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14 February 2017

Dr. David Morgan, Chairperson
PHIA Review
Department of Health and Community Services
Confederation Building
St. John's, NL A1B 4J6
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Dear Dr. Morgan,

Re PHIA Review

We write further to your invitation to present submissions with respect to the review of Newfoundland and Labrador's Personal Health Information Act ["PHIA"].

The Canadian Nurses Protective Society [CNPS] is a not for profit organization which provides professional liability protection and legal services to more than 134,000 nurses across all of Canada, including all registered nurses and nurse practitioners of Newfoundland and Labrador, with a focus on prevent and risk management.

The CNPS wishes to commend the Newfoundland and Labrador government for instigating a review of the PHIA. There is no doubt that the PHIA was the result of a thoughtful process, at the outset. However, with changing models of care, evolving technological advances, it was wise to contemplate that legislation as complex as the PHIA should be reassessed to ensure that it appropriately meets its objectives.

We are grateful for the opportunity to provide input in this process. Should further questions arise, we remain available to participate in subsequent rounds of consultations as you deem necessary.

We hope that the foregoing will be of assistance.

Yours truly,

Chantal L. Léonard, LLB
Chief Executive Officer

PERSONAL HEALTH INFORMATION ACT REVIEW, 2017

SUBMISSIONS OF THE CANADIAN NURSES PROTECTIVE SOCIETY

The Canadian Nurses Protective Society [CNPS] is a not for profit organization which provides professional liability protection and legal services to more than 134,000 nurses across all of Canada, including all registered nurses and nurse practitioners of Newfoundland and Labrador. The risk management services are accessed on demand and include legal education and confidential individual legal advice to nurses about their professional legal rights and obligations pursuant to the personal health information protection legislation in their respective province or territory. Although our comments are formally provided in our capacity as legal advisor to registered nurses and nurse practitioners, similar considerations could apply to other health care providers.

It is clear that in developing the Personal Health Information Act ["PHIA"], significant efforts were made to develop a comprehensive legal framework that would meet important objectives:

- the patients' interest to receive prompt and competent care;
- the patients' interest in having their personal health information ["PHI"] protected from inappropriate access, use or disclosure;
- the need for information of the health care system and health care providers to appropriately manage health care services
- the relatively frequent requirements to use and disclose PHI in connection with legal proceedings or other legal requirements, as set out in jurisprudence or other legislation.

The CNPS recognizes the importance of having patient PHI adequately protected from inappropriate access, use or disclosure, and does not, in the context of these submissions, propose to diminish the protection afforded to PHI by the PHIA. It also does not propose to comment on the sanctions imposed on individuals should they deliberately inappropriately access, use or disclose PHI, as such actions are deserving of sanction.

These submissions will focus, instead, on concerns identified in the day to day application of the provisions of the PHIA, proposed enhancements to the framework for the policies and procedures adopted by custodians to implement the PHIA and strategies to better integrate the professional obligations of registered nurses, nurse practitioners and by extension, other regulated health care providers, with the PHIA. The aspects of the PHIA under review in this submission can be summarized as follows:

1. **The employer policies or express authorization adopted pursuant to s. 13 as the authorizing mechanisms for an agent (nurse)'s collection, use and disclosure of PHI under the PHIA, including:**

    a. **General considerations (page 2)**

b. **The need to reconcile registered nurses and nurse practitioners' professional and legal obligations to patients and their responsibilities to comply with employer policies (page 3)**

c. **The need to formally recognize registered nurses and nurse practitioners' personal statutory reporting obligations (page 5)**

d. **The need for additional guidance within the PHIA with respect to the information policies and procedures adopted by custodians (page 7)**

2. **Access to PHI when required by registered nurses and nurse practitioners to effectively participate in a legal proceeding (page 12)**

3. **The implied consent provisions and definition of "circle of care" in subsections 24(2) and (3) of the PHIA (page 14)**

The complete list of draft amendments consistent with our recommendations is found at Appendix A.

Section I

The employer policies or express authorization as the authorizing mechanisms for an agent's collection, use and disclosure of PHI under the PHIA

a) General considerations

PHIA implementation is based on a delegated approach whereby the PHI governs the actions of the custodian and the custodian in turn adopts information policies and procedures which govern all actions of its agents, with respect to PHI, including access, use and disclosure of PHI.

As a result, these information policies and procedures, more than the PHIA itself, become the rules and guidelines which re-define what constitutes a "privacy breach" for nurses and other regulated health care professionals who practice within a health care facility. These policies represent not only a code of conduct within that facility, but are also conferred the status of legal obligation by section 14(2)(c) of the PHIA, which makes it *a legal requirement* for all agents to comply with the information policies and procedures of the custodian, provided that they do not conflict with the Act or its regulations:

> 14(2) A custodian's employees, agents, contractors and volunteers, and those health care professionals who have the right to treat persons at a health care facility operated by the custodian shall comply with
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> (a) this Act and the regulations; and
>
> (b) the information policies and procedures referred to in subsection 13(1).

It is certainly appropriate that the PHIA recognize the role of employer policies and procedure in the management and protection of PHI. We submit, however, that requiring custodians to develop a set of information policies and procedures that are intended to apply effectively as a "complete code" governing the management of PHI within the organization:

- is particularly burdensome for custodians, who are required to anticipate any and every situation in which every employee may have to make decisions with respect to the collection, use and disclosure of PHI;
- fails to recognize that nurses (and other health care professionals) practising within health care facilities also have an independent status as regulated health professionals and must, as a result, comply with overarching professional and legal obligations, for which they are answerable to their professional regulatory body and other authorities; the PHIA requires them, irrespective of permitted uses contemplated in the PHIA, the requirements that exist under other legislation and their professional obligations, to operate in accordance with this "complete code", which may or may not fully encompass the full extent of their professional and legal obligations;

- could lead to unfairness or an inconsistent practice, given that the PHIA does not incorporate any quality assurance mechanism or process to oversee the content or the application of these policies and procedures.

We elaborate further below.

b) The need to reconcile registered nurses and nurse practitioners' professional and legal obligations to patients and their responsibilities to comply with employer policies

Registered nurses and nurse practitioners are members of a self-regulated profession, which is governed, primarily by the *Registered Nurses Act, 2008*[1], the regulations and bylaws adopted pursuant to this Act.

Irrespective of the provisions of the PHIA, they are required to practice in accordance with a code of ethics and standards adopted by their provincial regulatory body (*Registered Nurses Act*, section 10(j) and 18 to 35). As the preamble to the standards indicates,

> "The primary purpose of standards is to identify the level of performance expected of RNs in their practice, against which actual performance can be measured. All registered nurses are responsible for understanding the Standards and applying them to their practice." [2]

These standards include documentation requirements (including documentation of personal health information (PHI)[3], communication requirements within the health care team and quality of care requirements. They require nurses, in appropriate circumstances, to share information with a substitute decision-maker to obtain the patient's informed consent. They also include the requirement to comply with a duty to report imposed by law.[4]

Failure to comply with the Code of Ethics or the standards of practice can give rise to professional sanctions of increasing severities, up to and including the revocation of their license to practice nursing.[5]

Notwithstanding the foregoing, there is no reference to the *Registered Nurses Act*, its regulations or the standards of practice adopted pursuant to that legislation in the PHIA, nor is there a more general acknowledgment of nurses' professional and legal obligations to comply with such legislation and standards in the PHIA. The same can be said of the governing legislation of other regulated health professions in Newfoundland and Labrador.

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[1] S.N.L. 2008, c. R-9.1, as amended

[2] Standards of Practice for Registered Nurses (2013), ARNNL, p.4 (references omitted) https://www.arnnl.ca/sites/default/files/Standards_of_Practice_for_Registered_Nurses.pdf

[3] Documentation Standards for Registered Nurses, 2010, ARNNL, https://www.arnnl.ca/sites/default/files/documents/ID_Documentation_Standards.pdf

[4] Standards of Practice for Registered Nurses (2013), note 2, par. 1.8, p. 7.

[5] Registered Nurses Act, note 1, ss. 18-35.

The definition of "agent" in section 2 of the PHIA suggests, rather, that the status of registered nurses and nurse practitioners as regulated health professionals is irrelevant to the management of PHI within a health care facility. "Agent" is defined as follows:

> (a) "agent", in relation to a custodian, means a person that, with the authorization of the custodian, acts for or on behalf of the custodian in respect of personal health information for the purposes of the custodian, and not the agent's purposes, whether or not the agent has the authority to bind the custodian, is paid by the custodian or is being remunerated by the custodian; [Emphasis added.]

As a matter of law, registered nurses and nurse practitioners cannot ignore their status as regulated health care professionals when providing care or managing PHI, whether they practice independently or within a health care facility. Their actions are not solely for the purpose of the custodian but also in compliance with their own professional obligations. Ideally, all policies adopted by custodians would incorporate the provincial standards of practice or at least enable nurses (and other regulated health professionals) to comply with their provincial standards of practice to ensure that patients receive the appropriate level of care. We recommend, however, that this not be left to the discretion of the custodian and that the PHIA instead expressly authorize regulated health care professionals to collect, use and disclose PHI (subject to obtaining the custodian's consent to release documents within the custodian's control) to meet their professional obligations.

c) The need to formally recognize registered nurses and nurse practitioners' personal statutory reporting obligations

A similar inconsistency exists if the policies and procedures adopted by a custodian do not expressly authorize nurses to disclose PHI to comply with their statutory duties to report. Section 43 of the PHIA expressly imposes upon a custodian a requirement to disclose PHI "without the consent of the individual who is the subject of the information where the disclosure is required by another Act or an Act of Canada or by a treaty, agreement or arrangement made under another Act or an Act of Canada." However, the PHIA does not contain any such express authorization or requirement in the case of regulated health professionals. Pursuant to s. 14, the authorization for a regulated health professional to disclose PHIA would again have to be found in the information policies and procedures adopted by the custodian.

Nurses' statutory duties to report include:

i) The duty to report a child in need of protective intervention:

Section 11 of the *Children and Youth Care and Protection Act*, SNL 2010, c. C-12.2 (the "CYCPA") imposes a legal obligation on any individual, but specifically on **any healthcare professional**, to report information that a child is or may be in need of protective intervention to report the information to a manager, social worker or peace officer. Pursuant to subsection 11(4), this obligation exists "notwithstanding the provisions of any other Act". Pursuant to subsection 11(8), "A person who contravenes this section is guilty of an offence and is liable

on summary conviction to a fine not exceeding $10,000 or to imprisonment for a term not exceeding 6 months, or to both a fine and imprisonment."

ii) The duty to report a condition that may make it dangerous for a person to operate a motor vehicle:

Section 174.1 of the *Highway Traffic Act*, RSNL 1990, c. H-3 (the "HTA") imposes a legal obligation on "a medical practitioner licensed under the Medical Act, 2005, **a nurse practitioner as defined in the Registered Nurses Act**, **2008** or an optometrist licensed under the Optometry Act, 2012" to report to the Registrar of motor vehicles a person over the age of 16 attending the practitioner and who is suffering from a condition that may make it dangerous to operate a motor vehicle. Pursuant to ss. 206 and 208 of the HTA, a professional who fails to comply with this requirement commits and offence and is liable to the penalties contemplated in the *Provincial Offences Act. (Emphasis added.)*

iii) The duty to report an adult in need of protective intervention:

Section 12 of the *Adult Protection Act*, SNL 2011, c. A-4.01 (the "APA") imposes a legal obligation on "**any person who reasonably believes that an adult may be an adult in need** of protective intervention shall immediately give that information, together with the name and address of the adult, if known, to the provincial director, a director, a social worker or a peace officer." This obligation also extends to "all the information" within the knowledge of the person making the report. Pursuant to s. 32 of the APA, a person who fails to comply with this obligation is liable to a fine not exceeding $10,000 or a term of imprisonment up to one year.

A similar argument could be made with respect to the duty to warn that exists at common law. Indeed, it is generally accepted that a court would be likely to impose a duty to warn (or take reasonable steps to prevent harm) on a health care professional who became aware that a patient or third party was at risk of imminent injury. Subsection 40(1) of the PHIA expressly authorizes a custodian to disclose PHI "to prevent or reduce a risk of serious harm to the mental or physical health or safety of the individual the information is about or another individual" but relies on the custodian to extend this authorization to the agents of the custodian by way of policy or express authorization.

Where a custodian's information policies and procedures do not expressly incorporate an authorization to comply with these personal statutory obligations, pursuant to section 11 of the PHIA, the provisions of the PHIA would override the reporting obligations under the HTA and APA. In the case of the duty to report a child in need of protective intervention, a nurse would have to contend with the wording of section 14 the CYCPA, which provides that the duty to report exists "notwithstanding the provisions of any other Act", and wording of section 11 of the PHIA, which states that that the PHIA would prevail.

As a result, where a custodian's information policies and procedures do not authorize nurses working within the facilities to disclose PHI for the purpose complying with their statutory reporting obligations, the practical prudent course is to seek the express authorization of the custodian before

making the report required by law. We submit that this is inefficient and potentially hazardous, if time is of the essence.

To lessen the burden on custodians and ensure that regulated healthcare professionals who collect, use and disclose personal health information as agents of a custodian can, at all times, comply with any and all statutory reporting obligations we recommend that the PHIA expressly stipulate that regulated healthcare professionals can disclose personal health information as necessary to comply with their statutory reporting obligations.

d) The need for additional guidance within the PHIA with respect to the information policies and procedures adopted by custodians

Relying on custodians to develop a "complete code" governing the implementation of the PHIA within their respective organizations is not only unnecessarily burdensome for the custodian, it can lead to an inconsistent or unfair application of the PHIA for a number of reasons:

i) The PHIA imposes a significant burden on custodians to create information policies and procedures which are intended to serve as a "complete code" for the management of PHI by its agents; compliance with the information policies and procedures is then mandated by law, thereby arguably elevating every deviation from such policies to the status of a "privacy breach"

As noted above, employers (custodians) are given a largely unfettered authority and obligation to implement information policies and procedures to comply with what is truly complex legislation, notwithstanding the wide range of circumstances in which agents come in contact with PHI and without regard for the resources available to the custodian for the development of these policies. Paragraph 14(2)(b) of the PHIA creates a legal obligation on the part of "agents", such as registered nurses and nurse practitioners, to comply with these information policies and procedures. Consequently, the PHIA mandates compliance with any custodian's information policy irrespective of its content, how clearly it is expressed and the extent to which it furthers the requirements of the PHIA. This is in contrast to the current state of the law which normally considers employer policies to be "guidelines".

The unfortunate result is that non-compliance with an employer/custodian's information policy and procedure, no matter how trite, can be perceived as a violation of the PHIA or a "privacy breach". This may occur, for instance, if a nurse on a ward who may or may not have been involved in patient care is asked by a physician to access the record of a patient who has very recently left the ward to determine if the results of a laboratory tests are available in order to prescribe the appropriate antibiotics. The PHIA authorizes the health care facility to disclose such information pursuant to s. 24 [implied consent where the custodian is part of the circle of care], s. 37(1)(a) [disclosure to another custodian for the provision of care] and s. 39(1)(d) [disclosure for the purpose of delivering a program]. Notwithstanding this, if the policies and procedure do not expressly authorize the nurse in question to disclose the information, he or she may be found to have acted in violation of the custodian's policies and by extension of the PHIA.

We submit that it denigrates the integrity of the entire health care system and the dedicated professionals who strive to provide the best care possible to their patients to characterize any deviation from policies as "privacy breaches" and paint minor deviations which do not result in inappropriate access, use or disclosure of PHI with the same brush as circumstances which truly infringe the requirements of the PHIA. We further submit that the requirement at subsection 14(2) of the PHIA to comply with a custodian's information policies and procedures is superfluous since the custodian can already enforce compliance through a variety of means, depending on the nature of its legal relationship with the agent. Absent this provision, deviations from a custodian's information policies and procedures could then be managed as any other employer policy, and only conduct which truly infringes the requirements of the PHIA would be characterized as a privacy breach.

ii) The PHIA does not stipulate whether the employer's authorization to collect, use or disclose PHI can be implicit or if it must be an express authorization.

Nurses may work in roles that do not involve providing direct care to patients, but for which the nurse generally still needs to use PHI to properly perform his/her duties. For example, some nurses may be in managerial roles where they delegate nursing activities to other nurses and ancillary workers, as well as supervise and evaluate their work. Nurse managers also are usually required to use PHI for the purpose of the management and planning of the delivery of health care services. Nurses may also act as clinical educators whereby they share their expertise with other nurses to improve the delivery of care. Nurse educators are not usually involved in providing direct care to patients, but may use PHI for the purpose of educating others on a particular clinical and/or practice issue.

The authority for nurses to access patient records is typically granted on an implicit basis or pursuant to a general policy. In many cases, there is simply an unwritten understanding between the employer/custodian and their employee nurses about the circumstances for which they can access patient records. This access may be based on the specific duties of the nurse and the need-to-know principle. It would be helpful for the PHIA to expressly state that an employer's authorization to collect, use or disclose information can be inferred, for instance, from a job description or their assigned responsibilities. Absent this clarification in the legislation, it has been our experience that some employers have concluded that employees inappropriately accessed PHI when this was done without an express authorization, notwithstanding that the access was for a purpose consistent with the responsibilities that were assigned to them by the custodian.

Section 24 of the PHIA specifically contemplates that the consent of an individual to the collection, use or disclosure of his or her personal information may be express or implied. We submit that the PHIA should also stipulate that the collection and use of PHIA by agents can also be implied.

iii) The PHIA does not stipulate whether, if the custodian/employer omits to adopt a policy or procedure that would clearly set out the rights and obligations of its employees in a particular

situation, a health care professional could, without seeking the express authorization of the employer/custodian, use the information for a purpose consistent with the PHIA.

iv) The PHIA does not include any requirements of procedural fairness that a custodian must follow to determine if an employee has inappropriately accessed PHI.

In the context of electronic health records, whenever nurses access patients' PHI, they must enter their authorization credentials (e.g. user name and password). Nurses report that in the context of a busy day, log in methods are not always efficient. It is also important to note that nurses may sometimes be required to access records for patients who are not directly assigned to their care (e.g. for an educational purposes, to oversee the quality of care, generate an administrative report, etc.) and that electronic record systems generally have no ability for users to identify the reason for accessing a patient's record.

Sometime after records have been accessed, the custodian may conduct an audit, which generally involves an analysis of the metadata relating to PHI to determine who accessed PHI, when, and generally what information within the record was accessed. Because there is no ability for the nurse to indicate the reason for access at the time of access, this results in inferences having to be made by the employer when this analysis takes place, generally in reference to the reviewer's understanding of the notion of "circle of care". Conclusions resulting from these inferences can at times have a high degree of reliability (e.g. a conclusion that access to PHI was appropriate because the nurse was assigned responsibility for the patient's care; or a conclusion that access to PHI was inappropriate because the patient was an ex-spouse with whom the agent is involved in a custody dispute and for whom the agent did not have responsibility for care). However, at times they may be inconclusive. Absent clear indications in specific cases that access was inappropriate, the custodian may choose to rely, in large part, on a statistical analysis to determine if PHI was accessed inappropriately.

Generally, the nurse is provided with an opportunity to explain the access/use of PHI that the custodian has not been able to justify through inference. Because there is no opportunity to record the reason for access in a patient's record, nurses must generally rely on their memory to explain an access that may have occurred days, weeks or months previously for a matter of seconds in the case of any given patient. We also note that in the context of the employment relationship, there is no requirement to provide information in advance of conducting a meeting. Nurses are often presented the information that the employer considers to be indicative of wrongdoing for the first time at the meeting is in progress.

An employer who concludes that a nurse accessed PHI without authorization is likely to impose a disciplinary sanction, which, depending on the nature and extent of unauthorized access, may range from a suspension to a dismissal. Nurses are also sometimes placed on administrative leave in advance of the interview.

Given that there is generally no opportunity to record reasons for access to PHI and the fact that nurses may subsequently have to rely on their recollection to justify access, it would be

important to ensure that they have been afforded procedural fairness before coming to a determination that their access to PHI was unauthorized.

e) Recommendations

We respectfully submit for your consideration the following recommendations:

i) It would lessen the burden on custodians, be more conducive to the efficient provision of health care and more consistent with the objectives of the PHIA if the PHIA were to incorporate in the legislation the basic rules governing access, use and disclosure of PHI by health care professionals who practice as employees of a custodian, rather than leave this to the determination of the custodian. For instance, the PHIA should expressly provide that regulated health care professionals are deemed to be authorized to collect and use PHI if the collection or use is

   a. to comply with their professional or legal obligations; or

   b. to comply with their responsibilities as agent of the custodian, provided that

      i. the collection, use or is in compliance with the PHIA or its regulation and

      ii. for a purpose contemplated in the PHIA or its regulation.

ii) While employers/custodians should continue to have the ability or obligation to adopt information policies and procedures as necessary to implement the objectives of the PHIA, the PHIA should be amended to eliminate the requirement at paragraph 14(2)(b), that agents of custodians comply with any and all information policies and procedures, but preserve the requirement at paragraph 14(2)(a) to collect, use and disclose PHI in accordance with the requirements and principles set out in the Act and the regulations. Employers/custodians already have the means to compel compliance with their policies and procedures by their employees and agents. This would ensure that custodian policies continue to be viewed, legally, as employer policies without an enhanced legal status. A deviation from an employer policy could then be managed as a breach of policy or a policy breach depending on whether it also was in violation of the legal requirements of the PHIA.

iii) To ensure procedural fairness, the PHIA should:

   a. contain a requirement that prior to making a determination that an agent's access or use of personal health information was in contravention of the PHIA, a custodian must provide the agent with an opportunity to review and consider the information upon which the suspicion of unauthorized access is based, and provide written submissions to the employer/custodian;

   b. provide that the burden lies on the employer to establish that the access of PHI was unauthorized;

These recommendations could be incorporated as amendments to the PHIA in the form of the draft amendments proposed in Recommendations 1 to 5 in Appendix A.

Section II

Access to PHI when required by registered nurses and nurse practitioners to effectively participate in a legal proceeding

a) General comments

It has long been held at common law that health care professionals, including nurses, have a personal duty of care to their patients and can be held personally accountable and liable for their actions. Under Canadian law, an individual who has been harmed by negligent health care services can seek compensation from the health care professionals who provided the service, against the health care professional's employer or both. The doctrine of vicarious liability, which extends an employee's personal liability to his or her employer, does not absolve employees of their personal liability. In fact, in recent litigation, a Newfoundland Health Authority has argued that it should not be held vicariously liable for their employees' unauthorized access to PHI.

In addition, nurses can all be held individually and personally accountable for the professional services to their regulatory body, to the patients and to the justice system for the quality of their professional services. Nurses (and other health care professionals) practising as employees may also be required to address concerns raised by their employers/custodians with respect to the provision of care to a patient or their management of a patient's PHI. Finally, they may be asked to testify as a witness in court proceedings arising from a number of circumstances, such as criminal prosecutions for spousal abuse, driving while impaired, custodial disputes, etc.

The PHIA expressly provides for the right of custodians to use and disclose PHI for legal purposes. Paragraphs 34(g) and 39(1)(g), in particular, expressly provide that custodians may use and disclose PHI for the purpose of a proceeding or contemplated proceeding when the custodian is or may become involved in a legal proceeding or when it requires legal or risk management advice:

> 34. A custodian may use personal health information in its custody or under its control for one or more of the following purposes:
>
> […]
>
> (g) for the purpose of a proceeding or contemplated proceeding in which the custodian is or is expected to be a party or witness and where the information relates to or is a matter in issue in the proceeding or contemplated proceeding;
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> 39. (1) A custodian may disclose personal health information without the consent of the individual who is the subject of the information
>
> […]
>
> (g) to a person who requires the personal health information to carry out an audit for, or provide legal services, error management services or risk management services to, the custodian;

These authorizations, however, does not extend to health care professionals who are required to address a concern about their care, to participate as a party or witness in a legal proceeding or who wish to obtain legal or risk management advice.

b) Recommendations

We submit that nurses practising as employees should also have the right to access and use PHI for the purpose of addressing complaints about their care and other legitimate legal purposes.

This recommendation could be incorporated as amendments to the PHIA in the form of the draft amendments proposed in Recommendations 6 and 7 in Appendix A.

Section III

The implied consent provisions and definition of "circle of care" in subsections 24(2) and (3) of the PHIA

Subsections 24(2) and (3) of the PHIA incorporate a practical and functional definition of circle care, which expands the "circle of care" to incorporate any custodian as a regulated health care provider, a health care provider other than a regulated health care provider or a person who operates one of the specified health care facilities and who "participates in […] the provision of health care to the individual who is the subject of the personal health information".

> 24. (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.
>
> (3) For the purpose of subsection (2), the expression "circle of care" means the persons participating in and activities related to the provision of health care to the individual who is the subject of the personal health information and includes necessarily incidental activities such as laboratory work and professional consultation.

It would be helpful for the PHIA to include a further definition applicable to agents of custodians. It would also be helpful for this definition to take into account the reality of health care, and, as in the case of the existing definition, the fact that in a large facility, health care is the result of the interactions of many individuals who contribute through a complex network of services, and have access to confidential PHI on a need to know basis: from the administrative personnel in the physicians' office who prepare and forward the admitting requisition, the laboratory clerk and laboratory technician who process the pre-admission laboratory tests, the admitting clerk who completes the initial intake information on the day of admission, the nurses who welcome the patient and develop the nursing plan of care, the physician who is primarily responsible to oversee and direct the medical care, the technicians who will ensure that the appropriate instruments are available for surgery, the nurses who will be participate in the surgery, the different nurses on duty who will attend to the patient's needs during the stay (including those who respond to patient needs during breaks and meals), the different respirologists, physiotherapists and other specialists who will participate in the patient's rehabilitation, etc.

Paragraph 34(c) already provides that custodians may use PHI "for delivering health care programs", which would require providing access, on a "need to know basis" to all the individuals listed above. However, it has been our experience that the concept of "circle of care", as it applies to agents of custodians nonetheless is often given a very restrictive interpretation pursuant to which access to PHI is

limited to individuals to whom responsibility for patient care has been formally assigned and who are formally directly involved in the provision of care.

This recommendation could be incorporated as amendments to the PHIA in the form of the draft amendment proposed in Recommendation 8 in Appendix A.

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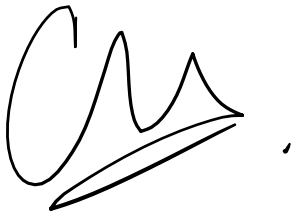
The PHIA has served us well by creating a framework for the management and protection of PHI, and by increasing awareness of the need for better protecting the privacy of PHI. We are grateful for the opportunity to share, based on our experience with personal health information management legislation and practices, in the province of Newfoundland and Labrador, as well as with other similar legislation across Canada, how it may be further harmonized with other applicable legislation and professional obligations.

We hope that these comments will be of assistance to the Review Committee.

All of which is respectfully submitted,



Chantal Léonard, CEO

Appendix A: List of recommendations

<u>Recommendation 1</u>: To recognize that an agent may have professional or statutory obligations independent from those of the custodian, the definition of "agent" at paragraph 2(1)(a) should be amended as follows:

> **"agent", in relation to a custodian, means a person that, with the <u>express or implied</u> authorization of the custodian, acts for or on behalf of the custodian in respect of personal health information ~~for the purposes of the custodian and not the agent's purposes,~~ whether or not the agent has the authority to bind the custodian, is paid by the custodian or is being remunerated by the custodian**

<u>Recommendation 2</u>: To delete paragraph 14(2)(b) of the PHIA, and to add a new subsection 14(2.1) which would read as follows:

> **(2.1) Regulated health care professionals are deemed to be authorized to collect and use PHI if the collection, use or disclosure is**
>
> **c. to comply with their professional or legal obligations; or**
>
> **d. to comply with their responsibilities as agent of the custodian, provided that**
>
> **i. the collection, use or is in compliance with the PHIA or its regulation and**
>
> **ii. for a purpose contemplated in the PHIA or its regulation.**

<u>Recommendation 3</u>: The requirement imposed upon regulated health care providers to disclose PHI in compliance of the provisions of another Act or regulation could be contemplated in a new section 43.1 as follows :

> **43.1 An agent shall disclose personal health information within the agent's knowledge without the consent of the individual who is the subject of the information where the disclosure is required by the agent pursuant to another Act or an Act of Canada or a treaty, agreement or arrangement made under another Act or an Act of Canada.**

<u>Recommendation 4</u>: To add a new subsection 13(5) to the PHIA providing that a custodian shall not impose any sanctions on an agent for failing to comply with an information policy or procedure adopted pursuant to subsection 13(1) unless the custodian has first

> **a) provided the agent with particulars of the suspected non-compliance;**
>
> **b) provided the agent with an opportunity to review and consider the information upon which the suspicion of non-compliance is based; and**
>
> **c) considered any written submissions by the agent in reference this information**

<u>Recommendation 5</u>: To add a new subsection 13(6) to the PHIA providing that the burden lies on the custodian to establish that access of PHI by a regulated health professional in contravention of this Act, the regulations or an information policy adopted pursuant to subsection 13(1) was unauthorized.

<u>Recommendation 6</u>: To add a new section 34.1 to the PHIA as follows:

34.1: An agent or ex-agent of a custodian who is a regulated health care professional may, upon notification to the custodian, use personal health information in the custody or under the control of the custodian for the purpose of a proceeding or contemplated proceeding in which the agent is or is expected to be a party or witness and where the information relates to or is a matter in issue in the proceeding or contemplated proceeding.

<u>Recommendation 7</u>: To add a new section 39.1 to the PHIA as follows:

39. (1) An agent or ex-agent of a custodian who is a regulated health care professional may, upon notification to the custodian, access and disclose personal health information without the consent of the individual who is the subject of the information to a person who requires the personal health information to provide legal services to the agent or ex-agent of the custodian.

<u>Recommendation 8:</u> To add a new section 24.1 to clarify that agents can rely on the patient's implied consent when sharing information within the circle of care and to define the notion of circle care applicable to the agents of a custodian:

> **24. 1(1) Where the agent of a custodian, in the course of performing his or her duties,**
> **(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 agent is entitled to assume that he or she has the individual's continuing implied consent to use or disclose the information to another agent of the same custodian or to another custodian or person for the purpose of providing health care to that individual unless the agent collecting or receiving the information is or becomes aware that the individual has withdrawn his or her consent.**
>
> **(2) For the purpose of subsection (1), the expression "circle of care" means the persons participating in activities related to the provision of health care to the individual who is the subject of the personal health information, whether or not the person participating or assisting with the care has direct contact with the individual, and includes necessarily incidental activities such as laboratory work and professional consultation.**