



## Background

Western Health provides a broad range of programs and services to the people of Western Newfoundland. These programs and services are based in community and facility settings. Western Health provides health and community services from 24 office sites, 26 medical clinic sites (including traveling clinic sites), and eight (8) health facilities including two hospitals, four health centres, and two long term care centres. Within its facilities, Western Health operates 293 acute care beds, 434 long term care beds, 40 enhanced assisted living beds for individuals with mild to moderate dementia, as well as 14 restorative care beds.

## Strengths of PHIA

The proclamation of the *Personal Health Information Act (PHIA)* in 2011 established a common and consistent framework for the protection of personal health information in Newfoundland and Labrador. The importance of protecting the privacy of and establishing rules for granting access to personal health information has been long recognized, and has been evident in policies, procedures and practices across the health system for some time. However, PHIA has served to further cement long standing knowledge, skills and practices as well as pull together various pieces of related legislation that already existed in the province. Notable specific strengths of PHIA include privacy breach notification and reporting as well as rules for the collection, use and disclosure of personal health information.

## Issues and Challenges Associated with PHIA

This next section outlines questions and opportunities that Western Health has identified over the past five years since *PHIA* was implemented. We have also included some general suggestions, for the most part to clarify the legislation as it currently exists.

### Issue: Scope of meaning of the term “student”

Section 3 of the *Personal Health Information Regulations* state:

#### *Health care service*

3. *Where a custodian has entered into an affiliation agreement to provide instruction to a student or other person in his or her course of study to become a health care provider or a health care professional, that instruction is a health care service within the meaning of paragraph 2(1)(h)(viii) of the Act.*

Section 3 of the *Personal Health Information Regulations* has provided clarification and support with respect to students in the course of study to become a health care provider or health care professional. However, additional clarification would be useful with respect to other students, e.g. Office Administration, who come into the Regional Health Authority for student placements and require access to personal health information, even if it is limited, to get the full benefit of the placement experience. While these students are not Health care providers or health care professionals, they do provide supportive services in such positions.

Suggested Resolution: Broaden the language of section 3 of the *Personal Health Information Regulations* to include students who provide supportive services.

Issue: Definition of the term “spouse”

*Representative*

Section 7.(b) of *PHIA* states:

*7. A right or power of an individual under this Act or the regulations may be exercised*

*(b) where the individual lacks the competency to exercise the right or power or is unable to communicate, and where the collection, use or disclosure of his or her personal health information is necessary for or ancillary to a "health care decision", as defined in the Advance Health Care Directives Act , by a substitute decision maker appointed by the individual in accordance with that Act or, where a substitute decision maker has not been appointed, a substitute decision maker determined in accordance with section 10 of that Act;*

*Furthermore, section 38(b) and (d) state:*

*Where individual deceased*

*38. A custodian may disclose personal health information about an individual who is deceased or presumed to be deceased without the consent of the individual who is the subject of the information*

*(b) for the purpose of informing a person whom it is reasonable to inform in the circumstances of the fact that the individual is deceased or presumed to be deceased and the circumstances of the death, where appropriate;*

*(d) to a spouse, partner, sibling or descendant of the individual where the recipient of the information reasonably requires the information to make decisions about his or her own health care or the health care of his or her child or where the disclosure is necessary to provide health care to the recipient;*

The term “spouse” is used throughout *PHIA*. Section 2 does not include a definition of spouse; therefore, its meaning is open to interpretation. As well, other terms and phrases are used such

as “person whom is reasonable to inform” in section 38(b) and “to a spouse, partner....” in section 38(d).

Suggested Resolution: Broaden the language of section 2 of *PHIA* to include a definition of the term “spouse”.

#### Issue: Definition of the term “minor”

##### *Representative*

*7. A right or power of an individual under this Act or the regulations may be exercised*

*(d) by the parent or guardian of a minor where, in the opinion of the custodian, the minor does not understand the nature of the right or power and the consequences of exercising the right or power;*

However, section 2 of *PHIA* does not include a definition of “minor”. For example, provincial legislation such as the *Children and Youth Care and Protection Act* defines “child” as “....a person actually or apparently under the age of 16 years” and “youth” means “.....a person who is 16 years of age or over but under 18 years of age.” Furthermore, the *Age of Majority Act* sets out the age of majority as 19 years of age.

Suggested Resolution: Define the term “minor” by age in section 2 of *PHIA* and introduce consistent terminology such as “child” and “youth”.

#### Issue: Material Breach

Section 5 of the *Personal Health Information Regulations* state:

##### *Material breach*

*5. The factors that are relevant to determining what constitutes a material breach for the purpose of subsection 15(4) of the Act include the following:*

*(a) the sensitivity of the personal health information involved;*

*(b) the number of people whose personal health information was involved;*

*(c) whether the custodian reasonably believes that the personal health information involved has been or will be misused; and*

*(d) whether the cause of the breach or the pattern of breaches indicates a systemic problem.*

Furthermore, section 15.(4) of *PHIA* states:

### *Security*

*(4) Where a custodian reasonably believes that there has been a material breach as defined in the regulations involving the unauthorized collection, use, or disclosure of personal health information, that custodian shall inform the commissioner of the breach.*

Section 5 of the *Personal Health Information Regulations* includes factors relevant to determining what constitutes a material breach, and section 15(4) of *PHIA* provide direction that where a custodian reasonably believes that there has been a material breach as defined in the regulations involving the unauthorized collection, use, or disclosure of personal health information that custodian shall inform the Commissioner of the breach. Western Health supports this requirement, and diligently fulfils this responsibility. That said, the definition seems broad, thereby allowing discretion in its interpretation. While this may be beneficial in particular circumstances, overall it is recommended that clarifying this definition would only strengthen the current process and practices and lend further consistency across the system of health care custodians in the province.

Suggested Resolution: Clarify the definition of material breach in section 5 of the *Personal Health Information Regulations*.

### Issue: Disclosure of information of deceased individuals

Section 7.(e) of *PHIA* states:

#### *Representative*

*7. A right or power of an individual under this Act or the regulations may be exercised*

*(e) where the individual is deceased, by the individual's personal representative or, where there is no personal representative, by the deceased's nearest relative, and for this purpose, the identity of the nearest relative may be determined by reference to section 10 of the Advance Health Care Directives Act*

Next, section 38 states:

#### *Where individual deceased*

*38. A custodian may disclose personal health information about an individual who is deceased or presumed to be deceased without the consent of the individual who is the subject of the information*

*(a) for the purpose of identifying the individual;*

*(b) for the purpose of informing a person whom it is reasonable to inform in the circumstances of the fact that the individual is deceased or presumed to be deceased and the circumstances of the death, where appropriate;*

(c) to the personal representative of the deceased for a purpose related to the administration of the estate;

(d) to a spouse, partner, sibling or descendant of the individual where the recipient of the information reasonably requires the information to make decisions about his or her own health care or the health care of his or her child or where the disclosure is necessary to provide health care to the recipient; or

(e) for research purposes under the authority of section 44.

Sections 7.(e) and 38 of *PHIA* address the disclosure of information of deceased individuals. Section 38 seems to specify, perhaps narrowly, the circumstances under which information about deceased individuals is disclosed. Clarification is required with respect to how these two sections work together in keeping with the spirit and intention of the *Act*, in particular limiting access to information or resulting in a privacy breach. Furthermore, section 38(c) makes reference to the “personal representative of the deceased” as opposed to “representative”. The question is whether the addition of the word “personal” to 38(c) changes the definition of the term “representative”. If so, a definition of personal representative should be added to section 2 of *PHIA*.

Suggested Resolutions: **1.** Review sections 7.(e) and 38 of *PHIA* to ensure that unintentionally, they do not lead to an interpretation whereby information is inappropriately disclosed or withheld. **2.** Broaden the language of section 2 of *PHIA* to include a definition of the term “personal representative”.

#### Issue: Regional Health Authorities (RHAs) as persons

Section 24 of *PHIA* states:

*Consent may be express or implied*

24. (1) *A consent of the individual to the collection, use or disclosure of his or her personal health information may be express or implied.*

(2) *Where a custodian referred to in paragraph 4(1)(e), (f) or (g)*

(a) *collects personal health information from and with the consent of the individual who is the subject of the information; or*

(b) *receives personal health information about an individual from a custodian*

*for the purpose of providing health care or assisting in the provision of health care to the individual as part of a circle of care, that custodian is entitled to assume that he or she has the individual's continuing implied consent to use or disclose the information to another custodian or person for the purpose of providing health care to that individual unless the custodian collecting*

or receiving the information is or becomes aware that the individual has withdrawn his or her consent.

Furthermore, section 4.(1)(e) states:

4. (1) *In this Act, "custodian" means a person described in one of the following paragraphs who has custody or control of personal health information as a result of or in connection with the performance of the person's powers or duties or the work described in that paragraph:*

(e) *a health care professional, when providing health care to an individual or performing a function necessarily related to the provision of health care to an individual;*

(f) *a health care provider;*

(g) *a person who operates*

(i) *a health care facility,*

(ii) *a licensed pharmacy as defined in the Pharmacy Act, 2012 ,*

(iii) *an ambulance service, or*

(iv) *a centre, program or service for community health or mental health, the primary purpose of which is the provision of health care by a health care professional or health care provider;*

Although Regional Health Authorities (RHAs) are not specifically included in section 24(2) of *PHIA*, up to now it has been Western Health's understanding that RHAs could be included in section 4(g), i.e. as being "persons" who operate health care facilities.

Suggested Resolution: While the current language found in *PHIA* has not necessarily interrupted the use and disclosure of personal health information for the purpose of providing health care, including additional language as currently included in section 4 (a), i.e. "an authority" to Section 24(2) of *PHIA* would ensure that RHAs are clearly identified.