Legislative Update, Risk & Compliance

Kathryn Frelick
kfrelick@millerthomson.com
416.595.2979

Lauren Parrish
lparrish@millerthomson.com
416.595.2638

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Overview

1. Overview of Bill 119 and key changes to PHIPA and QCIPA
2. Intersection of QCIPA 2015 with other legislation
3. Implications for compliance and risk
1. Introduced on Sept. 16, 2015
2. Currently in second reading debate
If passed, Bill 119 will:

1. Amend the *Personal Health Information Protection Act* (PHIPA)

2. Repeal and replace the *Quality of Care Information Protection Act* (QCIPA)

3. Amend Regulation 965 of the *Public Hospitals Act* (PHA) re: critical incidents
Proposed Amendments to PHIPA
Background

1. PHIPA – in force 2004
2. Bill 78, EPHIPA (2013)
3. Significant technological advancements within health industry and use of electronic health records
Privacy Class Actions

1. *Rowlands v Durham Regional Health* – statutory privacy breach

2. *Hopkins v Kay* – “intrusion upon seclusion”

3. Certification of privacy class action law suits for snooping, theft of PHI
1. **Use** – broadened to “view, handle or otherwise deal with”

2. **Prescribed Organization** – unclear at this time
New Obligations for HIC

1. HIC must take reasonable steps to ensure PHI is not collected without authority
HIC Responsible for Agents

1. HIC must ensure no improper use of PHI by agents

2. HIC responsible for any use of PHI by agents (whether authorized or unauthorized)
Mandatory Notification

1. Expanded obligations for HIC
2. HIC must notify patient of theft or unauthorized use
3. HIC must notify patient of right to complain to Commissioner
4. HIC must notify Commissioner of theft or unauthorized use
1. HIC must report to relevant professional College if:
   - Practitioner is disciplined, suspended or terminated due to unauthorized collection, use or disclosure of PHI
   - HIC reasonably believes practitioner resignation relates to unauthorized collection, use or disclosure of PHI
Mandatory Notification and Reporting

1. Scope of obligation is unclear
2. What is “unauthorized” use?
Electronic Health Record (EHR)

1. Proposed Part V.1
2. Sets out obligations of prescribed organizations for managing EHRs
3. Modifies definition of collection, use and disclosure of PHI to account for transfer of PHI to prescribed organization
1. Prescribed organizations required to put into effect consent directives relative to EHR

2. Consent directive is a qualified right
Consent Directives – Authorized Disclosure of PHI

1. To another HIC who reasonably believes that PHI is required to reduce risk of harm to others

2. To another HIC who reasonably believes that PHI is required to reduce risk of harm to subject of directive, and no time to get consent
Prosecutions - Background

1. PHIPA enforcement criticized as illusionary

2. Only one prosecution advanced under PHIPA (stayed in 2015 due to delay)

1. No limitation period for prosecutions
2. Prosecution may be commenced with consent of Attorney General
3. Larger role for Commissioner in prosecutions
Penalties

1. Fines doubled:
   - Individuals, $100,000
   - Corporations, $500,000
Risk Management Strategies

1. HICs must develop policies to address individual access of shared PHI on EHR
2. Electronic systems must be capable of noting consent directive specifics
3. HICs should develop and implement standardized consent directive process
QCIPA 2015 – New legislative provisions
Background

1. QCIPA – in force 2004

2. Main critique - stringent restriction on disclosure of QCI

3. QCIPA Review Committee Recommendations
1. **Health Facility** – expanded to include “prescribed entity that provides health care”

2. **Quality of Care Committee (QCC)** – Can now be established jointly

3. **Quality of Care Functions** – now include reviews of critical incidents
Definitions and Scope

4. Quality Oversight Entity – new legislative concept

5. Quality of Care Information – broadened under QCIPA 2015

6. Critical Incident – not previously a defined term (adopts PHA definition)
Who Can Rely on QCIPA?

1. Hospitals
2. Independent health facilities
3. Long-term care homes
4. Labs
5. Others as prescribed
Critical Incident Reviews

New Requirements:
1. Must interview patient
2. Must disclose critical incident information to patient
3. Minister may make regulations re: use of QCC for reviewing critical incidents
1. Overlap with QCIPA 2015 regarding critical incident reviews

2. “Health facilities” must inform patient as to the cause of a critical incident
Critical Incident Investigations

Investigations can now involve multiple health facilities
Critical Incidents - Central Question

1. Is it a “critical incident” within the QCIPA 2015 definition, or an adverse event that does not trigger the QCIPA review process?

2. Required process?
QCI – Permitted Disclosure

1. Where required by law
2. Where necessary to reduce risk of serious bodily harm
3. Disclosure between QCCs (QCIPA 2015)
QCI – Restrictions on Disclosure

1. Legal proceedings
2. Credentialing and performance management
Intersection with other Legislation

1. Excellent Care for All Act (ECFAA)
2. Apology Act
Excellent Care for All Act

1. Every health care organization shall establish a quality committee
2. Reports to “responsible body”
Excellent Care for All Act

3. Responsible to:
   - Monitor and report to the responsible body on quality issues and overall quality of services
   - Consider and make recommendations re: quality improvement initiatives and policies
   - Ensure best practices
   - Oversee preparation of annual Quality Improvement Plans
   - Carry out any other responsibilities in regs.
Excellent Care for All Act

4. Surveys – at least once every fiscal year
5. Patient relations process – mandatory
6. Patient declaration of values - mandatory
Excellent Care for All Act

7. Annual Quality Improvement Plans
   – Considers data from surveys, patient relations process and critical incident data
   – Must be made public
   – Must contain:
     • Annual performance improvement targets and justification
     • Information linking executive compensation to performance targets
Excellent Care for All Act - 2015


2. Patient Ombudsman (not yet proclaimed)
Apology Act

1. An apology:
   - Does not constitute an express or implied admission of fault or liability
   - Does not void, impair or otherwise affect any insurance or indemnity coverage
   - Shall not be taken into account in any determination of fault or liability in connection with that matter
Risk Management Strategies - QCIPA

1. Review and update to risk management and quality improvement policies
2. Ensure appropriate “on ramps” and “off ramps” to QCIPA review process
3. Identify process triggers – risk issues, legal privilege, performance management, physician issues
1. A review of Orders issued under PHIPA, as well as corresponding fact sheets and guidance documents reveal that many of these repeat the SAME THEMES.

2. Must ensure that privacy practices continue to evolve as technology changes.

3. Focus on monitoring and enforcing compliance with privacy policies.
1. Increased enforcement powers of IPC and statutory reach

2. Increased use of common law privacy tort
   - statutory requirements do not necessarily equate with common law obligations → due diligence / ability to define industry standards
Questions?

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kfrelick@millerthomson.com
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