NOTEBOOK ON ETHICS, LEGAL ISSUES, AND STANDARDS IN COUNSELLING

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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