



GARDINER ROBERTS LLP

BEST PRACTICES FOR PHIPA COMPLIANCE

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Note: Nothing in this presentation is provided as legal advice. You should consult the Act and your own solicitors for all purposes of interpretation



FACT SCENARIOS

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Scenario 1

Bam is 15 years old. His parents, Betty and Barney divorced three years ago. As a child, Bam was diagnosed with Attention Deficit Hyperactivity Disorder, and in junior high he began getting into fights frequently.

Betty now lives with her new boyfriend Fred, and Fred's daughter from his first marriage, Pebbles, as well as Bam.

Bam has become increasingly difficult to live with. He is prone to violent outbursts towards Pebbles and Fred and is causing Betty severe stress.



Scenario 1 (cont'd)

Recently, Bam announced that he would like to live with Barney. Barney has moved to another community and has no contact with Betty or Bam.

Bam was referred by the school principal to a psychologist, who diagnosed him as having Conduct Disorder and recommended individual and family counselling.

The psychologist referred Bam to the Bedrock Children's Centre ("BCC") for assessment and treatment.



Scenario 1(a)

Bam refuses to attend counseling.



Question 1: If Bam does not attend for counselling, but sessions are held to support his family members, can BCC open a file under Bam's name?

- ❖ The file should be opened under the family members' names rather than under Bam's name.
- ❖ Collecting personal health information ("PHI") without an individual's consent is prohibited (PHIPA, section 29), except where specifically authorized by PHIPA (i.e. section 36).



Question 1 (cont'd)

- ❖ If PHI is being collected, Bam's consent, or that of his substitute decision maker, is required unless an exception applies.
- ❖ Limited information can be collected as part of the family's file, if the family can be a client of the agency.
- ❖ Information may be collected from them about Bam as part of their family history.
- ❖ No more information may be collected than is necessary to provide the service.



Question 2: Can the BCC counsellors get credit for the service hours where Bam does not receive counselling services?

- ❖ If the family becomes clients of the BCC then the file would appropriately be opened in their names.



Question 2 (cont'd)

- ❖ If the MCYS awards credit for service hours for family counseling, then the counsellors can get credit for the service hours. However, if family counseling is not credited, and Bam has not consented to receiving services, then counsellors cannot get credit for the service hours provided to Bam's family.
- ❖ The awarding of credit hours cannot dictate the name in respect of whom a file is opened!



Question 3: Is it permissible for BCC to release information to the psychologist who referred Bam regarding whether Bam has followed through with the referral?

- ❖ If the psychologist is providing ongoing care, then he/she is part of Bam's circle of care and there is implied consent to the sharing of PHI.
- ❖ In this situation, Bam's express consent is not required, but both HICs can rely on his assumed implied consent. (PHIPA, s. 20(2))
- ❖ If the psychologist is not providing ongoing care, then no information should be provided without Bam's consent.



Scenario 1(b)

Bam decides to participate in therapy with the BCC. After some time, a bed becomes available at the BCC's residential facility and his counsellor suggests that Bam participate in a residential program.



Question 4: Can Bam consent to the residential service?

- ❖ Bam cannot consent to placement in a residential facility on his own. Betty's consent is also required.
- ❖ According to section 27(2) of the *Child and Family Services Act*, a service provider may provide a residential service to a child who is less than 16 years of age only with the consent of the child's parents.
- ❖ Bam could still consent to treatment, if he is capable of doing so, pursuant to the *Health Care Consent Act, 1996*.



Question 5: Can Bam consent to the use or disclosure of his personal health information in connection with this program?

- ❖ Yes, Bam can consent to the use or disclosure of his PHI.
- ❖ However, there are a number of provisions in PHIPA that permit use and disclosure of PHI without consent (i.e. mandatory disclosures, reports for health system planning, etc.)



Question 5 (cont'd)

- ❖ An individual is capable of consenting to the collection, use or disclosure of PHI if he or she (section 21 of PHIPA):
 - ❖ is able to understand the information relevant to deciding whether to consent to the collection, use or disclosure, and
 - ❖ is able to appreciate the reasonably foreseeable consequences of giving or not giving consent.



Question 6: If Bam and Betty do not consent to this placement, can BCC participate in a Residential Placement Advisory Committee Review (RPACR)? If so, what information can be provided?

- ❖ Yes, BCC can participate in a RPACR despite the lack of consent from Betty and Bam to participate in this process.
- ❖ An agency has discretion to provide information about a client for a RPACR (section 43(1)(e) of PHIPA).
- ❖ BCC may only disclose PHI that is reasonably necessary for the committee to perform its statutory functions.



Scenario 1(c)

Bam continues to attend for individual and family counselling at the BCC.

In an individual counselling session, he confides in his counsellor that he thinks he has difficulty seeing small print and gets headaches when he tries to read more than a page at a time, but he will not have his eyes tested because he refuses to wear glasses (because he will look like a freak).

Bam implores his counsellor not to tell Betty or anyone else. Some weeks later, Bam has a follow-up appointment with his psychologist, and Betty requests that a copy of Bam's file be sent to the psychologist.



Question 7: Are there limits to what can be provided to the psychologist?

- ❖ Bam can restrict BCC from disclosing all or part of his personal health information to Betty and to his psychologist.
- ❖ This has the effect of placing certain information in a “lock box”.



Question 7 (cont'd)

- ❖ The BCC staff can advise the psychologist of the fact that he will not have all of the PHI that may be necessary.
- ❖ They are required to do so only if they are of the view that the “locked” information is reasonably necessary in order for the psychologist to provide care to Bam.



Question 7 (cont'd)

- ❖ The staff can also suggest to Bam that he share this fact with Betty and his psychologist.
- ❖ Without Bam's express consent, the psychologist could not access this information.
- ❖ However, Betty would be Bam's Substitute Decision Maker, even if he is capable, and may have access to the file, except where the information relates to treatment or counseling which Bam has decided to obtain on his own. (PHIPA s. 23(2)).



Scenario 1(d)

BCC receives a letter from Betty's lawyer stating that he requires a complete copy of Bam's file in connection with Barney and his matrimonial dispute. Subsequently, Betty also asks for a copy of the file.



Question 8: What can be provided?

- ❖ Having already decided that Bam is capable of consenting to the collection, use or disclosure of his PHI, the BCC should not provide a copy of Bam's information to either Betty or the lawyer without Bam's consent.
- ❖ However, BCC can nonetheless disclose Bam's PHI based on Betty's consent - see s.23(1)[2] of PHIPA. But, since the provisions is discretionary, best legal advice for BCC is not to disclose in this situation based on a parent's consent.



Question 8 (cont'd)

- ❖ Since Betty was also a client of BCC, she can obtain access to that part of the file that relates solely to her.
- ❖ She would be entitled to access the portion of the file that relates to Bam's PHI, in her capacity as Substitute Decision Maker for Bam, subject to the access exceptions (where the information relates to counseling or treatment to which Bam consented on his own).
- ❖ Where there is a conflict between Bam and Betty, or where Betty appears to seek the record for her own interest, the best advice is for BCC not to provide it.



Scenario 1(e)

Barney then attends at BCC and demands to see his son Bam's file, claiming "I'm still his parent".



Question 9: What can BCC give to Barney?

- ❖ PHIPA grants a right of access only to the individual to whom the record relates. If Bam were not capable of consenting to the disclosure of his health information, and Betty (as his substitute decision maker) was not available, then Barney could obtain access to the file.
- ❖ PHIPA allows parents to participate in their children's health care decisions. It allows parents to consent to the collection, use or disclosure of PHI. (s. 25(1)).
- ❖ However, since the custodial parent outranks the access parent with respect to substitute decision-making, then Barney could still not obtain access without Betty's consent.



Question 10: What can BCC give to Barney if Barney becomes Bam's custodial Parent?

- ❖ If Bam is capable of consenting to the disclosure of his health information, Bam should be given the opportunity to give consent.
- ❖ Section 23(1)-(2) of PHIPA says that a custodial parent can give consent to collection, use or disclosure of PHI if the child is under 16. Section 25(1) extends this authority to any instruction a person can give, including with respect to access.



Question 10 (cont'd)

- ❖ Further, section 23(3) says that in the event of a conflicting decision to consent between the parent and a capable child under 16, the child's decision prevails.
- ❖ Where custody is not established, Barney and Betty would rank equally as substitute decision makers. Therefore, in the event of a conflict, the Public Guardian and Trustee could be involved.



Scenario 1(f)

Bam continues to attend individual and group therapy at BCC.

One of BCC's therapists, a social worker, Dina, who was not previously involved in his care, suggested to Bam and his mother that immaturity on Bam's part, and lack of discipline by Betty, rather than any psychological diagnosis, were the causes of Bam's behaviour.

Betty and Bam then marched into the BCC director's office and demanded the therapist's personnel file in order that they could "take appropriate action".



Question 11: Can the agency release this information without the therapist's consent?

- ❖ Any information relating primarily to BCC's employees do not form part of Bam's PHI record.
- ❖ As such, the employee's personnel record is not subject to PHIPA restrictions with respect to, for instance, the client's consent and disclosure.



Question 11 (cont'd)

- ❖ There is no legislation that governs employee information in this situation, but it would not be appropriate for BCC to provide the employee's personal information in these circumstances.



Scenario 1(g)

Dina is fascinated by Bam's case and feels she would like to discuss it with her former supervisor, a social worker who practices independently in Bedrock. Since he is part of the community of health professionals in Bedrock, Dina assumes that he is part of Bam's circle of care and that she has Bam's implied consent to sharing his personal health information.



Question 12: Is Dina correct?

- ❖ Dina is not correct in assuming all members of the Community of Health Professionals in Bedrock are part of Bam's circle of care.
- ❖ In this situation, her former supervisor may form part of Bam's circle of care, if Dina is seeking her mentor's advice with respect to Bam's care.



Question 12 (cont'd)

- ❖ An individual's circle of care is the group of health information custodians that can collect, use, or disclose PHI (without having to obtain express consent) for the purpose of:
 - (a) providing health care to the individual, or
 - (b) helping to provide health care to the individual.

- ❖ In this situation, if Dina proposes to give Bam's information to the former supervisor to obtain advice on the health care to be provided to Bam, the supervisor would fall under the second category in helping to provide health care.



Question 12 (cont'd)

- ❖ If Dina simply wanted to gossip about Bam's care with her former supervisor, he would not be part of Bam's circle of care.



Scenario 2

Bart is a client of the Springfield Children's Centre. His parents, Marge and Homer, are in the midst of divorce proceedings.

Due to Bart's report about difficulties that his sister Lisa and mother Marge seem to be having, Bart's counsellor recommends to Marge that they participate in a family-focused program. As the Springfield Children's Centre does not have such a program, they propose to refer Marge and her children to Shelbyville Family Centre ("SFC").



Scenario 2 (cont'd)

Marge says she is prepared to do what the counsellors recommend, but is very reluctant to attend at the SFC because her estranged husband, Homer, provides maintenance services to that facility, and his new girlfriend, Maude is a therapist there.

After speaking with the SFC privacy officer, Marge agrees that she and her children will become clients, but registers under a pseudonym family name (Sampson) and asks that neither Homer nor Maude have anything to do with their file or treatment.



Scenario 2 (cont'd)

Some weeks later, Homer calls Marge and makes comments about her depression and coping mechanisms, all of which could only have been known to Homer from a review of the family's file at the SFC.

Marge immediately complains to the privacy officer, who starts an investigation.

The privacy officer also takes the step of inserting a VIP flag on the Sampson's files, such that anyone accessing the files would have to confirm their need to access such files and acknowledge that the files are private health records.



Scenario 2 (cont'd)

The privacy officer reviews the audit trail from the electronic records and determines that it was, in fact, Maude who had accessed the Sampson's records.

As per the SFC Human Resources Policy, the privacy officer takes steps to convene a meeting to address the situation. However, the meeting must include a Human Resources representative, a union representative, and Maude's manager, given that she will be confronted with acts of misconduct.

This meeting takes three weeks to schedule and in the interim, Maude continues to access the Sampson's file.



Question 1: What would the Information and Privacy Commissioner/Ontario be likely to do in the event Marge complains to the Commissioner?

- ❖ See Order HO-002 by the Information and Privacy Commissioner/Ontario regarding a similar situation at Ottawa Hospital, which required:
 - ❖ that the Hospital review and revise its Privacy and Human Resources policies to ensure that they comply with the requirements of the Act and its regulations, and acknowledge the paramount importance of protecting patients' PHI;



Question 1 (cont'd)

- ❖ that the Hospital implement a protocol to ensure that reasonable and immediate steps are taken, upon being notified of an actual or potential breach of an individual's privacy, to ensure that no further unauthorized use or disclosure of records of PHI is permitted; and



Question 1 (cont'd)

- ❖ that the Hospital ensure that all employees and/or agents of the Hospital are appropriately informed of:
 - a) their duties under the Act pursuant to Section 15(3)(b) of PHIPA; and
 - b) their obligations to comply with the revised information practices of the Hospital pursuant to Section 10(2) of PHIPA.



Advice from the Information and Privacy Commissioner/Ontario

Unless policies are inter-woven into the fabric of a Hospital's day-to-day operations, they will not work. Hospitals must ensure that they not only educate their staff about the Act and information policies and practices implemented by the Hospital, but must also ensure that privacy becomes imbedded into their institutional culture.



Question 2: What steps would be taken within the IPC to deal with this complaint?

INTAKE STAGE

Screening

General Intake

Deemed Refusal

Failure to Disclose

Dismissed

Settled

Order

Settled

Order

Settled

MEDIATION STAGE

Time Extension

Reasonable Search

Regular Mediation

Settled

Order

Settled

Order

Settled

ADJUDICATION STAGE

Reasonable Search Review

Regular Review

Expedited Access Review

Settled

Order

Order

Settled

Order

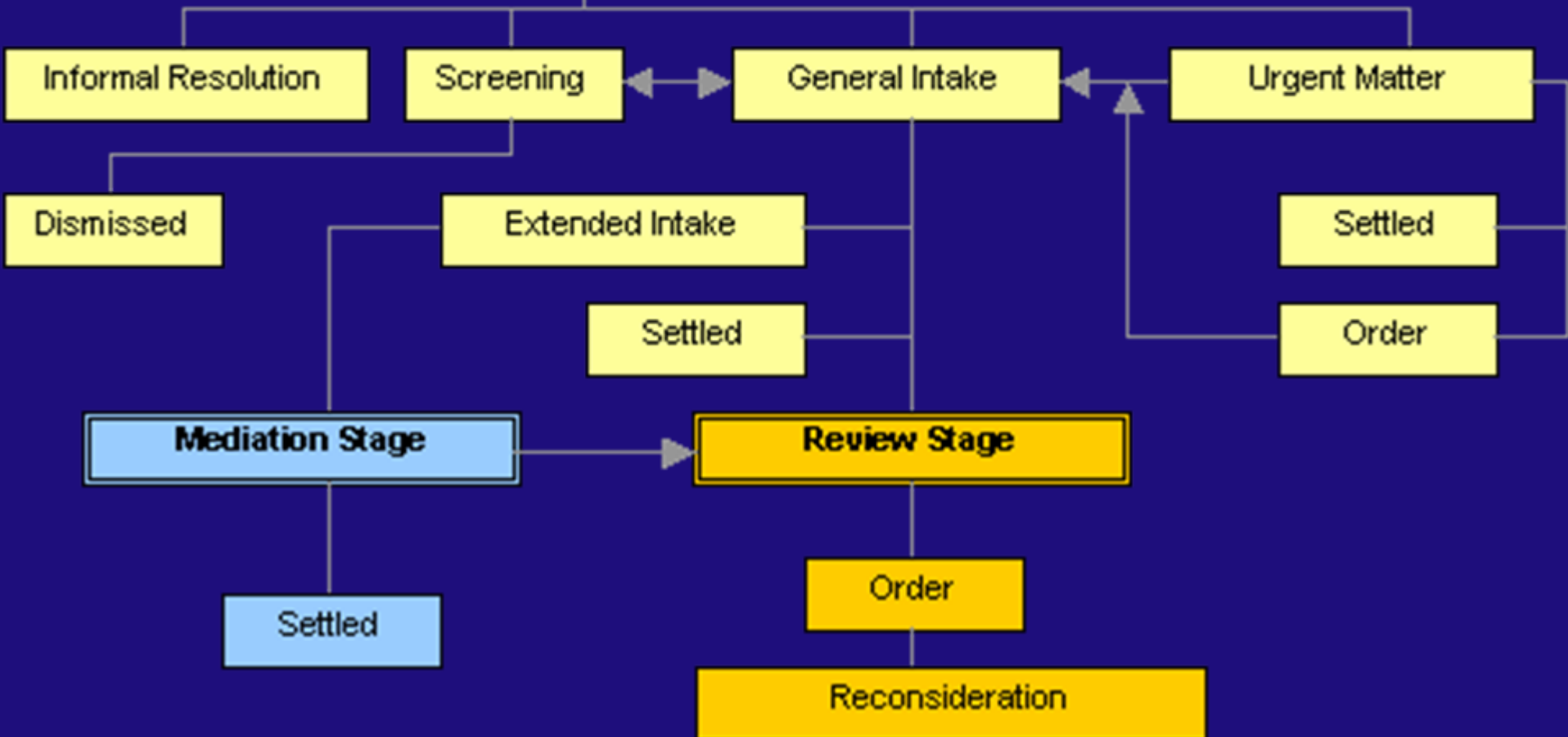
Reconsideration

Reconsideration

Reconsideration

COLLECTION, USE,
DISCLOSURE
COMPLAINT

INTAKE STAGE





Scenario 2(a)

Staff at the SFC requests copies of Bart's clinical records from the Springfield Children's Centre. They are advised that the records were destroyed once Bart's care was taken over by the SFC.



Question 3: Can files be destroyed?

- ❖ PHIPA does not impose particular requirements with respect to which or how long clinical records must be kept because different HICs have different retention periods.



Question 3 (cont'd)

- ❖ As an example, the Ontario College of Social Workers and Social Service Workers sets out a number of guidelines on these issues in its *Code of Ethics and Standard Practice*.
- ❖ The *Code* permits social workers to destroy client records after 7 years of retention. Longer retention periods, however, may be necessary in cases of sexual abuse, accidents involving minors, and where there is potential or ongoing litigation. In these cases, the records should be maintained until 6 years after the child turns 18, and in the case of sexual abuse, permanently.



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