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**BY E-MAIL: carole.c.rioux@nb.aibn.com**

February 19, 2014

College of Psychologists of New Brunswick
236, St. Georges Street, Suite 219
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**Attention:** Carole Cormier-Rioux, Registrar

**RE: Duty of Psychologists to Disclose**
**Our file no.: 130802**

As requested, the following will serve as our legal opinion with respect to the ethical and legal obligations of psychologists and the release of confidential information, including the raw data and psychological tests material following a request from clients, lawyers and/or following a Court Order.

In order to adequately address your concerns, we have reviewed the ***Personal Health Information Privacy and Access Act,*** SNB 2009, c P-7.05, the ***Rules of Court of New Brunswick*** and case law. In addition, we have also consulted various documents and articles pertaining to the release of records and file information disclosure. Finally, we reviewed the legal opinions of solicitor Robert Basque, Q.C. dated respectively November 18, 2010 and January 6, 2011.

This legal opinion is divided as follows:

1. Introduction

2. Issues:
    a. Request from clients;
        i. *Client's right to access records;*
        ii. *What can a client have access to;*
    b. Request from lawyers and Court Orders;

3. Conclusion.



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## 1. INTRODUCTION

Clients usually expect that any private information they disclose to a professional will be kept confidential. That is, they expect the professional will not reveal that information to anyone else without their permission.

According to the ***Canadian Code of Ethics for Psychologists*** (herein the "*Code of Ethics*") and the ***Code of Conduct of the College of Psychologists of New Brunswick*** (herein the "*Code of Conduct*"), psychologists are expected not to disclose information without the patient's consent unless otherwise provided and, in addition, they must do no harm to their patients.

Section 2 of the *Code of Conduct* provides the following:

> **II Definitions**
>
> II. 2. **Confidential information**. "Confidential information" means information revealed by a client or clients or otherwise obtained by a psychologist, where there is reasonable expectation that because of the relationship between the client(s) and the psychologist, or the circumstances under which the information was revealed or obtained, the information shall not be disclosed by the psychologist without the informed consent of the client(s).

However, psychologists often receive requests for file disclosure either from patients, lawyers, or third parties. These requests often arise when clients are involved in legal proceedings and more particularly in personal injury cases where the client alleges to have sustained mental injuries as a result of the wrongful acts or negligence of a third party. In such cases, psychologists may be faced with requests to release the client's information which may seem contrary to the obligation or duty of confidentiality. Most often, these requests will come from the client's lawyer who is prosecuting a claim for personal injury on behalf of the client.

## 2. ISSUES

### a. REQUEST FROM CLIENTS

#### *i. Client's right to access records*

Under Canadian common law, a patient has the right to have access to his or her medical file that was used in the provision of medical and psychological services rendered. In ***McInerney v MacDonald,*** [1992] 2 SCR 138 (herein "*McInerney*"), the Supreme Court of Canada recognized



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that in absence of regulatory legislation, patients have an interest in information which a health care provider has obtained in the course of providing treatment and accordingly, they are entitled to inspect and copy all information in his or her medical file.

However, the Court in *McInerney* noted that this right is not absolute and the common law confers discretion to the health care provider to withhold access if there is a "significant likelihood of a substantial adverse effect on the physical, mental or emotional health of the patient or harm to a third party".

It is important to note that the *McInerney* case was originated in New Brunswick in the early 1990's. At that time, there was no legislation in the province regulating a patient's access to information contained in medical records.

In September 2010, the first access and privacy legislation to apply to health care providers in both public and private sectors came into force in New Brunswick through the ***Personal Health Information Privacy and Access Act***, SNB 2009, c P-7.05 (herein the "PHIPAA"). The goal of the legislation is to provide a set of rules that protects patients' privacy and the confidentiality of their personal health information. It also balances individuals' right to privacy with respect to their own personal health information with the reasonable needs of persons and organizations providing health care services to access and share this information.

Section 2 of the PHIPAA provides the following:

> **2** The purposes of this Act are
>
> (*a*) to provide individuals with a right to examine and receive a copy of their personal health information maintained by a custodian, subject to the limited and specific exceptions set out in this Act,
>
> (*b*) to provide individuals with the right to request the correction of or amendment to their personal health information maintained by a custodian, subject to the limited and specific exceptions set out in this Act,
>
> (*c*) to establish a set of rules for custodians regarding the collection, use, disclosure, retention and secure destruction of personal health information that protects the confidentiality of personal health information,
>
> (...)



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The PHIPAA also refers to health care providers as "custodians". Custodians are individuals or organizations that handle personal health information in order to provide or assist in the delivery of health care. Section 1 of the Act provides a list of individuals and/or organizations that are considered to be "custodians"

> "custodian" means an individual or organization that collects, maintains or uses personal health information for the purpose of providing or assisting in the provision of health care or treatment or the planning and management of the health care system or delivering a government program or service and includes
>
> (*a*) public bodies,
> (*b*) health care providers,
> (*c*) the Minister,
> (*d*) the following organizations or agencies:
> (i) Ambulance New Brunswick Inc.,
> (ii) the New Brunswick Health Council,
> (iii) FacilicorpNB Ltd.,
> (iv) regional health authorities,
> (v) the Workplace Health, Safety and Compensation Commission, and
> (vi) the Canadian Blood Services,
> (*e*) information managers,
> (*f*) researchers conducting a research project approved in accordance with this Act,
> (*g*) health care facilities,
> (*h*) a laboratory or a specimen collection centre,
> (*i*) nursing homes and operators as those terms are defined in the *Nursing Homes Act*, and
> (*j*) a person designated in the regulations as a custodian.

It may be confusing for some individuals and/or organizations as to who is in fact subject to the *Act*, but this list is not exhaustive and applies to most individuals and/or organizations involved in the health care sector, including psychologists. In fact, even though "psychologists" are not explicitly included in the definition of "custodian", the definition of "health care" provides assistance in the interpretation:

> "health care" means any observation, examination, assessment, care, service or procedure that is carried out or provided for a health-related purpose and



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(*a*) to diagnose, treat or maintain an individual's physical or mental condition,
(*b*) to prevent disease or injury or to promote health, or
(*c*) as part of rehabilitative or palliative care,

***ii. What can a client have access to?***

Under the common law, the client may have reasonable access to examine and copy records, but the client does not have the right to remove the records from the premises. In fact, in *McInerney*, *supra*, the Supreme Court of Canada held that the physician, institution or clinic compiling the medical records owns the physical records and patients are not entitled to the records themselves.

However, the Supreme Court of Canada added that the patient is entitled to reasonable access to examine and copy the records, provided the patient pays a legitimate fee for the preparation and reproduction of the information. The access should also be limited to the information that the physician obtained in providing treatment, and it does not extend to information arising outside the doctor-patient relationship. In other words, patients may have access to reproductions of documents, but not the originals, and they may also have access to all information in their file that the physician considered in administering advice or treatments, including reports or material provided to that health care provider by other health care providers.

Similarly, section 7 of the PHIPAA explicitly provides the right to patients to have access to personal health information. In fact, a patient has the right to examine copies of his or her personal health information:

> 7(1) Subject to this Act, an individual has a right, on request, to examine **or** receive a copy of his or her personal health information maintained by a custodian.

Personal health information includes:

> "personal health information" means identifying information about an individual in oral or recorded form if the information
>
> > (*a*) relates to the individual's physical or mental health, family history or health care history, including genetic information about the individual,



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(*b*) is the individual's registration information, including the Medicare number of the individual,

(*c*) relates to the provision of health care to the individual,

(*d*) relates to information about payments or eligibility for health care in respect of the individual, or eligibility for coverage for health care in respect of the individual,

(*e*) relates to the donation by the individual of any body part or bodily substance of the individual or is derived from the testing or examination of any body part or bodily substance,

(*f*) identifies the individual's substitute decision maker, or

(*g*) identifies an individual's health care provider.

In the same vein, section 14 of the PHIPAA also provides exceptions for which a custodian may refuse to disclose information.

**Reasons for refusing request**

**14**(1) A custodian is not required to permit an individual to examine or copy his or her personal health information under this Part

(*a*) if knowledge of the information could reasonably be expected to endanger the health or safety of the individual or another person,

(*b*) if disclosure of the information would reveal personal health information about another person who has not consented to the disclosure,

(*c*) if disclosure of the information could reasonably be expected to identify a third party, other than another custodian, who supplied the information in confidence under circumstances in which confidentiality was reasonably expected,

(*d*) if the information was compiled and is used solely



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(i) for the purpose of review by a committee established to study or evaluate the health care practices of a health care facility,

(ii) for the purpose of a body with statutory responsibility for the discipline of health care providers or to regulate the quality or standards of professional services provided by health care providers, or

(iii) for the purposes of risk management, error management or for the purpose of activities to improve or maintain the quality of care or to improve or maintain the quality of any related programs or services of the custodian,

(*e*) if the information was compiled principally in anticipation of, or for use in, a civil, criminal or quasijudicial proceeding to which the custodian is or may be a party or is protected by privilege,

(*f*) if the information is protected by privilege,

(*g*) if another Act of the Legislature or the Parliament of Canada or a court order prohibits disclosure of the personal health information to the individual,

(*h*) if the personal health information was collected for purposes of an investigation conducted pursuant to an Act of the Legislature, or

(*i*) for any reason prescribed by regulation.

Alternatively, a psychologist may also refuse to disclose or release information to clients pertaining to test data and protocols. In fact, the psychologist must take into consideration any contractual limitation relating to disclosure of test results as testing instruments used by psychologists are often copyrighted by the test publisher. We note that solicitor Basque also discussed this issue in one of his opinion letter to the College.



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This issue was addressed in numerous documents and articles and more particularly in an article published by the College of Alberta Psychologists entitled "*Release of Confidential Information: Special Issues in Client and Third Party Request*" (2005):

> *(...) the interpretation of psychological test information often requires special knowledge and skills that are part of the training of psychologists but that may not be represented in the preparation of other professionals or lay persons. For these reasons, whenever possible, psychologists should release only interpreted information about psychological test findings to insure that those findings are understood and used appropriately. The principal way in which psychologists will exercise this duty is to release psychological test data and protocols only to other psychologists.*

However, if a client insists on production of psychological test data, the psychologist must comply with that request unless there is a significant likelihood that the disclosure of the information would cause a substantial adverse effect on the client's physical, mental or emotional health, or harm to a third party as mentioned previously.

Although clients have ultimate right of access to all of their file information, psychologists should make every effort to protect the utility of the measures they use by the care they exercise in distribution of tests and test information.

In sum, the psychologist has the obligation to disclose the information requested by the patient. However, the psychologist should only disclose the information which relate to the matter in issue. Where a psychologist has doubts about the relevancy of a document and its possible effects to the health or safety of the individual or another person, it should not be disclosed.

In other words, each case or each request for disclosure will have to be dealt with on a case by case basis based on the psychologist's best judgment.

## b. REQUEST FROM LAWYERS AND COURT ORDERS

A client's legal counsel is acting as an "agent" for the client and as such he or she should be able, upon the client's written consent, to have the same access as the client would.

However, the obligation must be taken a step further in civil procedures. In cases where a lawyer or a third party seeks the production or disclosure of documents from a psychologist who refuse to provide the necessary information, they may rely on paragraphs 31.04(4) and 52.04(4) of the



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***Rules of Court of New Brunswick*** whereas:

> **31.04(4)** A court may, at any time, order production for inspection of documents generally or of any particular documents in the possession or control of a party for which no privilege is claimed. Where privilege is claimed for a document, the court may inspect the document to determine the validity of such claim.
>
> **52.01 (4)** Where a report has been served under paragraph (1) or paragraph (2), on motion the court may order that any records, documents or other materials on which the report is based be produced for inspection and copying.

In fact, in such procedures there is a presumption that full disclosure of relevant documents is necessary. In ***Clements v. Fougère***, 2007 CarswellNB 34, the Plaintiff had brought two actions for damages for physical and psychological trauma sustained in two motor vehicle accidents. The Plaintiff's pre-accident and post-accident psychological states as well as causality and quantum were in issue in each action. The Defendants' motion to compel the Plaintiff to produce psychologist's file was dismissed on grounds that notes were irrelevant and privileged. The Defendants appealed the Motion's judge decision and the Appeal was allowed.

The New Brunswick Court of Appeal said the following with respect to documents disclosure:

> 40 As a general rule, in personal injury actions, all non-privileged documents that bear upon the material issues must be voluntarily produced at the earliest reasonable opportunity. **The notes of all treating caregivers, whether labeled as "chart" notes, "progress" notes, "file" notes or "clinical" notes, are almost invariably critical in determining issues such as causality and the seriousness of the compensable injuries. Courts should not easily accept the view that it would be fair to force the defendant to proceed to trial without the benefit of discovery of those notes.**
>
> 41 The following passage lifted from Cook v. Ip, at paras. 11, 13 and 14, captures the traditional rule:
>
> [...]
>
> No doubt medical records are private and confidential in nature. Nevertheless, when damages are sought for personal injuries, the medical condition of the plaintiff both before and after the accident is relevant. In this case, it is the very issue in question. The plaintiff himself has raised the issue and placed it before the



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> court. **In these circumstances there can no longer be any privacy or confidentiality attaching to the plaintiff's medical records.**
>
> There is an inherent jurisdiction in the court to ensure that all relevant documents are before it. The court requires this jurisdiction in order to determine properly and fairly the issues between the parties. [...]
>
> [Emphasis added.]

Collaterally, there is also an **implied undertaking rule** which provides that any information obtained in civil procedures cannot be used for any other purposes or procedures. The rationale behind that rule has been consistently recognized as resting on two underlying principles: the protection of privacy rights and the goal of promoting full discovery and full and frank disclosure.

As such, legislation and case law seems to suggest that in civil procedures psychologists should provide all copies of all material considered by him or her, including raw data and tests protocols.

However, if a psychologist is convinced that information in his or her file should not be release, he or she has the burden to prove that the release of such information and the implied undertaking rule preventing the release of such information outside the given proceedings is inadequate to protect the material disclosed and that such disclosure would pose a "real risk" of the document being used for an improper or collateral purpose by a particular person or persons or a particular group.

The test to be applied in such circumstances and which has been adopted in ***Hernandez v. Purcell***, 2013 NSSC 303 was set out in ***TransCanada Pipelines Ltd v Nova Scotia (Attorney General*** (1999), 179 NSR (2d) 364:

> 47. In my view, the general rule that there is an implied undertaking is sufficient unless there is a "real risk" that documents would be used for a collateral purpose.
>
> 48. There is no evidence before me that these documents deal with trade secrets or manufacturing formulae or processes as was the case in **Big Country Gas** and **Bow Valley Husky**. The **Miller** case is not of much assistance because of the lack of detail about "the nature and relationship between the parties" or about the "evidence and argument presented by counsel".
>
> 49. Even in cases where there are "special circumstances such as patent processes, trade mark rights, sensitive or personal information, or in highly



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> competitive industries" (**Wirth**), there must be a "real risk". I conclude that there is a two-step test which must be met. The first is to show that the nature of the documents is such that it is necessary to consider conditions on disclosure and, second, to show that there is a "real risk" of the document being used for an improper or collateral purpose by a particular person or persons or a particular group.

There may be circumstances where a Court may find a "real risk" however the implied undertaking rule is generally sufficient to address this concern.

As a result of the foregoing, we are of the opinion that the psychologist should, in most circumstances, disclose all the relevant information including their notes whether labeled as "chart" notes, "progress" notes, "file" notes or "clinical" notes, as they are critical in determining issues such as causality and the seriousness of the compensable injuries.

Again, each case will have to be dealt with on a case by case basis using the above guiding principles.

As for Court Orders, we are of the opinion that if a psychologist is served with a valid Court Order requiring production of personal health information, including psychological test data or test protocols, the psychologist must comply with that order.

Furthermore, if the psychologist is served with a *Subpoena* or Summons to Witness in court proceedings that direct him or her to bring files in his or her possession, the psychologist must also comply or risk facing legal sanctions.

The *Code of Conduct* provides the following:

> Section II Definitions
>
> II. 3. Court order. "Court order" means the written or oral directive to a psychologist from a member of the judiciary of the Provincial Court, Court of Queen's Bench or Court of Appeal of New Brunswick,
>
> Section III Rule of Conduct
>
> III. 1.7. Release of confidential information. The psychologist may release confidential information upon court order, as defined in section II of this Code, or to conform with appropriate federal or provincial law or regulation.



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As such, where a Court orders a psychologist to produce records including raw data and tests protocols, he or she must comply with the said order. A contractual obligation undertaken with tests publishers cannot supersede a Court Order.

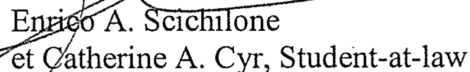
As a final matter, the psychologist should review the Order carefully and release only the information required.

## 3. CONCLUSION

In summary, in most cases where a request is made either by a client, his or her lawyer or by means of a Court Order, psychologists will have a duty to disclose the requested information unless some of the exceptions discussed are present. However, psychologists should be cautious and, in most cases, only disclose the minimum amount of information necessary. Should the information be deemed insufficient or incomplete by the requesting party, he or she may take the necessary steps to obtain further information by means of an application or motion to the Court to obtain a Court Order for the production of same. That way, if a complaint is made against the psychologist for having disclosed such confidential information, then the psychologist can rely on the Court Order which, as previously indicated, must be complied with pursuant to the *Code of Conduct*.

If you need additional information / advice on all related questions, do not hesitate to contact the undersigned

Yours truly,
**ACTUS LAW DROIT**



Enrico A. Scichilone
et Catherine A. Cyr, Student-at-law

EAS/cc

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