applies. More difficult to conceptualize as commercial are the operations of clinics and physician services covered by publicly funded provincial health care plans.[18]

PIPEDA covers personal health information, the definition of which includes information concerning:

- the physical or mental health of an individual;
- any health services provided to an individual; and
- the donation of any biological substance and the information derived from the testing or examination of that biological substance.[19]

2. PROVINCIAL AUTHORITIES

In Canada, access to and the collection, use, and disclosure of health information is governed primarily by statute. A variety of federal, provincial, and territorial statutes apply, depending on the health provider's location and center of operation, i.e. whether public or private sector.[20] The authority to regulate health information collected and used for health care purposes lies primarily with the provincial and territorial governments, pursuant to their power over hospitals, property, and civil rights, along with matters of a local or private nature.[21] Every province and territory in Canada has passed legislation specifically to govern and protect personal information held by governments and other public sector bodies. Provincial and territorial governments have also passed legislation to protect and govern the handling of personal information held in the public and private sectors.

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[17] *Personal Information Protection Act*, SA 2003, c P-6.5 (Alberta); *Personal Information Protection Act*, SBC 2003, c 63 (British Columbia); *Personal Health Information Privacy and Access Act*, SNB 2009, c P-7.05 (New Brunswick); *Personal Health Information Act*, SNL 2008, c P-7.01 (Newfoundland and Labrador); *Personal Health Information Act*, SNS 2010, c 41 (Nova Scotia); *Personal Health Information Protection Act*, 2004, SO 2004, c 3, Sch A (Ontario); and *Act respecting the protection of personal information in the private sector*, CQLR c P-39.1 (Quebec). The aforementioned statutes of New Brunswick, Newfoundland and Labrador, Nova Scotia, and Ontario pertain only with respect to health information custodians.

[18] Joanna Erdman, Vanessa Gruben & Erin Nelson, *Canadian Health Law and Policy*, 5th ed (Toronto: LexisNexis Canada, 2017) in 213.

[19] *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5, s 2(1).

[20] Erin Nelson & Ubaka Ogbogu, *Law for Healthcare Providers* (Toronto: LexisNexis Canada, 2018) at 105.

[21] Joanna Erdman, Vanessa Gruben & Erin Nelson, *Canadian Health Law and Policy*, 5th ed (Toronto: LexisNexis Canada, 2017) at 211.

A. PRIVATE SECTOR PERSONAL INFORMATION LEGISLATION

A number of provinces have enacted legislation that deals exclusively with health information in the belief that the area is both complex and worthy of specific and focused protection.[22] The aim of health information statutes is to provide for the protection of personal health information being collected, used, stored, or disclosed by an entity (usually referred to as a custodian or trustee) other than the individual who is the information source.[23] Personal health information is defined in various ways in different statutes. In general, the legislation tends to take an inclusive view as to the types of information that fall within its sphere.[24] Thus, the legislation may include within its definition of personal health information such matters as information with respect to:

- the donation of biological parts or substances;[25]
- a health card number;[26]
- genetic information;[27]
- payment information;[28]
- family health history;[29] and
- the name of an individual's substitute decision maker.[30]

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[22] *Personal Health Information Act*, CCSM, c P33.5 (Manitoba); *Health Information Act*, RSA 2000, c H-5 (Alberta); *Health Information Protection Act*, SS 1999, c H-0.021 (Saskatchewan); *Personal Health Information Protection Act, 2004*, SO 2004, c 3, Sch A (Ontario); *Personal Health Information Act*, SNL 2008, c P-7.01 (Newfoundland and Labrador); *Personal Health Information Privacy and Access Act*, SNB 2009, c P-7.05 (New Brunswick); *Personal Health Information Act*, SNS 2010, c 41 (Nova Scotia); *Health Information Act*, SNWT 2014, c 2 (Northwest Territories); and *Health Information Privacy and Management Act*, SY 2013, c 16 (Yukon). British Columbia's *E-Health (Personal Health Information Access and Protection of Privacy) Act*, SBC 2008, c 38 is also health-information specific, albeit applying to very limited circumstances. Quebec's *Act respecting the Sharing of Certain health Information*, CQLR, c P9.0001 is also health-information specific but has limited application. See also Joanna Erdman, Vanessa Gruben & Erin Nelson, *Canadian Health Law and Policy*, 5th ed (Toronto: LexisNexis Canada, 2017) at 215-216.

[23] *Personal Health Information Protection Act, 2004*, SO 2004, c 3, Sch A, s 1(a).

[24] Joanna Erdman, Vanessa Gruben & Erin Nelson, *Canadian Health Law and Policy*, 5th ed (Toronto: LexisNexis Canada, 2017) at 216.

[25] *Health Information Act*, RSA 2000, c H-5, s 1(1)(i)(iii); *Health Information Protection Act*, SS 1999, c H-0.021, s 2(m)(iii); *Personal Health Information Protection Act, 2004*, SO 2004, c 3, Sch A, s 4(1)(e); *Personal Health Information Privacy and Access Act*, SNB 2009, c P-7.05, s 1.

[26] *Personal Health Information Protection Act, 2004*, SO 2004, c 3, Sch A, s 34(2).

[27] *Personal Health Information Act*, CCSM, c P33.5, s 1(1); *Personal Health Information Privacy and Access Act*, SNB 2009, c P-7.05, s 1.

[28] *Health Information Act*, RSA 2000, c H-5, s 1(1)(i)(vi); *Personal Health Information Act*, CCSM, c P33.5, s 1(1); *Personal Health Information Protection Act, 2004*, SO 2004, c 3, Sch A, s 4(1)(d); *Personal Health Information Privacy and Access Act*, SNB 2009, c P-7.05, s 1.

[29] *Personal Health Information Protection Act, 2004*, SO 2004, c 3, Sch A, s 4(1)(a); *Personal Health Information Privacy and Access Act*, SNB 2009, c P-7.05, s 1.

[30] *Personal Health Information Protection Act, 2004*, SO 2004, c 3, Sch A, s 4(1)(g); *Personal Health Information Privacy and Access Act*, SNB 2009, c P-7.05, s 1.

The legislation in some jurisdictions applies only to recorded information[31], whereas in others, it applies to information in various forms, including oral.[32] Some legislation goes on to define the concept of "use" of information, addressing questions of whether viewing information falls within the definition of use. Ontario's health information statute, for example, provides further clarification that "use" includes "to view, handle or otherwise deal with the information".[33]

B. PARAMOUNTCY

Because health information is a type of personal information, personal information protection statutes apply to health information. However, when dealing with health information, statutes that directly and specifically govern health information may have priority over other personal information protection statutes. Alberta's *Health Information Act*, for instance, provides that its provisions on the protection of health information supersede inconsistent provisions in other statutes, unless otherwise stated.[34]

Similarly, because the federal legislation PIPEDA applies to many types of health information, it had the potential to be a significant incursion into what is viewed as mainly provincial powers. However, the Act contains a mechanism whereby provinces can seek an exception to PIPEDA's application to inter-provincial uses of information. As long as a province or territory can establish that its legislation offers protections that are "substantially similar" to PIPEDA's Part 1, the provincial/territorial legislation may apply to information within that province.[35]

C. SCOPE OF HEALTH INFORMATION STATUTES

Health information statutes apply to persons or entities that collect, use, and disclose health information. The terms "custodian", "trustee", "affiliate", and "agent" are used in health information statutes to describe such persons or entities.

In general terms, a health custodian or trustee is an individual or organization authorized by statute to collect, use, disclose, store, and exercise custody over health information. Typical custodians include healthcare providers, regional health authorities, hospital boards, and provincial health boards. Generally, healthcare providers, including physicians, when they are acting as agents of a custodian, or are exercising admission, treatment, and discharge privileges at a health facility or a hospital, are not considered custodians. By contrast, providers who operate their own practice,

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[31] *Personal Health Information Act*, CCSM, c P33.5, s 1(1); *Health Information Privacy and Management Act*, SY 2013, c 16, s 2(1).
[32] *Personal Health Information Protection Act, 2004*, SO 2004, c 3, Sch A, s 4(1); *Personal Health Information Privacy and Access Act*, SNB 2009, c P-7.05, s 1; *Personal Health Information Act*, SNL 2008, c P-7.01, s 5(1); *Personal Health Information Act*, SNS 2010, c 41, s 3(r); and *Health Information Act*, SNWT 2014, c 2, s 1(1).
[33] *Personal Health Information Protection Act, 2004*, SO 2004, c 3, Sch A, s 2.
[34] *Health Information Act*, RSA 2000, c H-5, s 4.
[35] *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5, s 26(2)(b).

such as physicians, are custodians in relation to the health information collected, used, and disclosed in the practice.[36]

D. HEALTH CARE PROVIDER INFORMATION

Legislation in several jurisdictions includes information that identifies an individual's health care provider within the statutory definition of "personal health information".[37] In *IMS Health Canada Ltd. v. Alberta (Information & Privacy Commissioner)*[38], a similar provision in the Alberta *Health Information Act*[39] (*HIA*) was relied upon by Alberta physicians in an unsuccessful attempt to prevent pharmacists from selling physician-prescribing information. The Alberta *HIA* has since been amended to clarify that information about a health services provider "is deemed to be individually identifying health information about the individual who received the health service from the health services provider and not individually identifying health information about the health services provider."[40] Therefore, in Alberta, a health services provider cannot claim statutory protection for its information. The situation is less certain in other provinces which include the provider in their definition of personal health information.[41]

III. ADDRESSING PRIVACY CONCERNS IN MEDICAL AND HEALTH CARE LEASING: CASE LAW AND COMMERCIAL LEASE PROVISIONS

Under a lease agreement, landlords typically have the right to enter the premises in order to inspect it and its condition, to enforce or carry out any provisions of the lease, and to make such alterations to the premises that the landlord considers necessary. This may include the right to use, install, construct, maintain, replace, or repair any aspect of the premises for or in connection with the supply of any services. Given the applicability of both federal and provincial legislation and regulations pertaining to the compliance of healthcare providers to personal information protection legislation, as well as the sensitive nature of a medical use, there are a number of considerations for tenants of commercial leases to ensure compliance with their health information obligations.

A. ACCESS AND RIGHT-OF-ENTRY

[36] Erin Nelson & Ubaka Ogbogu, *Law for Healthcare Providers* (Toronto: LexisNexis Canada, 2018) at 107.
[37] These jurisdictions are Ontario, New Brunswick, Nova Scotia, Newfoundland and Labrador, and the Northwest Territories. See *Personal Health Information Protection Act, 2004*, SO 2004, c 3, Sch A, s 4(1)(b); *Personal Health Information Privacy and Access Act*, SNB 2009, c P-7.05, s 1; *Personal Health Information Act*, SNS 2010, c 41, s 3(r)(ii); *Personal Health Information Act*, SNL 2008, c P-7.01, s 5(1)(b); and *Health Information Act*, SNWT 2014, c 2, s 1(1).
[38] 2008 ABQB 213
[39] RSA 2000, c H-5, s 87.
[40] *Health Information Act*, RSA 2000, c H-5, s 1(4) as amended by *Health Information Amendment Act, 2009*, SA 2009, c 25, s 2(b).
[41] Joanna Erdman, Vanessa Gruben & Erin Nelson, *Canadian Health Law and Policy*, 5th ed (Toronto: LexisNexis Canada, 2017) at 219.

Tenants should ensure that their lease prevents landlords from accessing or disclosing the personal health information within their custody. Most standard commercial leases permit the landlord the right to re-enter the premises in specific circumstances. These include purposes such as effecting necessary repairs, conducting inspections of the premises for compliance with particular lease terms, and showing the premises to prospective tenants or mortgagees. Whatever re-entry rights are granted in the lease must be reconciled with the essential privacy requirements.[42]

Health care and medical office tenants may wish to consider using a provision such as the following in the event of an emergency necessitating the entry of the landlord:

> *Notwithstanding anything to the contrary contained in this Lease, the parties hereto recognize that the nature of Tenant's business in the Premises requires that Tenant retain personal and confidential information of its clients, as identified and protected under the privacy information laws of Canada, therefore should Landlord enter the Premises in the event of any real or apprehended emergency and should Tenant's representative not be present, then Landlord shall take such reasonably necessary precautions to ensure that the Premises are secure from entry by any unauthorized person. For the purposes hereof, "unauthorized person" means a person such as a maintenance or repair person who is not accompanied by Landlord or a representative of Landlord, a passerby or another tenant (other than Tenant and those for whom it is in law responsible) but shall not mean emergency services personnel, security officers, law enforcement officers or peace officers.*

In addition to this, a tenant may require that their landlord follow the tenant's adopted security protocol prior to entering the premises. Due to regulatory concerns, the tenant may be responsible for, and may be best equipped to contract for, any required security. If the tenant stores any pharmaceuticals or other regulated substances within the premises, the parties should determine who is responsible for providing security to the space.[43]

Access may be controlled by requiring that the landlord be accompanied by a representative of the tenant during entry and that access be limited to (or strictly prohibited from) certain spaces within the leased premises in which the collection, use, and storage of personal health information occurs. Access of the premises by the landlord may also be accomplished within certain agreed-upon times so as to mitigate any excessive access to clients or their personal health information. Outlining strict requirements regarding providing written notice prior to re-entry may assist the parties in determining future access.

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[42] Deborah A. Watkins & Monica Pak, "You're Special and They're Special – Specialty Leasing Issues" (Paper delivered at the ICSC Canadian Law Conference, 14 April 2015), online: *Daoust Vukovich LLP* <https://www.dv-law.com/docs/default-source/Articles/specialty-leasing-issues.pdf?sfvrsn=0>

[43] Stefanie L. Brennan, "Leasing to Health Care Tenants: What You Need to Know" (10 April 2017), online: *Lexology / Pepper Hamilton LLP* <https://www.lexology.com/library/detail.aspx?g=3935bece-37d3-480f-94ae-a71e02a9d513>

B. MAINTENANCE SERVICES AND REPAIRS

Health care and medical office lease tenants may wish to consider whether maintenance services are to be provided by the landlord via a subcontractor or if they are to acquire maintenance services themselves. In an effort to limit access to sensitive information, a landlord may consider allowing a medical tenant to undertake its own maintenance and janitorial services in the premises. Specialized health equipment belonging to a health care and medical office facility with significant alterations, specialized technology, as well as other considerations such as biological waste require planned and specialized maintenance work. Maintenance service providers should be aware of standards needed to be met by the health care provider and must present competence in the following:

- procedures and training;
- construction and alterations within the premises;
- healthcare technology, drugs, and supplies;
- safety;
- environmental liabilities; and
- quality management.

With regards to environmental liabilities, maintenance and janitorial subcontractors acquired by either the landlord or the tenant must be aware of the unique conditions in which health care providers and medical offices may bring radioactive materials, hazardous chemicals, volatile gasses, controlled pharmaceutical substances, or infectious waste into the retail space and how these biological materials may be subject to legislative protection as personal health information.

Transparency between landlord and tenant about the nature of these materials is required. As an added practice, the landlord and tenant may wish to agree that the landlord will have the right to inspect the premises and to engage an environmental specialist to confirm compliance with applicable environmental laws. The landlord may wish to require the medical tenant to undergo an inspection of the premises completed by an environmental specialist on surrender of the premises to confirm the absence of the hazardous materials, medical waste, and biological waste.[44]

C. STORAGE AND RETENTION OF CLIENT RECORDS AND PERSONAL HEALTH INFORMATION

Health care providers and medical tenants are required to follow guidelines on storage and retention that emphasize the need for safe and secure custody and handling of their personal health

[44] Caryn S. Engander, "Ten Key Considerations When a Health Care Tenant Negotiates a Shopping Centre Lease" (10 December 2014), online: *DLA Piper* <https://www.dlapiper.com/en/us/insights/publications/2014/12/10-key-considerations-healthcare-tenant>

information and, at times, biological material. Tenant practitioners who are custodians and trustees of personal health information are required to establish appropriate and secure facilities, infrastructure, policies, and procedures for the storage of materials and data, along with safeguards to prevent unauthorized access or disclosure.[45] While not directly related to landlord obligations, tenants should ensure that their premises includes adequate facilities for the storage of personal health information in the form of client files, charts, contact and insurance coverage information, treatment plans, and any biological material. This includes off-site storage spaces, if necessary.

In the matter ***Ooi, Re,***[46] involving the Saskatchewan Information and Privacy Commissioner (IPC), the IPC was alerted to a large volume of patient files in a recycling bin located on the corner of a shopping center parking lot near an office building in south Regina. The investigation uncovered 180,168 pieces of personal health information, including approximately 2,682 patient files, in the recycling bin. The records belonged to the Alberta Park Family Medical Centre and were under the custody of a Dr. Teik Im Ooi.

It was determined that the patient records were thrown into the recycling bin by two employees of a contracted maintenance company for the Golden Mile Shopping Centre, which was adjacent to the Gold Square commercial retail space. The records had been initially moved by the Alberta Park Family Medical Centre staff for storage on the second floor of the Gold Square building in 2005, and by 2007, approximately 150 boxes of patient records had accumulated. This was the first of five different moves of the patient records that involved two retail spaces and four different storage areas over a period of almost six years. The health care provider was determined to have lost track of the records when they were moved from their original location in 2005. It was determined that from 2007 until 2011, the large volume of patient personal health information was unprotected from many unauthorized persons. This included workmen, labourers, staff of the Golden Mile Shopping Centre, and others who entered the basement where the patient files were stored in an unlocked space prior to being moved to the recycling bin.

Although this case did not implicate or apportion any liability to the landlord of the Alberta Park Family Medical Centre or the Golden Mile Shopping Centre – despite having hired the maintenance company workers who disposed of the records into the recycling bin – landlords may wish to consider alerting contracted maintenance companies to the patient files and personal health information under the custody of any health care or medical office tenants as well as any records that may be found within or around the premises leased by the tenant.

D. COLLECTION AND USE OF CLIENT RECORDS AND PERSONAL HEALTH INFORMATION

[45] Erin Nelson & Ubaka Ogbogu, *Law for Healthcare Providers* (Toronto: LexisNexis Canada, 2018) at 243.
[46] *Ooi, Re,* 2011 CarswellSask 948

With family health teams and collaborative practices becoming more common in retail settings, tenants should be wary about the use and dissemination of client personal health information amongst their practices, particularly if the relationship of the parties within the collaborative practice is that of a landlord and tenant as opposed to a partnership or other association.

In ***Donbrook, Re***,[47] the IPC was similarly alerted to the collection and retention practices of a medical practitioner who was collecting personal health information of the clients of massage therapists and another chiropractor that worked within the same clinic space. Although Saskatchewan's *Health Information Protection Act* indicates that a trustee may collect personal health information for any purpose with the consent of the subject individual,[48] section 24(1) of the Act contains three key elements:

- the collection must be for a service of the trustee;
- that service must be one that can reasonably be expected to benefit the patient; and
- the service to the patient must be the primary purpose for the collection activity.[49]

In this matter, Dr. Donbrook described the other chiropractor in his clinic as an "associate". He collected the personal health information of his clients for the purposes of providing chiropractic services to the individuals. The IPC found that all three elements appeared to be present, and the collection of personal health information was consistent with section 24(1) of the Act. However, Dr. Donbrook had a landlord and tenant relationship with the massage therapists in the clinic. Dr. Donbrook had also collected personal health information from the clients of the massage therapists in addition to those of the other chiropractors. The IPC found that Dr. Donbrook did not have the authority to collect the registration information of the clients of the massage therapists under subsection 24(1) of the Act because the collection was not for a service of Dr. Donbrook as the trustee but instead for the service of his tenant.

E. DISTRESS, SEIZURE, AND EXEMPTIONS TO DISTRESS

In the event of failure to pay rent, a landlord's remedies for rent arrears include the seizure of goods. Some commercial leases may provide that the exercise by the landlord of its right to distrain does not constitute a trespass or a breach of any express or implied term of the lease or render the landlord subject to any legal proceedings.[50] While technological equipment in health care and medical fields may be considered substantial assets, the tenant, as the distraining party, may wish to exempt their assets from distress and consider including a provision such as the following:

[47] *Donbrook, Re*, 2015 CarswellSask 953.
[48] *Health Information Protection Act*, SS 1999, c H-0.021, s 24(4).
[49] *Donbrook, Re*, 2015 CarswellSask 953, para 8.
[50] Harvey M. Haber, *The Commercial Lease: A Practical Guide*, 5th ed (Toronto: Canada Law Book, 2013) in 354.

Notwithstanding Section (x), Landlord covenants and agrees that the following shall be exempt from distress:

> *... all of Tenant's confidential information, materials, and data, whether in written or electronic format on a computer hard drive or other electronic medium including, without limitation, any item that contains information that is confidential and personal in nature to Tenant's clients and Tenant's client records; and*
>
> *... information received, collected, produced, or used in connection with the administration of Tenant including, without limiting the generality of the foregoing, whether in written or electronic format, on a computer hard drive or other electronic format, Tenant's accounting materials and information, financial, business, and personal data relating to its clients.*

While a landlord may be wary of negotiating and reducing their rights upon a tenant defaulting on a lease, distraint provisions that allow the landlord to seize the tenant's inventory and assets that are present on the premises upon a default ought to be tailored to carve out any sensitive or confidential personal health information being collected, used, and stored in the premises. Another example of a provision that health care and medical office tenants may consider using is the following:

> *The Landlord shall have the right to terminate this Lease by notice to the Tenant or to re-enter the Premises and repossess them and, in either case, the Landlord may remove all property, excluding patient charts and/or records, whether in paper or electronic form and all electronic data related thereto or in any medium whatsoever, from the Premises and store such property at the expense and risk of the Tenant or sell or dispose of such property in such manner as the Landlord sees fit without notice to the Tenant. For greater clarity, any medical records, electronic or otherwise, located within the Premises may not be seized, viewed, copied or handled in any way by anyone other than the Tenant at any time. The parties acknowledge the significance of the privacy issues as identified in the Personal Health Information Protection Act or other applicable legislation in the province, and the Landlord hereby agrees to be held fully accountable and responsible for any and all damages which may result from breach of this clause and contravention of the Personal Health Information Protection Act.*[51]

F. LIENS AND COLLATERAL

[51] Deborah A. Watkins & Monica Pak, "You're Special and They're Special – Specialty Leasing Issues" (Paper delivered at the ICSC Canadian Law Conference, 14 April 2015), online: *Daoust Vukovich LLP* <https://www.dv-law.com/docs/default-source/Articles/specialty-leasing-issues.pdf?sfvrsn=0>

The tenant may further require that personal health information and any equipment containing personal health information be excluded from any of the landlord's liens on the tenant's property to ensure that the acquisition of the equipment containing personal information in order to satisfy any claims of the landlord would be less permissible.

In order to address collateral as defined in the commercial lease agreement, the following lease provision may be considered by prospective tenants:

> ***"Collateral":*** *means collectively Tenant's present and after-acquired personal property including, without restriction, all inventory, fixtures, equipment, chattel paper, documents of title, goods, instruments, money, securities, accounts and intangibles (each as defined in the personal property security legislation of the Province) and any improvements which Tenant effects on or in respect of the Premises. Notwithstanding the foregoing, Collateral shall exclude any item that contains information that is confidential and personal in nature to Tenant's clients.*

IV. CONCLUSION

The impacts of a tenant's privacy compliance requirements on a landlord's rights in health care and medical office settings warrant specialty leasing transactions, and the unique characteristics of these privacy requirements can present challenges for landlords and tenants alike. Although health information protection laws contain rules and processes for ensuring that the privacy and confidentiality of health information is maintained by medical and health care tenants as information trustees, it would be wise for both landlords and tenants to accustom themselves with the provincial legislative mechanisms which outline the legal duties and obligations of recipients and users of health information and how these may be impacted in the event of commercial landlord and tenant disputes.