Date: 1998 06 18
Docket: CV 07677

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF an application pursuant to Section 74 of the *Hospital Standards Regulations*, R.R.N.W.T. 1990, c. T-6, as amended

BETWEEN:

NORTHWEST TERRITORIES REGISTERED NURSES ASSOCIATION

Applicant

- and -

MACKENZIE REGIONAL HEALTH SERVICES

Respondent

MEMORANDUM OF JUDGMENT

[1] The applicant seeks an order compelling the respondent to produce the records of treatment for 124 patients of the Lutsel K'e Health Centre. The patients are all ones who were treated during a tuberculosis treatment programme in Lutsel K'e between October, 1995, and January, 1996. The respondent is the public agency responsible at the material time for the Lutsel K'e Health Centre and thereby the "keeper" of the patient records (although it is in fact the Government of the Northwest Territories, Department of Health, that has the records).

[2] The applicant is the statutory body charged with the regulation and discipline of the nursing profession in the Northwest Territories. As part of its mandate it is empowered to investigate complaints of malpractice or improper conduct against its members. In this case the applicant received two formal complaints, in March of 1995, alleging negligent documentation practices by three nurses responsible for the tuberculosis treatment programme in Lutsel K'e. I was told that the complaints are specifically concerned not with the treatment provided to these patients but with the charting procedures on the patients' medical records. The applicant's officials wish to obtain the records so as to make a systematic review to determine if there is a pattern of faulty charting procedures.

[3] I was told that only a few of the 124 patients are known by name but that the respondent has access to all of them through a register of patients who have been treated in the tuberculosis programme. Some of the known patients have given consents to the release

of their files, others have refused (although for unknown reasons). A considerable amount of effort has been expended by the applicant to inform the patients of the reasons for this request.

[4] When this application came before me in Chambers I had serious reservations as to whether there was any alternative but to go to Lutsel K'e and hear from any patients who may object to the disclosure of their records. After all, it goes almost without saying that a patient has a significant expectation of privacy in his or her medical records. But, as has often been noted, the records themselves are not the property of the patient and the privacy interest is not absolute: see, for example, *McInerney v MacDonald*, [1992] S.C.J. No. 57 (S.C.C.). Furthermore, as has also been noted recently, the privacy interest of patients has had to become more flexible in view of modern medical practices and delivery models. Patients are routinely treated by a series of health providers depending on need thereby necessitating the transfer of records. Patients' records are routinely accessed by various government agencies for purposes of administering medicare and other health care insurance programmes. All of these trends have moved society away from the principle of total individual privacy. For a discussion of these points, one may refer to Rozovsky & Rozovsky, Canadian Health Information (2nd ed., 1992), pages 83 - 100. This was a point also made in the case of *Medical Review Committee v Lim* (1981), 8 Man. R. (2d) 407 (Q.B.). There the health services commission sought an order compelling a physician to divulge patients' files for review by a committee investigating the doctor's medical practices. Hunt J., while recognizing that special precautions must be taken to insure secrecy and to protect patient privacy, ordered disclosure. In doing so he said (at page 407):

> Medicare advances the common good, convenience and welfare of society. The right of citizens of this province to receive adequate medical care and treatment is universally regarded as a great benefit. However, for every right there is a corresponding duty. For every benefit received there is a corresponding responsibility.
>
> In the case of Medicare, this responsibility lies not only in the payment of money levied by taxes but also in accepting some degree of disturbance to the important confidentiality between a medical practitioner and his patient as to communications between them and treatment provided.

[5] This application is brought pursuant to s.74(1)(g) of the Hospital Standards Regulations, enacted pursuant to the *Territorial Hospital Insurance Services Act*, R.S.N.W.T. 1988, c. T-3. That regulation outlines circumstances under which medical records may be disclosed:

> 74. (1) Medical records with respect to an in-patient or out-patient shall be the property of the hospital and shall be kept secret, except that they may be disclosed under the following circumstances:
>
> (a) on the request of the superintendent of another hospital, tuberculosis sanatorium, mental hospital, or the medical officer in charge of a cancer clinic or

> psychopathic ward of a general hospital, or the attending medical practitioner when required in giving proper care, diagnosis and treatment of the in-patient or out-patient;
>
> (b) on the request of the local Medical Health Officer;
>
> (c) to a person on a written request signed by the in-patient or out-patient;
>
> (d) in the event of death or incapacity of an in-patient or out-patient on a written request signed by his or her next of kin;
>
> (e) on the direction of the Board;
>
> (f) for academic or teaching purposes by the medical staff of the hospital, and for review of the professional work carried on in the hospital;
>
> (g) on the order of a court of competent jurisdiction;
>
> (h) on the request of a referee appointed by the Commissioner under the *Workers' Compensation Act* in respect of cases entitled to care or assistance under that Act;
>
> (i) on the request of the Department of Veterans Affairs (Canada) or its successors made with respect to an in-patient or out-patient who is a member or former member of the army, naval or air force of Canada, or who is otherwise eligible to receive services from that department.

[6] It will be noted that there are numerous grounds on which disclosure can be made. In addition to a court order, medical records may be disclosed "for review of the professional work carried on in the hospital". Clearly this contemplates internal review, and not an external one as here undertaken by the applicant, but it does recognize the fact that medical records may be accessible for purposes of legitimate inquiries into competence. Such inquiries are obviously in the public interest as well as the personal interest of the patients being served. Inquiries into charting procedures are significant to patients' interests since, as has been described, good record-keeping is the "foundation of good hospital, medical and nursing care": see Rozovsky, The Canadian Patient's Book of Rights (1980), at page 74.

[7] With these thoughts in mind, I have concluded that there is a reasonable alternative to holding a hearing which has the potential to be unfocussed and which could do more harm than good for patient privacy (for example, if people were identified by name in such a public hearing). Furthermore, the issue here is the competence of the nurses in their charting procedures. The records would be used to assess that, not what particulars may be recorded for any individual patient.

[8] Counsel for the applicant has prepared a draft order (attached as Appendix "A") which sets out sufficient safeguards for maintaining the confidentiality of these records and limits their use to the intended investigation. Counsel for the respondent board and government cannot agree to release of these records but they would of course comply with the terms of any order issued. The proposed order is regarded as an appropriate one. Ms. Payne, counsel for two of the nurses under investigation, objects to any disclosure without a court order.

[9] My conclusion is as follows. Having regard to the public interest in carrying out this investigation, an order in the form annexed should issue. It seems to me, however, that since the focus of the investigation is on charting practices, there is no need to identify the patient whose record is being reviewed. The name of the patient should be irrelevant to this entire process. Therefore, the proposed order will be amended to direct the respondent to delete the names of the individual patients from the records encompassed by the order. Since only copies of the records are sought, such deletions should not affect the original records.

[10] An order will issue accordingly. If further directions are required, counsel may speak to me. Any costs incurred by the respondent in its efforts to comply with the order will be reimbursed by the applicant.

[11] Dated this 18th day of June, 1998.

J. Z. Vertes
J.S.C.

To: Steve T. Eichler
Counsel for the Applicant

Earl D. Johnson, Q.C.
Counsel for the Respondent

Kelly A. Payne
Counsel for two individual nurses

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