

NOTEBOOK ON ETHICS, LEGAL ISSUES, AND STANDARDS FOR COUNSELLORS

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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 and 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.