

July 25, 2022

VIA EMAIL

The Honourable Jean-Yves Duclos
Minister of Health
House of Commons
Ottawa, Ontario,
Canada
K1A 0A6

The Honourable Karina Gould
Minister of Families, Children and Social Development
House of Commons
Ottawa, Ontario,
Canada
K1A 0A6

Honourable Ministers:

Re: Provision of Abortion Services to U.S. Residents

On July 4th, 2022, the Canadian Medical Protective Association (CMPA) wrote to request your intervention to address physicians' liability concerns in offering abortion services to patients who are not residents of Canada.

The Canadian Nurses Protective Society supports the CMPA's position on this matter and on behalf of nurses and nurse practitioners, would like to draw your attention to additional concerns related to the provision of abortion services to U.S. residents who are subject to state legislation prohibiting or restricting abortions. **This information is provided to you under confidential cover to protect Canadian health care providers who offer abortion services to U.S. residents.**

About the CNPS

The Canadian Nurses Protective Society (CNPS) is a not-for-profit organization which provides professional liability protection (PLP) and additional legal support services, including legal and risk management advice, to more than 140,000 nurses across all provinces and territories and all professional nursing designations. The services of the CNPS are funded directly from fees ultimately collected from individual nurses. Like the CMPA, the CNPS is structured to respond to legal proceedings commenced in Canada, and its assistance does not extend to proceedings commenced outside Canada.

Nurses and the provision of abortion services

Registered nurses, registered psychiatric nurses, and licensed/registered practical nurses can be involved in the planning of abortions, the provision of pre- and post-operative nursing care and the provision of counseling with respect to abortions. Nurse practitioners can be involved in all aspects of the provision of medical abortions, including the prescription of medication (namely, Mifegymiso). At present, some aspects of the provision of abortion services may take place by way of virtual care.

Legal considerations in the provision of abortion services to U.S. residents

We concur with the CMPA that Canadian health care professionals who provide or are involved in the provision of abortion services to U.S. residents may be subject to the application of U.S. law.

The CNPS further submits that:

- Before engaging in the provision of abortion services to U.S. residents, it is necessary to conduct a thorough review of U.S. law to assess the risk of legal consequences related to each state where a U.S. patient seeking abortion services resides; this requires the involvement of U.S. legal advisors. We seek your intervention to make resources readily available to Canadian facilities and health care professionals contemplating providing abortion services to U.S. residents.
- Nurses and nurse practitioners should be enabled to make individual decisions as to whether to provide or contribute to the provision of abortion services to U.S. residents where the contemplated services would contravene the patient's home state laws.
- To the extent that some abortion services are made available to U.S. residents after this review, ensure that adequate professional liability protection or insurance coverage is available in respect of U.S. civil and criminal proceedings to both physicians and nurses involved in the provision of these services.

In doing so, we urge the federal government and its provincial counterparts to consider the following:

Civil proceedings: Non-Canadian residents who receive health care services in Canada and who decide to initiate legal proceedings in connection with the provision of these services are not required by law to commence proceedings in Canada. Nurses and nurse practitioners providing services relating to abortion for non-residents of Canada will require an alternate source of PLP for legal actions commenced outside of Canada if their employer coverage does not extend to U.S. proceedings, as CNPS PLP does not extend to litigation commenced outside of Canada.

Criminal proceedings: The laws criminalizing abortion may explicitly extend to health care providers who provide abortions or even "counsel" abortions to state residents. We agree with the CMPA that legal assistance should be made readily available to Canadian health care providers

who provide abortion services to U.S. residents in the event of a criminal proceeding, but most importantly, *before any involvement in the provision of abortion services to U.S. residents*. The scope and reach of state abortion laws should be well understood so that practitioners can first determine if the risk is acceptable, as they will have to personally contend with a finding of guilt and personally submit to any sanction.

We submit that in assessing the risk of involvement in U.S. civil or criminal proceedings, consideration be given to the following:

- If it is contemplated that any aspect of the care be provided virtually while the U.S. resident is still physically located in their home state, could law enforcement and the courts of that state determine that part of the care was provided in the state, thus making Canadian health care providers subject to the application of U.S. law? Would the provision of virtual healthcare services contravene the laws regulating the practice of medicine or nursing in that state.
- Given the prevalent use of electronic communications, could evidence of involvement by Canadian health care providers be accessible to law enforcement on a U.S. resident's device?
- If Canadian facilities or clinics maintain health care records using a cloud-based service, it may be that Canadian health care records are located on U.S. servers. In such case, would their access be governed by U.S. law, making them more easily accessible to U.S. authorities?

Vulnerability of U.S. residents: To the extent that the involvement of Canadian health care providers is contemplated to protect U.S. residents from the implications of abortion laws in their home state, it is worth considering to what extent the provision of health care services in Canada would be successful in achieving this objective, having regard to the following considerations:

- Could any communication exchanged electronically with a U.S. resident be accessible to U.S. law enforcement agencies by virtue of the application of the search and seizure laws of the U.S. resident's home state?
- If the health care records of Canadian facilities or health care providers are stored using cloud-based services on servers physically located in the U.S., could a U.S. patient's complete healthcare records be accessible to U.S. law enforcement agencies, by virtue of the application of search and seizure laws in the U.S.?

- Could U.S. residents be reticent to seek medical attention in the event of a complication for fear of criminal consequences? This consideration is particularly relevant if abortion services are provided virtually (provided that arrangements can be made for any required medication to be legally accessed in their home state) or if a U.S. resident does not remain in Canada after undergoing an abortion procedure.

We thank you for your work on this pressing matter. If it would be helpful, we would be pleased to meet with you at your convenience to discuss this matter further.

Sincerely,

Chantal Léonard
Chief Executive Officer
The Canadian Nurses Protective Society

cc: The Honourable David Lametti, Minister of Justice and Attorney-General
Vaska Jones, NP, CNPS President
Dr. Lisa Calder, CMPA CEO