

## **The Disclosure of Medical Records from a Canadian\* Perspective.**

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**\*Ontario (which is actually not synonymous with Canada)**

### **Statutory Protection of Medical Information**

**Personal Health Information Protection Act (PHIPA), S.O. 2004, c. 3, Sch. A.**

This statute was introduced in 2004. It applies to “health information custodians” (HICs) in hospitals, long-term care facilities and clinics as well as the Ministry of Health & Long Term Care. It also applies to employers and insurance companies that receive personal health information from the health care system.

The PHIPA limits the “collection, use and disclosure” of personal health information by “health information custodians” unless the health information custodian has the knowledgeable, informed and freely given consent of the individual and the collection, use or disclosure is “necessary for a lawful purpose.” Implied consent applies in limited circumstances, but is not permitted where the disclosure of the information is not for the purpose of providing health care.

Section 41(1) provides:

A health information custodian may disclose personal health information about an individual,

- (a) subject to the requirements and restrictions, if any, that are prescribed, for the purpose of a proceeding or contemplated proceeding in which the custodian or the agent or former agent of the custodian is, or is expected to be, a party or witness, if the information relates to or is a matter in issue in the proceeding or contemplated proceeding;

....

- (d) for the purpose of complying with,

- (i) a summons, order or similar requirement issued in a proceeding by a person having jurisdiction to compel the production of information, ...

### **The Occupational Health and Safety Act (OHSA), RSO 1990, c. O.1**

Section 63(2) provides that “no employer shall seek to gain access, except by an order of the court or other tribunal or in order to comply with another statute, to a health record concerning a worker without the worker’s written consent.” Section 63(6) states: This

section prevails despite anything to the contrary in the Personal Health Information Protection Act, 2004.”

### **The Mental Health Act, RSO 1990, c. M7**

This statute provides protection against the disclosure of psychiatric records. Section 35 of the Act sets out a procedure for the production and admissibility of the personal health information of “patients” in relation to assessment, observation or treatment of a patient in a designated psychiatric facility in legal proceedings. “Patient” is defined broadly and includes “former patients, out-patients, former out-patients and anyone who is or has been detained in a designated psychiatric facility.” Section 35(5) governs a specific procedure for prehearing disclosure. If the documents are to be entered into evidence, section 35(9) states that the party seeking to do so must apply to Divisional Court.

**Profession Specific Acts**, for professions regulated under the Regulated Health Professions Act.

Each medical profession in Ontario, including medical doctors and nurses, has a profession specific act and regulations, which governs the confidentiality of medical information. This significantly limits the release of medical information without the consent of the individual, or as required by law.

### **Evidence Act, R.S.O. 1990, c.E. 23**

Under Section 52, a medical report is admissible, in the absence of the doctor who wrote it, despite its hearsay nature, provided that the required notice is given to the opposite party (10 days) together with a copy of the medical report if requested.

### **Arbitration Authority**

#### **The Ontario Labour Relations Act, RSO 1995, c 1.**

**Section 48(12)(b)** of the statute empowers labour arbitrators to “require any party to produce documents or things that may be relevant to the matter and to do so before or during the hearing.”

**Section 48(12)(d)** empower arbitrators “to summon and enforce the attendance of witnesses and to compel them to give oral or written evidence on oath in the same manner as a court of record in civil cases.”

**Section 48(12)(f)** empowers arbitrators “to accept the oral or written evidence as the arbitrator or the arbitration board...in its discretion considers proper, whether admissible in a court of law or not.”

**West Park Hospital and Ontario Nurses' Association** (1993), 37 L.A.C. (4<sup>th</sup>) 160 (Knopf), a pre-PHIPA decision, sets out a five-fold test for the disclosure of medical information:

- (1) The information requested must be “arguably relevant.”
- (2) The request must be particularized so there is no dispute as to what is requested.
- (3) The board should be satisfied that the information is not being requested as a “fishing expedition.”
- (4) There must be a nexus between the information requested and the position in dispute, and
- (5) The board should be satisfied that the disclosure will not cause undue prejudice.

**Becker Milk Co. and Mile and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local 647** (1996), 53 L.A.C. (4<sup>th</sup>) 420 (Joyce), articulated the following principles:

1. In ordering the disclosure of medical records, arbitrators must be sensitive to the fact that such records may include personal and confidential information. In exercising the required discretion, the individual's interest in the non-disclosure of personal and confidential medical information must be balanced with the policy considerations that suggest that disclosure is useful and necessary. Some medical information such as that related to mental disorders, rightly or wrongly may tend to stigmatize the individuals. In such cases, a higher onus must be put on the requesting party to satisfy the arbitrator as to why this information is essential.
2. The information requested must be arguably relevant [and the other *West Park* factors].
3. An arbitrator has the authority under s. 48(12) of the *Labour Relations Act*, 1995, S.O. 1995, c. 1, Sch. A, to require the production of medical records, before or during a hearing.
4. An arbitrator carries responsibility to expedite the proceedings, to prevent the abuse of the arbitration process, and to provide a fair hearing. Where the union places the grievor's mental condition in issue, an arbitrator carries the authority to order a person to submit to a medical or psychiatric examination.
5. Anything which can assist in the preparation of cases, the refining of issues or which will facilitate settlement should be encouraged. As a general proposition, pre-hearing disclosure will assist with all these matters and should occur wherever possible.
6. If the positions taken by the parties on the merits of the case make it inevitable that certain evidence will be compellable during the course of the hearing, there is little to be gained by objecting to releasing that information prior to the hearing. More often than not a person's interests can best be served by tactics designed to expedite the hearing.
7. Each party is entitled to know in advance the case it has to meet, so that it can prepare its evidence and submissions.