

NOTEBOOK ON ETHICS, LEGAL ISSUES AND STANDARDS FOR COUNSELLORS AND PSYCHOTHERAPISTS

A School Counsellor's Notes and the Wigmore Criteria (A Court Case)

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In the Notebook in the last edition of **Cognica** I addressed the issue of confidentiality and the Wigmore Criteria. So, in this one I thought it would be informative to follow-up with an examination of a case in which the judge systematically applied the Wigmore Criteria when determining his response to an applicant seeking access to school counselling notes and for an opportunity to question the guidance counsellor who created them. Also, because as this justice observed, "there is very little jurisprudence on applications for disclosure of guidance counsellor records", and because this appears to remain the case.

This child protection case was heard before Mr. Justice A.D. Sheffield of the Ontario Superior Court of Justice (Children's Aid Society of Ottawa v. N.S. 2005, ONSC). A mother wanted the court to order the Ottawa Carlton School Board to produce her 15 year old daughter's complete school record; including all test results, any psychological assessments, records of all school meetings concerning her daughter, and school counselling notes. She also sought an order to allow for the questioning of her daughter's guidance counsellor.

Based on his review, Justice Sheffield decided that the school counselling record did not constitute privileged communication under the apparent privilege of pupil records as referenced in the Ontario Education Act. He then proceeded to evaluate each of the following 4 Wigmore Criteria to determine how to address the request before him:

1. Did the communication originate in a confidence that they would not be disclosed?

In answering "yes" to this first criterion question, he quoted from another court case which was heard before Judge LeBlanc in the Provincial Court of Newfoundland (R. v G.M., 1992) in which a School Board was objecting to the Crown's request for access to a high school student's school counselling record. He accepted Judge LeBlanc's view expressed as follows:

In my view the first three criteria have been established in relation to the documents in each of these two files. I find that such communications and testing were made on an understanding of confidentiality. That such confidentiality exists appears to be important in the opinion of Mrs. Maggs to maintain the relationship between the student and the counsellor...

2. Is the element of confidentiality essential to the full and satisfactory maintenance of the relationship between student and counsellor?

His answer to this question was *I agree with both the School Board and Judge LeBlanc that an assurance of confidentiality is necessary to the student-counsellor relationship,*"

the School Board position that if students could not rely on confidentiality in their meetings with their guidance counsellor it would "...effectively destroy the utility of the guidance counsellor" and, as the Judge Leblanc added, given the centrality of the element of confidentiality in helping students overcome their fears and worries in disclosing problems in their life, whether at school or at home".

3. Is the relationship between student and counsellor one that in the opinion of the community ought to be sedulously fostered?

His answer to this question was also in the affirmation. In doing so, he observed that the role of the guidance counsellor is well established in the modern day school system and accepted both the School Boards position and Judge LeBlanc's view that the community would want it to be "*sedulously fostered*".

4. Is the injury that would inure to the student-counsellor relationship by the disclosure of the communication greater than the benefit thereby gained for the correct disposal of litigation?

This last question is usually the most challenging question for a judge to answer. Justice Sheffield did observe that it is the applicant's responsibility to make the case as to why a confidential communication such as those recorded in school counselling notes should be disclosed in a particular court case. In arriving at his judgement in this case, he reminded the Court that he had to consider the following question:

The most significant part of the test to consider in this case is the fourth criterion. Would the injury caused by disclosure of the communications between a school counsellor or therapist and a student be greater than the benefit gained by consideration of such documentation at this hearing.

After carefully considering all the arguments and evidence in this case, he decided to deny disclosure of the guidance counsellor's records.

He expressed this decision as follows:

In my opinion, based on the circumstances of this case, the student/child's "best interests" would not be well-served by disclosure of the guidance counsellor's records.

It is reasonable to conclude that by ordering disclosure of a counsellor's records, a child's confidence in the guidance counsellor's ability to keep all communications confidential as much as possible would be undermined, with the practical effect that the child would no longer feel comfortable disclosing anything of importance to the counsellor. This result is not in the child's best interests, because clearly the child in this case felt comfortable confiding in the guidance counsellor, but did not feel comfortable speaking with her mother. Also, as evidenced by the child's own wishes and desires, disclosure of the counsellor's notes would have a significant negative impact on the child's already troubled relationship with her mother.

Disclosure might therefore have a very serious detrimental effect on the child's best interests, sufficient to override any potential benefit gained by the parent in terms of preparing and mounting an effective defence for the child protection hearing.

With respect to the application to question the guidance counsellor regarding the counselling notes he concluded that since the counsellor's notes were not available for disclosure, then it would be *"inconsistent and improper to allow questioning if the counsellor about the content of those notes and communications"*.

It is likely that in most court challenges school counselling notes would meet the first 3 Wigmore Criteria. The most challenging judgement will continue to be with respect to criteria number 4 and will no doubt depend on the nature of the issues before the court. Judge Sheffield reminds us of this when he wrote:

I note that the result may be different if the communications sought to be protected were part of an attempt to lay criminal charges or find criminal liability, which is not the case here. Disclosure of communications made to a counsellor in a criminal law context may involve different analytical considerations, and may yield a different result.

Note: This case also demonstrates the function of case law in which each court decision contributes to a body of jurisprudence about a particular issue which is then referenced to inform subsequent cases on the same or similar issues.

1. This court case can be found at www.canlii.org
2. Readers are referred to the section entitled "Children and Confidentiality" p. 12-13 in our **CCPA Standards of Practice**.