

Notebook on Ethics, Standards, and Legal issues for Counsellors and Psychotherapists: Some Breaches of Privacy and a Groundbreaking Decision

By Dr. Glenn Sheppard

The protection of privacy in Canada is regulated, in part, by a number of provincial and federal regulatory statutes. For example, the federal legislation The Personal Information Protection and Electronic Documents Act (PIPEDA) entrenches a right to the maintenance of confidentiality of private personal information as well as a right of individuals to access records of such information. Also, all provinces have freedom of information and protection of privacy acts and personal health information legislation. These various statutes are intended to protect individuals against inappropriate privacy invasions by health care authorities and other public agencies as well as by those who work in commercial enterprises including in professional private practices. The fiduciary duty of counsellors and psychotherapists to maintain client confidentiality is also grounded in common law and is clearly expressed in our professional codes of ethics.

Despite all of these protective provisions and ethical obligations, some breaches of privacy continue to occur. For example, in Newfoundland and Labrador, the public health authorities during the last several years have disciplined a number of employees who inappropriately accessed patient health records. In July 2012, five employees were fired for accessing health records they had no right to see – this included a nurse who saw 122 such records. In September of that year, the authorities publicly disclosed that patient records were accessed by two hospital clerks – one resigned and the other was fired. The authorities, once again, publicly announced in May 2014 that an administrative employee resigned after being accused of unwarranted access to 20 private health records. In all these cases, patients were informed of these breaches. Similar breaches have occurred in provinces across the country.

Fortunately, these public agencies were able to act decisively with well established authority. However, until a recent 2012 groundbreaking decision of the Ontario Court of Appeal there appeared not to be a provision for an individual to sue another for a privacy violation (*Jones v. Tsige*, 2012, ONCA 32). This case involved two employees who worked at different branches of the Bank of Montreal. Winnie Tsige had a common law relationship with the ex-husband of Sandra Jones. Tsige and her partner experienced some financial difficulties and she began to access Jones' bank account.

When Jones discovered that Tsige had invaded her private banking information on 174 occasions over four years she sought to be awarded damages for a breach of fiduciary duty. Justice Sharpe of CONA found Tsige liable for a breach of Jones' privacy and awarded Jones her \$10,000.00 in damages. In doing so, the Justice invoked a legal concept from American tort law called "Intrusion into Seclusion". In this decision, the Court stated that its action was based on the following: "One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person". The Court also outlined the conditions to be met when judging liability for privacy breaches under the "Intrusion into Seclusion" provision:

- 1) that the conduct must be intentional, including recklessness,
- 2) the conduct must be an invasion of a party's private affairs or concerns without lawful justification; and
- 3) the conduct must be reasonably regarded as highly offensive causing distress, humiliation, or anguish.

This type of privacy violation applies to such matters as: private correspondence, sexual practices and orientation, private health and financial records, and private employment information.

This court decision and the privacy breaches involving health records does serve as a reminder of our fiduciary duty to protect the private information entrusted to us by our clients and to allow only ethically and lawfully permitted access and disclosures. (The Jones v. Tsige court decision can be examined at www.canlii.org).