Release of Inmate Psychiatric Information

In keeping with the mental health care theme in this issue of FORUM, Legal Services examines some of the complex issues surrounding the release of inmate psychiatric information.[1] *However, the following represents only a general discussion of these issues, and Legal Services should be consulted in cases involving any uncertainty. Readers are also reminded that health care legislation often varies between provinces and this may affect decisions regarding the release of information.* A. Background: Duty of Confidentiality The duty of a physician to maintain patient confidentiality is *not* absolute, as enunciated in the Canadian Medical Association's Code of Ethics: An ethical physician will keep in confidence information derived from his patient, or from a colleague, regarding a patient and divulge it only with the permission of the patient except *where the law requires him [or her] to do so.* (emphasis added) There are several reasons why physicians and hospitals desire control over patient records. The records usually contain medical language not readily understandable by a non-medically trained person. Moreover, revealing certain information (for example, about a terminal illness or suicidal tendencies) could be detrimental to the patient's health and future treatment; this is especially true of psychiatric information. The records may also contain references to other persons that should not be disclosed to the patient. The premise behind all these reasons is the belief that the physician is in the best position to judge what information should be disclosed.

Courts have held that doctors must not volunteer patient information without the consent of the patient unless they are required to do so by due process of law.[2] The Correctional Service of Canada is in a unique position because requests to release medical information are often linked to judicial or administrative proceedings before a court or a parole board. In such cases, the duty of confidentiality, which requires openness and honesty between patient and physician, must be balanced against the public interest in the administration of justice. B. Release of Information to Inmate Offenders have the same legal rights as members of the general public to the confidentiality of information obtained by a health care professional and to access to that information. The policy of the Correctional Service of Canada on the release of inmates' medical reports is that, except for subpoenaed records, no confidential medical information shall be released from the control of health care staff or divulged to unauthorized persons.[3]

Inmates are normally allowed access to their own medical files; however, several circumstances would preclude automatic release: for example, if the file contained information about a third party,[4] if the information could seriously interfere with the inmate's institutional community program,[5] or if it could cause harm to another person.[6] Access could also be denied if the physician believed that the information might be harmful to the patient[7]; however, the doctor may have to provide compelling evidence to support that position. In Lindsay v. D.M., the court allowed a former mental hospital patient the right to access his medical records, although this right had previously been denied; the onus was put on the hospital to justify why such disclosure should not ensue.[8]

If the Correctional Service of Canada determined that one of the above circumstances for denying access existed, the inmate could apply for a reconsideration of the request under the *Privacy Act*. If the Privacy Commissioner again denied access, the inmate could then apply to the Federal Court for a review of the decision and a determination of whether or not the decision has been fairly reached.[9] C. Release of

Information to Persons Other than the Inmate In the absence of a court order, the Correctional Service of Canada is under no obligation to release medical reports to the inmate's lawyers or other persons, even with the consent of the inmate. However, release could be acceptable in some circumstances, such as in cases where the inmate has already reviewed the information, is fully aware of their contents and has consented (preferably in writing) to their release. Again, it is important to ensure that any released information does not contain references to "personal information" about other persons, as such information is protected under the provisions of the *Privacy Act.* If the Correctional Service of Canada refuses access, the inmate is still free to make an application under the *Privacy Act* to obtain the document and may later forward the document to other persons.

Thus, in the release of medical information to persons other than the inmate, even with the inmate's consent, it is important to remember that disclosure of medical records requires the patient's written consent or a court order. D. Release of Information for Parole Hearings or Detention Reviews The release of medical information without the patient's consent is generally contrary to all established principles of privacy and confidentiality. Notwithstanding this general principle, this area has been the subject of much discussion within the Correctional Service of Canada. Given the nature of some offenders' psychiatric profiles and potential behaviour upon release into the community, it is readily understood that certain psychiatric information would be crucial to any discharge decision. Once again, the individual's right to privacy and confidentiality must be weighed against the public interest in safety and the administration of justice.

The *Parole Act* states that when the Correctional Service is of the opinion that an inmate meets the criteria for detention, it shall refer the case to the Parole Board, together with all information that is relevant to the case.(10) For a parole hearing, the Board will consider all relevant information in the review of the case.(11) The need to balance individual privacy with the public interest may provoke a jurisdictional conflict, as health care is a provincial matter and parole is a federal matter. This jurisdictional conflict may be exacerbated by the fact that the federal Regional Treatment Centre and Regional Psychiatric Centres fall under federal jurisdiction and under the applicable provincial Mental Health Acts. Therefore, there may be a conflict between provincial and federal laws, which will have to be resolved on a case by case basis.

The jurisdictional problems were well illustrated in the case of *R. V. Worth,*(12) in which medical records were sought to corroborate evidence that a man convicted of first-degree murder had, just prior to his release from penitentiary, told his case management officer he would kill again. A search-and-seizure warrant was issued under the *Criminal Code of Canada* to obtain his records from the Regional Psychiatric Centres Prairies and Pacific, where he had been treated. As the court pointed out, Ontario's and Newfoundland's statutory provisions outlined the procedure for obtaining medical records and protecting their use, but there was no parallel provision in the Saskatchewan or British Columbia health acts. Moreover, British Columbia had no guidance for determining the circumstances in which medical records could be released. Thus, the court relied solely on the Criminal Code provisions (with no assistance from the provincial statutes) in reaching its decision to uphold the warrant, although there may have been a different outcome had the accused been treated in Ontario or Newfoundland. E. Inmate's Access to Reports Once Released to Review Board Principles of natural justice require that a person

know the facts of any case against him or her in order that a full and proper defence or response can be prepared. Given the delicate nature of the subject matter and the often controversial conclusions in psychiatric reports, it could be psychologically detrimental for an inmate to read the comments of a treating physician. In parole and detention hearings, the court, in compliance with its duty to act fairly, continuously weighs the privacy rights of the individual against the health and welfare of the individual and society.

In a recent New Brunswick Court of Appeal case, *McInerney v. MacDonald*,(13) the court found that a contractual relationship existed between doctor and patient, and that the patient was entitled to have access to all the information contained in the medical report. This supported the earlier Ontario decision, *Re Abel & Penetanguishene Mental Health Centre*,(14) in which the court held that the Chair of the Review Board had the authority to disclose information placed before the Board to the patient.

However, if disclosure of certain information could result in harm to the health of the inmate, the physician could request that such information not be released to the inmate.(15) In *Re Egglestone & Advisory Review Bd.*, the court found that it was appropriate for the Review Board to allow counsel access to the clinical record on the condition that the information in the record not be disclosed to the client.(16) In Re Stumbillich & Health Disciplines Bd.,it was further determined that to comply with the principles of fairness, it was not sufficient to provide summaries of documents supporting a complaint committee decision; rather, the documentation itself must be provided to the individual.(17) F. Conclusions Subject to certain exceptions, all Canadian citizens and permanent residents have the right to access information contained in their psychiatric records; inmates also have this inherent right. The Correctional Service of Canada has the final authority to determine whether or not psychiatric reports should be released upon request, but given the complicated nature of the exceptions listed above, it is usually wise to have the inmate gain access under the *Privacy Act.*

Treating physicians and health care officials have a professional duty to maintain the confidentiality of inmates' medical records and protect against the unauthorized release of psychiatric information. However, this right to individual privacy must sometimes be balanced against the public interest in safety and the administration of justice.

An inmate's psychiatric information is often pertinent to parole hearings and detention reviews; the *Parole Act* allows for submission of any information relevant to the case, including sensitive medical information. Again, individual rights are weighed against societal rights in the determination of informed parole and detention decisions. A case-by-case analysis is necessary, given the nature of the medical information involved and the vast differences between applicable provincial mental health legislation.

The following summaries or extracts from reports, opinions and other documents are provided for the information and convenience of the reader. However, as the extracts are not complete, the reader should refer to the actual opinion or document or consult with Legal Services at National Headquarters concerning the specific interpretation or applicability of any opinion or decision cited. If you have any questions about these or any other related matters, please contact Theodore Tax, Senior Counsel, Department of Justice, Legal Services, Correctional Service of Canada, National Headquarters, 4A-340 Laurier Ave. West, Ottawa, Ontario K1A 0P9.

RECENT DECISIONS

In *Cleary v. Correctional Service of Canada & National Parole Board,* Mr. Cleary was scheduled for a detention hearing before the Board. The *Parole Regulations* stipulate that the Board provide the inmate with a written summary of the relevant information in its possession at least 15 days before the date of the hearing. Because of a strike involving Correctional Service of Canada employees, the material was delivered only nine days before the hearing. Mr. Cleary applied to the Federal Court (Trial Division) for an Order quashing the National Parole Board's decision, but the Court dismissed his application on the grounds that the provisions regarding time frames were directory, not mandatory, and that the Board had acted within its authority. In April 1990, an appeal by Mr. Cleary to the Federal Court of Appeal was also dismissed, but the Court said that the time frames were in fact imperative. The Court of Appeal held that the trial judge had a discretion to grant the relief requested, and as Mr. Cleary had suffered no prejudice, the Court should have used its discretionary power to deny Mr. Cleary's application.

On May 31, 1990, the Federal Court of Appeal delivered its decision in *The Commissioner of Correctional Service of Canada V. Veysey*. Inmate Veysey had been refused the possibility of a private family visit with his partner of the same sex. The Court provided a legal interpretation of paragraph 19 of the Commissioner's Directive number 770 on Visiting, which establishes a list of eligible visitors. In combining the expressions "common law partners" and "relatives" and in looking at the purpose of the program, the Court concluded that the Commissioner could have exercised his discretion and granted the visit with the same-sex partner. While the Court did not determine the case by applying section 15 (Equality Rights) of the *Canadian Charter of Rights and Freedoms,* it did acknowledge the Attorney General of Canada's position that sexual orientation was a ground for discrimination under section 15 of the *Charter*. The Court refrained from deciding whether same sex partners could be considered common law spouses.

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(1)*Rules pertaining to medical documents apply to institutions, physicians and any other persons who compile them. No distinction is made between physicians' reports, nursing reports, psychological reports, etc. Thus, any record originating from a health care professional is governed by the rules of confidentiality as discussed in this article. These rules do not apply, however, to information in psychological reports prepared for non-medical purposes.*
(2)Canada (Solicitor-General) v. Ontario (Royal Commission of Inquiry into the Confidentiality of Health Records) *(1979), 47 C.C.C. (2d) 465 (Ont. C.A.). The Supreme Court of Canada overturned the Court of Appeal decision; however, Chief Justice Laskin quoted this duty with approval in his dissent.*
(3)*Correctional Service of Canada, Medical and Health Care Services. Policy No.105.1; Commissioner's Directive No.835.*
(4)Privacy Act, *R.S.C. 1985, c. P-21, s.26.*
(5)*Ibid., s.24(a).*
(6)*Ibid., s.25.*
(7)*Ibid., s.28.*
(8)*[1981] 3 W.W.R. 703 (Alta. C.A.).*

[9]Access to Information Act, *R.S.C. 1985, c. A-1, ss. 44 ff.*; *Federal Court Act, R.S., c.10 (2d Supp.), s.18.*
[10]*R.S.C. 1985, c. P-2, s.21.3[(2)].*
[11]Parole Regulations, *s.17.*
[12]*(1989), 54 CCC. (3d) 215 (Ont. H.C.J.).*
[13]*(1990), 66 D.L.R. (4th) 736*
[14]*(1979), 97 D.L.R. (3d) 304 (Ont. H.C.); affirmed 119 D.L.R. (3d) 1O1 (Ont. C.A.).*
[15]Parole Regulations, *s.17[(5)].*
[16]*(1983), 150 D.L.R. (3d) 86 (Ont. Div. Ct.).*
[17]*(1984), 12 D.L.R. (4th) 156; affirmed 3 D.L.R. (4th) 416 (Ont. C.A.).*