

## NEW DISCUSSION POINT FOR NWT'S HSPL: ENFORCEMENT & COMPLIANCE

### I. SIGNIFICANCE OF TOPIC

To help HSPL successfully regulate information handling practices, it is necessary that the legislation contain a mechanism to drive compliance, most commonly through enforcement and oversight provisions.

### II. STARTING POINT

Enforcement under HSPL may be achieved by providing for penalties and remedies in the event an obligation is breached, as well as mandatory reporting in respect of a breach. As we have discussed, Alberta, Manitoba, Newfoundland and Labrador, Ontario, and Saskatchewan have legislation governing health information in force or in progress.

### III. VARIOUS STRUCTURES OF ENFORCEMENT & COMPLIANCE SCHEMES

Although Canadian HSPL legislation is similar in intent, the language varies slightly regarding how enforcement and oversight is organized. Common to each is:

1. the creation of offences and corresponding penalties for certain breaches;
2. the provision of remedies available to individuals affected by a breach;
3. the definition of the scope of power of the oversight body, Commissioner or Ombudsman; and
4. the establishment of certain Trustees/Custodian duties to help implement compliance.

The way in which these elements are balanced varies between HSPL across Canada. A summary comparing the various models is set out below, followed by some specific provisions of each of the jurisdictions' HSPL.

In summary, we can compare and contract the various HSPL as follows:

**ALBERTA**

Offences and Penalties	<ul style="list-style-type: none"> <li>• Used to protect employees who act in accordance with the legislation from the custodian. Penalty: fine.</li> <li>• Used to provide a penalty for custodians who act in contravention of the Act, or impair efforts administer the Act. Penalty: fine.</li> </ul>
Remedies	<ul style="list-style-type: none"> <li>• The Commissioner may order a custodian to allow an individual access to his information, or to correct the information</li> <li>• The Commissioner may order that a duty imposed by the Act be performed</li> </ul>
Mandatory Reporting	<ul style="list-style-type: none"> <li>• No. However, an affiliate may disclose personal health information to the Commissioner if the affiliate believes that information is being collected, used or disclosed in contravention of the Act</li> </ul>
Scope of power of Commissioner	<ul style="list-style-type: none"> <li>• The Commissioner may authorize a mediator to investigate and attempt to settle a matter</li> <li>• The Commissioner has the power to conduct an inquiry</li> <li>• The Commissioner has the power to make an order</li> <li>• The Commissioner has all of the powers of a commissioner under the Public Inquiries Act when conducting an inquiry</li> <li>• The Commissioner may disclose information necessary to conduct an inquiry or prepare a report.</li> <li>• In conducting an investigation or inquiry, the Commissioner may require any relevant record to be</li> </ul>

	produced, and may examine that record.
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**MANITOBA**

Offences and Penalties	<ul style="list-style-type: none"> <li>Used to provide a penalty for trustees and employees who act in contravention of the Act, or impair efforts administer the Act. Penalty: fine.</li> </ul>
Remedies	<ul style="list-style-type: none"> <li>The Ombudsman may make a recommendation regarding access to information, or privacy.</li> </ul>
Mandatory Reporting	<ul style="list-style-type: none"> <li>No.</li> </ul>
Scope of power of Commissioner	<ul style="list-style-type: none"> <li>The Ombudsman has all of the powers and protections of a commissioner under the Manitoba Evidence Act when conducting an investigation</li> <li>The Ombudsman may require that any record maintained by a trustee be produced, where he considers it relevant to an investigation.</li> <li>The Ombudsman has a right of entry to the premises of a trustee to examine and make copies of records that the Ombudsman believes to be relevant to an investigation.</li> <li>The Ombudsman may, with the consent of the individual involved, appeal a decision of a trustee not to comply with a recommendation.</li> <li>The Ombudsman may initiate a complaint.</li> </ul>

**NEWFOUNDLAND**

Offences and Penalties	<ul style="list-style-type: none"> <li>Used to provide a penalty for custodians who act in contravention of the Act, or impair efforts administer the Act. Penalty: fine and/or imprisonment.</li> </ul>
Remedies	<ul style="list-style-type: none"> <li>The Commissioner may make a recommendation</li> </ul>

	regarding access to information, or privacy.
Mandatory Reporting	<ul style="list-style-type: none"> <li>• Yes. Where a custodian reasonably believes that there has been a material breach, he must inform the Commissioner.</li> </ul>
Scope of power of Commissioner	<ul style="list-style-type: none"> <li>• The Commissioner has the power to conduct a review where there has been a complaint.</li> <li>• The Commissioner has all of the powers and protections of a commissioner under the Public Inquiries Act when conducting an investigation</li> <li>• The Commissioner may require that any record maintained by a trustee be produced, where he considers it relevant to an investigation.</li> <li>• The Commissioner has a right of entry to the premises of a trustee to examine and make copies of records that the Commissioner believes to be relevant to an investigation.</li> <li>• The Commissioner may, with the consent of the individual involved, appeal a decision of a trustee not to comply with a recommendation.</li> </ul>

**ONTARIO**

Offences and Penalties	<ul style="list-style-type: none"> <li>• Used to provide a penalty for custodians and employees who act in contravention of the Act, or impair efforts administer the Act. Penalty: fine.</li> </ul>
Remedies	<ul style="list-style-type: none"> <li>• The Commissioner may order a custodian to allow an individual access to his information, or to correct the information</li> <li>• The Commissioner may order that a duty imposed by the Act be performed</li> </ul>

Mandatory Reporting	<ul style="list-style-type: none"> <li>• No.</li> </ul>
Scope of power of Commissioner	<ul style="list-style-type: none"> <li>• The Commissioner has the power to conduct a review where there has been a complaint.</li> <li>• The Commissioner may require that any record maintained by a trustee be produced, where he considers it relevant to an investigation.</li> </ul>

**SASKATCHEWAN**

Offences and Penalties	<ul style="list-style-type: none"> <li>• Used to provide a penalty for any person who acts in contravention of the Act, or impair efforts administer the Act. Penalty: fine and/or imprisonment.</li> </ul>
Remedies	<ul style="list-style-type: none"> <li>• The Commissioner may make a recommendation regarding access to information, or privacy.</li> </ul>
Mandatory Reporting	<ul style="list-style-type: none"> <li>• No.</li> </ul>
Scope of power of Commissioner	<ul style="list-style-type: none"> <li>• The Commissioner has the power to conduct a review where there has been a complaint.</li> <li>• The Commissioner may require that any record maintained by a trustee be produced, where he considers it relevant to an investigation.</li> </ul>

Below reproduces (in their entirety) some of the key provisions of the HSPL:

**ALBERTA**

**Protection of employee**

106(1) A custodian or a person acting on behalf of a custodian must not take any action against its affiliate to negatively affect its status as an affiliate of the custodian because the affiliate, acting in good faith,

(a) has exercised or may exercise a right under section 83, or

(b) has properly disclosed information in accordance with this Act.

(2) A person who contravenes subsection (1) is guilty of an offence and liable to a fine of not more than \$10 000.

**Offences and penalties**

- 107(1) No custodian or affiliate of a custodian shall knowingly
- (a) alter, falsify or conceal any record, or direct another person to do so, with the intent to evade a request for access to the record, or
  - (b) destroy any record that is subject to this Act, or direct another person to do so, with the intent to evade a request for access to the record.
- (2) No person shall knowingly
- (a) collect, use, disclose or create health information in contravention of this Act,
  - (b) gain or attempt to gain access to health information in contravention of this Act,
  - (c) make a false statement to, or mislead or attempt to mislead, the Commissioner or another person performing the duties, powers or functions of the Commissioner or other person under this Act,
  - (d) obstruct the Commissioner or another person in the performance of the duties, powers or functions of the Commissioner or other person under this Act,
  - (e) fail to comply with an order made by the Commissioner under section 80 or by an adjudicator under section 101, or
  - (f) use individually identifying health information to market any service for a commercial purpose or to solicit money unless the individual who is the subject of the health information has specifically consented to its use for that purpose.
- (3) No researcher shall knowingly breach the terms and conditions of an agreement entered into with a custodian pursuant to section 54.
- (4) No information manager shall knowingly breach the terms and conditions of an agreement entered into with a custodian pursuant to section 66.
- (5) No person to whom non identifying health information is disclosed and who intends to use the information to perform data matching shall fail to comply with section 32(2).
- (5.1) No person shall knowingly disclose health information to which this Act applies pursuant to a subpoena, warrant or order issued or made by a court, person or body having no jurisdiction in Alberta to compel the production of information or pursuant to a rule of court that is not binding in Alberta.
- (6) A person who contravenes this section, except subsection (5.1), is guilty of an offence and liable to a fine of not more than \$50 000.
- (7) A person who contravenes subsection (5.1) is guilty of an offence and liable
- (a) in the case of an individual, to a fine of not less than \$2000 and not more than \$10 000, and
  - (b) in the case of any other person, to a fine of not less than \$200 000 and not more than \$500 000.
- (8) A prosecution under this Act may be commenced within 2 years after the commission of the alleged offence, but not afterwards.

**MANITOBA**

**Offences**

63(1) Any person who

- (a) wilfully makes a false statement to, or misleads or attempts to mislead, the Ombudsman or another person in the performance of the duties and powers of the Ombudsman;
- (b) wilfully obstructs the Ombudsman, or any person acting for or under the direction of the Ombudsman, in any manner;
- (c) wilfully destroys or erases personal health information with the intent to evade an individual's request to examine or copy the information;
- (d) obtains another person's personal health information by falsely representing that he or she is entitled to the information; or
- (e) requires production of or collects or uses another person's PHIN contrary to section 26;

is guilty of an offence.

**Offence by employee**

63(2) Despite subsection 61(2), a person who is an employee of a trustee or information manager who, without the authorization of the trustee or information manager, wilfully discloses personal health information in circumstances where the trustee or information manager would not be permitted to disclose the information under this Act, is guilty of an offence.

**Offences by trustees and information managers**

63(3) A trustee or information manager who

- (a) collects, uses, sells or discloses personal health information contrary to this Act;
- (b) fails to protect personal health information in a secure manner as required by this Act; or
- (c) discloses personal health information contrary to this Act with the intent to obtain a monetary or other material benefit or to confer such a benefit on a trustee or other person;

is guilty of an offence.

**Due diligence defence**

63(4) No trustee or information manager shall be found to have contravened clause (3)(a) or (b) if the trustee or information manager can establish that he or she took all reasonable steps to prevent the contravention.

**Continuing offence**

63(5) When a contravention of this Act continues for more than one day, the person is guilty of a separate offence for each day the contravention continues.

**Prosecution within two years**

63(6) A prosecution under this Act may be commenced not later than two years after the commission of the alleged offence.

**Penalty**

64(1) A person who is guilty of an offence under section 63 is liable on summary conviction to a fine of not more than \$50,000.

**Directors and officers of corporations**

64(2) When a corporation is guilty of an offence, a director or officer of the corporation who authorized, permitted or acquiesced in the offence is also guilty of an offence and is liable on summary conviction to a fine of not more than \$50,000.

**NEWFOUNDLAND AND LABRADOR (not yet in force)**

**Offences and penalties**

88. (1) A person who wilfully

(a) obtains or attempts to obtain another individual's personal health information by falsely representing that the person is entitled to the information;

(b) makes a false statement to, or misleads or attempts to mislead, the commissioner or another person performing duties or exercising powers under this Act;

(c) obstructs the commissioner or another person performing duties or exercising powers under this Act; or

(d) destroys or erases personal health information with the intent to evade a request for access to the information,

is guilty of an offence and liable, on summary conviction, to a fine of not more than \$10,000 or to imprisonment for a term not exceeding 6 months, or to both.

(2) A custodian or information manager who

(a) collects, uses or discloses personal health information contrary to this Act;

(b) fails to protect personal health information in a secure manner as required by this Act; or

(c) discloses personal health information contrary to this Act with the intent to obtain a monetary or other material benefit or to confer such a benefit on another person,

is guilty of an offence and liable, on summary conviction, to a fine of not more than \$10,000 or to imprisonment for a term not exceeding 6 months, or to both.

(3) A custodian or information manager shall not be found to have contravened paragraph (2)( a) or (b) if the custodian or information manager can establish that all reasonable steps were taken to prevent the contravention.

**ONTARIO**

**Immunity**

69. No action or other proceeding for damages may be instituted against the Commissioner, the Assistant Commissioner or any person acting on behalf of or under the direction of either of them for

- (a) anything done, reported or said in good faith and in the exercise or intended exercise of any of their powers or duties under this Act; or
- (b) any alleged neglect or default in the exercise in good faith of any of their powers or duties under this Act.

**Offences**

72. (1) A person is guilty of an offence if the person,
- (a) wilfully collects, uses or discloses personal health information in contravention of this Act or its regulations;
  - (b) makes a request under this Act, under false pretences, for access to or correction of a record of personal health information;
  - (c) in connection with the collection, use or disclosure of personal health information or access to a record of personal health information, makes an assertion, knowing that it is untrue, to the effect that the person,
    - (i) is a person who is entitled to consent to the collection, use or disclosure of personal health information about another individual,
    - (ii) meets the requirement of clauses 26 (2) (b) and (c),
    - (iii) holds the beliefs described in subsection 26 (5), or
    - (iv) is a person entitled to access to a record of personal health information under section 52;
  - (d) disposes of a record of personal health information in the custody or under the control of the custodian with an intent to evade a request for access to the record that the custodian has received under subsection 53 (1);
  - (e) wilfully disposes of a record of personal health information in contravention of section 13;
  - (f) contravenes subsection 34 (2), (3) or (4) or clause 47 (15) (a), (e) or (f);
  - (g) wilfully obstructs the Commissioner or a person known to be acting under the authority of the Commissioner in the performance of his or her functions under this Act;
  - (h) wilfully makes a false statement to mislead or attempt to mislead the Commissioner or a person known to be acting under the authority of the Commissioner in the performance of his or her functions under this Act;
  - (i) wilfully fails to comply with an order made by the Commissioner or a person known to be acting under the authority of the Commissioner under this Act; or
  - (j) contravenes section 70.

**Penalty**

- (2) A person who is guilty of an offence under subsection (1) is liable, on conviction,
- (a) if the person is a natural person, to a fine of not more than \$50,000;
- and
- (b) if the person is not a natural person, to a fine of not more than \$250,000.

**Officers, etc.**

- (3) If a corporation commits an offence under this Act, every officer, member, employee or other agent of the corporation who authorized the offence, or who had

the authority to prevent the offence from being committed but knowingly refrained from doing so, is a party to and guilty of the offence and is liable, on conviction, to the penalty for the offence, whether or not the corporation has been prosecuted or convicted.

**No prosecution**

(4) No person is liable to prosecution for an offence against this or any other Act by reason of complying with a requirement of the Commissioner under this Act.

**Commencing a prosecution**

(5) No person other than the Attorney General or an agent for the Attorney General may commence a prosecution for an offence under subsection (1).

**SASKATCHEWAN**

**Offences**

64(1) No person shall:

- (a) knowingly contravene any provision of this Act or the regulations;
- (b) without lawful justification or excuse, wilfully obstruct, hinder or resist the commissioner or any other person in the exercise of the powers, performance of the duties or the carrying out of the functions of the commissioner or other person pursuant to this Act;
- (c) without lawful justification or excuse, refuse or wilfully fail to comply with any lawful requirement of the commissioner or any other person pursuant to this Act;
- (d) wilfully make any false statement to, or mislead or attempt to mislead, the commissioner or any other person in the exercise of the powers, performance of the duties or carrying out of the functions of the commissioner or other person pursuant to this Act;
- (e) wilfully destroy any record that is governed by this Act with the intent to evade a request for access to the record; or
- (f) obtain another person's personal health information by falsely representing that he or she is entitled to the information.

(2) Every person who contravenes subsection (1) is guilty of an offence and is liable on summary conviction:

- (a) in the case of an individual, to a fine of not more than \$50,000, to imprisonment for not more than one year or to both; and
- (b) in the case of a corporation, to a fine of not more than \$500,000.

(3) Every director, officer or agent of a corporation who directed, authorized, assented to, acquiesced in or participated in an act or omission of the corporation that would constitute an offence by the corporation is guilty of that offence, and is liable on summary conviction to a fine of not more than \$50,000, to imprisonment for not more than one year or to both, whether or not the corporation has been prosecuted or convicted.

(4) No prosecution shall be commenced pursuant to this section except with the express consent of the Attorney General for Saskatchewan.

(5) No prosecution shall be commenced pursuant to this section after the expiration of two years after the date of the discovery of the alleged offence.

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