Alberta's *Health Information Act* and the *Charter*: A Discussion Paper

Prepared for:

Canadian Mental Health Association (Alberta Division)
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I. Introduction

Alberta's *Health Information Act* ("HIA" or the "Act")[1] received Royal Assent on December 9, 1999. It will come into force on proclamation, which has been delayed pending development of regulations. This discussion paper examines the HIA in the context of the protection of privacy in sections 7, 8 and 15(1) of the *Canadian Charter of Rights and Freedoms*.[2]

This paper is based on the following principles established in Supreme Court of Canada cases:

(a) the right to privacy is recognized and protected under the *Charter*;[3]

(b) the right to privacy has the same status as other rights protected under the *Charter*;[4]

(c) the right to privacy, in the context of health information, is reinforced and supported by the right to equality;[5]

(d) the right to privacy, like other *Charter* rights, is not absolute, and it must be balanced against competing *Charter* rights and valid social objectives.[6]

Using these principles, explained in more detail below, we have identified and analysed potential *Charter* issues in the *Health Information Act*. The discussion is preliminary, for two reasons:

(a) there have been no decisions, to date, analysing the right to privacy in relation to legislation governing health information; and

(b) regulations, policies, procedures, and other government actions, as well as statutes, may be challenged under the *Charter*[7] but here only the statutory provisions have been finalized and are available for analysis.

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[1] S.A. 1999, c. H-4.8.

[2] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[3] There was debate in past years about whether a constitutionally protected right to privacy exists because there is no explicitly mention of a right to privacy in the *Charter*. However, as will be seen below, the right to privacy has been developed and explained through Supreme Court of Canada decisions.

[4] There is no "hierarchy" of *Charter* rights: *Dagenais* v. *Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835. In *R.* v. *Mills*, [1999] 3 S.C.R. 668, the Supreme Court explicitly recognized that the right to privacy has the same status as other *Charter* rights, such as the right to make full answer and defence (at para. 61).

[5] See e.g. *Mills*, *ibid* at para. 64, 91-92.

[6] *Ibid*. at para. 61.

[7] See e.g. *Eldridge* v. *British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 20-21.

It should also be noted that while this paper does engage in analysis of the Act's provisions and identify potential *Charter* issues, it is not intended as a legal opinion on the constitutionality of the Act or any of its provisions, and is not to be relied upon as such. This discussion paper is intended to provide background information for all interested persons and to contribute to the ongoing discussions regarding the Act and privacy issues in the health care system.

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II. The right to privacy

A. Defining the concept of privacy

The right to privacy has been defined in a number of different ways, in part because it is multifaceted. Depending on the context, it may include freedom from interference in one's personal decisions, freedom from surveillance, protection of one's reputation, or freedom from interference with one's person or personal space. All of these aspects of privacy are interrelated, and flow from basic rights to autonomy and liberty. In this paper we will be focussing on what is sometimes referred to as "information privacy," the right to control the use and disclosure of information about oneself.

The terms "privacy" and "confidentiality" are often used interchangeably, but in fact refer to distinct, yet related, concepts. Confidentiality refers to the quality of information which has been disclosed with the expectation that it will not be further disclosed, or to the duty not to disclose information that has been disclosed in confidence. Physicians and other health care providers, for example, have legal and ethical duties which require them to maintain the confidentiality of patients' information. These duties of confidentiality protect privacy but only to the extent that they are recognized as professional duties and not abrogated by legal authority.[8] In contrast, the

[8]See Office of Health and the Information Iway, *Confidence, Confidentiality and Privacy: A report on barriers to the transfer of personally identifiable health information between jurisdictions* by Mary A. Marshall (Alberta: Health Canada, 1998). For further discussion of this

right to privacy may only be infringed by law to the extent that such infringement can be justified as a violation of constitutional rights.

Privacy may also be distinguished from the broader range of "fair information practices" which are internationally recognized.[9] Fair information practices include, for example, individuals' right to know what information has been collected about them, to access this information and to request corrections to inaccurate information; ensuring accuracy and integrity of personal data; proper disposal procedures and transparency of information handling practices. Although these practices are broader than privacy protection, they play a role in protecting personal privacy.[10]

Finally, privacy and security must be distinguished.[11] Security refers to the protection of information from unauthorized or unintentional disclosure, modification or deletion. Proper security measures will help to protect privacy, but privacy can also be infringed by authorized access which is not affected by security.

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distinction see BC Public Interest Advocacy Centre, *Personal Health Information and the Right to Privacy: An Overview of Statutory, Common Law, Voluntary and Constitutional Privacy Protections* (Vancouver: B.C. Freedom of Information and Privacy Association, 2000) at 6-7; Mary A. Marshall & Barbara von Tigerstrom, "Confidentiality and Disclosure of Health Information" in Jocelyn Downie & Timothy Caulfield, eds., *Canadian Health Law and Policy* (Toronto: Butterworths, 1999) 143 at 151.

[9]See e.g. Organization for Economic Cooperation and Development, *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* (Paris: OECD, 1981).

[10]UN Human Rights Committee, *CCPR General Comment 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Article 17)*, 32[d] Sess. (1988) para. 10.

[11]This distinction is also discussed in BC Public Interest Advocacy Centre, *supra* note 8 at 7-8.

B. Protection of the right to privacy

The right to privacy has as its foundation the principle of "inviolate personality"[12] and as a personal right is universal and inalienable.[13] The protection of privacy rights is considered to be crucial to respecting the dignity, integrity and autonomy of individuals. Privacy protection also has instrumental value because of its effect on personal and social relationships, and because it can indirectly protect individuals from harms such as discrimination which might be associated with disclosure of personal information.[14] These multifaceted justifications for the protection of privacy have been recognized by the Supreme Court:

> society has come to realize that privacy is at the heart of liberty in a modern state; see Alan F. Westin, Privacy and Freedom (1970), pp. 349-50. Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restraints imposed on government to pry into the lives of the citizen go to the essence of the democratic state.[15]

Privacy protection in the health care context is especially important for several reasons. First, health information is generally considered to be particularly sensitive information. Second, health information privacy has significant instrumental value in fostering beneficial relationships between health care providers and their patients.[16]

The Supreme Court of Canada has recently stated that "[t]he values protected by privacy rights will be most directly at stake where the confidential information contained in a record concerns aspects of one's individual identity or where the maintenance of confidentiality is crucial to a therapeutic, or other trust-like, relationship."[17] Health information will usually meet both these criteria.

The right to privacy is recognized in several major international human rights instruments, including the *Universal Declaration of Human Rights*[18] and the *International Covenant on Civil and Political Rights* (ICCPR).[19] Article 17 of the ICCPR provides that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation" and "[e]veryone has the right to the

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[12]Samuel D. Warren & Louis D. Brandeis, "The Right to Privacy" (1890) 4 Harv. L. Rev. 193 at 204.
[13]Charles Morgan, "Employer Monitoring of Employee Electronic Mail and Internet Use" (1999) 44 McGill L. J. 849 at 855.
[14]For a discussion of the values and interests relating to privacy protection, see Barbara von Tigerstrom, "Protection of Health Information Privacy: The Challenges and Possibilities of Technology" (1998) 4 Appeal Review of Current Law and Law Reform 44 at 46-47.
[15]*R.* v. *Dyment*, [1988] 2 S.C.R. 417 at 427-28.
[16]Marshall & von Tigerstrom, *supra* note 8 at 144.
[17]*Mills*, *supra* note 4 at para. 89.
[18]GA Res. 217, UN Doc. A/810 (1948), article 12.
[19](1966) 999 U.N.T.S. 171, article 17.

protection of the law against such interference or attacks." The UN Human Rights Committee has stated that "this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons."[20] Therefore, "States parties are under a duty themselves not to engage in interferences inconsistent with article 17 .... and to provide the legislative framework prohibiting such acts by natural or legal persons."[21]

III. Constitutional protection of privacy rights in Canada

The *Canadian Charter of Rights and Freedoms* provides constitutional protection for rights and freedoms in Canada. The *Charter* applies to the actions of federal and provincial governments respecting matters within their authority, including legislation and other government actions.[22] As part of the Constitution, the *Charter* is paramount over other laws, and therefore any law which is inconsistent with the *Charter* is "to the extent of the inconsistency, of no force and effect."[23]

There is no explicit mention of the right to privacy in the *Canadian Charter of Rights and Freedoms*, but Canadian courts have recognized that the *Charter* does protect privacy rights through several of its sections, notably sections 7 and 8, which read as follows:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> 8. Everyone has the right to be secure against unreasonable search or seizure.

Section 15, which guarantees equality before and under the law and the equal protection and benefit of the law without discrimination, may also be relevant to privacy rights in some circumstances.

A. Section 8

The right recognized in s. 8 "to be secure against unreasonable search and seizure" is to be construed in terms of its underlying purpose, the protection of individual privacy.[24] The Supreme Court of Canada has stated that the purpose of section 8 requires a proactive approach to prevent unjustified intrusions before they happen,[25] and that "s. 8 does not merely prohibit unreasonable searches and seizures ... it goes further and guarantees the right *to be secure against* unreasonable search and seizure."[26]

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[20] *Supra* note 10, para. 1.
[21] *Ibid*., para. 9.
[22] *Charter*, *supra* note 2, s. 32.
[23] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11., s. 52.
[24] *Dyment*, *supra* note 15 at 426.
[25] *Hunter* v. *Southam*, [1984] 2 S.C.R. 145 at 160.
[26] *Dyment*, *supra* note 15 at 427 [emphasis added].

Section 8 only applies to a "search" or "seizure" and therefore a claim based on s. 8 must establish that the impugned government action constituted or authorized[27] a search or seizure. While s. 8 has been frequently applied to searches of property or persons in a criminal law context, it is similarly applicable to a seizure of documents in other circumstances. As the Supreme Court has stated, "the essence of a seizure under s. 8 is the taking of a thing from a person by a public authority without that person's consent."[28] Such an approach was reiterated in *Thomson Newspapers* where the Court defined a seizure as "taking hold by a public authority of a thing belonging to a person against that person's will."[29] In several cases, the Court held that a statutory requirement that documents be produced is a "seizure" within the meaning of s. 8.[30] Similarly, a court order to produce records or the power to copy documents also constitute a "seizure" to which s. 8 applies.[31]

Although the courts have referred to seizure as taking something *belonging to* an individual, it has since been clarified that it is not essential that the individual have an ownership interest in the object of the search or seizure.[32] Furthermore, it is not essential that the object or information be taken directly from the individual: for example, the case of *R.* v. *Plant* involved a police search of computerized records maintained by the city, which contained information about the individual's electrical consumption. What is essential is that the individual have a reasonable expectation of privacy in the subject matter of the search or seizure. Whether there is a reasonable expectation of privacy will depend on the circumstances of each case, including the following factors:

> (i) presence at the time of the search;
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> (ii) possession or control of the property or place searched;
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> (iii) ownership of the property or place;
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> (iv) historical use of the property or item;
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> (v) the ability to regulate access, including the right to admit or exclude others from the place;
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> (vi) the existence of a subjective expectation of privacy; and

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[27]E.g. *Hunter*, *supra* note 25, involved a s.8 challenge to a law (the *Combines Investigation Act*) allowing searches by a member of the Restrictive Trade Practices Commission.
[28]*Dyment*, *supra* note 15 at 431 referred to with approval in *Thomson Newspapers Ltd.* v. *Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425 at 505.
[29]*Thomson*, *ibid*. at 493 (per Wilson J., dissenting but not on this point).
[30]*Ibid*.; *R.* v. *McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627.
[31]See *Mills*, *supra* note 4 at para. 77; *Comité paritaire de l'industrie de la chemise* v. *Potash*, [1994] 2 S.C.R. 406 at para. 4.
[32]*R.* v. *Plant*, [1993] 3 S.C.R. 281 at 291.

> (vii) the objective reasonableness of the expectation.[33]

In a number of cases, s. 8 has been applied to records and samples of bodily substances in a medical or therapeutic context. The Court has held that there is a high degree of privacy associated with one's bodily integrity[34] and with therapeutic records[35], as compared to the lesser degree of privacy associated with commercial records[36] and financial documents.[37]

In *R.* v. *Plant*, the Supreme Court stated that:

> 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.[38]

Thus, the Supreme Court has indicated that there is a compelling expectation of privacy in regards to information about one's individual identity, "lifestyle, intimate relations or political or religious opinions."[39] This was reiterated in the *Mills* decision, where the Court observed that "privacy rights will be most directly at stake where confidential information contained in a record concerns aspects of one's individual identity or where the maintenance of confidentiality is crucial to a therapeutic, or other trust-like, relationship"[40] and that the reasonable expectation of privacy protected by s. 8 "includes the ability to control the dissemination of confidential information."[41]

Records, including computerized records, will be subject to a reasonable expectation of privacy if their contents include personal information of the nature referred to above, or if the relationship between the individual and the person making or keeping the record can be characterized as confidential. The Court has explicitly recognized that individuals have a reasonable expectation of privacy in therapeutic records such as medical and counselling records, which is protected by s. 8.[42] Individuals also have a reasonable expectation that samples taken

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[33] *R.* v. *Edwards*, [1996] 1 S.C.R. 128 at para. 45.
[34] *R.* v. *Dersch*, [1993] 3 S.C.R. 768; *Dyment*, *supra* note 15; *R.* v. *Pohoretsky*, [1987] 1 S.C.R. 945; *R.* v. *Stillman*, [1997] 1 S.C.R. 607.
[35] *Mills*, *supra* note 4.
[36] *Plant*, *supra* note 32.
[37] *Thomson*, *supra* note 28; *McKinlay*, *supra* note 30.
[38] *Supra* note 32 at 293.
[39] *Thomson*, *supra* note 28 at 517-18, cited with approval in *Baron* v. *Canada*, [1993] 1 S.C.R. 416 at 444-45; see *Mills*, *supra* note 4 at para. 80; also cited with approval in *British Columbia Securities Commission* v. *Branch*, [1995] 1 S.C.R. 3 at para. 62.
[40] *Supra* note 4 at para. 89.
[41] *Ibid*. at para. 80.
[42] *Ibid*. at para. 82; *R.* v. *O'Connor*, [1995] 4 S.C.R. 411.

for medical purposes will remain private and the information from them not be used for other purposes.[43]

However, the right to privacy is not absolute: "[c]laims to privacy must, of course, be balanced against other societal needs ... and that is what s. 8 is intended to achieve."[44] A search or seizure will not violate s. 8 even in circumstances in which there is a reasonable expectation of privacy, if it is reasonable in the circumstances, minimally intrusive and is authorized by law.[45] Assessing the reasonableness of the search or seizure entails balancing the state's goals in conducting the search or seizure with the individual's privacy interests. Essentially, this assessment focuses on the "'reasonable' or 'unreasonable' impact on the subject of the search or the seizure and not simply its rationality in furthering some valid government objective."[46] A reasonable search or seizure will be one which intrudes on the individual's privacy to the minimal extent necessary.

For instance, a search of a suspect's home must meet a high standard of reasonableness to avoid violating the *Charter*. The criteria for such a search in the context of a criminal investigation were outlined in *Hunter* v. *Southam* and summarized in *Thomson*:[47]

1. a system of prior authorization, by an entirely neutral and impartial arbiter who is capable of acting judicially in balancing the interests of the State against those of the individual;
2. a requirement that the impartial arbiter must satisfy himself that the person seeking the authorization has reasonable grounds, established under oath, to believe that an offence has been committed;
3. a requirement that the impartial arbiter must satisfy himself that the person seeking the authorization has reasonable grounds to believe that something which will afford evidence of the particular offence under investigation will be recovered; and
4. a requirement that the only documents which are authorized to be seized are those which are strictly relevant to the offence under investigation.

[43] *Dyment*, *supra* note 15 at 434. See also *Dersch*, *supra* note 34; *R.* v. *Colarusso*, [1994] 1 S.C.R. 20.
[44] *Dyment*, *supra* note 15 at 428.
[45] *R.* v. *M.R.M.*, [1998] 3 S.C.R. 393 at para. 54.
[46] *Hunter*, *supra* note 25 at 157.
[47] *Supra* note 28 at 498-99; see also *McKinlay*, *supra* note 30 at 642-43.

Thus, a statutory provision providing for a mandatory search or seizure is more likely to infringe s. 8. For instance, in *Baron* a provision stating that a warrant 'shall' be issued in certain circumstances was held to be unconstitutional. As the Court explained, "Not only is the existence of a discretion indispensable to the balancing of interests which *Hunter* envisaged but the requirement that the officer authorizing the seizure be independent and capable of acting judicially is inconsistent with the notion that the state can dictate to him or her the precise circumstances under which the right of the individual can be overborne."[48]

However, this standard developed in the criminal law context may be relaxed depending on the type of statute authorizing the search or seizure and the extent of the privacy interest involved. For instance, in *McKinlay*,[49] the Court held that a demand for documents under the Income Tax Act does not violate section 8 because it is made pursuant to a regulatory statute, there is a minimal privacy interest attached to the documents in question, and the Act provided for the least intrusive means of enforcing the provisions of the Act.

Although strict adherence to the criteria established in *Hunter* v. *Southam* will not always be necessary outside of the criminal law context, the more compelling the individual's expectation of privacy in the circumstances, the more likely the criteria established in *Hunter* v. *Southam* will provide the basis for assessing the reasonableness of the search or seizure. Thus, as explained in *McKinlay*, "the greater the intrusion into the privacy interests of the individual, the more likely it will be that safeguards akin to those in *Hunter* will be required."[50]

B. Section 7

The right to liberty and security of the person in s. 7 also has been found to include the right to privacy.[51] "Respect for individual privacy is an essential component of what it means to be 'free.' As a corollary, the infringement of this right undeniably impinges upon an individual's 'liberty' in our free and democratic society."[52] Depending on the circumstances, security of the person may also be affected. Where a violation of privacy rights interferes with an individual's mental integrity, for example "where a therapeutic relationship is threatened by the disclosure of private records,"[53] it infringes the individual's right to security of the person.

An initial question which must be addressed is whether section 7 applies in the context of this Act. Section 7 is most often invoked in the criminal law context. It is now settled that it applies outside the criminal law, but its application may be limited to the administration of justice. As Lamer C.J. stated for the majority in the recent decision of *New Brunswick (Minister of Health and Community Services)* v. *G. (J.)*:

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[48] *Supra* note 39 at 439.
[49] *Supra* note 30.
[50] *Ibid*. at 649.
[51] *O'Connor*, *supra* note 42 at para. 110ff.
[52] *Ibid*. at para. 113.
[53] *Mills*, *supra* note 4 at para. 85.

> In both *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, *supra*, and *B. (R.)*, *supra*, I held that the restrictions on liberty and security of the person that s. 7 is concerned with are those that occur as a result of an individual's interaction with the justice system and its administration. In other words, the subject matter of s. 7 is the state's conduct in the course of enforcing and securing compliance with the law, where the state's conduct deprives an individual of his or her right to life, liberty or security of the person. I hastened to add, however, that s. 7 is not limited solely to purely criminal or penal matters. There are other ways in which the government, in the course of the administration of justice, can deprive a person of their s. 7 rights to liberty and security of the person.[54]

The Court was not required to decide in this case whether the section could apply outside the context of the administration of justice (the case involved a child custody matter in the court system), but this passage and the earlier decisions referred to in it clearly suggest that its application is limited to the administration of justice. Other cases which have involved administrative tribunals[55] could be considered to fall within the scope of administration of justice broadly construed. The passage quoted above suggests that what is required is some connection with state conduct "in the course of enforcing and securing compliance with the law." There are some superior court decisions which consider or apply s. 7 in a context which is outside the administration of justice[56] but these may be inconsistent with the Supreme Court's direction on this point.

The *Health Information Act* generally would fall outside this scope, although certain provisions which are specifically relevant to the administration of justice might fall within it.[57] Therefore, although we will consider s. 7 in our analysis, it should be noted that there is a serious question as to whether this section would apply at all in this context.

Assuming that section 7 does apply, the analysis is a two-step process: first, the court determines if there has been a deprivation of life, liberty or security of the person; second, the court must assess whether this deprivation is contrary to the principles of fundamental justice.[58] Only if the claimant succeeds at both stages will a violation be found and the court will move on to section 1.

In the first stage, the state action will be examined to see if it deprives the individual of liberty or security of the person. As noted above, there are some judicial statements to the effect that

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[54][1999] 3 S.C.R. 46 at para. 65.
[55]E.g. *Singh* v. *Minister of Employment and Immigration*, [1985] 1 S.C.R. 177; *Blencoe* v. *British Columbia (Human Rights Commission)* (1998), 160 D.L.R. (4th) 303 (B.C.C.A.) (appeal heard and reserved by S.C.C. January 24, 2000).
[56]E.g. *Fleming* v. *Reid*, (1991), 4 O.R. (3d) 74. (C.A.); *Wilson* v. *Medical Services Commission* (1988), 53 D.L.R. (4th) 171 (B.C.C.A.).
[57]E.g. s. 35(1)(h) allowing disclosure without consent for the purpose of a court or quasi-judicial proceeding, s. 35(1)(i) allowing disclosure without consent for the purpose of complying with a subpoena, warrant or rule of court, and s. 35(1)(j) allowing disclosure without consent to police for the investigation of an offence involving life-threatening person injury to the individual.
[58]*R.* v. *Beare* (1988), 66 D.L.R. (3d) 97.

protection of privacy is an important component of liberty. There is some disagreement as to the proper scope of the right to liberty protected by s. 7.[59] Liberty certainly includes freedom from physical restraint, and some Supreme Court justices have adopted a broader definition,[60] which was summarized as follows:

> the right to liberty enshrined in s. 7 of the Charter protects within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference. ... I do not by any means regard this sphere of autonomy as being so wide as to encompass any and all decisions that individuals might make in conducting their affairs. ... the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence.[61]

Security of the person has also been clearly linked to the protection of privacy. The Supreme Court has on several occasions held that psychological integrity is included in the definition of "security of the person."[62] The scope of this right was also discussed in the recent *New Brunswick v. G. (J.)* decision:

> For a restriction of security of the person to be made out, then, the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level or nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.[63]

Security of the person has been specifically linked with privacy in a number of Supreme Court of Canada decisions. Invasion of privacy, stigmatization, and intrusion into or disruption of personal and intimate relationships, all of which are likely results of disclosure of sensitive personal information such as health information, may infringe security of the person.[64]

If an infringement of liberty or security of the person is established, the next stage is to determine whether the infringement is in accordance with the principles of fundamental justice. These

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[59]See *New Brunswick* v. *G. (J.)*, *supra* note 54 at para. 56.
[60]See e.g. *Singh*, *supra* note 55 at 205; *R.* v. *Morgentaler (No. 2)*, [1988] 1 S.C.R. 30 at 164-66; *B. (R.)* v. *Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at para. 83; *Godbout* v. *Longueuil*, [1997] 3 S.C.R. 844, para. 66.
[61]*Godbout*, *ibid*.
[62]*Morgentaler*, *supra* note 60 at 56, 173; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 S.C.R. 1123 at 1177; *Rodriguez* v. *British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at 587-88.
[63]*Supra* note 54 at para. 60.
[64]See *New Brunswick* v. *G. (J.)*, *supra* note 54 at para. 61-62; *Mills*, *supra* note 4 at para. 85; *Mills* v. *The Queen*, [1986] 1 S.C.R. 863 at 919-20.

principles are the "basic tenets of our legal system"[65] and they may be both substantive and procedural.[66] Some of the principles referred to in cases involving criminal justice or other justice system issues are not relevant for our purposes. However, some broader principles have also been proposed. One view is that the analysis of the principles of fundamental justice should ask "whether, from a substantive point of view, the change in the law strikes the right balance between the [individual's] interests and the interests of society."[67] A law may violate principles of fundamental justice if it is arbitrary or unfair,[68] or if it is overbroad[69] or vague.[70] "If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate."[71]

The case of *Canadian AIDS Society* v. *Ontario*[72] involved the disclosure of information about the HIV status of blood donors under Ontario legislation. The Red Cross had tested certain stored blood samples and determined that some of the donors were HIV positive; the question was whether the public health authorities and the donors should be notified as required under provincial public health legislation. The Ontario Court (General Division) held that the notification requirements did violate the donors' rights to privacy protected by s. 7 of the *Charter*. However, the violation was in accordance with the principles of fundamental justice because "substantively, the law strikes an appropriate balance between the goal of the state to promote public health, and the privacy rights of the individual."[73]

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[65] *Re B.C. Motor Vehicles Act*, [1985] 2 S.C.R. 486 at 503.
[66] *Ibid*.
[67] *Cunningham* v. *Canada*, [1993] 2 S.C.R. 143 at 152. For a summary and analysis of other cases where this approach was taken by the Supreme Court, see T. J. Singleton, "The Principles of Fundamental Justice, Societal Interests and Section 1 of the Charter" (1995) 74 Can. Bar Rev. 446 at 457ff.
[68] *Rodriguez*, *supra* note 62 at 619-21.
[69] *R.* v. *Heywood*, [1994] 3 S.C.R. 761.
[70] *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, *supra* note 62; *R.* v. *Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606.
[71] *Heywood*, *supra* note 69 at para. 49.
[72] (1995), 25 O.R. (3d) 388; aff'd (1996), 31 O.R. (3d) 798; leave to appeal to S.C.C. denied, [1997] S.C.C.A. No. 33.
[73] *Ibid*. at para. 131.

C. Section 15(1)

Finally, s. 15(1) requires that individuals be guaranteed equality before and under the law and the equal protection and benefit of the law. A law or government action may infringe s. 15(1) without deliberately targeting or discriminating against a certain group, if it has an adverse effect on that group. However, not every distinction or instance of differential treatment or effect will constitute discrimination. The Supreme Court of Canada has recently stated the following test to determine if there is a violation of s. 15(1):[74]

> (A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
>
> (B) Is the claimant subject to differential treatment based on one or more of the enumerated and analogous grounds?
>
> and
>
> (C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

This three-step test is not a strict test or formula but summarizes the central issues to be addressed.[75] The third component requires that the differential treatment be "discriminatory in a substantive sense," which means that it violates the fundamental purpose of s. 15(1). This purpose is "to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration."[76]

This inquiry is to be undertaken using a comparative approach[77] and taking account of contextual factors including pre-existing disadvantage, the relationship between the grounds and the claimant's characteristics or circumstances, the ameliorative purpose or effects of the impugned

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[74] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 88.
[75] *Law*, *ibid*.; *Winko* v. *British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625 at para. 76.
[76] *Law*, *supra* note 74 at para. 51.
[77] *Ibid*. at para. 55-58.

provision and the nature of the interest affected.[78] The claimant must show that the purpose of s. 15 has been infringed by the impugned law.[79]

Where government actions violate privacy in a way that disproportionately affects individuals or groups sharing certain personal characteristics, equality rights may be implicated. For example, "the equality of individuals whose lives are heavily documented" is affected by rules allowing disclosure, "as these individuals have more records that will be subject to wrongful scrutiny."[80]

D. Section 1

According to s. 1 of the *Charter*, the rights and freedoms in the *Charter* are guaranteed "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Assuming that some sections of the HIA are found to contravene *Charter* rights, the analysis then turns to section 1 of the *Charter* and whether the infringement is a reasonable limit in a free and democratic society. The Supreme Court has, in a case called *Oakes*[81] and in subsequent cases,[82] developed a general test for addressing this question. This test generally examines whether, given its purpose, the benefits of the infringing legislation outweigh the effects of the infringement. The government has the burden of showing that this test is met on a balance of probabilities.

The first question to be examined is the purpose at issue. The government must show that the objective of the legislation or other action is "pressing and substantial." Depending on the circumstances, this may require the court to examine the legislation as a whole, a specific provision or other aspect that infringes *Charter* rights, or both.[83]

To answer this question the courts have looked to the debates surrounding the introduction of the legislation, to any preamble to the legislation and to the actual text of the legislation, among other things. In the case of the HIA, there is no preamble, but section 2 sets out the purposes of the Act:

> (a) to establish strong and effective mechanisms to protect the privacy of individuals with respect to their health information and to protect the confidentiality of that information,
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> (b) to enable health information to be shared and accessed, where appropriate, to provide health services and to manage the health system,

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[78] *Ibid*. at para. 62ff.
[79] *Ibid*. at para. 75ff.
[80] *Mills*, *supra* note 4 at para. 92.
[81] *R.* v. *Oakes*, [1986] 1 S.C.R. 103.
[82] E.g. *Egan* v. *Canada*, [1995] 2 S.C.R. 513 at para. 182, where the steps of the s. 1 test were summarized.
[83] *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493 at para. 109-11.

> (c) to prescribe rules for the collection, use and disclosure of health information, which are to be carried out in the most limited manner and with the highest degree of anonymity that is possible in the circumstances,
>
> (d) to provide individuals with a right of access to health information about themselves, subject to limited and specific exemptions as set out in this Act,
>
> (e) to provide individuals with a right to request correction or amendment of health information about themselves,
>
> (f) to establish strong and effective remedies for contraventions of this Act, and
>
> (g) to provide for independent reviews of decisions made by custodians under this Act and the resolution of complaints under this Act.

When introducing the bill in the legislature, Health Minister Halvar Jonson stated that the "Health Information Act will strike the right balance between protecting privacy and making sure that health information can be used carefully and appropriately to improve health care and the management of Alberta's health system."[84]

Without addressing whether or not the Act achieves the right balance it is clear that this summarizes the purpose of the Act . This interpretation is borne out by the text of the Act itself which includes provisions that could be viewed as addressing the maintenance of confidentiality of records as well as dealing with the uses to which confidential information may be put. It may be that certain infringing sections of the Act could be characterized as being directed toward this objective, or that they could be directed towards another objective. The objective of the actual infringing measure under consideration must be established and that objective may not be the same as the objective of the legislation as a whole, or may focus on one of the specific purposes listed above.

A court, upon determining the purpose of the legislation, must ask whether that purpose is a "pressing and substantial" one, for only a pressing and substantial purpose will warrant an infringement of a Charter right. The courts almost never find that a legislative purpose is not pressing and substantial and it is highly unlikely that it would do so in this case. Striking an appropriate balance with respect to the confidentiality and uses of health information is an extremely important purpose and even those opposed to the balance struck by this legislation would have to concede that point.

Upon finding that a legislation's purpose is sufficiently pressing and substantial, a court would then turn to the question of whether the infringement is proportional to the purpose and effect of the legislation. This examination consists of evaluating three factors:

1. Is the legislative measure at issue rationally connected to its purpose?
2. Does the legislative measure impair *Charter* rights only as much as is necessary to accomplish its objective?

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[84] Alberta, Legislative Assembly, *Debates* (17 November, 1999) at 1841.

3. Do the harmful effects of the infringement caused by the measure outweigh its purpose and actual effect?

The rational connection requirement calls for an assessment of the means chosen and the purposes sought to be achieved. The Supreme Court has held that a law "must be carefully designed to achieve the objective in question" and that it should not be "arbitrary, unfair, or based on irrational considerations."[85] However, Professor Hogg has pointed out recently that only two cases at the Supreme Court of Canada level had ever been decided on the basis that a legislative measure was not rationally connected to its objective.[86]

The pivotal element of the *Oakes* test has always been the minimal impairment branch (also known as the "least drastic means" branch). This branch of the test is not to be read as literally as it appears. It will usually be the case that a court could imagine some way of achieving the objective in question that infringed the Charter right in issue at least a little less than the legislative measure being evaluated. The court is not, however, to mechanically substitute its judgment for that of the legislature and the legislature will be allowed to choose, from among a range of reasonable alternatives,[87] that measure that impairs the right in question "as little as reasonably possible."[88] As Professor Hogg has noted, the Supreme Court will consider a number of factors in determining the amount of latitude that is to be granted to a legislature when it could be said to have chosen from among a range of legislative alternatives. Courts will be more deferential to legislators in the application of the minimal impairment branch of the test where "the law is designed to protect a vulnerable group", "where the law is premised on complex social-science evidence", "where the law reconciles the interests of competing groups"and "where the law allocates scarce resources."[89]

The final branch of the *Oakes* analysis is called the "deleterious effects" step. It asks, given that the legislative measure in question has satisfied the other elements of the analysis, whether the harmful effects of the law outweigh whatever beneficial objective or effects it may be seeking to bring about. In other words, is it worth infringing a *Charter* right for? This step, as with the rational connection step, has not been the location in the analysis where many legislative measures have fallen. If a legislative measure satisfies the other elements of the *Oakes* analysis it is difficult to imagine how it might fail the deleterious effects branch.

For the *Health Information Act*, then, as for almost all other legislation, the crucial points in the section 1 analysis will be the characterization of the objective and the minimal impairment step. These tasks and their outcomes may vary from section to section of the legislation. As such, each potentially infringing measure has to be subjected to its own section 1 analysis.

Although section 1 applies to all of the rights and freedoms guaranteed in the *Charter*, it has been noted that where there is a violation of section 7 or 8, it will be very difficult to justify this violation as a reasonable limit under section 1. This is because each of these provisions contains

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[85] *Oakes*, *supra* note 2 at 139.
[86] P.W. Hogg, *Constitutional Law of Canada*, Loose-leaf ed., (Scarborough: Carswell, 1997) at 35.10(a) [updated to 1999].
[87] *Irwin Toy* v. *Quebec*, [1989] 1 S.C.R. 927 at 999.
[88] *R.* v. *Edwards Books and Art*, [1986] 2 S.C.R. 713 at 772.
[89] Hogg, *supra* note 86 at 35.11(b).

an internal balancing analysis. Section 7 is only violated if the infringement of liberty or security of the person is contrary to the principles of fundamental justice. It would be difficult to establish that such an infringement is a reasonable limit under section 1.[90] Similarly, because section 8 proscribes only "unreasonable" searches or seizures, some have suggested that it is rare that a violation would be justified.[91]

IV. *Health Information Act* overview

The *Health Information Act* creates rules regarding access to health information; collection, use and disclosure of health information; duties and powers of health information custodians; and duties and powers of the Information and Privacy Commissioner (the Commissioner).

The definitions of terms used in the Act are contained in s. 1(1). "Health information" is defined in the Act to include "diagnostic, treatment and care information," "health services provider information" and "registration information"; each of these types of information is also defined. There is also a distinction between "individually identifying" and "non-identifying" health information, depending on whether the identity of the subject of the information can be readily identified. Generally, the rules in the Act only apply to individually identifying information. They also apply only to recorded information, although there are some restrictions on use of non-recorded information (s. 29).

The Act defines two categories, custodians and affiliates, which are subject to the Act. There are also a few general prohibitions which apply to everyone, but generally the rules in the Act are directed at custodians, and indirectly at affiliates.

Custodians include the following:

- the board of an approved hospital, other than one owned and operated by a regional health authority or the Alberta Cancer Board
- the operator of a nursing home, other than one owned and operated by a regional health authority
- a provincial health board, community health council or subsidiary health council under the Regional Health Authorities Act
- the Alberta Cancer Board
- a board, council, committee, commission, panel or agency of any of the above custodians, if the majority of members is appointed by or on behalf of the custodian, except quality assurance committees as defined in the Alberta Evidence Act
- a health services provider who is paid under the Alberta Health Care Insurance Plan to provide health services
- a licensed pharmacy
- a pharmacist
- the Department of Health and Wellness
- the Minister of Health and Wellness

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[90] In *Re B.C. Motor Vehicle Act*, *supra* note 65, Lamer J. stated that a section 7 violation could be justified under section 1, but only in exceptional circumstances (at 518); Wilson J. in this (at 523) and other cases took the view that a section 7 violation may *never* be justified under section 1. See Hogg, *supra* note 86 at 35-39.

[91] See e.g. *Thomson*, *supra* note 28 at para. 107 (per Wilson J., dissenting but not on this point).

- any individual or body designated by the regulations as a custodian

The Alberta Alcohol and Drug Abuse Commission and Community or Facility Boards are specifically excluded.

"Affiliates" include the following:

- employees of a custodian
- a person performing a service for the custodian as an appointee, volunteer, student, contractor, or agent
- a health services provider who has the right to admit and treat patients at a hospital

but not ambulance operators or agents under the Health Insurance Premiums Act. An affiliate must collect, use and disclosure health information only in accordance with their duties to the custodian with which they are affiliated (ss. 24, 28, 43). Affiliates must comply with the Act, the regulations and the custodian's policies and procedures (s. 62(4)), and the custodian is responsible for ensuring that its affiliates comply. Custodians are also responsible for the acts of their affiliates because any collection, use or disclosure by an affiliate, or disclosure to an affiliate, is considered to be by or to the custodian (s. 62(2),(3)).

However, most of the rules in the Act apply to custodians. Part 2 sets out how custodians must respond to requests by individuals for access or corrections to their health information. Parts 3, 4 and 5 contain rules on collection, use and disclosure, respectively. Part 6 sets out the duties and powers of custodians, and provisions on data matching. Part 7 deals with the powers and duties of the Commissioner, including reviews of decisions, resolving complaints and conducting investigations. General provisions including offences and penalties, and the power to make regulations, are contained in Part 8. Finally, Part 9 sets out provisions amending other statutes and governing the coming into force of the Act.

V. Issues and concerns

In this section we will review certain aspects and provisions of the Act that may raise constitutional issues. This analysis is of a preliminary nature, not least because the statute has been enacted but is not yet in force. The regulations, policies, procedures, and implementation schemes that are adopted will also be subject to the *Charter* and may require further scrutiny. Furthermore, once the Act is in force, it will also be possible to address specific actions taken under the Act. If those actions are government actions within the meaning of section 32 of the *Charter*, the *Charter* will apply to them.

There are some aspects of the Act which, although they are important, have not been discussed in the following section because the implementation of the Act will be crucial to their operation. As a result, little useful analysis is possible at this early stage. For example, s. 60(1) requires custodians to "take reasonable steps in accordance with the regulations to maintain administrative, technical and physical safeguards", including those that will "(b) protect the confidentiality of health information that is to be stored or used in a jurisdiction outside Alberta or that is to be disclosed by the custodian to a person in a jurisdiction outside Alberta and the privacy of the individuals who are the subjects of that information." The existence of appropriate safeguards regarding the transfer of information outside the jurisdiction is essential

for the protection of privacy, but the level of protection cannot be assessed until the safeguards (which may be set by regulation according to s. 108(1)(h)) are actually established.

The provisions regarding disclosure of health information for research (sections 48-56) are also very important and have been the subject of substantial discussion. The actual operation of these provisions will depend on a number of factors including the bodies which are designated as ethics committees (s. 108(2)(a)) and the standards applied by those committees in carrying out their functions under s. 50.

This analysis will focus on the text of the statute as such and potential applications of the sections of the *Charter* discussed above to selected provisions. The aim of this section is to identify some arguments that could be made and factors to be considered, rather than to reach specific conclusions on the constitutionality of the Act.

A. Individually identifying and non-identifying health information

The Act draws a distinction between individually identifying and non-identifying health information. Non-identifying health information may be collected (s. 19), used (s. 26) or disclosed (s. 32) for any purpose, with virtually no restrictions. A recipient of non-identifying information who is not a custodian must inform the Commissioner of an intention to use the information for data matching, and the custodian disclosing the information must notify the recipient of this obligation. The provisions in the Act setting limits and rules for collection, use and disclosure apply only to individually identifying information.

Therefore, the definitions of these categories of information are very important, since non-identifying information is effectively unprotected by the Act. The following definitions are found in section 1(1):

> (p) "individually identifying", when used to describe health information, means that the identity of the individual who is the subject of the information can be readily ascertained from the information;
> ...
> (r) "non-identifying", when used to describe health information, means that the identity of the individual who is the subject of the information cannot be readily ascertained from the information"

The key to both of these definitions is whether the identity of the subject can be *readily ascertained from the information*. This imposes a very low threshold for when information is considered to be non-identifying (and therefore unprotected), in two respects. First, the use of the phrase "readily ascertainable" suggests that if the subject's identity can be determined with some, but not necessarily great, effort, the information is considered to be non-identifying. This may be compared to the equivalent definition in the Saskatchewan *Health Information Protection Act*[92] which requires that the subject not be *reasonably expected* to be identified. In Manitoba, anonymous information (to which the Act does not apply) is information "that does

[92]S.S. 1999, c. H-0.021, s. 3(2)(a).

not, either by itself or when combined with other information available to the holder, permit individuals to be identified."[93]

Second, the Alberta definition refers only to identity being ascertained from the information itself, ignoring the possibility of identity being revealed in another way, for example by this information being matched with other information. In contrast, the Saskatchewan and Manitoba Acts specifically contemplate the possibility of a subject individual being identified through combination with other information. This omission is especially worrying given that there are no effective restrictions on data matching, which is the "creation of individually identifying health information by combining individually identifying or non-identifying health information or other information from 2 or more electronic databases, without the consent of the individuals who are the subjects of the information."[94] Non-identifying information, which may be freely collected, used or disclosed, may be combined with other information to create identifying information. Non-custodians may perform data-matching and thereby indirectly obtain individually identifying information. There is nothing in the Act which may prevent or control this activity by non-custodians, beyond the requirement noted above that the Commissioner be notified of an intention to use non-identifying information for data matching. Data matching is especially a concern in the case of non-custodians since they, and any information they generate, are not subject to the rules in the Act.

Custodians are permitted to perform data matching using any information that is under their custody or control. By definition, this may occur without consent. If a custodian wants to perform data matching using information under its custody or control and other information (in the custody or control of another custodian or of any other person), it must first complete and submit to the Commissioner a privacy impact assessment. The Commissioner may review and comment on these assessments but has no power to prevent the data matching. Therefore, custodians and non-custodians alike can generate individually identifying health information through data matching, with very little control. The only real limitation is that if data matching is for the purpose of research, the provisions on use of information for research must be complied with.

Data matching will be facilitated by the low threshold defining the category of "non-identifying" health information. Conversely, the definition is a greater concern because of the lack of any real restrictions on data matching. In effect, the Act allows non-custodians to obtain indirectly what they are not permitted to obtain directly – individually identifying health information – and once they have that information, there is no control over how it is used or further disclosed. There is a serious question whether privacy is violated by collection, use and disclosure of non-identifying information *per se*, but even assuming that we are only concerned with individually identifying information, the level of protection in this Act is deficient.

The Act therefore creates a scheme which substantially increases the risk of privacy violations involving health information. It could be argued that, assuming that section 7 applies in this case, this constitutes an infringement of security of the person due to the psychological impact both of actual violations of privacy and of the knowledge that such violations are likely to occur.

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[93] *Personal Health Information Act*, C.C.S.M.1997, c.P33.4, s. 3.
[94] *HIA*, s. 1(1)(g).

One would then have to assess whether any such violation is in accordance with the principles of fundamental justice. Does it properly strike the balance between individual and public interests? The public interest would have to be identified. Presumably the legislature wanted to exclude from the scope of the Act information such as anonymous or aggregate information in which individuals have a lesser privacy interest: this would make it easier to share information and likely ease custodians' administrative burden. However, even if there is a compelling objective for this exclusion, the definition – alone and in combination with the possibility of data matching by non-custodians – may exclude too much information from protection, increasing the risk of disclosure of individually identifying information and thus of serious privacy violations.

If an infringement were established, the court would then turn to section 1, but it is important to note that it is rare that a violation of section 7 will pass the section 1 tests. The court would examine the objectives of the legislation and whether the provisions at issue here have some rational connection to those objectives. The minimal impairment branch of the section 1 analysis might take account of the fact that experience from other jurisdictions, as discussed above, has shown that it is feasible to draft provisions which accomplish similar objectives with less risk to privacy.

B. Sensitive information

Although all health information is generally considered to be sensitive personal information, some types of information may be particularly sensitive. The perceived sensitivity of certain information may be due to embarrassment or fear of discrimination or other repercussions. What is "sensitive" may vary from individual to individual, depending on each person's views and circumstances. However, certain categories of information are likely to be sensitive because of a history of discrimination or social stigma associated with certain conditions or health services: for example, mental health, sexually transmitted diseases, HIV status, substance abuse and abortion. Protection of such information is essential to protect individuals from the psychological and other harms that could result from disclosure.

The previous *Health Information Protection Act* introduced in Alberta in 1997 addressed privacy concerns related to sensitive information by developing the concept of a "lock box" which allowed patients to request that a record or portion of a record containing health information about them not be disclosed without their consent in the context of provision of health services.[95] The current Act contains no comparable provision. Subsection 58(2) requires custodians to consider the wishes of the individual as an "important factor" in determining how much information to disclose. If an individual feels that certain information is particularly sensitive and does not want it to be disclosed, this will therefore be taken into account. However, the individual's wishes are only one factor to be considered and need not be respected, so the level of protection is weak. Furthermore, where information is requested by the Minister, Department, or other custodian under section 46 or 47, there are very limited grounds for refusing, which do not take into account the sensitivity of the information.

[95]Bill 30, *Health Information Protection Act*, 1st Sess., 24th Leg., Alberta, 1997, s. 16.

The lack of protection for sensitive information is an omission that could be challenged under the *Charter*.[96] The disclosure of very sensitive information will often have a serious psychological impact on the individual, and therefore failing to protect against such disclosures might be said to violate security of the person.[97] This is the case even if disclosures are only to custodians who are authorized under the Act to receive and use the information for permitted purposes. By analogy, Justice L'Heureux-Dubé held in *O'Connor* that "even an order for production to the court is an invasion of privacy. The records here in question are profoundly intimate, and any violation of the intimacy of the records can have serious consequences for the dignity of the subject of the records."[98]

There is a very strong interest on the part of the individual in protecting such information, therefore the public interests on the other side must be carefully examined to determine if the appropriate balance has been struck to satisfy the principles of fundamental justice. The "lock box" provision in the earlier draft legislation was criticized on two main grounds,[99] and we can look to these grounds to indicate the possible interests. The first was that administration of the lock box would be too complex and burdensome. The second was that excluding certain information from disclosure could jeopardize the individual's care and treatment, and thus actually be dangerous to the individual.

As mentioned above, the sensitivity of information must be assessed on an individual basis, but certain types of information can be presumed to be particularly sensitive because of the intensely personal nature of the information or the stigma or risk of discrimination associated with it. These may include, for example, mental health records or information about certain conditions or interventions. As a result, the lack of effective protection for sensitive information is likely to have a disproportionate impact on individuals with certain characteristics. It may therefore be possible to establish a violation of the s. 15(1) equality guarantee in this context. An individual could claim that she is not afforded equal protection or benefit of the law on the basis of an enumerated or analogous ground. The claimant would first have to establish a distinction, which could be found in the adverse effect of the legislation, which results in substantively differential treatment on the basis of a personal characteristic. Next, the differential treatment must be based on one of the enumerated or analogous grounds. Many of the categories of sensitive information identified above may be tied to a mental or physical disability or gender, and connections with other enumerated or analogous grounds might also be found.

A claimant would also have to establish that the differential treatment is contrary to the purpose of section 15, which is the protection of the individual's right to be treated with dignity and the promotion of a "society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society."[100] This requires examination of contextual factors. Pre-existing disadvantage will likely be relevant given that the stigma and prejudice attaching to

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[96]Regarding a *Charter* challenge to a legislative omission, see *Vriend*, *supra* note 83 at para. 50ff.
[97]See e.g. *Mills*, *supra* note 4 at para. 85.
[98]*Supra* note 42 at para. 151.
[99]Provincial Steering Committee on the Health Information Protection Act, *Report and Recommendations* (30 June 1998); http://www.health.gov.ab.ca/hipa/index.htm.
[100]*Law*, *supra* note 74 at para. 51; *Winko*, *supra* note 75 at para. 75.

some conditions (such as mental illness or HIV-positive status) is an important factor in determining what information is sensitive. The fact that the group which is subject to differential treatment suffers pre-existing disadvantage will not necessarily mean that the treatment is discriminatory, but it may lead to that conclusion.[101] The court will also look at the nature of the interest affected.[102] Here, the interest affected, protection of privacy with respect to sensitive personal information, is central to human dignity.

In this analysis, it must be remembered that designing provisions to protect sensitive health information is difficult and some even question whether specific provisions are necessary or desirable.[103] There is probably no ideal provision to protect sensitive information, but a range of possible options exist.[104]

C. Disclosure without consent

The general rule in the Act is that disclosure of individually identifying health information requires the consent of the subject of the information (s. 34). However, sections 35 to 40 allow custodians to disclose this information without consent in a number of circumstances, and sections 46 and 47 allow certain custodians to compel others to disclose individually identifying health information. The provisions allowing disclosure without consent bear examination as potential violations of individuals' privacy. Although some have expressed concern about the number and scope of exceptions to the consent requirement, it is important to remember that the mere fact that disclosure is allowed is not necessarily problematic. A number of the disclosures permitted by the Act were already permitted either under the common law or in other legislation; many of them are also common to other jurisdictions. This does not necessarily mean that they are immune from review, and any disclosure without consent may be subject to scrutiny as an invasion of privacy. The justification for allowing disclosure must be weighed against the privacy interest in each case, however.

Before looking at some these provisions in more detail, there are several general matters that should be considered. First, these provisions must be read in the context of the rest of the Act, which includes some limiting provisions. For instance, section 59 requires consent for any disclosure by electronic means, except where the disclosure is for the purpose of obtaining or processing payment for health services. There are still some outstanding issues of interpretation with respect to this requirement, such as the definition and scope of "electronic means" and the meaning of s. 59(2)(a) which requires the consent to include authorization for "any custodian" to disclose information by electronic means "for all of the purposes listed in section 27." However,

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[101] See *Law*, *ibid*. at para. 65 and the cases cited therein.
[102] *Ibid*. at para. 74ff.
[103] See von Tigerstrom, *supra* note 14 at 55-57.
[104] See B. von Tigerstrom and V. Cosco, "Health Information Systems and Legislation: Protection of Sensitive Information" (1999) 1:6 Observ@tions: Bulletin of the Telehealth Ethics Observatory, online: <http://www.ircm.qc.ca/bioethique/english/telehealth/previous_issue16.html>.

the provision does allow individuals a measure of control over disclosures by electronic means, which are perceived to present heightened security and privacy risks.[105]

Sections 57 and 58 also place important limits on collection, use and disclosure. Section 57 provides that custodians must collect, use or disclose health information in the most anonymous form possible: first aggregate information (non-identifying information about groups), then other non-identifying information, and finally individually identifying information, as required for the intended purpose. These provisions do not apply, however, to collection, use or disclosure for the purpose of providing health services or determining or verifying eligibility for health services. Where they do apply, they should affect custodians' decisions to disclose information without consent under ss. 35-40, or to request information under ss. 46-47.[106] In addition, custodians are required by s. 58 to collect, use or disclose only the amount of information that is necessary to carry out the intended purpose. In deciding how much information to disclose, the custodian must "consider as an important factor the expressed wishes of the individual who is the subject of the information, together with any other factors the custodian considers relevant."

Second, the fact that custodians may have some discretion whether to disclose without consent means that we need to examine the relationship between these provisions and other legal and ethical duties that custodians may have. Sections 35-40 provide that a custodian "may disclose" information in certain circumstances, so in each case the custodian would have to decide whether or not to disclose. By contrast, in sections 46 and 47, a custodian who is requested to disclose information has no or only very limited scope to refuse (see subsections 46(2) and 47(2), respectively).

Under the common law, physicians and other health care providers have duties of confidentiality to their patients, based on their fiduciary duties,[107] duties of care[108] and implied or express contracts.[109] As a result, they must keep personal information about their patients confidential unless a patient consents to disclosure or certain other exceptions apply.[110] However, where a statute either requires or expressly permits disclosure without consent, the statutory provision may override the common law duty.[111] Although a physician or other practitioner might decide not to disclose information even when the statute permits it, if she decides to disclose as permitted, the patient would have no legal recourse.

The ethical duties of confidentiality are broader, however. The Code of Ethics of the Canadian Medical Association directs physicians to respect "the patient's right to confidentiality except

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[105]See von Tigerstrom, *supra* note 14.
[106]Although it is our understanding that these provisions were intended to apply throughout the Act, their application in the context of the mandatory disclosure provisions is problematic.
[107]*McInerney* v. *MacDonald*, [1992] 2 S.C.R. 138 at 149.
[108]*Furniss* v. *Fitchett*, [1958] N.Z.L.R. 296 (S. Ct.); *Peters-Brown* v. *Regina District Health Board*, [1996] 1 W.W.R. 337 (Sask. Q.B.), affd [1997] 1 W.W.R. 638 (C.A.).
[109]*Mammone* v. *Bakan*, [1989] B.C.J. No. 2438 (QL); *Peters-Brown*, *ibid*.
[110]E.g. where there is an imminent risk of serious harm to a third party: *Tarasoff* v. *Regents of the University of California*, 131 Cal. Rptr. 14 (1976).
[111]E. I. Picard & G. B. Robertson, *Legal Liability of Doctors and Hospitals in Canada*, 3d ed. (Toronto: Carswell, 1996) at 27-30; Marshall & von Tigerstrom, *supra* note 8 at 160-61.

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."[112] The patient's right to confidentiality would conflict with the physician's responsibility to the law if the law *requires* disclosure, but not if disclosure is merely permitted by a statute. Therefore, where the Act requires custodians to disclose information upon request (ss. 46 and 47), this will override ethical duties of confidentiality. When the Act merely permits disclosure but does not require it, we must assume that physicians and other custodians that are subject to similar ethical duties (health care providers) will not disclose information in an unethical manner. If they do breach their ethical duties, an individual could complain to the relevant professional body.

Not all custodians will be subject to these types of duties, however. The definition of custodian includes numerous bodies and individuals besides health care providers. Therefore, our analysis of the provisions allowing disclosure without consent takes account of the fact that these disclosures will take place in at least some cases, even if in other cases the custodian will choose not to disclose in compliance with ethical duties.

The fact that discretion exists at the level of disclosing or requesting information is also significant for the constitutional analysis. Where a statute provides that a decision maker may exercise discretion in making a decision, the mere fact that a decision that infringes a constitutional right could result does not alone render the statute unconstitutional. It is now axiomatic in Canadian law that where a statute is capable of two differing interpretations, one constitutional and the other unconstitutional, the court should presume that the legislature meant to enact a constitutional statute or should give the legislature the benefit of the doubt, as it were.[113] This reasoning has been extended to the context where a decision maker is given the discretion to make a decision and, on the basis of the discretion conferred, that decision could result in an infringement of a *Charter* right. In such a case, the legislation is presumed not to confer upon the decision maker the authority to infringe a *Charter* right.[114] As Justice Lamer (as

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[112]Canadian Medical Association, *Code of Ethics* (1996) 155 C.M.A.J. 1176, para. 22.

[113]*Slaight Communications* v. *Davidson*, [1989] 1 S.C.R. 1038 at 1078, *Eldridge*, *supra* note 7 at paras. 22-24, *Mills*, *supra* note 4 at 690, 711.

[114]*Slaight Communications, ibid.* At p. 1080 Lamer J. stated that one of two situations would arise in this context:

> 1. The disputed order [or decision] was made pursuant to legislation which confers, either expressly or by necessary implication, the power to infringe a protected right.
> -it is then necessary to subject the legislation to the test set out in s. 1 by ascertaining whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society.
>
> 2. The legislation pursuant to which the [decision maker] made the disputed order [or decision] confers an imprecise discretion and does not confer, either expressly or by necessary implication, the power to limit the rights guaranteed by the *Charter*.

he then was) stated in *Slaight Communications*: "Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed."[115]

The facts of *Eldridge* are instructive in elucidating this principle. At issue in *Eldridge* was whether the *B.C. Medical and Health Care Services Act* or *B.C. Hospital Insurance Act* violated section 15 of the Charter by failing to include the provision of medical interpreter services for the deaf in their definitions of "benefits" and "general hospital services." The Acts did not explicitly exclude the provision of the service at issue. Ultimately this decision was left up to the Medical Services Commission or individual hospitals which were empowered by the two statutes to determine whether a service was a benefit or insured as a general hospital service. The Court found that, assuming that the failure to provide sign language interpreters in a medical context violated the equality provisions of the *Charter*, it could not find that the Acts could be interpreted as *requiring* that result. Neither legislation either expressly or by implication prohibited the Medical Services Commission or individual hospitals from approving sign language interpreters as medically required, and therefore a "benefit" or "general hospital service" under the Acts. As such, what came to be reviewed in *Eldridge* were the decisions of the Commission and the individual hospital themselves. In the result, the Court found that the Commission and the individual hospital's decisions to not include sign language interpreters as a "benefit" or a "general hospital service" infringed section 15 of the *Charter*. It is of vital importance to note that in this circumstance, where the *Charter* is applied to a decision maker, rather than the legislation, that decision maker must be found to be "government" as set out in section 32 of the *Charter*.[116]

The Supreme Court in *Eldridge* made an important observation that is relevant to the context of the Health Information Act: "[N]ot every conferral of statutory discretion may be interpreted consistently with the Charter. Some grants of discretion will necessarily infringe Charter rights notwithstanding that they do not expressly authorize that result."[117] The Court approvingly quotes Professor Ross[118] on this point and indicates that "in such cases, it will generally be the statute, and not its application that attracts Charter scrutiny."[119] Professor Ross writes that:

> This approach is justified in terms of what may be reasonably expected of the legislature. Where the legislature is granting discretionary authority in a context that involves a clear impact upon *Charter* rights and freedoms it is reasonable to require it to anticipate and take steps to prevent unreasonable interferences. These steps would normally be in the form of statutory limits on the discretionary power. The legislature's duty in this regard is supervised by *Charter* review of

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> -It is then necessary to subject the order [decision] made to the test set out in s. 1 by ascertaining whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society.

[115] *Ibid.* at 1078.

[116] *Eldridge, supra* note 7 at paras. 35-52. The Court in this instance found both the Commission and the hospital to be government and found that their decisions had to comply with the *Charter*.

[117] *Ibid.* at para. 30. This observation is consistent with the statement of Justice Lamer referred to in note 114, above.

[118] J. Ross, "Applying the Charter to Discretionary Authority" (1991) 29 Alta. L. Rev. 382.

[119] *Eldridge, supra* note 7 at para. 30.

> the statute. But where the legislature grants authority that only incidentally may affect *Charter* guarantees, it seems unreasonable to expect it to anticipate potential breaches and take steps to anticipate them.[120]

The Court in *Eldridge* did appear to approve of the above quoted views of professor Ross, while not necessary to decide the case before it. It noted that the discretion accorded the Medical Services Commission to determine whether a service qualifies as a benefit did not necessarily or *typically* threaten Charter rights, and that on that basis the decision not to review the Act and to only review the Commission's decision was supported.[121]

In the context of the *Health Information Act* though, the law would seem to dictate that the statute itself ought to be reviewed, rather than individual disclosures of custodians, to ensure the protection of the privacy rights of patients. Given that the HIA concerns itself exclusively with health information and that a *Charter* right (whether a privacy right under section 8, or privacy as protected by the right to security of the person under section 7) will almost always be engaged when the disclosure of such information is considered, it falls into the category of legislation for which the decision-by-decision review would not be appropriate. As such, the sections of the Act that allow for disclosure of information and the factors that a custodian must consider before disclosing the information ought to be reviewed to ensure that they do not allow for a disclosure that could contravene a patient's *Charter* rights. This is the case even where the custodian is only granted the discretion to disclose by the Act and is not *required* to disclose.

This position is further bolstered by examining one of the rationales behind the existence of a privacy right in medical records: fostering the trust necessary to ensure full disclosure in the relationship between a patient and a health care professional. It is essential to ensure that patients are confident that they can, without reservation or fear of future contravention of their right to privacy, disclose all relevant information to their health care professional. To this end, the discretionary disclosure provisions of the HIA must be reviewed to determine whether the guidelines that govern the circumstances of disclosure expressly protect patients' *Charter* rights to privacy. It is not a sufficient comfort to patients that a custodian's decision to disclose can later be measured against some principles of constitutional law to determine if the disclosure was proper. The trust element of the patient-therapist relationship demands that the circumstances under which a disclosure *could* be made be explicit and clear. If the HIA guidelines are such that it is possible to comply with the Act's express provisions and disclose information that would infringe a patient's right to privacy, then the Act may be unconstitutional to the extent that it allows this.

Further support for the proposition that the HIA itself ought to be reviewed for conformity with the *Charter*'s privacy guarantees comes from the fact that there are likely to be a very high number of individual disclosures under the Act and that every one of those disclosures has the potential to affect privacy rights. If the legislation is left to be reviewed on an "as applied" basis, this will possibly result in a huge number of review applications, especially involving disclosures dealing with particularly sensitive information.

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[120]Ross, *supra* note 118 at 392.
[121]*Eldridge, supra* note 7 at para. 30.

Lastly, the availability to a patient of a review process to review a custodian's decision to disclose (or use or collect) health information, bears on the decision to review the legislation on its face or review individual applications of the legislation.[122] Section 73(2) of the Act provides that an individual may apply to the Commissioner to review a disclosure, use or collection that the individual believes was not in conformity with the Act. This section is problematic for at least two reasons. First, it provides for a review after the fact. The unconstitutional use, collection or disclosure would already have occurred and the post-hoc review would in no way protect an individual's privacy interest in the records. Second, an individual would only foreseeably request a review if they were aware of the use, disclosure or collection in the first place. The Act does not require that individuals be notified in all circumstances when individually identifying information pertaining to them is used, collected or disclosed. For example, sections 35-40 of the Act contemplate such disclosure, with no requirement that the individual consent to or receive notice of the intended disclosure. Section 41 requires a record to be kept of disclosures made under subsections 35(1) and (4) only, and this information is available upon request. The fact that the Act only provides for review of the use, collection or disclosure of information after the fact and the fact that in some cases the individual may never know that their information has been used, collected or disclosed in an unconstitutional manner point to the inadequacy of the review procedures provided in the Act. As such, this is another factor that ought to militate against the argument that the constitutionality of the Act ought to be reviewed on an "as applied" basis only. In this circumstance, only a facial review of the Act to determine whether it possibly allows for uses, collections or disclosures that are unconstitutional will conform to the established standards for reviewing discretionary authority.

It should be noted that in the event that a court, upon a constitutional challenge to the HIA, finds that it is only appropriate to review each disclosure decision as it arises, rather than to review the discretionary provisions of the Act on their face, this does not in principle reduce the degree of privacy protection that individuals have in their health records in certain circumstances. When the custodian is considered "government" for the purposes of the Charter, the Charter provisions concerning privacy contained in section 7 and section 8 apply to every decision that the custodian makes and, as such, even if the custodian strictly complies with the Act's provisions, they could still be found to have made an unconstitutional disclosure. Of course, there would be practical difficulties with leaving this matter to be reviewed on a decision by decision basis and for this reason and the others suggested above, the existing constitutional law would seem to require a review of the statue itself.

Summary

Several factors must be kept in mind when considering the sections of the Act allowing for disclosure without consent. Certain sections of the Act place some general limits on collection, use and disclosure: s. 57, requiring collection, use and disclosure of information in the most anonymous form that will satisfy the purpose (except where the purpose is providing health care services or for determining eligibility for health services) ; s. 58 which requires disclosure of the least amount of information; and s. 59 which requires consent for electronic disclosure. In addition, where custodians have the discretion to use information they must still do so only in accordance with their ethical duties, in particular the duty to maintain the confidentiality of patient information. As noted above, however, a mandatory disclosure provision in the Act

[122]Ross, *supra* note 118 at 416-17.

overrides any ethical duty to maintain confidentiality and only those custodians who are subject to an ethical duty of this sort will be limited by such a duty. Finally, it is likely that, because each and every disclosure or use under the Act carries the possibility of an infringement of a privacy right, the Act itself ought to be subjected to a *Charter* review to ensure that it adequately protects privacy rights, despite the fact that some sections of the Act only allow for a use, collection or disclosure and do not require them.

1. Permission to disclose

With that background, we turn to an examination of some of the provisions which permit disclosure without consent. The aim in this section is not to conduct an exhaustive analysis of all provisions but rather to examine selected provisions to provide examples of arguments that could be raised.

Section 35(1)(a)
Section 35(1)(a) allows a custodian to disclose individually identifying diagnostic, treatment and care information without consent "to another custodian for any or all of the purposes listed in section 27(1) or (2), as the case may be." Section 27(1) and (2) set out all of the purposes for which custodians may use individually identifying health information. The purposes in s. 27(1) are:

> (a) providing health services;
>
> (b) determining or verifying the eligibility of an individual to receive a health service;
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> (c) conducting investigations, discipline proceedings, practice reviews or inspections relating to the members of a health profession or health discipline;
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> (d) conducting research [if certain conditions are met];
>
> (e) providing for health services provider education;
>
> (f) carrying out any purpose authorized by an enactment of Alberta or Canada;
>
> (g) for internal management purposes, including planning, resource allocation, policy development, quality improvement, monitoring, audit, evaluation, reporting, obtaining or processing payment for health services and human resource management.

Section 27(2) allows certain custodians (provincial health boards, RHAs, the Alberta Cancer Board, the Department and the Minister) to use individually identifying health information "to carry out the following functions within the geographic area in which th custodian has jurisdiction to promote the objectives for which the custodian is responsible":

> (a) planning and resource allocation;
>
> (b) health system management;
>
> (c) public health surveillance;
>
> (d) health policy development.

Section 35(1)(a), therefore, allows disclosure without consent of individually identifying health information for any or all of these purposes. It must be remembered that such disclosures will be

subject to the limiting provisions in ss. 57 and 58, as discussed above. However, the scope for disclosure without consent is still very broad. The fact that the disclosures are to other custodians may minimize security concerns, but does not mean that there is no violation of privacy. As one health information privacy expert has stated: "the most serious threats to privacy come from authorized users of health information."[123] Invasion of privacy occurs whenever there is disclosure of personal information, especially of the intimate nature of diagnostic, treatment and care information, without the subject's consent.

Therefore, one could argue this provision constitutes a *prima facie* violation of privacy and thus of security of the person and liberty in s. 7. If it does, a claimant would also have to establish that it was contrary to the principles of fundamental justice. This would involve a consideration of the balance between state objectives and the individual's privacy interests. The breadth of the section could also be raised as an issue in the context of the principles of fundamental justice and also in section 1. However, the limits on disclosure from section 57 and 58 also have to be taken into account in assessing the balance of interests.

Some of the custodians to whom information may be disclosed under this provision are government bodies. Although the disclosures are made at the discretion of a third party (the custodian), who may not be a state agent, they may still be seizures subject to section 8. For instance, in cases where a physician or hospital voluntarily gave records[124] or samples[125] to the police, the police are held to have seized the evidence: "the courts will treat a giving up of evidence as voluntary only if the accused was aware of the purpose for which the evidence was to be used. ... Even when the police obtained the sample by the voluntary act of the hospital (or anyone other than the accused), their obtaining of the property is still deemed to be a seizure because it invades a reasonable expectation of privacy on the part of the accused."[126]

Assuming that a disclosure authorized in this section may constitute a seizure, the question becomes whether the seizure is an unreasonable one. There should be no difficulty in establishing that the individual has a reasonable expectation of privacy in the information. However, a search or seizure in circumstances in which there is a reasonable expectation of privacy will not violate s. 8 if it is reasonable in the circumstances, minimally intrusive and is authorized by law.[127] Assessing the reasonableness of the search or seizure entails balancing the state's goals in conducting the search or seizure with the individual's privacy interests. Essentially, this assessment focuses on the "'reasonable' or 'unreasonable' impact on the subject of the search or the seizure and not simply its rationality in furthering some valid government objective."[128] Furthermore, "the state interest only becomes paramount when care is taken to infringe the privacy interest of the individual as little as possible."[129] Again, it will be necessary

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[123]L.O. Gostin, "Health Information Privacy" (1995) 80 Cornell L. Rev. 451 at 485. See also von Tigerstrom, *supra* note 14 at 46.
[124]E.g. *Dersch*, *supra* note 34 (medical report including results of blood alcohol test provided by physician in response to request from police).
[125]E.g. *Dyment*, *supra* note 15 (blood sample taken for medical purposes provided to police).
[126]Hogg, *supra* note 86 at 45-8.
[127]*M.R.M.*, *supra* note 45 at para. 81.
[128]*Hunter*, *supra* note 25 at 157.
[129]*Thomson*, *supra* note 28 at 495.

to consider the fact that sections 57 and 58 of the Act limit disclosures under this provision to some extent.

As previously noted, if there is an infringment of section 8, it will likely be difficult to justify under section 1.

Section 35(1)(c)

Another example of disclosure without consent is section 35(1)(c), which allows a custodian to disclose individually identifying diagnostic, treatment and care information without consent "to family members of the individual or to another person with whom the individual is believed to have a close personal relationship, if the information is given in general terms and concerns the presence, location, condition, diagnosis, progress and prognosis of the individual on the day on which the information is disclosed and the disclosure is not contrary to the express request of the individual."

Disclosure of personal health information to family members or close friends is appropriate in many circumstances. However, when information is disclosed without consent, it may be a serious invasion of privacy and in some cases could irreparably harm important personal relationships. Allowing such disclosures could therefore be argued to violate an individual's security of the person. On the analysis of principles of fundamental justice, it will be necessary to consider the valid, even compelling, reasons for allowing disclosure of certain general information to family members, so that they can be advised of the nature and seriousness of the individual's condition. Many people would want this information to be disclosed to family members or others close to them, in most circumstances. The provision does prevent disclosure where it is contrary to the individual's express request, so there is some protection for circumstances in which the individual would not want family or friends informed. On the other hand, requiring an express request may not adequately balance the interests at issue here. There may be many circumstances where the individual has not had the opportunity to make an express request, but would not want the information to be disclosed. Disclosure is permitted in these circumstances, and the s. 58(2) limit does not provide any additional protection because it also requires an express statement of wishes.

Section 35(1)(j)

Section 35(1)(j) allows a custodian to disclose individually identifying diagnostic, treatment and care information without consent "to a municipal or provincial police service for the purpose of investigating an offence involving a life-threatening personal injury to the individual, if the disclosure is not contrary to the express request of the individual."

The disclosure in this provision is to a state agent, the police, for the purposes of investigating an offence, therefore it could fall within the definition of a search or seizure under section 8. This section could therefore be examined for potential violations of sections 7 and 8.

Individuals would have a high expectation of privacy in this context which would be sufficient to reach the first stage of analysis in section 7 (breach of security of the person) and section 8 (reasonable expectation of privacy). There is, however, a clear and compelling interest in favour of disclosure in this case. The state has a strong and legitimate interest in investigating and prosecuting a serious offence, which could be held to override the individual's privacy interest. The individual may be able to prevent disclosure by express request, although again there is the

difficulty that an individual might not be in a position to express her wishes, yet have strong objections to disclosure. It would be preferable to allow for this eventuality in the provision, for example by allowing disclosure only where the custodian reasonably believes that the individual would not object.

Section 35(1)(n)

Section 35(1)(n) allows a custodian to disclose individually identifying diagnostic, treatment and care information without consent "if that individual lacks the mental capacity to provide a consent and, in the opinion of the custodian, disclosure is in the best interests of the individual."

The fact that disclosure is permitted without consent where, in the opinion of the custodian, disclosure is in the best interests of the individual is problematic because it allows the custodian to ignore the decision of a legally authorized substitute decision maker or the individual's previously expressed competent wishes.

In the case of *Fleming* v. *Reid*,[130] the Ontario Court of Appeal considered a provision of the provincial *Mental Health Act* that allowed psychiatric treatment to be administered to involuntary incompetent patients where it was judged to be in their best interests, despite their prior competent refusal of treatment. The Court held that the provision was unconstitutional because it violated the patients' s. 7 rights and could not be saved under s. 1. The common law right to bodily integrity and personal autonomy, which includes the right to make decisions about medical treatment, is "fundamental" and can be treated as co-extensive with section 7 rights to liberty and security of the person.[131] Competent decisions cannot be overridden except in exceptional cases, even when the patient later becomes incompetent and even if the result is a risk of serious harm to the patient.[132] Therefore, the provision allows prior competent decisions to be disregarded when it was in the patients' best interest violated their section 7 rights. It was also found to be contrary to the principles of fundamental justice:

> A legislative scheme that permits the competent wishes of a psychiatric patient to be overridden, and which allows a patient's right to personal autonomy and self-determination to be defeated, without affording a hearing as to why the substitute consent-giver's decision to refuse consent based on the patient's wishes should not be honoured, in my opinion, violates "the basic tenets of our legal system" and cannot be in accordance with the principles of fundamental justice.[133]

There is an analogy between this case and the rule established in s. 35(1)(n) which allows custodians to disclose information without consent where they believe it to be in the individual's best interests, regardless of a decision of the individual while competent or a substitute decision-maker. Section 57(2) requires custodians to consider the individual's wishes when deciding how much information to disclose, but not whether to disclose, and the wishes need not be respected if disclosure is perceived to be in the individual's best interests.

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[130] *Supra* note 56.
[131] *Ibid*. at 88.
[132] *Ibid*. at 91; *Malette* v. *Shulman* (1990), 72 O.R. (2d) 417.
[133] *Ibid*. at 93.

The decision here does not involve bodily integrity, as it did in the *Fleming* case. However, decisions about the disclosure of personal information are also connected to liberty and security of the person, therefore, section 7 rights are implicated. Unlike the provisions at issue in *Fleming*, the Act does allow for some consideration of the individual's wishes through s. 58(2), so the analysis of principles of fundamental justice may not be as clear. However, the s. 58(2) limitation is quite weak and does not prevent the individual's wishes being overridden, with no real opportunity to challenge the decision to disclose.

A section 15(1) challenge to this provision might also be brought. Section 35(1)(n) amounts to differential treatment of individuals without mental capacity to consent. This differential treatment is on the enumerated ground of mental disability or, alternatively (if lack of capacity must be distinguished from mental disability), an analogous ground. It also arguably shows a lack of respect for the wishes and autonomy of individuals without capacity that would be relevant to the third part of the section 15(1) test.

There are already many circumstances in which information may be disclosed without consent in the Act, covering provision of health services, prevention of harm to the individual or others, public health surveillance and a host of other purposes. Where consent is required, it may be given by someone who has legal authority to make personal decisions for the individual. It is not clear why the additional provision for disclosure on a "best interests" standard is necessary or appropriate.

Sections 39 and 40

Section 39(1) provides that "[t]he Minister or the Department may disclose individually identifying diagnostic, treatment and care information without the consent of the individual who is the subject of the information to another Minister of the Government of Alberta for the purpose of developing public policy." Section 40 provides that "[a] custodian other than the Minister may disclose individually identifying health information to the Minister without the consent of the individual who is the subject of the information if the disclosure is necessary or desirable in the opinion of the custodian to enable the Minister to carry out the duties of the Minister."

These provisions are extremely broadly stated; in particular the permission for disclosures "necessary or desirable in the opinion of the custodian to enable the Minister to carry out [his] duties" is potentially so broad that its scope is difficult to define. As always, ss. 57 and 58 and some custodians' ethical obligations will limit the scope of disclosure. However, these provisions could be subject to similar criticisms as s. 35(1)(a) above.

2. Power to compel disclosure

Two sections of the Act give certain custodians the power to compel disclosure of individually identifying health information from other custodians. The compulsory nature of these disclosures raises distinct concerns in addition to those discussed above regarding permission to disclose without consent.

Section 46 provides that the Minister or Department "may request another custodian to disclose individually identifying health information for any of the purposes listed in section 27(2)" if the Minister or Department is authorized to obtain the information by another enactment or if the information relates to health services provided by the custodian with resources from the Department. If these conditions are met the custodian *must* disclose the information, and the individual's consent is not required. The Minister or Department may disclose any information received to a provincial health board, RHA or the Alberta Cancer Board for the purposes in s. 27(2). Where the information requested relates to health services provided, the Department must prepare a privacy impact assessment and submit it to the Commissioner for review and comment, and the Commissioner's comments must be considered before the information is disclosed by the Minister or Department.

Section 47 provides that a provincial health board, RHA or the Alberta Cancer Board "may request another custodian to disclose to the requesting custodian individually identifying information for any of the purposes listed in section 27(2)" if the requesting custodian is authorized to obtain the information by another enactment or if the information relates to health services provided by the custodian with resources from the requesting custodian. Individually identifying health information may be disclosed without consent pursuant to such a request. The requesting custodian may disclose any information received to the Minister or Department, a provincial health board, RHA or the Alberta Cancer Board for the purposes in section 27(2).

If the information requested is information about health services, the custodian may refuse to disclose the information if disclosure could reasonably be expected:

> (a) to result in immediate and grave harm to the mental or physical health or safety of the individual who is the subject of the information,
>
> (b) to threaten the mental or physical health or safety of another individual, or
>
> (c) to pose a threat to public safety.

If a custodian does refuse to disclose the information, non-identifying information must be provided instead, and the requesting custodian may ask for a review of the refusal by the Commissioner.

Both sections therefore specifically contemplate disclosure without consent of individually identifying health information. Custodians have no ability to refuse in s. 46 and may refuse only on very narrow grounds in s. 47.

As previously discussed, any disclosure of individually identifying health information without the consent of the individual is, on its face, a violation of privacy and therefore of the rights protected in section 7. There are some safeguards which would be considered under the analysis of principles of fundamental justice. Sections 57 and 58 should apply to limit the scope of disclosure somewhat, by limiting the information requested, although their application to the custodian's discretion to disclose is not an effective limit because of the custodian's limited opportunity to refuse. Because the provisions *require* custodians to disclose information, they override not only custodians' common law obligations but also ethical obligations.

A request for information authorized by these sections also fits within the definition of a seizure under section 8, because it is a taking of records by a government authority without the individual's consent. Given that there is a very high expectation of privacy in this case, one could argue that some safeguards analogous to the requirement of prior authorization would be appropriate. The Steering Committee that examined the earlier draft statute stated: "The power of health oversight agencies, including the Minister, to compel identifiable information should be subject to adjudication by an independent review body in situations where a request for disclosure of health information is questioned by a custodian of that information."[134] There is no provision for review at all in s. 46, and the Commissioner's comments on the privacy impact assessment required in that section do not affect the Minister or Department's ability to request information. They are only to be "considered" before any further disclosure by the Minister or Department. Section 47 does provide for the Commissioner's review of a refusal, but refusals are only permitted in very narrow circumstances in any case. There is no room for a refusal on the ground that it would unduly violate the individual's privacy.

[134] *Supra* note 99 at 38-39.

VI. Summary and Conclusion

The protection of privacy rights is crucial to respecting the dignity, integrity and autonomy of individuals. Privacy protection also has instrumental value because of its effect on personal and social relationships, and because it can indirectly protect individuals from harms such as discrimination which might be associated with disclosure of personal information. The Supreme Court of Canada has recognized these various aspects of the importance of privacy protection.

Although there is no explicit mention of privacy in the *Charter of Rights and Freedoms*, the courts have found that sections 7 ("the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice") and 8 ("right to be secure against unreasonable search or seizure") of the *Charter* protect the privacy of individuals. Section 15, which guarantees equality before and under the law and the equal protection and benefit of the law without discrimination, may also be relevant to privacy rights in some circumstances. In each of these sections, there are several steps that have to be established. In some cases there may be a threshold issue as to whether the section applies in this context. If a violation of a *Charter* right is found, the government can try to establish that it is justified under section 1 of the *Charter*. This requires the government to establish a "pressing and substantial" purpose, rational connection to the purpose, minimal impairment of *Charter* rights, and proportionality between the objective and effects of the law. It is unusual for a violation of section 7 or 8 to be upheld under section 1.

Selected provisions of the Act were examined with a view to identifying possible issues or arguments based on these *Charter* sections. Some aspects of the Act will only be able to be usefully analyzed after it is implemented, and at this early stage the focus is on the text of Act.

The definition of non-identifying information because it establishes a low threshold which, particularly given the possibility of data matching by custodians and non-custodians, increases the likelihood of privacy violations. Next, we examined the treatment of sensitive health information in the Act. If particularly sensitive information is not effectively protected, this may violate individuals' privacy and also the equality rights of individuals with certain personal characteristics. However, there is little agreement on the best way to provide such protection and whether a specific provision is necessary or desirable.

The Act allows individually identifying health information to be disclosed without the individual's consent in a number of circumstances. Such disclosures may be appropriate in many cases, but should be scrutinized as violations of individuals' privacy. Possible arguments using sections 7, 8 and 15(1) could be raised in several cases. Particular issues exist with respect to the provisions allowing certain custodians to require disclosure of information. All of the provisions allowing or requiring disclosure must be read in the context of the limiting provisions elsewhere in the Act, other duties that might apply to restrict disclosure, and the effect of discretion in the Act on the constitutional analysis.

This preliminary analysis indicates that there are constitutional issues raised by the text of the *Health Information Act*. It will also be essential to bear in mind the constitutional protection of the right to privacy as the Act is implemented. The actions of government in implementing the Act will be subject to the *Charter*, as will the actions of custodians under the Act in many cases.

These actions must therefore be taken in a manner which is consistent with the *Charter*, including its requirement to respect individuals' privacy.