

Notebook on Ethics, Standards, and Legal issues for Counsellors and Psychotherapists

A Much-Quoted Decision of the Supreme Court of Canada Regarding Medical Records

By Dr. Glenn Sheppard

The 1992 Supreme Court of Canada decision in the case of **McInerney versus Macdonald** is frequently referenced by those who wish to find a legal basis for their decisions, advice or insight with respect to medical records. This is most likely because the case still stands as the most informative and comprehensive court decision with respect to such critical matters as record ownership and the right of access. It also speaks eloquently about how a fiduciary duty obligates health professionals to follow certain practices with respect to record management, and the maintenance of confidentiality.

This court case had its origins in New Brunswick where Dr. Elizabeth McInerney was practicing medicine as a licensed physician. The respondent was her patient, Mrs. Margaret Macdonald. She had seen a number of doctors over a period of years prior to becoming Dr. McInerney's patient. Apparently some concerns about her health prompted Mrs. Macdonald to visit Dr. McInerney requesting a copy of her complete medical file. Her doctor accommodated her wish by providing her with copies of all the material in the file that she had prepared. However, she refused to provide a copy of reports in the file that she had received from other physicians regarding Mrs. Macdonald. She stated that such material was the property of those doctors and that she did not have the ethical authority to release them unless Mrs. Macdonald sought permission from them for such a release.

Mrs. Macdonald followed up with an application to the Court of Queen's Bench in New Brunswick asking that Dr. McInerney be ordered to provide her complete medical record. This application was successful and a subsequent appeal to the New Brunswick Court of Appeal to have this judgement overturned was dismissed. Dr. McInerney was then granted leave to appeal the decision to the Supreme Court of Canada.

The Supreme Court upheld the decision of the courts in New Brunswick. It concluded that there is an entitlement to a copy of the full medical record, including reports from other professionals, that were used to inform the treatment decisions of the patient's physician. However, it also said that the patient is not entitled to the record itself but rather a copy since the medical records should remain with the physician. Furthermore, patient right of access to medical records is not absolute. The Justices said that a physician may deny access if it was felt

that a disclosure could endanger the emotional or physical well-being of the patient. Of course, any such decision could be subject to a court challenge.

Despite the significance of this part of the ruling, it is what the Justices had to say about the nature of the physician/patient relationship, and their elaboration of the commitments that constitute a fiduciary duty that might be even more relevant for counsellors and psychotherapists.

Their views are expressed succinctly in the following statements I have selected from their decision. (Bolds are mine):

- The physician-patient relationship is **fiduciary** in nature and certain duties arise from that special relationship of **trust** and **confidence**. These include the duties of the doctor to act with utmost **good faith** and **loyalty**, to hold information received from or about a patient in confidence, and to make proper disclosure of information to the patient. The doctor also has an obligation to grant access to the information used in administering treatment.
- This **fiduciary duty** is ultimately grounded in the nature of the patient's interest in the medical records. Information about oneself revealed to a doctor acting in a professional capacity remains, in a fundamental sense, one's own.
- While the doctor is the owner of the actual record, the information is held in a fashion somewhat akin to a trust and is to be used by the physician for the benefit of the patient.
- Further, since the doctor has a duty to act with utmost **good faith and loyalty**, it is also important that the patient have access to the records to ensure the proper functioning of the doctor-patient relationship and to protect the well-being of the patient.
- Disclosure serves to reinforce the patient's faith in her treatment and to enhance the trust inherent in the doctor-patient relationship. As well, the **duty of confidentiality** that arises from the doctor-patient relationship is meant to encourage disclosure of information and communications between doctor and patient.

I expect members will find some reassurance from having fiduciary duty and the ethical nature of the physician-patient relationship expressed as a legal view from our Supreme Court Justices. I have no doubt that these views regarding medical records, including patient access to them, and the nature of the physician-patient relationship, apply equally to counselling

records and to our ethical obligations when we enter into counselling relationships. (This decision can be found at the Supreme Court website at <http://www.scc-csc.gc.ca>)

A Follow-up Note:

On my last notebook, in Cognica Fall 2014, I reported on a number of breaches of privacy by health care personnel regarding health records in Newfoundland and Labrador. In a recent court decision a nurse who had accessed records of 18 patients for whom she did not have treatment responsibilities was fined \$1000.00 and had already lost her license to practice nursing.