Canadian Landmark Case: *L.C. and the Attorney General for Alberta v. Brian Joseph Mills*

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The duty to protect the confidentiality of patient records is a central tenet of medical ethics and a value highly honored and guarded by psychiatrists and psychotherapists. This value is shared by the Canadian public, who in a recent survey rated the importance of privacy and confidentiality of personal health information second only to that of financial information.[1] Further, Canadians assume that their medical information *is* privileged. In a recent study conducted in Toronto, only 19 percent of people knew or guessed correctly that what they said to their doctor is not entirely confidential.[2]

Recent court decisions in Canada, however, have called into question the privacy of treatment records.[3, 4] Increasingly, courts are obtaining psychiatric records of various participants in the adversarial system through various means with little advance assurance that the material has any relevance to the matter at hand. Doctor-patient confidentiality has taken a back seat to the needs of the court in its role of ensuring a fair hearing. One area of concern is the recent access to the treatment records of victims of sexual violence in both criminal and civil proceedings, which has significantly compromised the privacy of treatment for traumatized women and children.[5] This article identifies the progression of decisions in this important area and reviews attempts to clarify and balance the rights of the accused with those of the complainant.

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R. v. O'Connor

In a highly publicized 1991 case in Canada, a Roman Catholic bishop was charged with the sexual assault of four native children at a residential school during the 1960s. Defense counsel representing Bishop O'Connor obtained a court order requiring disclosure of the complainants' entire medical, counseling, and school records. The defense successfully argued that that the records would assist in determining the credibility of the witnesses and whether the allegations were corroborated by the complainants' statements to others. In a unanimous decision on this issue, the Supreme Court of Canada ruled the request could be made and stated that if specified conditions were met, third parties might be required to produce therapeutic records relevant to a criminal court matter.[6] They concluded that concerns for fairness in the trial proceedings supersede the individual patient's privacy rights.

In their careful deliberation on this matter, the Supreme Court of Canada crafted a two-stage process whereby the court could order production of records that are in the hands of third parties. In the first stage, the accused must establish that the information is likely to be relevant, which is defined as a "reasonable possibility that the information is logically probative to an issue at trial or the competence

of a witness to testify" (Ref. 6, par. 22). Having established relevance, the records in question are produced to a trial judge. At the second stage, the judge determines whether to order production to the accused. This requires a consideration of (1) the extent to which the record is necessary in order for the accused to make full answer and defense, (2) the probative value of the record balanced against the complainant's right to privacy, (3) whether production of the record would be premised upon any discriminatory belief or bias, and (4) the potential prejudice to the complainant's dignity, privacy or security.

While the deliberations of the Supreme Court of Canada in *O'Connor*[6] and that of a companion judgment in *A.(L.L.) v. B.(A.)*[7] attempted to establish strict guidelines under which confidentiality of patient records could be violated in the context of criminal cases, they fueled the debate on the rights of victims in criminal proceedings. These cases resulted in courts across Canada granting access to such records at an unprecedented rate, leading therapists and women's advocacy groups to became highly vocal in their concerns that victimized women no longer had access to safe and confidential treatment.[8] In response, the Government of Canada amended the Criminal Code of Canada and in doing so made considerable progress in the task of balancing the rights of the complainant against those of the accused.

Bill C-46

In Bill C-46,[9] the Parliament of Canada expressed grave concern over the prevalence of sexual violence against women and children. It was noted that such violence limited the equal participation of women and children in society by undermining their rights and security of person. Further, Parliament stated that it wished to encourage the reporting of incidents of sexual violence and abuse and support the prosecution of offenses within a framework of laws that are consistent with the principles of fundamental justice and are fair to both complainants and accused persons. It was recognized that the compelled production of personal information could deter victims of sexual violence from reporting offenses to the police and seeking necessary treatment. In addition, it was acknowledged that compelled production of records and the process entailed would detrimentally affect those providing services for victims of sexual violence.

While retaining the basic two-stage structure outlined by the Supreme Court in *O'Connor*, Bill C-46 set a higher threshold for access to complainant records by the accused. The "likely relevant" standard, which in practice was not an onerous burden, was supplemented by the further requirement that production be deemed necessary in the interests of justice. In considering whether to order production of the records, the judge not only had to consider the four aspects outlined in *O'Connor* (as reported above) but also had to consider three additional aspects: (5) society's interest in encouraging the reporting of sexual offenses; (6) society's interest in encouraging the obtaining of treatment by complainants of sexual offenses; and (7) the effect of the determination on the integrity of the trial process. Further, the legislation did not permit vague suspicions or broad generalizations to serve as reasons to compel disclosure. Assertions by the accused that were identified by the courts as not sufficient for disclosure are found in Table 1.

This legislation did not require that the judge en-

Table 1 Insufficient Reasons for Disclosure in Bill C-46

That the record:

1. Exists
2. Relates to medical or psychiatric treatment, therapy, or counselling
3. Relates to the incident that is the subject matter or the proceedings
4. May disclose a prior inconsistent statement by the complainant or witness
5. May relate to the credibility of the complainant
6. May relate to the reliability of the testimony merely because the complainant has received psychiatric treatment
7. May reveal allegations of sexual abuse of the complainant by a person other than the accused
8. Relates to the sexual activity of the complainant with any person including the accused
9. Relates to the presence or absence of another recent complaint
10. Relates to the complainant's sexual reputation
11. Was made close in time to the complaint or to the activity that forms the subject matter of the charge against the accused

gage in a conclusive and in-depth analysis of each of the factors required for consideration, but rather, that each of the factors be taken into account. In particular, the judge was required to consider whether the search for truth would demand the production of the materials in question or whether the materials would introduce a discriminatory bias into the fact-finding process. Also, the legislation set out a procedure for obtaining each record separately, which makes the process potentially quite onerous for the accused and provides checks and balances at each stage. Further, as the material has not been viewed by the accused or the court at the initial stage, establishing the probative value has proven to be a challenge. Some have contended that this places the accused in a "Catch 22" situation because of the condition that they must establish the relevance of records without knowing their contents.

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Bill C-46 was immediately challenged, and within four months of its passage, it was overturned by three superior court judges, one in Alberta[10] and two in Ontario.[11, 12] In *R. v. Mills*,[10] Brian Mills was charged with sexual assault against a 15-year-old girl. The offense allegedly involved placing his hands in her pants pockets. However, in the next stage of the proceedings, the complainant made further allegations that a more serious sexual assault had occurred. As a result, counsel for Mills made an application for disclosure of the complainant's counseling records, contending that the counseling process may have contributed to the change in her story. The trial judge ruled in the accused's favor. In upholding the decision of the trial judge and striking down Bill C-46, the Supreme Court of Alberta stated that the bill established a regime that disturbs the delicate balance worked out by the Supreme Court of Canada in *O'Connor* and was thus unconstitutional. This decision was appealed to the Supreme Court of Canada.[13]

In considering the case, the Supreme Court of Canada overturned the ruling of the Supreme Court of Alberta and upheld Bill C-46. In doing so, the ruling discussed at length the relationship between the courts and the legislature. It was noted that the court must maintain a "posture of respect" to parliament and that the relationship between the two bodies must be based on dialog and a balance of power. In particular, the ruling noted that courts do not hold a monopoly on the protection and promotion of rights and freedoms. Parliament, in it role as an elected governing body is often able to act as an ally to vulnerable groups, in this case, victims of sexual violence. The Court acknowledged that the history of treatment of sexual assault complainants by our society and our legal system has been an unfortunate one. Important change has occurred through legislation aimed at both recognizing the rights and interests of complainants in criminal proceedings and in debunking the stereotypes that have been so damaging to women and children. Nevertheless, it was noted that treatment of sexual assault complainants remains an ongoing problem.

The Court further noted that through the process of consultation, legislators had more information at their disposal than the Supreme Court did in *O'Connor*. For instance, one study presented during the legislative review process indicated that most *O'Connor* applications were successful, suggesting that the guidelines set out by *O'Connor* did not protect the rights of vulnerable groups.[14] A further study determined that women with lengthy psychiatric histories were particularly vulnerable in the courts under *O'Connor*, as information about previous mental states could be used to attack their credibility. It was suggested that this discriminated against a disadvantaged group whose health records may include biases and historical facts that might be hurtful to their case but not relevant to the matter at hand.[15] In this regard, the Court recognized the value of parameters set out in Bill C-46 aimed at encouraging the reporting of sexual violence and addressing the "horizontal" inequality of women in the criminal justice system.

The Court identified three competing principles, namely full answer and defense, privacy, and equality, noting that no single one of these principles is absolute and capable of trumping the others. The accused's right to liberty under the Canadian Charter of Rights and Freedoms (the Charter)[16] may be jeopardized by unjust imprisonment. Conversely, § 8 of the Charter protects the right to privacy. There is, therefore, the need to balance the accused's right to make full answer and defense against the possibility of unreasonable search and seizure of the complainant's records. Both of these rights are fundamental to justice and must be considered within the context of each individual case. However, the Court underlined that the principles of fundamental justice embrace more than the rights of the accused. It therefore sug-

gested that the judgment be made "from the point of view of fairness in the eyes of the community and the complainant".[17]

In supporting the requirement to ensure full answer and defense, the Court pointed to two cases in which the non-disclosure of relevant information by the Crown was determined to seriously erode the individual's rights, *R. v. Stinchcombe*[18] and *Donald Marshall.*[19] In the Marshall case, it was found that the Crown's failure to disclose prior inconsistent statements played a key role in the miscarriage of justice. Marshall was convicted of murder and served 19 years in prison prior to a Royal Commission that recommended his release. Nevertheless, the Court pointed to the fact that generally, in sexual assault cases, the records were not necessarily part of the "case to meet," that is, the actual allegations or accusations are not contained in the records; this differentiates them from records held by the police, which the Crown would have a duty to disclose.

These records were further differentiated from those of civil proceedings. In Canada, individuals who initiate civil legal proceedings that put their treatment, medical condition, or health at issue are viewed as waiving the right to confidentiality and implicitly consenting to the disclosure of all confidential information that may be relevant to the action.[20] The Supreme Court noted, that in criminal matters, subsequent damage to the complainant is not in question and thus the requirement for disclosure in civil cases does not apply. Interestingly, however, the Court cited a civil case[21] that noted that victims are "doubly victimized" if counseling records are not privileged; this may infer that a Bill C-46 procedure could be relevant to civil cases.

Finally, the Court ruled that psychiatric records were clearly within the parameters of what the Charter refers to as a person's reasonable expectation of privacy. As one of the authors (G.D.G.) represented the Canadian Psychiatric Association as an intervenor, this finding was read with some satisfaction by the authors. The Court referred to "eloquent submissions of many intervenors in this case regarding counseling records" and stated: "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"(Ref. 13, par. 82). The Court accepted that the therapeutic relationship has important implications for helping a complainant recover from trauma. It stressed that a complainant's willingness to report a crime or accept counseling may be affected if there is no privilege accorded to counseling records. It further argued that since the person's mental integrity may be violated by production of records, the security of the person is implicated, which in and of itself violates the Charter. In addition, the Court recognized (as emphasized by the Canadian Psychiatric Association) the highly influenced context in which therapeutic records are made and their potential unreliability as factual accounts of an event.

Conclusion

In summary, the past several years have seen considerable debate in Canada over the rights of the accused to make full answer in defense in a sexual assault trial versus the rights of complainant to privacy. The 1995 Supreme Court of Canada decision in *O'Connor* allowed for access to treatment records of complainants only under certain specified conditions. In practice, however, the conditions did not act as a deterrent, and counseling records became routinely obtainable. The Canadian legislature then proclaimed legislation to further limit the access to records and uphold the privacy rights of the complainant. This was immediately overturned in provincial court as unconstitutional with respect to the rights of the accused. The most recent Supreme Court of Canada decision *L.C. (the complainant) and the Attorney General of Alberta v. Brian Joseph Mills*, reevaluates this issue and underlines the rights of the complainant. In this decision, the Court reinforces society's responsibility to vulnerable groups and to promoting equality. Further, it reinforces the centrality of confidentiality to the doctor-patient or therapist-patient relationship. At a time when doctor-patient confidentiality has been undermined in a wide variety of contexts, this represents an important precedence.

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