NOTEBOOK ON ETHICS, LEGAL ISSUES, AND STANDARDS IN COUNSELLING

Glenn Sheppard, Ed.D., CCC

A Few Interesting Decisions from Case Law

As you know, the interpretation and the development of our ethical practices and professional standards can be greatly influenced by decisions rendered by our courts, as well as by quasi-judicial judgements, such as, those made by provincial access to information and privacy commissioners. I have chosen the following interesting case examples to demonstrate this point:

Case I: A school Counsellor's Notes

In 1995, a mother, residing within the Cranbrook School District of British Columbia, sought access to an elementary school counsellor's notes from counselling sessions with the woman's two children. She said that she was interested not in what the notes might say about what the children had said to the counsellor but rather what the counsellor had said to them.

The school counsellor and her school district refused to release the counselling notes. The School District invoked the argument that such refusal was permitted under section 19(1)a of the Freedom to Information Act (FIPPA) of British Columbia. This section permits discretionary refusal of such a request if disclosure can reasonably be predicted to negatively affect the mental or physical health or the safety of the person(s) involved. The Information and Privacy Commissioner of B. C. was asked, by this parent, to rule on this refusal decision. The commissioner ruled that the counsellor's notes were in the custody and control of the School District which meant that the Commissioner had the jurisdiction to rule on the matter because such notes were covered by the provisions of the FIPPA.

The counsellor, dissatisfied with the Commissioner's ruling, took the matter to Court. She argued before the Court that her notes were really her personal possession made only as an aid to her and , in fact, she reasoned she was not required to keep counselling notes anyway and that she kept them in a notebook at home.

The Court ruled in favour of the Commissioner's view that the notes were under the custody and control of the School District because they originated as an aspect of the counsellor's work as a District Employee. Therefore, the question of access to these counselling notes came under the authority of the freedom in Information and Protection of Privacy Act.

The jurisdictional decision notwithstanding, the question of whether or not the notes should be released in this instance warranted additional consideration. On this matter the counsellor argued that she had an ethical obligation to keep the notes confidential. The court was understanding of this position, however, the issue of disclosure was not specifically before the Court in this case but rather the issue of jurisdiction. The judge did show some concern for the protection of children's right to privacy. It was noted that in the case of a child the parent or guardian normally has the right to consent to the release of the child's counselling record. In this case, it was the parent who was requesting the release of the child's counselling record. In this case, it was the parent who was requesting the release and was,

therefore, in a position to consent to her own request. This raises privacy protection concerns for sure! By the way, this decision did not necessarily diminish the school counsellor's responsibility to treat her counselling notes as confidential information. (Nielson v. British Columbia(Information and Privacy Commissioner), 08/07/1998. B. C. J. No. 1640, Vancouver, B. C.)

Case II: The Firing of a Social Worker

In July, 2000, the Newfoundland Supreme Court dismissed the claim of a social worker that he was unfairly fired for misconduct. In 1979-81, the social worker was working as a youth counsellor at a St. John's detention center for girls where a girl of 14 was admitted and became one of his clients there. It was clear to the Court that the counsellor has consensual sex with this girl just after she turned sixteen and while she was living in a community group home. This relationship continued for nearly three years and was not disclosed by the girl until 1995. At this time the social worker was a regional supervisor for the Youth Detention Center where he and the girl had first met. The court ruled that dismissal by his employer was not an unreasonable consequence for this type of conduct. In the light of this case, readers might like to review the "post-termination' prohibition as stated in the CCA Code of Ethics. (Evening Telegram, St. John's, NF, 15/07/00)

Case III: Access to the Questions, Answers, and Scoring Procedures of Standardized Tests

In 1994 parents residing within the jurisdiction of the Lincoln County Board of Education wanted to challenge the school psychologist's decision that their daughter was not a gifted student. In making this judgement, the psychologist had relied heavily on the results of the Stanford Binet Intelligence Scales.

The School Board refused the parents' "freedom of information" request to see all the answers and the scoring procedures for their daughter's performance on the Stanford-Binet. School authorities argued that they had a discretionary right of refusal under a section of the Ontario Freedom of Information and Protection of Privacy Act.

They further reasoned that the Stanford-Binet was purchased from a third party, in this case, Nelson Canada, and that maintenance of confidentiality with respect to answers and scoring procedures was essential to the integrity and continuing validity of this psychometric instrument. Nelson Canada also argued that disclosure would reveal a trade secret and have economic consequence for it.

When the parents referred this case to the Information and Privacy Commissioner his decision was that the one-page creativity test developed by the School Board should be released to the parents along with a separated copy of the fourteen pages of the Stanford-Binet Booklet on which the student's answers were recorded. Because a release of this booklet would reveal the scoring pages and invalidate the Test, the School Board refused the order and went to Court. The Board argued that the Commissioner (actually an assistant commissioner in this instance) ignored the significant consequences of releasing these pages, particularly those relating to the Vocabulary and Absurdities sections of the Test. The Court agreed with the School Board and considered the Commissioner's decision unreasonable because he had failed to take into account these consequences to the validity of the Test. The commissioner's decision was overturned by the Court and the Board did not have to make any such release of the

Stanford-Binet information. (Lincoln County Board of Education v. Ontario (Information and ORivacy Commissioner). [1994] O.J. No.2899(Div. Ct.)

Case IV: A Young Person's Consent to Common Law

(I am including this decision of fourteen years ago because it surprised many people at the time. Also, because the concept of competency to consent has emerged since that time as taking precedence over any arbitrary age limit such as in the concept of 'minor')

In this case, a pregnant sixteen year old girl had left home to seek access to an abortion. Her parents were opposed to her obtaining an abortion on moral grounds, and they went to court to prevent it arguing that she was not competent to give such consent. Although the court expressed empathy for the parents in these circumstances, it concluded that the girl understood the abortion procedure and the associated risks. She was therefore judged competent to give her informed consent and her parents' objections were overruled. Interestingly, the Court ruled that a parent's rights to make treatment decisions for their child terminates if and when the child achieves a sufficient understanding and intelligence to fully comprehend the treatment proposed on recommended. (C. v. Wren, 1987, 35 D. L. R. (4^{th}) 419 Altert

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Child abuse and the duty to report

Most of us are aware of our duty to report suspected instances of child abuse. However, I do speak with counsellors who, despite their commitment to uphold this duty, have not yet read the full extend of this responsibility as stated in the Act that outlines this statutory duty in the province in which they work. I thought, therefore, that it might be helpful to quote in this Notebook the complete text of this responsibility as stated in the Act in Newfoundland and Labrador (it is very similar in all other provinces). It is found in the **Child, Youth and Family Services Act, S.N.L. 1998 C-12.1.** Section 15 of this statute contains the Duty to Report. It states that any person in the course of their professional duties who has reasonable grounds to suspect that a child is in any of the circumstances as started in Section 14 shall immediately report the matter to a Director, a social worker, or a peace officer. In Section 2(1)(d) a child is defined as **"..person actually or apparently under the age of 16 years."**

Under Section 14, a child is in need of protective intervention where the child is:

(a) is, or is at risk of being, physically harmed by the action or lack of appropriate action by the child's parent;
(b) is, or is at risk of being, sexually abused or exploited by the child's parent;
(c) is emotionally harmed by the parent's conduct;
(d) is, or is at risk of being, physically harmed by a person and the child's parent does not protect the child;
(e) is, or is at risk of being, sexually abused or exploited by a person and the child's parent does not protect the child;
(f) is being emotionally harmed by a person and the child's parent does not protect the child;
(g) is in the custody of a parent who refuses or fails to obtain or permit essential medical, psychiatric, surgical or remedial care or treatment to be given to the child when recommended by a qualified health practitioner;
(h) is abandoned;
(i) has no living parent or a parent is unavailable to care for the child and has not made adequate provision for the child's care;
(j) is living in a situation where there is violence; or
(k) is actually or apparently under 12 years of age and has
    i. been left without adequate supervision,
    ii. allegedly killed or seriously injured another person or has caused serious damage to another person's property, or
    iii. on more than one occasion caused injury to another person or other living thing or threatened, either with or without weapons, to cause injury to another person or other living thing, either with the parent's encouragement or because the parent does not respond adequately to the situation.

P.S. If you have not already done so I invite you to obtain a copy of our CCA publication Standards of Practice for Counsellors, and if you already have copy please tell others about it. And remember, your comments on anything that appears in the Notebook are always welcome.

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Custody Evaluations

***Counselling Practice Alert ***

It seems appropriate for the Canadian Counselling Association to issue occasional 'Practice Alerts' to its members. Such alerts originate with the CCA Ethics Committee and are based on its analysis and reflection of enquires it receives and/or complaints made against CCA members over a period of time. The alert is intended to focus the attention of members on some aspect of counselling practice including on the ethical challenges associated with practice in a particular area. This is our first alert! It concerns the area of child custody evaluations. These are evaluations typically used in legal disputes around a child's access, care and relationship with biological, foster and adoptive parent(s), and/or with any other legal guardian.

Child custody evaluations can be a high-risk practice area because they typically occur within an adversarial circumstance in which there is an increased probability that one or more parties will be dissatisfied by an evaluation report. Such dissatisfaction can lead to a disciplinary complaint. The CCA Ethics Committee has dealt with four such complaints against CCA members in the past 24 months. Although only one of these complaints led to a judgement of significant inappropriate conduct, in its investigation the Committee noted some procedural and reporting deficiencies with respect to two of the others. Regardless of whether complaints are warranted or the investigative outcome, complaints cause considerable stress and uncertainty for members.

Counsellors, therefore, are advised to consider the following before engaging in this practice area, and when conducting child custody evaluations.

- Before engaging in any new practice area, members are reminded of their ethical obligations as expressed in articles A3 Boundaries of Competence and A4 Supervision and Consultation of our Code of Ethics.
- Our draft of Standards with respect to Boundaries of Competence now states the following:
  - Counsellors should extend their professional services to any additional areas of expertise only after they have secured adequate supervision from supervisors with demonstrative expertise in the practice area.
  - Supervisors should have a high level of expertise in the area. Whenever possible preference should be given to supervisors whose area of expertise is verified by an independent process such as: certification, registration, or licensing.

The following guidelines should prove helpful:

- Always give priority to the best interests of the child in all custody evaluations.
- Ensure that you have no prior or current relationship with the children and the adults primarily involved in the custody evaluation other than that of evaluator.
- Counsellors must provide objective and impartial assessments that must not be compromised by the perspectives of the individuals or agency requesting the evaluation or paying for it. Ideally, custody evaluations should be court-ordered, or mutually agreed on by participants.
- Secure a signed agreement before beginning the evaluation which clarifies such aspect as:
  - financial arrangement
  - who will be seen
  - time frame

    - who will receive copies of the report
- The counsellor should obtain informed consent from the adults involved and from older children to the extent possible. This should include informing participants as to who will receive the report and the associated limits to confidentiality.
- When counsellors have reasonable grounds to suspect child abuse during the course of their custody evaluations they must adhere to their statutory obligations to report it to the appropriate authorities.
- Counsellors should keep complete records of the evaluation process.
- Counsellors should restrict comments and recommendations to those which can be substituted by the sources of data obtained and the integration of all available information,
- Other useful considerations include: avoid confusing therapeutic and assessment roles, seek to ensure at the outset of the assessment that you have offered equal opportunity for the disputing parties to present their views, ensure balanced access to the key parties, avoiding discussion of events, observations or conclusions until the report is completed and fastidiously record all contacts or events (who, duration, content, etc.).

The following references are helpful resources;

Bricklin. B. (1995). The Custody Evaluation Handbook. New York: Brunner/Mazel.

McHale, M. J.(1991). Family Law. In M. R. Uhlemann and D. Turner (Eds.) (1998), A Legal Handbook for the Helping Professional. Second Edition. Victoria, B.C.: Sedgewick Society for Consumer and Public Education, P140- 162.

Stahl, P.M. (1994) Conducting Child Custody Evaluations: A Comprehensive Guide. Thousand Oaks. Sage.
Halon, Robert L. (1990). “The comprehensive child custody evaluation”. American Journal of Forensic Psychology, 8, 3, 19-46.

Kaplan, F K., Landau, Barbara L. and WcWhinney, Robert L.(1988). Custody/Access Assessment GuIdelines. Toronto: Ontario Psychological Foundation.

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Dealing with Requests for Information

Counsellors are frequently confronted with requests for information about their clients. These requests may be of an informal nature, expressed by telephone, letter, and sometimes through e-mail. Other requests can he more formal, such as a legal request for information known as a subpoena. To this issue of COGNICA I have a few notes on dealing with those informal requests (look for the next issue for notes on responding to subpoenas)

The following vignettes illustrate a variety of ways by which informal requests can he made and their potential for inadvertently violating counsellor-client confidentiality.

Vignette I

Barbara is a secretary for a private practice with tour full time counsellors, one of whom is clinical director. She receives the following telephone request.

Caller, "I am Albert Newell and I know that my wife, Shirley is going to your centre for counselling and would like to speak with whoever she is seeing there".

Barbara, “Mrs. Newell is being seen by Miss Kennedy. Miss Kennedy is not available now but I can have her call you”.

Vignette II

A counsellor, working atone in a part-time private practice, has been seeing a 23 year old female client. On her first visit she was accompanied by her father, although the father did not participate in the counselling session. The client has attended two sessions and the counsellor subsequently receives the following telephone call.

Caller, ‘Hello, I am Mark Grossman, Simone Grossman’s father. You might remember that I came and waited for her on her first visit.’

Counsellor, ‘Hello, Mr. Grossman, yes I do remember your visit was very supportive of Simone. What can I do for you?’

Caller, ‘Well I would like to come in to speak with you about Simone’
Counsellor, ‘Okay, Mr. Grossman, would Friday at 2 pm be okay for you’.

Vignette III

An addictions counsellor receives a letter from Ms. Breton, a local lawyer. In the letter, Ms. Breton identifies Mr. Crane as one of the counsellor’s clients and later in the letter she makes the following request. “I am presently preparing a legal claim on behalf of Mr. Crane and he has given me permission to speak to you. We both believe that you may have information which can help with this claim. Please phone my office so that we can find a mutually satisfactory time to meet”.

The counsellor phones Ms. Breton’s office, and as requested and arranges an appointment.

What do these three vignettes have in common? In my opinion, the secretary and both counsellors have acted inappropriately. The secretary has made an inappropriate disclosure and each of the counsellors has acted without the benefit of client informed consent.

In Vignette l Barbara has confirmed that Mrs. Newell is a client at the clinic and has also named her counsellor. The caller is not entitled to any of this information, even if he is the client's husband. In any case, a telephone call cannot reliably confirm the caller's identity.

An appropriate response by the secretary would be something like, "I am sorry but I am not at liberty to provide information about any client. In fact, we don't disclose who our clients are or provide any information unless we have their permission to do so. You may speak to Ms. Kennedy, our Clinic Director if you wish".

An appropriate alternative would be for the secretary to refer all such calls to the Director or another counsellor who could make a similar response to such requests.

Vignette II In this circumstance, the counsellor will need Simone's informed consent before agreeing to meet with her father. So a response something like "I am sorry Mr. Grossman but since Simone is an adult, I will need her permission to meet with you. Even then, I would prefer to see both of you together".

Let's suppose that Mr. Grossman responds with "Oh, I understand but I do have her permission to speak with you". This would still not fulfill the conditions for informed consent. It would be appropriate to reply with something like 'It is not that I don't believe you Mr. Grossman, but it is my obligation to get permission directly, so I will need to hear from Simone. Maybe she and I can discuss your request when she comes for her next visit unless you can come together then".

Vignette lll Even though this request arrives with more apparent formality, it too, must meet the conditions of informed consent. There is no completed informed consent form accompanying the letter. Even if there was such a form with the letter it would not be appropriate to discuss the request with the client before formulating a reply.

In summary, such requests from lawyers should be treated like any other informal request that may impact on a client's confidentiality. Without the client's consent, it would be inappropriate to confirm to the lawyer that Mr. Crane is, in fact, your client.

[I welcome critical comment on any of the vignettes or opinions expressed in these notes.]

Notebook on Ethics, Legal Issues, and Standards for Counsellors

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Duty to Warn

In our Code of Ethics we have the following declaration:

> *B3. Duty to Warn*
> *When counsellors become aware of their client's Intent or potential to place others in clear or imminent danger, they use reasonable care to give threatened persons such warnings as are essential to avert foreseeable dangers.*

This duty has emerged in recent years as both an ethical obligation and a legal principle. However its status as a legal duty remains somewhat unclear in Canadian case law and there is no general overarching statutory provision to assist us. However, since the landmark Tarasoff duty to warn case in the United States in 1974 that country has developed an extensive body of case law and has enacted many duty to warn legislative statutes. This difference between the two countries may reflect our different legal traditions with Canada influenced by the reluctance of English courts to accept the concept of vicarious liability in which professionals can be held liable for injuries inflicted by clients on third parties.

Very briefly, the Tarasoff case involved Dr. Thomas Moore, a psychologist working at the Counselling Centre of the University of California at Berkeley. One of his clients at the Centre was a 26 year old graduate student who during his counselling sessions disclosed his wish to kill Taliana Tarosoff, his girlfriend. Dr. Moore took his clients disclosure seriously and reported his concerns to the campus police and expressed his intention to proceed with committal of his client for a psychiatric evaluation. The campus police interviewed the student but released him from custody when he promised to stay away from Ms. Tarasoff. Neither the police nor Dr. Moore warned Taliana Tarasoff of the threat and the student did not return to see his counsellor. Just two months later he fatally stabbed her on the steps of her parents' home. Her parents initiated a lawsuit against Dr. Moore, the police, and the Board of Regents of the University. Although the Tarasoff claim was dismissed twice in the lower courts, when it went to the Supreme Court of California it concluded that Dr. Moore had a duty to warn Ms. Tarasoff or her parents of the threat. The court stated that confidentiality must yield to the duty to prevent danger to others when that danger is foreseeable. This frequently referenced case gave rise to the now well known maxim expressed by the judge at the time "the protective privilege ends when the public peril begins."

A number of court cases in Canada have referred to the Tarasoff decision and it has been mentioned in a number of legal judgements. Although there has been no exact example of this case in Canadian law, Picard and Robinson, authors of Legal Liability of Doctors and Hospitals in Canada, express the following view:

> *Despite the dearth of Canadian case-law, it seems likely that, faced with a true Tarasoff issue, a Canadian court would endorse the general principles underlying the California Supreme Court decision. At some point the need to protect the public from imminent danger becomes paramount, and at that point the doctor's duty of confidentiality ends and is replaced by a duty to warn the person or persons at risk. (1996, p. 34)*

In 1999 the Supreme Court of Canada, in the case of Smith v. Jones, did rule on the appropriateness of breaking confidentiality in a particular public safety circumstance. In this case, Jones was referred to Dr. Smith by his defence lawyer for a psychiatric evaluation following his being charged with the aggravated sexual assault of a prostitute in Vancouver. During the evaluation Jones disclosed to Dr. Smith, in some detail, his plans to kidnap, rape and kill prostitutes. Dr. Smith was not called to testify at Jones's trial at which he pleaded guilty to aggravated assault.

The psychiatrist felt that he had to disclose, for the sake of public safety, what he knew of Jones' expressed intentions and he made application to the British Columbia Supreme Court for permission to disclose the information to the Crown and to the police. The court ruled that he had a duty to make such a declaration, Jones' lawyer argued that such a disclosure would be a breach of his lawyer-client privilege since he had referred Jones to Dr. Smith. Dr. Smith made the disclosures.

Jones took the case to the Supreme Court of Canada. It unanimously ruled that not even solicitor-client privilege is absolute but may have to be breeched in certain circumstances in which there is a danger to public safety. The nine justices found that Dr. Smith had acted appropriately in the particular circumstances. However, they, unlike the B.C. Supreme Court, did not clarify if the duty to warn in this case was mandatory or discretionary. However, the court set out the following three factors that must be considered when deciding when the concern for public safety could warrant the breaching of lawyer-client privilege. They are:

1. Is there a clear risk to an identifiable person or group of persons?
2. Is there a risk of serious bodily harm or death?
3. Is the danger imminent?

(Smith v. Jones, 1999, scc.)

Despite the fact that Canadian law is not yet crystal clear with respect to our duty to warn, this Supreme Court decision goes a long way to clarify this ethical/legal obligation. It is clear that these three factors as the test of the risks to public safety apply not only for lawyers and psychiatrists but for all other professionals who have fiduciary obligations. This includes all of us as counsellors and it is for this reason that we have provided on page 9-10 of our Standards of Practice for Counsellors steps and actions to be taken should any of us have to act on this challenging ethical duty. I invite you to read it carefully, and to seek opportunities to discuss it with colleagues.

Notebook on Ethics, Legal Issues, and Standards for Counsellors

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What is Counselling?

A Search for a Definition

Those of us who work as professional counsellors are confident that we know what counselling is and when given an opportunity we are ready and eager to tell others what we do. However, when challenged to provide a crisp, comprehensive, and boundary-setting definition of counselling, we often falter. This may be because of the diversity of counselling approaches, its grounding in many theoretical perspectives, and the range of human problems for which counselling can be helpful. This definitional challenge is made all the more difficult because of the myriad of uses and activities for which the term 'counselling' is applied.

CCA is now being asked to create its definition of professional counselling. Those who request such a definition hope for some relief from the current state of semantic promiscuity, and for assistance in determining if a particular activity is within the counselling domain or outside it. Given the current striving for the statutory regulation of counselling it is assumed that a clear and comprehensive associational definition could provide the basis for establishing the scope of practice provision within any regulatory statute.

For this **Notebook** I thought it might be appropriate to ask all our members to reflect on this challenge of creating a CCA definition of counselling. You can help by sharing definitions with us, both any that you have found useful and any that you have created.

As way of getting the ball rolling, I am including the following definitions of professional counselling from my collection:

- The British Association for Counselling (BAC), now the BACP, may have been the first professional association to adopt a definition of professional counselling. In 1986 it published the following definition:

Counselling is the skilled and principled use of relationship to facilitate self- knowledge, emotional acceptance and growth and the optimal development of personal resources. The overall aim is to provide an opportunity to work towards living more satisfyingly and resourcefully. Counselling relationships will vary according to need but may be concerned with developmental issues, addressing and resolving specific problems, making decisions, coping with crisis, developing personal insights and knowledge, working through feelings of inner conflict or improving relationships with others.

The counsellor's role is to facilitate the clients work in ways that respect the client's values, personal resources and capacity for self-determination.

BAC (1986) **Counselling-Definition of terms in use with expansion and rationale** (Information Sheet 1). Rugby: British Association for Counselling.

- In 1993, Feltharn and Dryden included the following definition of counseling in their specialized ***Dictionary of Counselling***:

Counselling is a principled relationship characterised by the application of one or more psychological theories and a recognised set of communication skills, modified by experience, intuition and other interpersonal factors, to clients' intimate concerns, problems or aspirations. Its predominant ethos is one of facilitation rather than of advice-giving or coercion. It may be of very brief or long duration, take place in an organisational or private practice setting and may or may not overlap with practical, medical and other matters of personal welfare.

It is both a distinctive activity undertaken by people agreeing to occupy the roles of counsellor and client and it is an emergent profession.... It is a service sought by people in distress or in some degree of confusion who wish to discuss and resolve these in a relationship which is more disciplined and confidential than friendship, and perhaps less stigmatising than helping relationships offered in traditional medical or psychiatric settings.

Feitham, C. and Dryden, W. (1993) Dictionary of Counselling. London, : Whurr

- In 1997 the Governing Council of the American Counselling Association(ACA) accepted the following definition of professional counselling:

Counseling is the application of mental health, psychological or human development principles, through cognitive, affective, behavioral or systemic interventions, strategies that address wellness, personal growth, or career development, as well as pathology. (http://counseling. org)
The definition also includes these additional attributes:

- *Counseling deals with wellness, personal growth, career, and pathological concerns*. In other words, counselors work in areas that involve relationships (Casey, 1996). These areas include intra- and interpersonal concerns related to finding meaning and adjustment in such settings as schools, families, and careers.

- *Counseling is conducted with persons who are considered to be functioning well and those who are having more serious problems.* Counseling meets the needs of a wide spectrum of people. Clients seen by counselors have developmental or situational concerns that require help in regard to adjustment or remediation. Their problems often require short-term intervention, but occasionally treatment may be extended to encompass disorders included in the Diagnostic and Statistical Manual of Mental Disorders (1994) of the American Psychiatric Association.

- *Counseling is theory based.* Counselors draw from a number of theoretical approaches, including those that are cognitive, affective, behavioral, and systemic. These theories may be applied to individuals, groups, and families.

- *Counseling is a process that maybe developmental or intervening.* Counselors focus on their clients' goals. Thus, counseling involves both choice and change. In some cases, "counseling is a rehearsal for action" **(Casey, 1996, p. 176)**

Source: Gladding, S.T. (2004). **Counseling: A Comprehensive Profession (5th edition)**. Upper Saddle River, NJ: Merrill/Prentice Hall. P 6-7.

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Guidelines for Dealing with Subpoenas and Court Orders

In the Ethics Notebook, for October, 1999, I suggested that counsellors should treat requests from lawyers for client information like any other informal request. Proceed with caution! Such requests must always meet the conditions for 'informed consent'. All forms for the release of client information should be checked carefully and, whenever possible, counsellors should contact the client directly regarding the request. Should written informal consent be obtained then any disclosures should be limited to boundaries set within the informed consent process.

Formal requests from a court for information, on the other hand, should be handled differently. Such requests are either subpoenas or court orders. A subpoena is a legal command to provide information or to give testimony. Sometimes it can require both testimony and disclosure of specific documents. This is called subpoenas duos tecum. Since in Canada, unlike the United States, there is no counsellor-client privilege, there is virtually no information generated within these counselling relationships which is outside the reach of the courts. However, judges are typically sensitive to the counsellors' ethical responsibility to protect their clients' confidentiality, and do not require us to breach confidentiality unless there are compelling reasons to do so. Judges often apply the Wigmore criteria to enable them to adjudicate whether the breaching of confidentiality is warrant in a particular instance, see Cognica for further details.

The following guidelines, although not legal advice, may prove helpful should you receive a subpoena or court order,

- Always make a timely response to such requests. (But don't panic!) Counsellors are encouraged to consult with a lawyer before making any release of 'subpoenaed' information. Counsellors are also reminded that a decision to comply with such requests will not leave them legally vulnerable to a charge of breach of confidentiality. Nevertheless, disclosure should be restricted to only the information requested and disclosing additional information may be seen as a confidentiality violation.

- Never destroy information in response to a subpoena or to an expectation of receiving one. Such conduct, if proven, may be judged as obstruction of justice or contempt of court.

- Counsellors should consult their clients when in receipt of a subpoena or court order. After all 'confidentiality' belongs to the client not to the counsellor. Therefore, arguments advanced to court, on behalf of the client to cancel or further restrict the information requested may receive a more sympathetic hearing.

- Sometimes there are requests for informational disclosure which may have significant negative consequences. For example, court disclosure of test items, psychometric protocol, and other testing data may seriously affect the validity of a test and its integrity as a psychometric instrument. This is the type of request to which a counsellor may decide to resist compliance but, nevertheless, will need to make a formal response indicating the rationale for any concerns. It would be appropriate to seek legal counsel in advancing any such objections to the court. There are a number of court

decisions in Canada which support the withholding of such psychometric information. However, lawyers are best equipped to assist in presenting such legally based arguments. (I will share one such case in a future issue of Cognica).

Sometimes through negotiations with the requestor of the subpoena, a counsellor's concerns about the disclosure of certain information will be respected, and more restricted boundaries set for the request.

• There may be compelling reasons for a counsellor, in response to a particular subpoena, to file a motion to have it cancelled or modified. This will require the assistance of a lawyer. Also, a counsellor may seek the guidance of the court on a particular subpoena. For example, with respect to a demand for certain psychometric information a counsellor could argue that a disclosure would adversely affect third party interests such as those of test publishers and the public who wish to preserve the validity and integrity of certain psychometric instruments. This, too, could result in a more restricted disclosure than initially decided. Sometimes subpoenas are very broad to maximize access to information without much sensitivity to the nature of the information being requested.

In the final analysis, if a subpoena or court order is not withdrawn or modified, then counsellors must comply with the original request for disclosure with or without their client's consent.

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The issue of confidentiality when a client dies

It is often challenging for counsellors when a current or previous client dies. Like all experiences with death, it is can be effected by many factors, such as: the recency of the relationship, length and intensity of the counselling relationship, the degree of counselling success with the client, the cause of death, whether it was anticipated or not, and so forth. One of the many questions that can confront the counsellor on such occasions is "What is my responsibility with respect to the client's right to confidentiality?"

The CCA Ethics Committee was recently asked by a member to address this question and the following is intended to provide direction to counsellors.

- The right to confidentiality does not end with the death of the client and counsellors have a continuing responsibility to protect client confidentiality.

- A deceased client's right to confidentiality can be transferred to a legally appropriate personal representative of the client. However, this person would not usually be a parent in the case of adult clients. This representative can then exercise informed consent on behalf of the client.

- Counsellors are advised to demand formal verification of an individual's claim to be legally sanctioned to act on behalf of a deceased client.

- Counsellors should consult and/or inform the personal representative in the same way they would the client with respect to any request for access to the client's counselling record, including informing them of court orders and subpoenas.

- Counsellors in such situations continue to have the duty to retain client counselling records for a minimum of 7 years from the conclusion of counselling.

CCA policy and practice with respect to membership list

CCA has never sold, or otherwise provided, our membership mailing list to anyone. We have no intention of doing so unless we obtain your expressed permission. Members with CCC will know that they are asked if they wish to give consent to having their name placed on our CCC Directory online and most give this consent. The 'Find a Counsellor' feature of our website does allow visitors to gain access to information, including e-mail addresses. This provision does leave those members open to receiving unsolicited e-mails, including from those who may have something to promote or sell. The good news is that members have experienced very little of this type of unwanted activity, and, in any case, we can we can do little to prevent it from happening. However, we ask all our ***CCA members to refrain from harvesting our CCC Directory to promote or market a product or service, to conduct research, or for any other reason beyond its expressed purpose.***

NOTEBOOK ON ETHICS, LEGAL ISSUES, AND STANDARDS FOR COUNSELLORS

Glenn Sheppard Ed.D. CCC

A Landmark Decision with Implications for counsellors in Canada

In 1999, the Supreme Court of Canada, in the case of R. v. Mills, released a decision of profound legal and social significance and one which has implications for counsellors in Canada. The essential task in this case was for the Court to find an appropriate balance of a complainant's right to privacy in sexual assault cases and the accused's right to a fair trial and a full defence.

The series of events leading up to this historic case are as follows. In the early 1990s therapists began receiving subpoenas in sexual violence cases for complainants' therapy records. The intent in seeking such records was very often to find a basis for claiming that the complainant was in some way unreliable. This practice came to a head in 1995 in the case of R. v. O'Conner. O'Conner was charged with sexual assault and the Supreme Court ruled (with a strong minority objection) that his access to a complainant's counselling record was part of his right to a fair trial and a full defence.

In response to this controversial Supreme Court decision the Federal Government passed Bill C-46 which changed the Criminal Code to restrict a defendant's access to a sexual assault complainant's therapy record. It places the obligation on the defendant to convince a judge in private that access to the record is so relevant in a particular case that it warrants violating the complainant's right to confidentiality.

In 1997 Bryan Joseph Mills (Alberta) was accused of sexually abusing a woman. In his defence, Mills persuaded an Alberta judge to strike down Bill C-46 as unconstitutional. It was this decision which was at issue in the R. v. Mills Supreme Court decision of 1999.

The Court upheld Bill C-46 and its more restrictive access to therapy records. Both the Canadian Mental Health Association and the Canadian Psychiatric Association had intervener status before the Court. While this decision is important, the arguments written by Justice Claire L'Heureux-Dubé are significant both for the commitment to the right to privacy and for the deep understanding of the importance of confidentiality within the therapeutic relationship. This commitment and understanding is clearly demonstrated in the following lengthy excerpt from the Supreme Court judgment:

> *That privacy is essential to maintaining relationships of trust was stressed to this Court by the eloquent submissions of many interveners in this case regarding counselling records. The therapeutic relationship is one that is characterized by trust, an element of which is confidentiality. Therefore, the protection of the complainant's reasonable expectation of privacy in her therapeutic records protects the therapeutic relationship.*
>
> *Many interveners in this case pointed out that the therapeutic relationship has important implications for the complainant's psychological integrity. Counselling helps an individual to recover from his or her trauma. Even the possibility that this confidentiality may be breached affects the therapeutic relationship. Furthermore, it can reduce the complainant's willingness to report crime or deter him or her from counselling altogether. In our view, such concerns indicate that the protection of the therapeutic relationship protects the mental integrity of complainants and witnesses. This court has on several occasions recognized that security of the person is violated by state action interfering with an individual's mental integrity.*

In summary, the following broad considerations apply to the definition of the rights at stake in this appeal. The right of the accused to make full answer and defence is a core principle of fundamental justice, but it does not automatically entitle the accused to gain access to information contained in the private records of complainants and witnesses. Rather, the scope of the right to make full answer arid defence must be determined in light of privacy and equality rights of complainants and witnesses. It is clear that the right to full answer and defence is not engaged where the accused seeks information that will only serve to distort the truth seeking purpose of a trial, and in such a situation, privacy and equality rights are paramount. On the other hand, where the information contained in a record directly bears on the right to make full answer and defence, privacy rights must yield to the need to avoid convicting the innocent, Most cases, however, will not be so clear, and in accessing applications for production, courts must determine the weight to be granted to the interests protected by privacy and full answer and defence in the particular circumstances of each case. Full answer and defence will be more centrally implicated where the information contained in a record is part of the case to meet or where its potential probative value is high. A complainant's privacy interest is very high where the confidential information contained in a record concerns the complainant's personal identity or where the confidentiality of the record is vital to protect a therapeutic relationship.

Taken from R. v. Mills, SCC, 1999

(Access to this and other Supreme Court decisions is available at Website http :://www./exum.umontreal.ca/csc-scc/)

I call members attention to the following useful resources;

1. Julie Henkelman and Robin Everal, University of Alberta, just published a very helpful article in the April issue of the Canadian Journal& of Counselling. The article is entitled "Informed Consent with Children: Ethical and Practical Implications"

2. Dr. Allan Barsky, LL.B., M.S.W., Ph.D., has written a very useful book for all counsellors and other mental health practitioners in Canada. It is entitled Counsellors as Witnesses and is a most informative guide to the judicial and quasi-judicial processes in which counsellors may have to be involved in their role as witnesses. It will help counsellors to be better prepared for these experiences by making the legal system more understandable and by providing considerable direction as to how handle assessments, record keeping, court disclosures and so forth.

Dr. Barsky has a background in law, social work, and mediation and is an Assistant Professor in the Faculty of Social work at the University of Calgary. His book is available from Aurora Professional Press, Aurora, Ontario.

NOTEBOOK ON ETHICS, LEGAL ISSUES, AND STANDARDS FOR COUNSELLORS

Glenn Sheppard Ed.D. CCC

I am delighted to welcome Dan and Lawrence as our first guests to the Notebook column. They are CCA members who have thought a lot about the ethical challenges associated with counsellors' use of the internet in their professional work. I invite others to follow their lead and make their contribution to the Notebook.

Glenn Sheppard

Ethics, E-mail, and the Counselling Profession

By Dan L. Mitchell and Lawrence J. Murphy

Using e-mail for communication with colleagues and other professionals is an everyday experience for most counsellors. Communicating with clients via e-mail is less common. Nevertheless, many counsellors do exchange e-mail correspondence with clients, even if it is to clarify a billing issue. In spite of our daily use of e-mail, we may not be aware that there are several practical and ethical issues that deserve close examination. Our intention, in this article, is to alert counsellors to potentially serious problems and to consider the options available to prevent such problems.

"What if" Scenario

You were able to grab a bite to eat for lunch today. It's Tuesday, 12:55 p.m. and you decide to check your e-mail before your one o'clock counselling session.

You find three messages. One of them is from a sender you do not recognize. Your first instinct is that is that it must be junk mail, but then you notice the subject line: "Please Help!"

Upon opening the message, your emotional alarm bells resound as you read these words:

"Hi I'm at the end of my rope. No one is helping. This time I'll make sure it works…"

You know you need to take action, but what can you do? You look for a name, a phone number or any identifying information. You check the e-mail address hoping for some kind of clue. It is no help at all: bluejay374@hotmail.com."

Fighting back the urge to panic, you print out a copy of the e-mail distress call and give it to your secretary hoping he will know what to do. He does not. But he offers to call the police to see if they might know how to trace the origins of the message.

"Good idea." you say, as you try to pull yourself together to focus on your client who is now in your waiting room…

Although this is a fictitious scenario, it could be real. The message could have been a disclosure of child abuse. Or it could have revealed a possible intention to commit homicide. We need to assume that it is only a matter of time until we receive an emergency e-mail message.

Practical and Ethical Concerns

Clearly there are many concerns of both a practical and an ethical nature. When counsellor e-mail addresses are freely available, the following are some of the more serious challenges:

1. Client confidentiality

Most counselling agencies and clinical practitioners own regular e-mail addresses (i.e., not secure) and make those addresses public, whether in advertising or on business cards and stationary. Once that address is out there in the world, it is available for anyone to use who has internet access.

Regular email is not secure and does not protect client confidentiality. Although you may simply be writing to acknowledge a new session date and time, the client may respond with highly confidential information (e.g., "I'm actually glad I have another week to think about thing, I've remembered some more details since we talked last week about…")

2. Domain names

Many e-mail addresses owned and made public by counselling agencies and clinical practitioners contain domain names that reveal their professional identity. (A domain name is the portion of an e-mail address that follows the "@") Publicizing such e-mail addresses does not protect client confidentiality. For example, imagine a client, using her home computer that her children also use, who sends a regular e-mail message to info@counsellorbob.ca. With default e-mail settings, computers store copies of all outgoing messages. Unless she deletes her "Sent Items", her children could easily discover that Mom is seeking personal counselling.

3. Inability to act in an emergency

If clients or prospective clients convey emergency information using regular e-mail, counselling practices and agencies may be powerless to take action, since regular e-mail may not contain enough information to trace its geographic origin.

This is quite unlike the experience of someone telephoning into an agency and disclosing suicidal thoughts. With the client on the telephone there is the opportunity to talk with him, perhaps to book an appointment or to refer him to emergency assistance. In such a case, you at least know that the client has received your communication. In an acute emergency, police can trace a telephone call, and dispatch appropriate emergency assistance.

4. Liability Insurance

It is as yet unclear whether professional liability insurance will cover counselling professionals who have not minimized the exposures (risks) noted above.

Possible Resolutions

We suggest that counselling agencies and clinical practitioners consider the following options:

1. Refrain from publishing regular e-mail addresses. This option, while ethically sound, may be neither convenient for clients nor helpful for practitioners and agencies attempting to market their services.
2. Publish regular e-mail addresses with a clearly visible warning that clients must waive their right to confidentiality. This option gives clients an opportunity to choose whether they are willing to waive their right to confidentiality.

While a warning informs clients of the confidentiality issue, it raises other important questions. If clients wish to gain access to professional counsellors via e-mail, is it ethical to ask them to give up their right to confidentiality to cover our inability to protect them? Would a "non-confidentiality" waiver stand up to legal scrutiny?

In order to address the domain name issue (the 2nd ethical concern noted above), e-mail addresses that are published should be either generic (e.g., info@hotmail.com, info@yahoo.com) or in some other way obscure any affiliation with the counselling profession (e.g., info@tlcobc.com).

A further necessity, if counsellors implement this second option is that the warning must also contain a request that clients include basic contact information. This, then, would allow practitioners and agencies to act on emergencies.

However this, too, is a weak solution because the warning and the request contradict each other. If anything, the warning about the lack of confidentiality would influence clients to avoid discussing private matters. We put them in a bind if they must include their private residential address or telephone number in an insecure e-mail message.

3. Provide for clients secure e-mail with contact information collection capability. This option resolves several issues, but special attention must be given to the following:

First, if counsellors must provide secure e-mail for their clients, does this mean that clients will be required to download and install special software? If so, there is a risk that the process of downloading and installing software may cause clients further distress. Ideally, whatever secure e-mail solution is provided, the process for clients should minimize any technical demands or expertise. In addition, telephone contact should be offered in case clients encounter technical difficulties.

Second, the domain name issue remains. Professionals should choose an e-mail security method whose domain name obscures and affiliation with counselling.

Third, the process of providing clients with secure e-mail should be integrated with the collection of their contact information. This minimizes the burden on clients to supply contact information in a separate process. In addition, the process of collecting and storing contact information should be secure (by housing the database on a secure server for example). Otherwise, again, confidentiality is compromised.

Conclusion: Awareness and Appropriate Technology

The experience in most professions today is that the rapid pace of technological advances speeds ahead of ethical considerations. The counselling profession is no exception. Ethical and practical issues that pertain to the publication of regular e-mail addresses have not been widely recognized in the

counselling profession. Most ethical codes that specifically address the topic of internet communications with clients stipulate the necessity of securing those communications so that the confidentiality of information is assured. It is more than a hyperbole to suggest that the use of insecure e-mail by counselling professionals may be the single most ubiquitous breach of counselling ethics in our profession's history.

Awareness is the first priority. In raising the issue, we want to encourage discussion and reflection. As the profession takes a closer look at the use of e-mail, we hope that counsellors will be inspired to take action to select and utilize appropriate security technology. Solutions do exist. The truth is that it would not be too difficult for a knowledgeable hacker to monitor, steal, and publish a sensitive e-mail going into or out of a counselling office. A former spouse, for example, could do a great deal of damage to both their former partner and to the counselling profession as a whole with such a simple act. It is incumbent on us to make sure that this kind of disaster simply cannot happen.

Dan L. Mitchell, CCC, and Lawrence J. Murphy are the founders of Therapy Online (www.therapy-online.ca), and online counselling service established in 1995. They have been pioneers in the development of secure technological solutions for counsellors, pertinent ethical codes, and online counselling skills.

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Notebook on Ethics, Legal Issues, and Standards in Counselling

Glenn Sheppard, Ed.D. CCC

Parent denied access to counselling notes

As many of you know, the provincial Access to Information and Protection of Privacy Acts in Canada make provision for unresolved disputes in matters covered under these acts to be adjudicated by a commissioner. Such an adjudication, of particular interest to counsellors, took place in British Columbia in August, 2000. It involved the Southeast Kootenay School District and a mother's desire to gain access to the counselling notes of the school counsellor who was seeing her two elementary school children (Order number 00-40).

The parent's request for access to the counselling notes occurred immediately following a visit she received from Child Protection personnel. The mother argued that, as a parent, she had a right to know what had transpired between the school counsellor and her children.

The initial response of the school district authorities that they could not grant the requested access because they did not have custody of the counsellor's notes was quickly dismissed. (Cognica readers are referred to the Notebook, Winter, 2002, in which I report on a decision of the B.C. Privacy Commissioner in 1996 in another dispute involving access to the notes of a school counsellor. In that case, the Commissioner ruled that the school board, as the counsellor's employer, had ultimate jurisdiction over the notes. However, the decision in that case did not diminish the counsellor's responsibility for stewardship over her notes and for the maintenance of confidentiality. This decision was quickly invoked in this instance).

Following this initial ruling, the school board authorities were ordered to provide the Commissioner with the counselling record to assist in the determination as to whether or not the mother's disclosure request could be granted. Following his review he concluded that the mother would not be allowed to have access to the counselling notes. In reaching this decision the Privacy Commissioner concluded that the notes contained personal information given to the counsellor by the children with an expectation that it was given in confidence, and that with disclosure there was a reasonable possibility that the mental or physical health of the children would be at risk. Therefore, he decided, that in this case, the children's right to privacy would be unreasonably violated if the mother's demand was granted.

The B.C. Freedom of Information and Protection of Privacy Act, like most other such acts in Canada, outlines the conditions under which a public body, such as school board, could and should refuse a request for disclosure of personal information. It states as follows:

> *19 (1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if disclosure could reasonably be expected to*
>
> *a) threaten anyone else's safety or mental or physical health, or*
>
> *b) interfere with public safety*

> *22(l) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy*

In his ruling, the Commissioner provided sonic guidelines that will assist school boards and others to exercise their responsibility when making such challenging decisions. They were:

- There must be a careful distinction between the right of a parent to access information on 'behalf of a child' and a parent's desire to access their child's record at arms-length from the interests of the child.

- Despite the decision in this case, school counselors' counselling notes are not, as a class of records, exempt from disclosure under the Act.

- Counselling notes, as in this case, can contain personal information as defined under the Act, and disclosure would invade children's right to personal privacy.

- Children, as in this case, can have a reasonable expectation of confidentiality when they share personal information with their school counsellor.

- A parent's 'right to know' must be balanced against the reasonable expectations of the benefits and risks when there is request to invade their children's privacy.

This decision of the B.C. Privacy Commissioner is consistent with the Access to Records provisions found on pages 15-16 of the CCA Standards of Practice for Counselors. Members are strongly encouraged to become familiar with them, including with the following:

> *School counsellors should make every effort to ensure that there is a school-based procedure in place to adjudicate any requests from parents or guardians for access to counselling records(p. 16).*

As a matter of fact, a number of privacy commissioners in their adjudication decisions have directed school board authorities to have specific provisions in place in anticipation of disclosure request under the access to information and protection of privacy acts within their respective provinces.

Personal information Protection and Electronics Documents Act (PIPEDA)

What is PIPEDA?
Federal legislation entitled, Personal Information Protection and Electronics Documents Act (PIPEDA), came into full effect on January 1, 2004. It was implemented in two stages. In 2011 it took effect for federally regulated organizations, but it now applies to all federal government departments and agencies and to all commercial activity in Canada. This Act is administered by the federal Privacy Commissioner, who has the authority to make public statements on violations of the Act and/or refer serious cases to Federal Court. Virtually all provinces in Canada have some type of privacy protection and right to information legislation. The federal Privacy Commissioner may exempt organizations and activities in those provinces if their privacy laws are substantially similar to the PIPEDA. So, even if a province is exempted obligations similar to those outlined here would still apply but under provincial legislation.

What does PIPEDA Say?
It "sets out the ground rules for the collection, use and disclosure of personal information in the course of commercial activities...(and) balances an individual's right to privacy with an organization's needs for personal information for legitimate business purposes."

"Organizations covered by the Act must obtain an individual's consent when they collect, use or disclose the individual's personal information. The individual has a right to access personal information held by an organization and to challenge its accuracy, if need be. Personal information can only be used for the purposes for which it was collected. If an organization is going to use it for another purpose, consent must be obtained again."

"Individuals should also be assured that their information will be protected by specific safeguards, including measures such as locked cabinets, computer passwords or encryption."

The types of personal information covered by the new rules include:

- age, name, ID numbers, income, ethnic origin or blood type;
- opinions, evaluations, comments, social status or disciplinary actions;
- employee files, credit records, loan records, medical records, existence of a dispute between a consumer and a merchant, intentions (for example, to acquire goods or services, or to change jobs.)

Source: *Privacy Commissioner of Canada*, http://www.privcom.gc.ca

How Does PIPEDA Apply to Counsellors?

The legislation applies to all counsellors working in private practice. This is so because it applies to all commercial activity but not to activities in the public domain. For example, it does not apply to public educational institutions, hospitals, local governments and so forth.

What Must Counsellors in Private Practice Do to Comply with PIPEDA?
Fortunately, the standards set by our CCA Ethical Code and Standards of Practice are equal to and, in most areas, higher than those expected by PIPEDA, For example, the principles of informed consent and confidentiality are central to our professional conduct. So, counsellors should have no difficulty achieving compliance with this Act. However, all private practitioners should review their practices to ensure that they do so by being familiar with the requirements as stated here and more fully on the website provided in this Notebook. Clients have a right to know what private information is being collected and why, how it will be used, to give consent to its use and transmission, to correct information in their file, to have their questions answered, and to know who to contact if they have a related compliant.

If private practitioners have receptionists, business managers, and so forth, they must act to ensure that these same privacy rights are extended to their employees with respect to their personal information. When counsellors are employed by private agencies or organizations they should also follow the PIPEDA policies and procedures that such employers are required to establish.

Two Problem Areas with PIPEDA
There are two problem areas for counsellors (private practitioners) if they are expected to achieve full compliance with PIPEDA.

Firstly, although PIPEDA states that service providers do not have to disclose personal information that could endanger a third party, it does not extend such an exemption to the disclosure of information in a counselling file that may be harmful to a client. Rather, it requires full disclosure of client personal information. As members know, under our Ethical Code we have an obligation to protect clients from disclosure of personal information that is likely to cause them harm, such as, information that is likely to promp them to engage in self-destructive or self-injurious behavior.
Secondly, it appears that under PIPEDA counsellors(private practitioners) could be expected to disclose to clients information about psychological tests they may have taken, such as scoring keys and the like, disclosure of which could violate the integrity of such psychometric instruments and compromise fair trade practices for companies that produce and sell psychological tests. Such disclosure would be inconsistent with our practice standards and with Canadian case law (see Notebook, Cognica, volume 33, No. 1 for a case law example).

I suspect that these are unforseen difficulties with this legislation. CCA will be writing to the Canadian Privacy Commissioner to inform him of the need to address those problematic provisions. In the meantime, we are advising you to be in touch with our CCA Ethics Committee should you encounter a request to comply with a client request in either of these problematic areas.

Notebook on Ethics, Legal Issues, and Standards for Counsellors
Dr Glenn Sheppard, CCC

I am delighted to welcome Cameron Symons to the Notebook. Cameron presented an informative and interactive session on counsellor recording keeping at CCA Conference 2004 in Winnipeg. He generously accepted my invitation to transform his presentation on this important topic into an article for this edition of the Notebook, Cameron is a former school counsellor currently teaching in the Faculty of education at Brandon University. As always, I invite you to follow his example and consider making your contribution to the Notebook

Record Keeping: Ideas for Counsellors

By Cameron Symons

Counsellors' record keeping practices are increasingly governed by legislation. In some provinces, new Freedom of Information and Protection of Privacy legislation and Personal Health Information acts have given counsellors new guidelines about the way they keep records. The federal Youth Criminal Justice Act will also influence counsellors' practices on record keeping. For school counsellors, legislation regarding the administration of public schools adds other imperatives. Some provinces have synthesized these various legislative requirements into policy statements that provide counsellors with a guide for the management of their counselling records.

In schools, pupil records are typically held in three areas: the cumulative file in the main office; the young offender file if one exists, held in a secure location by the principal; and the counselling or special education files normally maintained by the counsellor and resource teacher.

The cumulative file component includes things such as identification information, parent/guardian information, citizenship, school history, relevant health information, academic information on marks, attendance, awards, and correspondence & legal documents. Some counselling information, such as results of psychoeducational assessments that may inform programming decisions can also be included in this file.

The counselling and special education files typically include additional information such as: special education or resource information; counselling information; clinician reports, and meeting notes; referrals to other agencies; diagnostic testing results; and reports from service providers outside of the school such as hospitals and treatment facilities.

The Youth Criminal Justice Act component contains information about a young offender that may be used: to ensure compliance with a court order; to ensure the safety of staff, students and others; and to assist in the rehabilitation of the young offender.

Most legislation is in agreement that there are certain conditions under which a person may be refused access to information in a file. They are: if disclosure might cause an invasion of the privacy of a third party; if disclosure could be detrimental to the education of the pupil; if disclosure could cause physical or emotional harm to someone; or if disclosure could interfere with an enactment or investigation.

Personal Health Information legislation, (Manitoba's for example), adds additional conditions under which access may be refused. These include: if disclosure may endanger the mental or physical health or safety of a person; if disclosure may reveal information about another person who has not consented to

disclosure; if disclosure could identify a third party who supplied the info in confidence under circumstances where confidence could be expected; or if the information was compiled for legal purposes.

The Youth Criminal Justice Act demands that the offender's file must be kept separate from any other record of the young person; that no other person has access to the information except if authorized under the Act; and that the record be destroyed when the information is no longer required for the purpose for which it was disclosed.

In cases of divorced or separated parents, the Divorce Act of Canada states that "Unless the court orders otherwise, a spouse who is granted access to a child of the marriage has the right to make inquiries, and to be given information as to the health, education and welfare of the child." Provincial family law usually supports this notion as in Manitoba's legislation, for example, which states: "Unless a court otherwise orders, the non-custodial parent retains the same right as the parent granted custody to receive school, medical, psychological, dental and other reports affecting the child". (Family Maintenance Act Manitoba)

While the legislation described above is very similar from province to province, it is important to check on the specific wording of these kinds of acts in your own jurisdiction.

Counsellors are often concerned about transferring information when a student transfers to a new school. Generally, both the cumulative file, and the counselling or special education file must go to the new school. A strategy that will help give counsellors some sense of security is to retain the counselling records themselves, and place a notice in the cumulative file to the effect that counselling information exists on this student and may be obtained by contacting the counsellor directly. In this way, the records can go from professional to professional, and their security and privacy be ensured. Many schools have the parents or students, (if they are the age of majority), sign a release form to allow the transfer of these records.

Lawyer, Robert Solomon, and Consultant, Dennis Lucas have each offered suggestions about effective record keeping. These ideas include:

- Keeping all entries in chronological order;
- Recording information while it's fresh;
- Making any alterations with a straight line, dated and initialled;
- Sticking to behaviours and concise description;
- Staying away from diagnosis & interpretation;
- Limiting records only to directly relevant info;
- Including record keeping information in your informed consent form,
- Record ingredients may include:
- Name and date:
- Presenting issue:
- Past history of issue (if not described in an earlier record);
- Current status of issue changes since last visit;
- Treatment/goals/homework/actions;
- Check-back date/time;
- Referral info: To whom, where, when, what was said;
- Administrative info: timetable, credits, etc.

To ensure the protection of your students and yourself, it is important to check your employer's policies on access to information, the CCA Standards of Practice on record keeping, and the privacy legislation in your province. If no workplace policy exists, it is critical that such a policy on record keeping be created.

In some provinces, requests for information can be referred to the individual appointed as Privacy and Access Coordinator for your school hoard. This individual can, with input from you, decide to release the whole record, release parts of it, or deny access altogether. Parents then have the right of appeal to a provincial privacy adjudicator such as the provincial ombudsman In provinces where these procedures are not mandated, it is important to follow the CCA policy that school counsellors should make every effort to ensure that there is a school-based procedure in place to adjudicate any requests from parents or guardians for access to counselling records.
As a proactive step to avoid misunderstanding with students and parents, it is essential to have a good informed consent form in place. A consent form used in a school setting may say something like this:

"In all discussions between us you have a right to expect that anything we talk about will remain confidential. We will respect and guard your right to confidentially very carefully, but you need to know that there are a few cases where that may not apply. These are the situations where information may be shared with someone else:

I) if you ask me to speak with someone else for you or give them information you wish them to have;
2) If I feel that you or someone else may be in danger or in need of protection,
3) If a court orders the release of information,
4) If required by law, as in cases of child abuse.
5) To consult with another professional person in confidence to try to find solutions or answers for you.

These situations are very rare, but it is important for you to know about them."

Notebook on Ethics, Legal Issues, and Standards for Counsellors

Glenn Sheppard, Ed.D. CCC

Reflections on Ethics Education in Counsellor Education Programs

I recently prepared and conducted a day long seminar entitled, *Pedagogical Perspectives on the Teaching of Ethics Courses*. So, in this Notebook, I have decided to share a few reflections on this important aspect of counsellor education.

- A commitment to ethics education is foundational to any graduate program in counselling.
- Ethics education rather than being just an obligatory programmatic add-on can be both intellectually and personally challenging and satisfying, and, to my surprise, it can serve a truly integrative function within counsellor preparation since it can touch every aspect of counselling practice.
- One of the primary goals of ethics education in counsellor education is help students develop the ego strength to take ethical action, as well as, to tolerate the ambiguity inherent in most ethically laden circumstances.
- Young professionals are more likely to develop an ethically responsible approach to counselling practice in an environment where counsellor educators value and model ethical behaviour and are open about their ethical challenges and their tolerance for ambiguity so typically associated with such challenges.
- Ethics education is not only about teaching a body of knowledge, it is also concerned with decision-making, problem solving, and critical thinking.
- Counsellors educators who teach ethics course have available a variety of conceptual models of the process of ethical decision making, including, those that see it as: a cognitive, problem-solving process, a moral reasoning process, a process that is multi-dimensional requiring the integration of a number of psychological processes.
- Although our Code of Ethics and Standards of Practice are necessary and helpful, they cannot anticipate the appropriate response to every ethical challenge. Therefore, it is essential that ethics education prepare students to recognize ethical dilemmas and to think through the most appropriate course of action. Fortunately, we have available a number of models of ethical decision-making to assist with this process. (Capuzzi and Gross, 1999, Cottone and Tarvydas, 1998, Kitchener, 1986, Rest, 1984, Schulz, 2000)
- Ethics course should contain both didactic and experiential components. An experiential curriculum is essential to the development of ethical decision making capability. In fact, Handelsman (1986) views it as a skill that can and should be developed. Gawthrop and Uhlemann (1992) found that just a 3-hour experiential workshop had significant positive effect on a group of undergraduate students' ethical decision making when dealing with role play scenarios.
- Historically our approach to ethics education has been to see it as occurring across the counsellor education curriculum, what is sometimes called an infused approach that takes advantage of teachable opportunities, particularly those that occur during supervised practice components. Although this infused approach continues to be essential it may not be sufficient for a number of reasons: there is now a significant body of knowledge to be learned, higher consumer expectations for counsellor ethical sophistication, time constraints during supervision, and maybe a limited range of ethical issues are present during practica and other supervised experiences.

- As most members know, our CCA Accreditation Standards require a stand alone course in counsellor education programs, however, our Certification requirements do not. I know that our Certification Committee is currently wrestling with their review of this aspect of our certification standards. The CCA Board has taken the position that should a change occur requiring an ethics course for certification there would have to be a lengthily transitional period that would allow the continued certifying of graduates from programs with only the infused approach to ethics education until the necessary adjustments are made.
- Ethics education curriculum should include the following: CCA Code of Ethics, CCA Standards of Practice and Casebook. All counsellors of should have some familiarity with such statutory laws as, child protection, privacy and freedom of information, youth justice act, mental heath act, divorce and matrimonial act, as well as selected examples from case law. All CCA counsellors should be familiar with the CCA Ethical Complaints and Disciplinary Procedures.
- Ethics education in counselling is a rich environment for the generation of a great deal of research activity for both faculty and students. For example, we need to have a fuller understanding of the ethical challenges confronting our members in a variety of work places, schools, private practice, counsellor education. Tracey Nigro (2001) has set a fine scholarly example with her master's thesis dealing with the attitude towards and experiences with duality by our CCA members in British Columbia. There is a need for basic research to shine more light on the nature of ethical decision making and the psychological processes involved.
- It is only through the development of appropriate ethics education with a shared curriculum and instructional goals can we honour our social commitment to self regulation and public protection.

Note: the references for this Notebook are available on request.

NOTEBOOK ON ETHICS, LEGAL ISSUES, AND STANDARDS FOR COUNSELLORS

Glenn Sheppard Ed.D., CCC

Scope of Practice for Counsellors

For this Notebook I thought that it might be useful to continue with the regulatory theme from the last issue. You will remember that I presented a number of definitions of professional counselling. I hope that you found them interesting and engaging. With activity in a number of provinces taking us towards the possibility of the statutory regulation of counselling we need to be developing an inventory of practices that might serve to inform any such statutes. For example, what is our preferred title for counsellors in a regulated profession? Should it be licensed professional counsellor (LPC), registered professional counsellor (RPC), certified professional counsellor (CPC), or maybe the title currently being proposed by the BC Task Group on regulation, licensed or registered counselling therapist? Also, any statute will need to include a Scope of Practice provision that sets out the scope of professional activities permitted under the legislation. Since virtually all the states in the United States have professional counsellors regulated by legislative statute I thought that it might be useful to sample a few of the scope of practice statements found in their statutes or in the administrative rules established under the authority of their acts.

I have the generous permission of the American Counseling Association (ACA) to share with you the following examples taken from a 1997 ACA publication entitled: ***Licensing Requirements: Counselors, Marriage and Family Therapists, Psychiatirc Nurses, Psychologists, and Social Workers***, ***2nd Edition.***

Arkansas:

> "Practice of counseling shall mean... any service involving the application of principles, methods, or procedures of the counseling profession which include, but are not restricted to: (1) Counseling which means... assisting... to develop understandings of personal problems to define goals, and to plan action reflecting his or her interests, abilities, aptitudes, and needs as these are related to personal-social concerns, educational progress, and occupations and careers; (2) Appraisal... selecting, administering, scoring, and interpreting instruments designed to assess an individual's aptitudes, attitudes, abilities, achievements, interests, and personal characteristics, but shall not include the use of projective techniques in the assessment of personality; (3) Consulting... (4) Referral... (5) Research..." See 17-27-102 (5) for complete citation.

Florida:

> "The practice of mental health counseling is the use of scientific and applied behavioral science theories, methods, and techniques for the purpose of describing, preventing, and treating undesired behavior and enhancing mental health and human development. Such practice includes the use of methods of a psychological nature to evaluate, assess, diagnose, and treat emotional and mental dysfunctions or disorders, whether cognitive, affective or behavioral; behavioural disorders; interpersonal relationships; sexual dysfunction; alcoholism: and substance abuse... may include clinical research. Mental health counseling treatment includes, but is not limited to counseling, psychotherapy, behavior modification, hypnotherapy, sex therapy, consultation, client advocacy, crisis intervention, providing needed information and education to clients... The terms "diagnose" and "treat" as used in this chapter, when considered in isolation or in conjunction with any provision of the rules of the board, shall not be construed to permit the performance of any act which mental health counselors are not educated and trained to perform.." See Chapter 491.003 (9) for complete citation.

Kansas:

'"Professional counseling' means to assist an individual or group to develop understanding of personal strengths and weaknesses, to restructure concepts and feelings, to define goals and to plan actions as these are related to personal, social, educational and career development and adjustment. 'Assessment' means selecting, administering, scoring and interpreting instruments designed to describe an individual's aptitudes, abilities, achievements, interests and personal characteristics. 'Consultation' means the application of principles, methods and techniques of the practice of counseling to assist in solving current or potential problems of individuals or groups in relation to a third party. 'Referral' means the evaluation of information to identify problems and to determine the advisability of referral to other practitioners." K.S.A. 65-5802 (c) (d) (e) (f)

Michigan:

"Practice of counseling or counseling means... the application of clinical counseling principles, methods, or procedures for the purpose of achieving social, personal, career, and emotional development and with the goal of promoting and enhancing healthy self actualizing and satisfying lifestyles whether the services are rendered in an educational, business, health, private practice, or human services setting. The counseling techniques, or behavior modification techniques for which the licensed professional counselor or limited licensed counselor has been specifically trained..." "Counseling principles, methods, or procedures means a developmental approach that systematically assists an individual through the application of any of the following procedures: (i) evaluation and appraisal techniques. As used in this subparagraph, "appraisal techniques" means selecting, administering, scoring, and interpreting instruments and procedures designed to assess an individual's aptitudes, interests, attitudes, abilities, achievements, and personal characteristics for developmental purposes and not for psychodiagnostic purposes, (ii) exploring alternative solutions, (iii) developing and providing a counseling plan for mental and emotional development, (iv) guidance, (v) psychoeducational consulting, (vi) learning theory, (vii) individual and group techniques emphasizing prevention, (viii) counseling techniques, (ix) behavioral modification techniques, (x) referral..." See M.C.L.A.333.18101 (a) (d) for complete citations.

North Carolina:

"The 'practice of counseling' means holding oneself out to the public as a professional counselor offering counseling services that include, but are not limited to, the following: (a) Counseling - Assisting individuals, groups, and families through the counseling relationship, using a combination of clinical mental health and human development principles, methods, diagnostic procedures, treatment plans, and other psychotherapeutic techniques, to develop an understanding of personal problems, to define goals, and to plan action reflecting the client's interests, abilities, aptitudes, and mental health needs as these are related to personal-social-emotional concerns, educational progress, and occupations and careers, (b) Appraisal Activities - Administering and interpreting tests for assessment of personal characteristics, (c) Consulting - Interpreting scientific data and providing guidance and personnel services to individuals, groups, or organizations, (d) Referral Activities - Identifying problems requiring referral to other specialists, (e) Research Activities - Designing, conducting, and interpreting research with human subjects." 90-330 (3)

South Carolina:

"...The procedures of counseling include, but are not limited to, the following; (A) 'counseling', which means assisting children, adolescents, and adults, either individually, in groups, or in organizations, through the counseling and psychotherapeutic relationship to develop an understanding of and to explore possible solutions to interpersonal and personal problems and conflicts, to define goals, to make decisions, and to plan a course of action reflecting an individual's or a group's Interests, abilities, and mental and emotional needs which include, but are not limited to personal- social concerns, psychotherapeutic progress, sexual adjustment, developmental difficulties, educational achievement, and occupational and career development. (B) 'appraisal', which means selecting, administering, scoring, and interpreting instruments designed to assess an individual's aptitudes, abilities, achievements, interests, and personal characteristics, and the use of nonstandardized methods and techniques for understanding human behavior in relationship to coping with, adapting to, or changing life situations. (C) 'consulting', which means conferring with other professional colleagues, groups, or organizations for the purpose of assisting them in their work with persons who are experiencing personal problems. (D) 'referral', which means the evaluation of data to identify problems and to determine the advisability of referral to other specialists." 40-75-80

Wyoming:

"'Practice of counseling' means... a service that integrates a wellness, pathology and multicultural model of human behavior, This model applies a combination of mental health, psychotherapeutic, and human development principles and procedures to help clients achieve effective mental, emotional, physical, social, moral, educational, spiritual or career development and adjustment throughout the life span, and includes the diagnostic description and treatment of mental disorders or disabilities within the range of the professional's preparation. 'Psychotherapy' means the treatment, diagnosis, testing, assessment or counseling in a professional relationship to assist individuals or groups to alleviate mental disorders, understand unconscious or conscious motivation, resolve emotional relationships or attitudinal conflicts, or modify behaviors which interfere with effective emotional, social or intellectual functioning." WS 33-38-102 (vi) (viii)

Notebook on Ethics, Legal Issues, and Standards in Counselling
Glenn Sheppard, Ed.D, CCC

Sexual Abuse of Clients: A Continuing Concern in the Helping Professions

I recently received two major reports on the sexual abuse of clients by their professional helpers. The first is entitled **Professional Therapy Never Includes Sex** published by the Department of Consumer Affairs, State of California, The other is a Canadian report entitled **"What about accountability to the patient?"** A Final Report of the Special Task Force on the Sexual Abuse of Patients. As part of the mandatory five year review of the Ontario Regulated Health Professions Act (RHPA) in 2000, the Ontario Health Professions Regulatory Advisory Council (HPRAC) established an independent task group to examine a number of important issues with respect to the sexual abuse of patients by individuals to whom they have gone for professional help.
This report is the Task Group's final submission to the Ontario Minister of Health and the HPRAC. It contains poignant comments from some of the 57 victims who made representation to the Group and 34 recommendations on steps that could be taken to stop the sexual abuse of clients. The Task Group was chaired by Marilou McPhedan.

A Clear and Unequivocal Judgment.
This report to the HPRAC contains a lengthly quote from a 1998 judgment issued by Justice J. Aitken of the Ontario Court of Justice, General Division, in the case of the sexual abuse of a client by her psychologist. I have decided to include it in this Notebook because it is such a crisp and unequivocal judgment on one of the most destructive violations of fiduciary relationships;

"She went to him for help at a time when she was particularly vulnerable and insecure. He had the professional knowledge to help her, but instead used that knowledge to manipulate the situation to his own advantage, playing on [her] lack of confidence, her search for a positive father figure and her sexual inhibitions. In these circumstances, as has been attested by Dr. Jackson and Dr. Freebusy, [the patient] could not exercise free will. Her participation in sexual activities with Dr. B. [a psychologist] was not based on any understanding on her part as to what was really happening. He kept her in a constant state of confusion as to whether his advances were part of her treatment, evidence of his love for her, or something else. This was coupled with her ovetwhelming dependency on him, which he let develop unchecked, so that she was rendered incapable of coming to her own assessments or conclusions. There could be no genuine consent in these circumstances. Therefore even/thing from the initial touching to the hugging, kissing, fondling, masturbating and finally intercourse were all forms of battery.

I agree with McLachlin J. that '... where such a power imbalance exists it matters not what the patient may have done, how seductively she may have dressed, how compliant she may have appeared, or how self interested her conduct may have been the doctor will be at fault if sexual exploitation occurs.' (Norberg v. Wynrib (1992), 92
D.L.R. (4th) 449 (S.C.C.) p. 497)

Exploitation did occur in this case, and the sole responsibility for that rests with Dr. B. There can be no doubt that (the therapist] owed fiduciary obligations to [the patient] when he took her on as a client within his clinical psychology practice. It is also equally clear that he breached those obligations by totally ignoring what were appropriate therapist-client boundaries and particularly by initiating and maintaining a sexual relationship with her. The obligation was on him and him alone to ensure the appropriate boundaries were maintained. By breaching them, he put his own needs ahead of those of

[his patient]. He did not do this on just one occasion. He did it repeatedly form August 1990 to August 1995, and arguably beyond."

The court in this case awarded the plaintiff damages in the amount of $326, 275.98.

CCA members are invited to become familiar with the section entitled **'Sexual Intimacies with Clients'** in our **Standards of Practice for Counsellors** and with the chapter on boundary violations on our **Ethics Casebook**.

Comments on this issue of the Notebook are invited and we continue to welcome contributions to this feature of our newsletter.

Notebook on Ethics, Legal Issues and Standards in Counselling

Glenn Sheppard, Ed.D., CCC

Special Education and the Charter: No Presumption in Favour of Integration

In this Notebook I have decided to review a landmark decision of the Supreme Court of Canada that will be of interest to all our members, but it has particular implications for those CCA members who work in public schools and more especially for those who participate with colleagues in making programming and placement decisions for students with special needs.

As you know, our society like many others continues to strive towards providing the most appropriate educational environment to meet the many diverse needs of students with special needs. Over the past several decades various ideological labels have emerged that capture these educational strivings: integration, mainstreaming, normalization, least restrictive environment, and more recently the ideology of inclusion.

There are those who take the view that all children with special needs are entitled to be educated within the regular classroom with their disabled peers regardless of the degree of disability or the extent of their special needs. Some such advocates take the view that the Canadian Charter of Rights and Freedoms guarantees this right. Well, the Supreme Court of Canada in the case of Eaton v. Brant County Board of Education (February. 1997) has decided otherwise. It unanimously ruled, in the case of 12 year old Emily Eaton, that the Charter provides for no such guarantee since there is no presumption under the charter in favour of integration. Rather, the justices concluded that the Charter protects the best interest of the child and that this 'best interest' and the child's special needs may mean, as they concluded in Emily's case, that a best placement is other than in the regular classroom.

At the time of this decision Emily was a 12 year old student in Burford County. Ontario. She has cerebral palsy and according to the Court decision, "...is unable to communicate through speech, sign language or other alternative communication system, has some visual impairment and who is mobility impaired and mainly uses a wheelchair". After several years of working to meet her special needs in regular class, including the provision of a fulltime student assistant, it was decided that her needs could best be met by placement in a special education classroom. This decision was appealed by her parent's but it was upheld by a Special Education Appeal Board, the Ontario Special Education Tribunal, and by Divisional Court. It was overturned by the Ontario Court of Appeal. It was this later decision that was appealed by the Brant County Board of Education to the Supreme Court of Canada. The Court concluded that a placement decision is not discriminatory nor does it violate a child's equality rights if the decision makers

1. determine the best possible placement for the child
2. take into account the child's best interest and special needs when doing so
3. provide for ongoing assessment of the child's needs and make changes accordingly
4. determine placement of an,"...exceptional child from a subjective, child-centred perspective--one which attempts to make equality meaningful from the child's point of view as opposed to that of the adults in his or her life."

It concluded that the educational authorities had met all these conditions in Emily's case and, therefore, it upheld the placement decision. It further argued that any attempt to provide an alternative curriculum for Emily while in regular class would be inappropriate since it would only serve to isolate her more. In other words, placement of an exceptional child in regular class can for some children, in the view of the Court, be a most restrictive placement rather than a least restrictive one. The Court supported the view expressed by the Special Education Tribunal when it heard the Eaton's appeal. It concluded that the provision of a parallel curriculum for exceptional children when in regular class can

be beneficial only when it is realistically parallel but may very well have the effect of isolating the child when it is not so.
This landmark decision still stands to provide some guidance to those charged with the challenging task of providing for the special educational needs of exceptional children. Since 1997 it has been used as a benchmark in a number of subsequent judicial challenges to placement decisions. For example, in the case of Pokonzie v. Sudbury District Roman Catholic Separate School Board (O.J. No. 4698) the court upheld a previous decision of the Special Education Tribunal in its support of a special education placement for a boy with developmental disabilities. It also noted that his parents who were appealing the placement decision had an "unrelenting commitment to full classroom integration" without regard for "his cognitive skills, his abilities or his behaviours." In other words, in the view of the court a parent's view of their child's best interest may not always be determinative of the best educational placement.

Eaton v. Brant County Board of Education (February 7, 1997) No. 24668. S.C C.

P.S. I have found the **Education Law Reporter for Elementary and Secondary Schools** invaluable in my professional work. It is has been published by a private company since 1989 and is available, by subscription, ten times per year. The authors report on the most recent legal issues in education in Canada including a review of all case law in education as such decisions are rendered by the courts. They write their reviews in a clear and user friendly style and draw our attention to implications and applications. School counsellors and school psychologists will find many court decisions reviewed in the **Education Law Reporter** have immediate and significant application to their work. The Supreme Court decision that I have reviewed in this Notebook, for example, I first became aware of by reading about it in this publication. You can learn more about this useful resource by visiting their web site at http://wviw.edlawcanada.com

Notebook on Ethics, Legal Issues and Standards in Counselling

Glenn Sheppard, Ed.D., CCC

Valuing Diversity and Acting Ethically: The Practitioner's Dilemma

Submitted by Gail Beniek, M.Phil, M.Ed., CCC - Professor, Sheridan College

As the Canadian population becomes increasingly diverse, counsellors can anticipate working with more clients who bring with them values, beliefs and behaviours that are culturally different from the western principles on which the CCA Code of Ethics is based. The CCA Code of Ethics does contain specific articles (A9, B8 and D10) mandating counsellors to practice in a culturally sensitive manner. Yet, in some cases sensitivity to the client's cultural norms and maintenance of professional standards of practice may pose an ethical dilemma for the practitioner.

Scenario

The following case illustrates how a counsellor may be caught in a conflict between professional ethical standards and the cultural norms of the client.

You are a counsellor working at an educational institution. A Vietnamese student, Tu Li, is assigned to you because of academic difficulties. You note that the student is a reluctant speaker and is slow in his conversational style.

In attempting to establish a positive relationship with Tu Li, you lean toward him, look him straight in the eyes and ask him directly to tell you about the difficulties he is having in his academic work. When the student looks away and does not respond, you suggest that he has a language problem and that a class in English as a second language might help him to communicate more effectively.

In the course of your counselling sessions, Tu Li says that he is feeling mounting pressure from his father to major in the sciences in order to pursue a career in medicine. Tu Li feels he is not suited for medicine and is keen to study interior design. Besides, he is getting "B" and "C" grades in his biology course, which he fears will bring embarrassment and shame to his family.

You notice that the student is becoming increasingly despondent because of his perceived academic failures. You encourage Tu Li to follow his passion and pursue the career path of his choice.

Cultural Encapsulation

It is not difficult to discern that the above scenario is riddled with examples of cultural encapsulation or ethnocentric bias on the part of the counsellor. The attending skills which the counsellor uses to build a therapeutic alliance may be inappropriate with a client from a culture in which directness is regarded as a lack of respect. The counsellor's assumption that a hesitant manner of speaking is symptomatic of an English language deficiency reflects a disregard for cultural variation in communication patterns. The counsellor's encouragement of the client to be self determining in his career choice demonstrates a misunderstanding of cultural norms regarding filial piety, family obedience and collectivist decision making.

Risks of Cultural Encapsulation

The risks associated with the type of cultural encapsulation exhibited by the counsellor in the above scenario are well worth considering because they raise legal, ethical and practice based concerns.

First, by failing to integrating a respect for diversity into their practices, counsellors may infringe on the client's basic human rights. From a legal perspective, counselling practices which are culturally encapsulated may be construed as a form of systemic discrimination against clients that are not from the dominant groups in our society. Cultural encapsulation has a disproportionately adverse impact on clients from non-western cultures and has the negative effect of excluding them from the benefits of counselling services. Under the Canadian and provincial human rights codes systemic discrimination is prohibited an numerous grounds including race, ethnicity, nationality and country of origin. To practice counselling in a culturally encapsulated manner may thus constitute a human rights violation.

Secondly, a counsellor's failure to demonstrate respect for diversity may infringe on the client's cultural autonomy and thereby constitute an unethical practice under the CCA Code of Ethics. Counsellors who hold stereotypical beliefs about racial and ethnic minority clients or who practice without an awareness of the unique cultural realities of their clients may cause harm to these clients. The failure to demonstrate sensitivity to the culture of clients may violate several of the fundamental ethical principles of the profession, such as respect for the dignity of persons, not harming others and responsible caring.

Thirdly, failure to understand the culture differences of clients may reduce the chance of establishing an effective therapeutic relationship or lead to a rupture in the therapeutic alliance between practitioner and client. In acquiring sensitivity to cultural variation, counsellors reduce the probability of miscommunication with the client, misdiagnosis and misinterpretation of client behaviour.

The Culturally Skilled Counsellor

One way to minimize the risks of cultural encapsulation is for counsellors to ensure that their counselling practices are compatible with the cultural differences of their clients. Many professionals in the field regard the development of multicultural competencies as the best route to practitioner/client compatibility in a diverse society.

Multicultural competencies can be defined as a set of knowledge, skills and attitudes which increase counsellor awareness of a) their own values and biases; b) the worldview of the client; and c) culturally appropriate intervention strategies.

Just as important as these competencies is the counsellor's ongoing surveillance of the cultural biases inherent in the way counselling is practiced. The counsellor's willingness to modify theories and techniques to meet the client's cultural needs will help the profession of counselling remain both effective and ethical.

The following are helpful resources:

Corey, G., Corey, M. And Callanan, P. (1998). Issues and Ethics in Helping Professions. Pacific Grove, CA: Brooks/Cole Publishing Company.

Das, A.K. (1995). Rethinking multicultural counselling: Implications for counsellor education. Journal of Counseling and Development. 74(1), 45-52.

Pedersen, P. (1994). A Handbook for Developing Multicultural Awareness. (2nd ed.). Alexandria, VA: American Counseling Association.

Sue, D.W., Ivey, A.E. and Pedersen, P.B. (1996). A Theory of Multicultural Counseling and Therapy. Pacific Grove, CA: Brooks/Cole.

Sue, D.W. and Sue, D. (1990). Counselling the Culturally Different: Theory and Practice. (2nd ed.). New York: Wiley.

Notebook on Ethics, Legal Issues and Standards in Counselling

Glenn Sheppard, Ed.D., CCC

When Counsellors Cease to Practice

There are many legal, ethical, and personal issues that may arise when counsellors cease their professional counselling practice. The cessation of counselling practice may be permanent or temporary, sudden or well planned and gradual, and can occur for a wide variety of reasons, including: disciplinary action, illness, disability, death, retirement, or other personal reasons. Whatever the reason for such a decision, counsellors should be aware of the concerns that typically arise under such circumstances and understand the many obligations associated with any such event.

- The mode of practice is one critical factor to consider in planning for the cessation of counselling services. Since work environments vary from sole practitioner to partnerships, public and private service corporations, and so forth, it is essential to be aware of all the expectations and obligations associated with the mode of practice in which the counsellor is working. It may be necessary to seek legal counsel since there can be legal obligations beyond those typically associated with the practice of counselling. In some work settings the appropriate legal advice may be available from the employer.
- Counsellors can best prepare for the inevitable termination of their practice by seeking to understand and clarify at the very beginning of their professional employment or practice partnerships all the relevant expectations and obligations, including what happens when they cease to practice.
- Whatever the circumstances of the cessation counsellors continue to have an overriding obligation to fulfill their ethical obligations to their clients. These include, managing client confidentiality, obtaining informed consent, the security and disposition of client records, taking steps to avoid client abandonment, and respecting restrictions on the sale of a practice.
- CCA members working in private practice are expected to maintain client counselling records for at least seven years. This period could be longer in other employment situations and where there may be other expectations with respect to records. Counsellors should ensure that following termination of practice client records are secured long enough to meet these obligations and that they are accessible to clients for treatment, legal, or personal needs. Retention of records can also help to assist the counsellor should there be an ethical complaint lodged against the counsellor following the cessation of practice or should there be liability against the counsellor's estate.
- An estate executor acts on the wishes of the deceased counsellor with respect to his/her professional obligations. This could include determining a location where client records can be stored, notifying clients of the death of the counsellor and where their records are secured, obtaining the wishes of the clients regarding the disposition of their records, and obtaining the consent of the clients to transfer their records. Counsellors are advised to develop the directions to be followed with respect to their professional obligations in case they continue to have such obligations at the time of their death.
- Counselling records should not be transferred to another professional without the consent of the client. In general, clients should have the choice of obtaining a copy of their record, having the record transferred to another practitioner, or agreeing to have their record remain in storage. Clients should be notified of the location when their records are stored in the offices of another practitioner. Newspaper announcements can assist with a notification about the closing

of a practice, particularly to difficult to find clients and also serve to provide general information to them as to who to contact with respect to their counselling records.

- The sudden termination of counselling services due to an unexpected illness or disability, or the sudden death of a counsellor would not be considered as client abandonment. Nevertheless, counsellors can act to minimize any negative consequences for their clients by developing plans in case of such events and making these plans known to the clients either within the counselling discourse or by way of agency literature made available to clients.
- When counsellors are aware ahead of lime that their practice will cease within a known time frame they should begin the process of counselling termination with those clients for whom it is appropriate to do so. For clients needing continued counselling services, counsellors should begin a briefing process with them to facilitate referrals to other practitioners. These may be colleagues within the counsellor's workplace or to practitioners working in other locations. In any case, counsellors should act to meet the requirements of informed consent during this transfer process. (See page 26 , CCA Standards of Practice for Counsellors)
- Counsellors may consider selling their private practice. However, only tangible assets can be sold and the names of clients and their records cannot be included in such a sale. If a counsellor wanted to transfer her/his clients to a new practitioner/owner this could only be accomplished by following an informed consent process for each client in which each client would decide whether or not his/her name and/or his counselling record could be transferred.

Clearly, the cessation of a counselling practice, for whatever reason, and whether temporary or permanent can be a challenging process with many associated obligations. The paramount consideration for all counsellors in such circumstances is to act in ways to fulfill their ethical and legal responsibilities and in a manner to avoid or minimize any harm for their clients.

A Useful Resource for Counsellors

There have been situations in which counsellors and other professionals have been asked to submit to the court or legally constituted tribunal information about the scoring procedures and other psychometric protocols involved in the scoring of psychometric instruments such as the Wechsler Intelligence Scales. Disclosure of this type of information can have the effect of invalidating the future use of these instruments and impairing the ability of the publishers to engage in responsible commercial practices as well as violating copyright protection. Despite necessary and appropriate protest counsellors and others may receive a court order or subpoena to comply. Should you receive such a request or know of a colleague facing such a challenge you can find very helpful information at the website of the Psychological Corporation that provides policies, legal arguments and some case law on such matters. Counsellors and their lawyers are directed to http://psychocorp.com/sub/legalaffairs/releasepolicy.html. Should the psychometric instruments involved in the dispute be published by the Psychological Corporation you are invited to call then for further advice.
I extend my thanks to Dr Todd Kettner, a psychologist in Nelson, BC for making this information available.

As always, I invite members to contact me with respect to this Notebook entry. You might wish to submit a response to this topic that could be published in the next Cognica. The invitation is once again extended to all our members to consider making a contribution to the Notebook on any ethical, legal, or standards issue that might be of interest to professional counsellors in Canada.

Aide-mémoire sur la déontologie, les questions d'ordre juridique, et les normes pour les conseillers

Il me fait plaisir d'accueillir Dan et Lawrence comme les premiers invités de la chronique Aide-mémoire. Ces membres de l'ACC ont longuement réfléchi sur les défis déontologiques afférents aux conseillers qui utilisent Internet dans l'exercice de leur profession. J'invite les autres à suivre leur exemple et à apporter leur contribution à la chronique Aide-mémoire.

Glenn Sheppard

La déontologie, le courriel et la profession de counseling

Par Dan L. Mitchell et Lawrence J. Murphy

L'Utilisation du courrier électronique pour communiquer entre collègues et autres professionnels est une expérience quotidienne pour la plupart des conseillers. La communication par courriel avec les clients est moins fréquente. Cependant, beaucoup de conseillers correspondent par courrier électronique avec des clients, ne serait-ce que pour remettre un rendez-vous ou pour clarifier une facture. Malgré l'utilisation quotidienne du courrier électronique, nous pouvons ne pas être conscients de bon nombre de questions pratiques et éthiques qui méritent un examen sérieux. Par le biais de cet article, notre intention est de mettre en garde des conseillers contre de sérieux problèmes potentiels et de les inciter à envisager les options possibles pour les éviter.

Le scénario ≪simulation≫

Aujourd'hui, vous avez pu avaler une bouchée pour le déjeuner. Il est 12h55, mardi, et vous décidez de vérifier votre courrier électronique avant notre séance de counseling de 13h.

Vous y trouvez trois nouveaux messages. Un d'entre eux provient d'un expéditeur que vous ne reconnaissez pas. Votre première réaction est de croire que ce message est un courriel-poubelle, mais alors vous remarquez l'objet ≪À l'aide!≫.

À l'affichage du message, la lecture du texte vous alerte :

≪Salut, je suis au bout du rouleau. Personne ne m'aide. Cette fois je vais m'assurer que ça va marcher … ≫

Vous savez que vous devez faire quelque chose, mais que pouvez-vous faire? Vous cherchez un nom, un numéro do téléphone ou tout autre élément d'identification. Vous vérifiez l'adresse du courriel en espérant trouver un indice, mais ce n'est d'aucune aide : ≪bluejay374@hotmail.com≫.

Résistant à l'impulsion de panique, vous imprimez une copie du courriel de détresse et vous la donnez à votre secrétaire en espérant qu'il saura quoi faire. Il ne sait pas, mais il suggère de téléphoner au service de police pour voir si l'on peut retracer la provenance du message.

≪Bonne idée≫, que vous répondez, pendant que vous essayez de vous concentrer sur votre client qui est dans la salle d'attente…

Bien que ce scénario soi fictif, il pourrait être vrai. Le message aurait pu être une dénonciation de mauvais traitement d'enfants. Il aurait aussi pu signaler une intention possible de commettre un homicide. Nous devons supposer que ce n'est qu'une question de temps avant que nous recevions un message d'urgence par courriel.

Préoccupations pratiques et déontologiques

Il y a évidemment beaucoup de préoccupations de nature pratique et déontologique. Voici quelques-uns des problèmes considérés parmi les plus sérieux qui suscite la facilité avec laquelle on peut accéder à l'adresse de courriel des conseillers.

1. La confidentialité du client

La plupart des organismes et des praticiens en counseling ont des adresses électroniques normales (c.-à.-d. non sécurisées) et rendent ces adresses publiques, que ce soit par la publicité, sur leurs cartes professionnelles ou sur leur papeterie. Dès que cette adresse circule, elle est disponible à quiconque a accès à l'Internet.

Le courrier électronique normal n'est pas sécurisé et ne protège pas la confidentialité du client. Même si vous ne voulez que confirmer la date et l'heure d'une nouvelle séance, le message de réponse du client pourrait contenir des renseignements très confidentiels (p. ex. ≪Je suis en fait heureux d'avoir une autre semaine pour réfléchir. Je me suis rappelé d'autres détails depuis notre conversation de la semaine dernière au sujet de…≫).

2. Les noms de domaine

Beaucoup d'adresses électroniques d'organismes et de praticiens de counseling renferment des noms de domaine qui révèlent leur profession. (Un nom de domaine est la partie de l'adresse électronique qui suit le ≪@≫.) Le fait de rendre publiques de telles adresses électroniques compromet la confidentialité des communications avec le client. Par exemple, imaginez une cliente qui utilise l'ordinateur de la maison, aussi utilisé par son enfant, pour envoyer un message électronique normal à info@ counsillerbob.ca. Les définitions par défaut du logiciel de courrier électronique font que les ordinateurs gardent en mémoire une copie de tous les messages envoyés. À moins que cette cliente ait effacé ses ≪messages envoyés≫, son enfant peut facilement découvrir que sa mère recherche un conseiller personnel.

3. Incapacité de réagir à une urgence

Si les clients ou des clients potentiels acheminent de l'information sur une situation d'urgence en utilisant le courrier électronique normal, les praticiens et les organismes en counseling peuvent être dans l'impossibilité d'intervenir, puisque le courriel pourrait ne pas contenir assez d'information pour en retracer son origine géographique.

C'est très différent du cas de quelqu'un qui téléphone à un organisme pour faire part de ses pensées suicidaires. Le client au bout du fil, on peut lui parler, peut-être pour lui fixer un rendez-vous ou pour le

diriger vers un service d'aide d'urgence. En pareil cas, vous savez au moins que le client a reçu vos conseils. En cas d'urgence grave, la police peut retracer l'appel téléphonique et acheminer l'aide approprié.

4. L'assurance de responsabilité civile

On ne sait toujours pas si l'assurance de responsabilité civile couvre les professionnels du counseling qui n'ont pas minimisé les risques mentionnés ci-dessus.

Les solutions possibles

Nous suggérons que les organismes et praticiens de counseling considèrent les options suivantes :

1. **Éviter de publier les adresses électroniques normales.** Cette option, bien qu'elle soit raisonnable du point de vue déontologique, peut n'être ni pratique pour les clients ni utile pour les praticiens et organismes qui tentent de promouvoir leurs services.

2. **Publier les adresses électroniques normales avec une mise en garde claire stipulant que les clients doivent renoncer à leur droit à la confidentialité.** Cette option offre la possibilité au client de renoncer à la confidentialité de la communication.

   Bien qu'une mise en garde informe les clients de l'enjeu de la confidentialité, elle soulève d'autres questions importantes. Si les clients désirent avoir accès aux conseillers professionnels par courriel électronique, est-il éthique de leur demander de renoncer à leur droit à la confidentialité pour parer à notre incapacité de les protéger? Est-ce qu'une renonciation à la confidentialité résisterait à un examen légal minutieux?

   En vue d'aborder la question des noms de domaine (la deuxième préoccupation déontologique ci-dessus), les adresses électroniques publiées devraient être soit génériques (p. ex. info@hotmail.com, info@yahoo.com) ou d'une quelconque autre façon, masquer tout lien avec la profession de counseling (p. ex. info@tlcobc.com).

   De plus, si les conseillers appliquent cette deuxième option, il est essential que la mise en garde comprenne aussi une demande aux clients d'inclure leurs coordonnées de base. Ceci permettrait alors aux praticiens et aux organismes d'intervenir en cas d'urgence.

   Cependant, il s'agit aussi d'une solution peu souhaitable parce que la mise en garde et la demande se contredisent. En fait, la mise en garde sur le manque de la confidentialité pourrait inciter les clients à ne pas discuter d'affaires personnelles. Ils se retrouvent ainsi en situation contradictoire s'ils doivent inclure leur adresse personnelle ou leur numéro de téléphone dans un message électronique non-sécurisé.

3. **Offrir aux clients un service de courrier électronique sécurisé avec capacité de collecter les coordonnées**. Cette option résout plusieurs problèmes, mais on doit porter une attention particulière aux points suivants :

Premièrement, si les conseillers doivent offrir un service de courrier électronique sécurisé à leurs clients, est-ce que ceux-ci devront télécharger et installer un logiciel à cette fin? Si oui, il y a risque que le processus de téléchargement et d'installation du logiciel incommode encore plus les clients. Idéalement, quel que soit la solution de messagerie sécurisée offerte, l'utilisation devrait réduire au minimum toute forme d'exigence ou de compétence technique de la part des clients. De plus, il faudrait offrir un contact téléphonique aux clients qui éprouvent des difficultés techniques.

Deuxièmement, la question des noms de domaine demeure. Les professionnels devraient choisir une façon de sécuriser le courrier électronique avec possibilité de choix de noms de domaine qui masquent tout lien avec le counseling.

Troisièmement, l'offre aux clients de courrier électronique sécurisé devrait être intégrée au processus de collecte de leurs coordonnées. Ceci minimise l'effort imposé aux clients pour obtenir leurs coordonnées par un processus différent. De plus, le processus de collecte et de stockage de ces coordonnées devrait être sécurisé (p. ex. en hébergeant la base de données sur un serveur sécurisé). Autrement, encore une fois la confidentialité est compromise.

Conclusion : prise de conscience et technologie appropriée

De nos jours, dans la plupart des professions, on constate que le rythme rapide des découvertes technologiques devance celui de l'évolution de la déontologie. Le domaine du counseling ne fait pas exception. Dans cette profession comme ailleurs, les enjeux d'ordre pratique et déontologique liés à la publication d'adresses électroniques normales n'ont pat étés bien reconnus. La plupart des codes d'éthique qui se rapportent spécifiquement aux communications par internet avec des clients stipulent la nécessité de sécuriser nos communications de façon à ce que la confidentialité de l'information soit assurée. Ce n'est pas une hyperbole que de donner à penser que l'utilisation du courrier électronique non-sécurisé par les professionnels du counseling puisse être la violation la plus répandue de la déontologie du counseling de toute l'histoire de notre profession.

La prise de conscience est la première priorité. En soulevant la question, nous voulons encourager la discussion et la réflexion. À mesure que la profession étudie du plus près l'utilisation du courrier électronique, nous espérons que les conseillers sauront faire le nécessaire pour un choix et une utilisation d'une technologie de la sécurité appropriée. Il existe des solutions. Le fait est qu'il ne serait pas trop difficile pour un courriel confidentiel qui entre ou qui sort d'un bureau de counseling. Par exemple, un(e) ex-conjoint(e) fâché(e) pourrait faire beaucoup de tort à son ex-partenaire et à la profession de counseling tout entière par un simple geste semblable. Il nous incombe à tous de nous assurer que ce genre de désastre ne puisse tout simplement pas se produire.

Dan L. Mitchell, CCC, et Lawrence J. Murphy sont les fondateurs de ≪thérapie en ligne≫ (therapy online) (www.therapyonline.ca). Et d'un service de counseling en ligne, établis en 1995. Ils ont été des pionniers dans l'élaboration de solutions technologiques sécuritaires pour les conseillers, de codes d'éthique pertinents et de compétences de counseling en ligne.

Courriel : enquiries@privacemail.com
Téléphone : 1-88THERAPY-4

Aide-mémoire sur l'éthique…

Glenn Sheppard, Ed.D., CCC

Quelques décisions intéressantes tirées de la jurisprudence

Comme cous le savez, l'interprétation et le développement de nos normes professionnelles et de nos pratiques éthiques peuvent être grandement influencés par les jugements de not tribunaux, aussi bien que par ceux des organismes quasi-judiciaires, par exemple ceux rendus par les commissaires provinciaux chargés de l'accès à l'information et du droit de la vie privée. J'ai choisi quelques exemples intéressants pour démontrer ce point :

Cas no 1 : Les notes d'un conseiller d'orientation

En 1995, une mère qui demeurait dans le district scolaire de Cranbrook, en Colombie-Britannique, a demandé à voir les notes prises par la conseillère de l'école élémentaire au cours des sessions avec ses deux enfants. Elle disait que ce qui l'intéressait n'était pas ce que les enfants avaient dit à la conseillère mais plutôt ce que la conseillère leur avait dit.

La conseillère de l'école et la Commission scolaire ont refusé de lui transmettre les notes des sessions. La Commission scolaire a fait savoir qu'un tel refus était permis, selon l'article 19(1)a de la loi d'accès à l'information et de la protection de la vie privée (FIPPA) de la Colombie-Britannique. Cet article de loi permet le refus discrétionnaire d'une telle demande si l'on pense que sa divulgation peut nuire à la santé mentale ou physique de la ou les personnes concernées. La mère en a référé au Commissaire de l'information et de la vie privée de la C.-B. pour qu'il statue sur cette décision de refus. Le commissaire a décidé que les notes de la conseillère étaient la propriété et sous le contrôle de la Commission scolaire, ce qui signifie que le Commissaire avait le droit de statuer sur la gestion perce que de telles notes étaient couvertes par les clauses de la FIPPA.

N'étant pas d'accord avec la décision du Commissaire, la conseillère a fait appel au tribunal. Elle a soutenu devant le tribunal que ses notes étaient sa propriété, qu'elle n'en prenait que pour s'aider et que, de toute façon, elle estimait qu'elle n'était pas tenue de garder les notes prises au cours de ses sessions et qu'elle les gardait dans un cahier chez elle.

Le tribunal a statué en faveur du Commissaire en disant que les notes étaient la propriété de la Commission scolaire et étaient sous son contrôle parce qu'elles faisaient partie d'un aspect du travail de la conseillère et que cette dernière était une employée de la Commission. Dès lors, la question de l'accès aux notes des sessions tombait sous l'autorité de la Loi de l'accès à l'information et de la protection de la vie privée.

En dépit de ce jugement sur la juridiction, la question de savoir si ou non on devrait avoir accès aux notes dans un tel cas demandait plus ample réflexion. À ce sujet la conseillère soutenait qu'elle avait l'obligation éthique de protéger la confidentialité de ses notes. Le tribunal comprenait ce position, mais le problème soulevé devant le tribunal n'était pas celui de divulgation, mais plutôt de juridiction. Le juge a manifesté une certaine inquiétude en ce qui a trait à la protection des droits de la vie privée des

enfants. On a souligné que dans le cas d'un enfant, le parent ou le tuteur a normalement le droit de consentir à la divulgation du dossier de counseling de l'enfant. Dans ce cas précis, c'était un parent qui demandait la divulgation; elle devenait ainsi en mesure de consentir à sa propre requête. Il est certain que cela soulève le problème de la protection de la vie privée! Au fait, celle décision ne diminuait pas nécessairement la responsabilité de la conseillère scolaire de considérer ses notes comme information confidentielle (Neilson c. la Colombie-Britannique (Commissaire du Droit d'accès à l'information et de la protection de la vie privée. 08/07/1998. B.C.J. No 1640, Vancouver, C.-B.)

Cas no2 : Le licenciement d'un travailleur social

En juillet 2000, le Cour suprême de Terre-Neuve a rejeté la plainte d'un travailleur social qui prétendait avoir été injustement renvoyé pour mauvaise conduite. Entre 1979 et 1981, le travailleur social travaillait comme conseiller auprès des jeunes dans un centre de détention pour filles de St-Jean où une jeune fille admise à 14 ans est devenue une de ses clientes. La Cour a reconnu que le conseiller avait eu des rapports sexuels consensuels avec la jeune fille dès ses 16 and alors qu'elle vivait en hébergement collectif communautaire. Cette relation a continué pendant presque trois ans et n'a été dévoilé par la jeune fille qu'en 1995. À ce moment-là, le travailleur social était devenu superviseur régional pour le Centre de détention des jeunes, là où lui et la jeune fille s'étaient rencontrés pour la première fois. La Cour a décidé que le renvoi par l'employeur n'était pas une conséquence déraisonnable pour ce genre de conduite. À la lumière de ce cas, les lecteurs aimeront peut-être revoir l'interdiction de post-résiliation tell qu'elle est énoncé dans le Code d'éthique de l'ACC. (Evening Telegram, St-John's (T.-N.), 15/07/00)

Cas no 3 : L'accès aux questions, aux réponses et aux procédures à suivre pour compter les points dans des tests standards

En 1994, des parents qui demeurent dans la juridiction du conseil de l'éducation du comté de Lincoln souhaitaient contester le jugement du psychologue scolaire à l'effet que leur fille n'était pas surdouée. Pour ce jugement, le psychologue s'était fié dans une large mesure sur les résultats des échelles d'intelligence du test Stanford-Binet.

Nonobstant la demande des parents faite en vertu du ≪droit d'accès à l'information≫, le conseil scolaire leur a refusé l'accès aux réponses et aux modalités de notation qui ont servi à l'évaluation de leur fille à l'aide du test Stanford-Binet. Les autorités scolaires ont soutenu qu'elles avaient un droit de refus discrétionnaire en s'appuyant sur un article de la loi ontarienne sur l'accès à l'information et la protection de la vie privée.

De plus, on a fait valoir que le test Stanford-Binet avait été acheté d'une tierce partie, en l'occurrence, Nelson Canada, et que le maintien de la confidentialité des réponses et des procédures de notation était essential pour le maintien de l'intégrité et de la validité de cet instrument psychométrique. Nelson Canada soutenait aussi que la divulgation dévoilerait un secret professionnel, ce qui aurait des conséquences économiques pour eux.

Quand les parents ont soumis cette affaire au commissaire de l'accès à l'information et de la protection de la vie privée, ce dernier a décidé que le test de créativité d'une page élaboré par le Conseil scolaire devrait être mis à la disposition des parents avec une copie des 14 pages du cahier Stanford-Binet sur lesquelles les réponses de l'élève avaient été enregistrées. Le conseil scolaire a refusé l'injonction et porta l'affaire en justice parce que la divulgation de ce cahier aurait pour effet de dévoiler les pages de notation d'invalider le test. Le conseil a laissé entendre que le commission (dans ce cas-ci, en fait, une commissaire-adjoint) avait ignoré les conséquences de la divulgation de ses pages, notamment celles qui traitent des sections Vocabulaire et Absurdités du test. La Cour s'est dite pleinement d'accord avec le conseil scolaire et a considéré la décision du commissaire comme déraisonnable pare qu'il n'avait pas tenu copte des conséquences sur la validité du test. La décision de commissaire a été renversée par la Cour et le Conseil n'a pas eu à divulguer les informations sur le test Stanford-Binet. (Lincoln County Board of Education c. Ontario (Information and Privacy Commissioner). [1994] O.J.No 2899 (Div. Ct.)

Cas no 4 : Le droit d'une jeune personne à donner son accord selon la common law

(J'inclus ce jugement d'il y a quatorze and parce qu'il en avait étonné plusieurs à l'époque. Aussi parce que le concept d'aptitude à donner son accord est apparu depuis lors et qu'il a préséance sur toute limite d'âge arbitraire comme dans le concept de ≪mineur≫.)

Dans ce cas, une jeune fille de seize and enceinte avait quitté le domicile pour chercher à se faire avorter. Ses parents s'y opposaient pour des motifs d'ordre moral. Ils se sont adressés au tribunal pour empêcher l'avortement en soutenant qu'elle n'était pas apte à prendre une telle décision. Même si dans les circonstances le tribunal a exprimé de l'empathie pour les parents, il a conclu que la jeune fille comprenait la procédure d'avortement et les risques qui y étaient associés. Elle a donc été jugée apte à donner son accord en connaissance de cause et les objections de ses parents ont été rejetées. Il est intéressant de constater que le tribunal a statué que le droit d'un parent à prendre des décisions pour le traitement de son enfant s'arrêtait si et quand l'enfant atteint un niveau de connaissance et d'intelligence suffisant pour comprendre pleinement le traitement proposé ou recommandé.

(C.c. Wren, 1987, 35 D.L.R. (4th) 419, Albert)