

# MEDICAL RECORDS

## *Access, Ownership and Obligations*

Picture yourself at your doctor's office. Your appointment concerns the effects of a recent bout of food poisoning on your pregnancy. You have recently switched physicians because you felt that your previous doctor was dismissive of your concerns. Now you want to know what the relevant statistics say about your condition, as well as the subjective opinion of your physician, and the information your previous doctor had kept in her files. Thinking that this information will be kept in your personal medical file, you ask for access to these files. Does your doctor have the discretion to refuse that access? Can she give you certain records, but not others? What are your rights?

Access to medical records allows you to assess treatment your physician is proposing, to have informed opinions about her competence, and to correct mistaken or misrecorded information. Most importantly, access to the medical records helps address the imbalance in knowledge and power that exists between you and your physician. With these concerns in mind, the Supreme Court of Canada has found that privacy interests extend to control over personal information. In *McInerney v. MacDonald*<sup>1</sup> the Supreme Court of Canada held that access to medical files kept by physicians is instrumental in allowing patients to make informed decisions about proposed and ongoing medical treatment, and to ensure the "healthy maintenance" of the doctor-patient relationship. For these reasons, the court held that a physician cannot, generally, refuse you access to your own medical files.

In light of this decision, can you leave your doctor's office with all the notes, recommendations and information that have been kept in your personal file, including any reports passed on by previous physicians? The brief answer is "no," due to the curious nature of the medical record itself.

In *McInerney*, Elizabeth McInerney wanted copies of the information in her medical file. The physician, Margaret MacDonald, provided McInerney with all the medical information that she

herself had collected, but withheld records that had been given to her by McInerney's previous physicians. MacDonald argued that these other records were the property of the other physicians, and that she therefore had no right to provide the records to McInerney. The court held that McInerney was entitled to access her medical records, for the purpose of examining and copying the contents. The right of access included records prepared by other physicians.

According to the court in *McInerney*, medical records are an amalgam of personal and professional property, held in quasi-trust by a physician. That is, the physical records themselves (the file, notes, references, etc.) are the "property" of the physician with all the benefits and responsibilities that this entails, while the *information* contained in the same records remains the property of the patient and may only be used for the patient's benefit. In practice, patients have no right to take the records from a physician. Because the practitioner physically retains the records, this can limit a patient's access to her own medical information.

However, the doctor's control of the medical records is limited by her quasi-trust or "fiduciary" relationship with a patient. That is, a physician, either because of the inherent power and control that she exercises over a patient or because of the patient's reasonable expectations, has a duty to act in her patient's best interests. In other words, you have a personal interest in what a physician does on your behalf, which has the practical effect of imposing certain duties on your physician. A physician owes a patient duties of loyalty, good faith, and avoidance of conflict between duty and self-interest.<sup>2</sup> In *McInerney*, the court found that acting in the best interests of a patient includes allowing patient access to medical records.<sup>3</sup>

However, the fiduciary relationship may also limit some patients' access to information. The court in *McInerney* held that acting in the "best interests" of a patient could also mean denial of this

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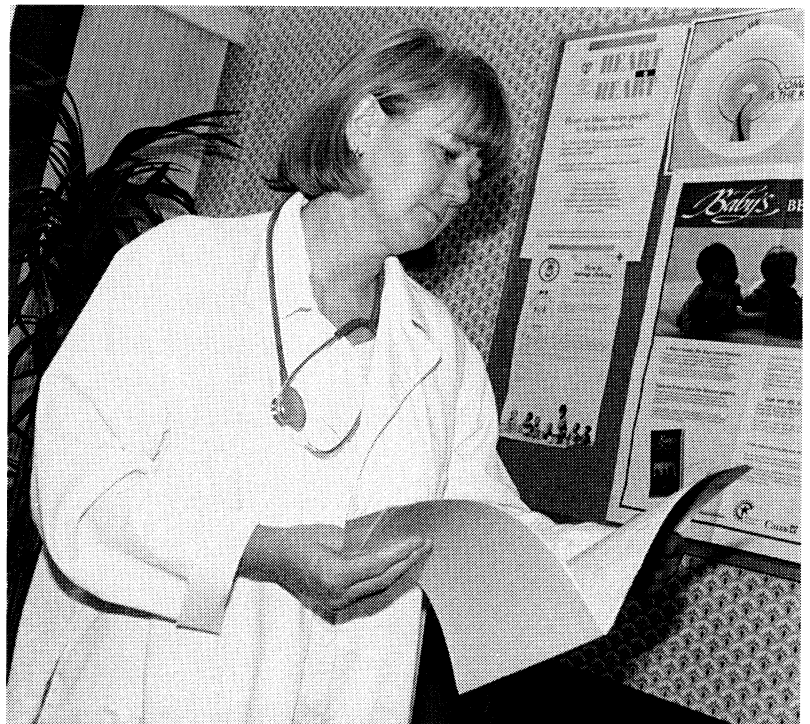
access, and provided two circumstances where access could be refused. First, if a physician can prove that allowing a patient to read and copy her medical records would seriously affect the patient's physical, mental or emotional health, the physician may refuse to allow access to the records. Second, the physician may deny access if she can prove that access might result in harm to another person. Despite the relatively high legal threshold — in both instances, the physician must show “significant likelihood of substantial adverse effect”<sup>4</sup> — this provision is another limit on a patient's free access to her medical records.

Returning to the problem of gaining access to your own medical records, if your physician can prove that allowing you to see the personal written reflections she has made on your condition would seriously affect your mental health, or seriously affect the health of another person, she can deny you access to these specific parts of your records. The rest of the records, however, remain yours to access and copy unless there is a further limit in specific legislation. As it stands, no province or territory in Canada has enacted legislation to this effect.

The Supreme Court of Canada in *McInerney* defines the conditions under which access to information should be guaranteed in a doctor-patient relationship. As noted in the above introductory comments, the court in *McInerney* characterized control of this personal information as part of a larger right to privacy. However, in subsequent jurisprudence, the contest over access to information has related not to patient access to their own medical information but to patients making personal information available for court proceedings. Ironically, in some circumstances, expanded access to information has resulted in a greater loss of privacy.

In July 1994 the Supreme Court of British Columbia in *Seller v. Grizzle*<sup>5</sup> determined whether the patient right of access to medical documents amounted to patient “control” over those documents. This case concerned a personal injury claim arising from a car accident and medical reports concerning the plaintiff. According to the British Columbia rules of civil procedure<sup>6</sup> a person who is in “possession or control” of a document can be ordered by the court to produce it at the discovery of documents stage of the proceedings, for the purposes of scrutiny. The court found that because the

“right” of a patient was limited to simple access, and did not constitute ownership, the patient did not have “control” or “possession” over the records. The court decided that any “control” rested in the hands of the physician who owned the medical records, and, therefore, the patient could not be required to produce them. Further, the court determined that the patient “right” to access also did not constitute “power” over those documents. The end result for the defendant in *Seller* was not too onerous as he had other avenues through which he could obtain the records. In particular, the defendant could demand that the plaintiff's physician produce the records for scrutiny at the examination for discovery stage of the proceedings,<sup>7</sup> based on the court's finding that a physician had “possession and control” of medical documents concerning her patients.



Such was not the case in *Saunders v. Nelson*<sup>8</sup> (decided in December 1994). In this case, the medical records of a patient, relating to a personal injury charge, were held by a clinic outside British Columbia. Unlike in *Seller*, the defendant had no recourse to rule 26(11), as the clinic was out of province.<sup>9</sup> However, rule 27(20) requires a person involved in an examination for discovery to produce all relevant documents in their “power.” The question in the case, therefore, was whether the

patient involved had “power” over the medical documents kept by her physician. Four months after the British Columbia Supreme Court had noted in *Seller* that patient access to medical records did not equal “power” over those records, the same court found that the patient *did* effectively have this “power.” The British Columbia Supreme Court was therefore able to order the documents produced. A right to access private information had effectively resulted in a duty to publicly produce that private information.

## RECORDS FOR PROFIT:

Medical practitioners' and hospitals' ownership of medical records have realizable economic benefits, so long as the records are treated in accordance with the best interests of the patients concerned in the documents. Patients' best interests include their right to privacy. If this privacy interest is protected, records may be used for security or profit. The Ontario Court of Appeal decided that a dentist could pledge his records as a security interest in a general security agreement. Ultimately, the records could be handed over to the insurer for transfer to another dentist. Because the agreement specifically accounted for the maintenance of patient confidentiality, the value of the records as property could be realized. However, debtors must specify an intention to use the records as security. In a different case, also involving a dentist, where the security agreement did not specifically refer to the use of dental records, the records could not be traded or used as collateral.

See: *Re: Axelrod* (1994), 111 D.L.R. (4th) 540 (Ont. Gen. Div.), affirmed (1994) 20 O.R. (3d) 133 (C.A.); *Re: Josephine v. Wilson Family Trust & Swartz* (1993), 107 D.L.R. (4th) 160 (Ont. Gen. Div.); *Strazdins v. Orthopaedic & Arthritic Hospital of Toronto* (1978), 22 O.R. (2d) 47 (Ont. H.C.).

In attempting to explain the inconsistency of these cases, one could observe that, on the one hand, the *Seller* decision did not leave the party demanding production of the records without other avenues of obtaining the records. On the other hand, had the *Saunders* court found that patient access to medical records did not constitute “power” in the words of rule 27(20), the party demanding production of the documents would have been completely cut off from other means of obtaining the documents. The conclusion here is that the court engaged in semantic gymnastics in order to protect a defendant’s right to access information important to his case.

Is it cause for concern that a patient’s right to access has resulted in positive duties imposed on that patient? Should not privacy rights come without strings attached? In *Saunders*, the court’s concern that the defendant be able to use the plaintiff’s medical records in mounting his case resulted in a

compromise of a patient’s privacy rights. This raises the larger issue of the state of patient-physician privilege in Canadian law today. Specifically, does a patient or her physician have the right to keep her medical records out of court proceedings? There is no patient-physician privilege in Canadian common-law provinces today,<sup>10</sup> although courts may be willing to recognize such privilege on a case-by-case basis.<sup>11</sup> Because medical records are not privileged, courts can have more or less unlimited access to the records of physicians. Seen in this light, *Saunders* can be characterized as an extension of an already broad judicial power allowing courts to get access to documents that might have been protected because the doctors were outside of the court’s jurisdiction.

As for the right to access your own medical information, the law appears to favour you as a patient. You can access this information and even copy it. Yet because of your ability to access your medical records you can be required by the court to produce this information, should you be involved in a law suit. This duty comes from the judicial characterization of what your rights of access mean: namely, that access gives you “power” over your medical records. Ironically, your privacy rights have been used to give public access to your private information. ▲

## ENDNOTES

- <sup>1</sup> *McInerney v. MacDonald*, [1992] 2 S.C.R. 138.
- <sup>2</sup> *Norberg v. Wynrib*, [1992] 2 S.C.R. 226.
- <sup>3</sup> This general principle has been followed more recently in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377.
- <sup>4</sup> *McInerney*, see note 1 at 158.
- <sup>5</sup> *Seller v. Grizzle*, (1994) 95 B.C.L.R. (2d) 297 (S.C.).
- <sup>6</sup> Rule 26 (1) of the British Columbia Supreme Court Rules.
- <sup>7</sup> See Rule 26 (11).
- <sup>8</sup> *Saunders v. Nelson*, [1994] B.C.J. No. 3039 (QL) (S.C.).
- <sup>9</sup> Rule 26 (11) of the British Columbia Supreme Court Rules only allows a party to demand production of documents from a third party who is in its jurisdiction — *United Services Funds (Trustee of) v. Richardson Greenshields of Canada Ltd.* (1987), 18 B.C.L.R. (2d) 360 (S.C.), affirmed (1988) 23 B.C.L.R. (2d) 1 (C.A.).

<sup>10</sup> *R. v. Burgess*, [1974] 4 W.W.R. 310 (B.C. Co. Ct.) is the British Columbia enunciation of this principle. The following is a brief glossary of some of the most recent cases in this area:

- *Brand v. British Columbia (Worker's Compensation Board)*, [1993] B.C.J. No. 2330 (QL) (S.C.).
- *R. v. Dersch*, [1993] S.C.R. 768.
- *G.M.M. v S.A.M.*, [1992] N.W.T.R. 249 (S.C.).
- *R. v. Osolin*, [1993] 4 S.C.R. 595.
- *A.M. v. Ryan*, [1994] B.C.J. No. 2313 (QL) (C.A.).
- *R. v. Weagle* (1993), 128 N.S.R. (2d) 254 (S.C.T.D.).
- *R. v. O'Connor* (1993), 105 D.L.R. (4th) 110 (B.C.C.A.).

<sup>11</sup> *R. v. Gruenke*, [1991] 3 S.C.R. 263.