Civil liability issues for PHAs and service providers

Civil liability of service providers for breach of confidentiality

The Canadian laws protecting the privacy of personal health information have been described as a "patchwork" of rules that can vary from one province/territory to another. These laws include:

- the *Canadian Charter of Rights and Freedoms*;
- the Quebec *Charter of Human Rights and Freedoms*;
- the common law and the *Civil Code of Québec*;
- Rules governing regulated professionals;
- Privacy acts;
- Health information protection acts; and
- Federal and provincial personal information protection acts.

For complete information on civil liability for breach of confidentiality, service providers and organizations should seek legal advice, since rules can vary from one province/territory to another and particular conditions may apply, depending on the nature of the organization and the type of service being provided.

Civil liability of service providers and organizations under Quebec law

- The ***Civil Code of Québec*** includes a right to respect for personal reputation and privacy. No one may invade the privacy of another person without the consent of the person in question, unless authorized by law.[1] Violation of the right to personal reputation or privacy can engage civil liability.

- However, in circumstances where a service provider or an organization may decide to disclose confidential information to protect another person from harm — provided both the decision to disclose and the steps taken were reasonable — they might not be found liable for disclosing client information without the client's consent.

- In such circumstances, a court would look at the facts of the case to decide whether the decision to breach confidentiality and disclose client information was reasonable. A court is very likely to analyze the issue based on the criteria set out by the Supreme Court of Canada in ***Smith v. Jones*** (later included in several

[1] *Civil Code of Québec*, section 35.

statutes in Quebec), providing for a *discretion* to breach confidentiality where:

- there is a clear risk of harm to an **identifiable person or group of persons**;
- there is a **risk of serious bodily harm or death** (e.g., the threat must be such that the intended victim is in danger of being killed or of suffering serious bodily harm);[2] *and*
- the **danger is imminent** (i.e., the nature of the threat must be such that it creates a sense of urgency).[3]

The right to privacy and confidentiality is also guaranteed by the Quebec *Charter of Human Rights and Freedoms*. Section 5 provides that "[e]very person has a right to respect for his private life," and section 9 provides that "[e]very person has a right to non-disclosure of confidential information."

For more information on breach of confidentiality to protect others from harm, see "Preventing harm to others" in the section on "Client confidentiality and record-keeping," also in this resource kit.

At least, four common law provinces (British Columbia, Manitoba, Saskatchewan, and Newfoundland and Labrador) have enacted **general privacy acts** that give a right to sue for violations of privacy. Typically, the statutes state that "it is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another." It is noteworthy that the plaintiff need not prove that he or she suffered actual harm in lawsuits under the privacy statutes.

Provinces including Manitoba, British Columbia, Alberta, Ontario and Quebec have enacted **legislation on the protection of health information** and/or **general legislation on the protection of personal information.** Specific agencies, such as the Ombudsman Manitoba, Access and Privacy Division in Manitoba, or the Information and Privacy Commissioner of Ontario, are responsible for enforcing such legislation. Complaints can usually be made to such agencies in cases of violation of these legislations.[4]

Civil liability of service providers and organizations in other provinces and territories

- Service providers and organizations have a duty to maintain client confidentiality. When a service provider receives confidential information from a client, the counsellor is under a legal duty not to use that information for any purpose other than counselling the client.

[2] *Smith v. Jones*, [1999] 1 S.C.R. 455 at para 82.
[3] *Smith v. Jones*, [1999] 1 S.C.R. 455 at para 84.
[4] For information on the protection of health information and the possibility of making a complaint in Manitoba, see http://www.ombudsman.mb.ca/phia-long.htm; for information on the protection of health information in Ontario and the possibility of making a complaint, see http://www.health.gov.on.ca/english/providers/legislation/priv_legislation/phipa_brochures/phipa_brochure.pdf.

- If the information is used for another purpose, and the person suffers damage as a result, he or she is entitled to a remedy — which can be sought by bringing an action for *breach of confidence*.[5] Depending on the province/territory, other privacy-related lawsuits may be brought in cases of breach of confidentiality. For example, in some provinces, lawsuits for violations of privacy may be made under a particular statute (see text box above).

- To prove that there has been a breach of confidence, a client must establish three elements.[6] The client must prove that the information given to the service provider or organization was:

    1. **confidential**;
    2. **communicated in confidence** (i.e., there was a mutual understanding that the information would be kept secret); and
    3. **misused by the service provider or the organization to the detriment of the client**.

- A counsellor or an organization breaching client confidentiality may be faced with an action for breach of confidence. Whether or not a court holds the service provider or organization civilly liable for breach of confidence would likely depend upon what the counsellor told the client about the confidentiality of their information and how the counsellor then used the information.

- The best way for a service provider to protect himself or herself and the organization from civil liability *might* be to:

    – advise clients about the public safety exception;
    – follow applicable guidelines and policies if they exist;
    – only disclose client information to prevent harm to a third party where other actions have proved insufficient — or not applicable in the circumstances — *and* the three conditions in the *Smith v. Jones* test are met; and
    – disclose as little information as possible.

For more information on the criteria set out in *Smith v. Jones*, see "Preventing harm to others" in the section on "Client confidentiality and record keeping," also in this resource kit.

Regulated professionals

Regulated professionals (such as registered nurses, registered psychologists, registered social workers and physicians) can be sued for breach of confidentiality. Because trust and confidence are at the core of the relationship between a professional and a client, the law imposes a greater duty on the professional to hold client information in confidence.

[5] *LAC Minerals Ltd. v. International Corona Resources Ltd*., [1989] 2 SCR 574.
[6] Ibid.

This duty may make it harder for a professional to legally justify breaching client confidentiality, although the principles set out in *Smith v. Jones* as described above would apply to regulated professionals too.

In addition to civil actions, a client can file a complaint against a professional with the professional's regulatory body. Professional regulatory bodies do not have the power to award monetary damages to a client. But regulatory bodies do have the power to discipline health care professionals for incompetence or misconduct, and can impose sanctions such as revoking, suspending or placing conditions on the professional's licence to practice, reprimanding the professional, or imposing a fine.

Regulated health professionals may also have particular legal obligations regarding disclosure of health information under provincial/territorial legislation, which violation may result in a complaint to the provincial/territorial agency in charge of enforcing the legislation (see above text box, page 2).

For complementary information on regulated professionals and the duty of confidentiality, see "Preventing harm to others" in the section on "Client confidentiality and record keeping," also in this resource kit.

The defensive role of policy

- Part of the role of the board of an organization is to develop policies and guidelines to help staff and volunteers fulfill the organization's mandate, and to help limit the organization's civil liability. From a civil liability standpoint, it is a good idea for an organization to have a confidentiality and record-keeping policy, and to follow it.

- Courts place great weight on the particular facts of each case, including the parties' actions. Courts are more likely to find in favour of a party who acted reasonably. It is reasonable for an organization to adopt confidentiality and record-keeping policies that are firmly grounded in legal and ethical duties, and then to act in accordance with them. Where an organization has a sound policy, which its workers follow, a court might be less likely to impose civil liability on either the organization or the service provider.