Court of Appeal File No. CA030221
Court of Appeal Registry: VANCOUVER

COURT OF APPEAL

BETWEEN:

SEAN SMITH by his Guardian Ad Litem MICHELLE HAMPSEY

PLAINTIFF/RESPONDENT

AND:

RONALD HENRY FUNK

DEFENDANT/APPELLANT

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PART 1 — FACTS

1. On June 11, 2003 the Women's Legal Education Action Fund ("LEAF") and British Columbia Coalition of People With Disabilities ("BCCPD") (for ease of reference, the "Intervenors") obtained leave to intervene on this appeal which has been set to be heard at the same time as the appeal in *Amos* v. *Virk* (CA029433) and *Falvai* v. *Morawetz* (CA030447). The Intervenors are equality-seeking organizations and advocates for women, the disabled and the poor. The Intervenors have experience related to privacy and equality rights and understand the harmful and unequal impact loss of privacy can have on access to important services and to justice.

2. This appeal concerns British Columbia Supreme Court Rule 26(11) which provides:

> Where a document is in the possession or control of a person who is not a party, the court, on notice to the person and all other parties, may order production and inspection of the document or preparation of a certified copy that may be used instead of the original ….
>
> Supreme Court Rules, B.C. Reg. 221/90

3. This appeal also concerns the "Halliday" order, named after the case of *Halliday* v. *McCulloch* (1986), 1 B.C.L.R. (2d) 194 (C.A.). On application by party A for a category of documents in the possession of a non-party which relate to party B, a Halliday order provides that the non-party documents be first produced to party B for review as to issues of relevance and privilege. Party B then has an obligation to produce all the documents to party A, subject to any claims of privilege or relevance within the meaning of the test set out in *Compagnie Financiére et Commercial du Pacifique* v. *The Peruvian Guano Company* (1882), 11 Q.B.B. 55 (C.A.).

4. The Appellant is asking the Court to seriously restrict or abrogate the Halliday order procedure so that non-party records will be ordered produced to the opposite party directly, without the opportunity for prior review by the party to whom the documents relate. The Intervenors strongly oppose the Appellant's position and seek to bring to the Court's attention the substantial modern jurisprudence which protects privacy rights and which recognizes that failure to protect privacy in litigation may prevent equal benefit to the law, contrary to section 15(1) of the *Canadian Charter of Rights and Freedoms* (herein the "*Charter*"). The Intervenors submit that failure to protect privacy has a

disproportionately adverse impact on women and the disabled. An approach to document production which recognizes privacy and equality rights supports liberal use of the Halliday order.

5. The Courts below upheld the application of the Halliday procedure. The Intervenors support the Respondent's position that the appeal be dismissed.

PART 2 — ISSUE ON APPEAL

6. Should the Halliday order procedure be restricted, or applied liberally?

PART 3 — ARGUMENT

A. The *Charter*

7. The Intervenors submit that this Court should consider the values enshrined in the *Charter* as they relate to privacy and equality in determining this appeal. Although the *Charter* does not directly apply to civil litigation, the courts have held that the common law should be developed in accordance with *Charter* values, including in cases dealing with privacy concerns.

A.M. v. *Ryan*, [1997] 1 S.C.R. 157, at paras. 22 and 23

8. The *Charter* provides:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> 8. Everyone has the right to be secure against unreasonable search or seizure.
>
> …
>
> 15.(1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

9. The purpose of section 15(1) of the *Charter* was explained by the Supreme Court of Canada in *Law* v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at paragraph 51:

> It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

10. The Supreme Court of Canada held in *Law* v. *Canada*, *supra*, at paragraphs 53 and 54:

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individual affected and excluded by the law?
>
> The equality guarantee in s. 15(1) of the Charter must be understood and applied in light of the above understanding of its purpose. The overriding concern with protecting and promoting human dignity in the sense just described infuses all elements of the discrimination analysis.

11. Section 8 of the *Charter* protects a right to privacy, the scope of which is a reasonable expectation of privacy. Privacy is at the heart of liberty. It includes the right to be free from intrusion and to control the dissemination of confidential information.

R. v. *Mills*, [1999] 3 S.C.R. 668, at paras. 62, 77 and 79
R. v. *Wise*, [1992] 1 S.C.R. 527 at para. 3

12. An order for production of documents is a seizure within the meaning of Section 8 of the *Charter*. In *Gernhart* v. *R*., an income tax return that had been turned over to court and made public without the consent of the individual was held to constitute an unlawful search and seizure.

Gernhart v. *R.* (1999), 181 D.L.R. (4th) 506 (Fed. C.A.), [2000] 2 F.C. 292 (C.A.)
R. v. *Mills, supra*, at para. 77

13. In *R*. v. *Plant*, it was held that government records and information searches require authorization where they are of a personal and confidential nature. The Court held that the *Charter* seeks to protect "a biographical core of information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state".

R. v. *Plant*, [1993] 3 S.C.R. 28, at para. 20

14. Privacy interests are also protected under Section 7 of the *Charter*. Section 7 has been held to include a right over personal decisions and an "irreducible sphere of personal autonomy".

R. v. *O'Connor*, [1995] 4 S.C.R. 411, at para. 110
R. v. *Morgantaler*, [1993] 3 S.C.R. 519, at para. 166
Godbout v. *Longeueil (City)*, *supra*, at para. 66

B. Failure to Protect Privacy of a Litigant Can Result in Inequality

15. The Appellant's position on this appeal is that a litigant's privacy should be ignored when considering production of third party records. The Appellant's position ignores important developments in the law relating to rights of privacy and ignores the harm that can result when privacy interests are not protected. Women and the disabled bear a disproportionately larger share of this harm.

16. Statistics Canada's national Violence Against Women survey found that 39% of all Canadian women have experienced sexual assault since the age of 16 and over half of those had experienced more than one incident. Further, approximately 83% of women with a disability will be sexually assaulted during their lifetime, and "women with

multiple disabilities suffer multiple forms of violence". The majority of sex offences are committed by men and the majority of victims, both with and without a disability, are women. Sexual violence is experienced at a higher rate by those with a disability than those without.

J. Roberts, "Criminal Justice Processing of Sexual Assault Cases" (March 1994), *Juristat*, vol. 14 no. 7, at p. 3
Final Report if the Canadian Panel on Violence Against Women, *Changing the Landscape: Ending Violence ~ Achieving Equality* (Ottawa: Supply and Services, 1993), at p. 68
D. Sobsey, "Patterns of Sexual Abuse and Assault" (1991), 9 *Sexuality and Disability* 243, at pp. 244, 246

17. It has been found that women are more likely than men to seek therapeutic care in the aftermath of violence. Women and the disabled who are poor tend to be more reliant on support agencies for assistance. Disabled people are also more likely to interact with health and social services. It has been found that of those disabled individuals who have suffered abuse 41.8% sought counseling, 14.1% sought services and support from current caregivers and medical services and 7.9% sought protective services.

Wendy Murphy "Perspective on Our Progress: Twenty Years of Feminist Thought: Gender Bias in the Criminal Justice System" Spring 1997 20 Harv. Women's L.J. 14 (Lexis), at p. 16
D. Sobsey, *supra*, at p. 249

18. Moreover it has been found that:

> . . . children and women with disabilities are more likely to be isolated with potential offenders in homes or institutional settings. More women then men are admitted to psychiatric facilities and children with disabilities are more likely than non-disabled children to be in residential placements other than their natural families.

D. Sobsey, *supra*, at p. 252

19. In *R.* v. *O'Connor*, *supra*, at paragraph 121, L'Heuruex-Dubé, J. recognized that:

> It is a common phenomenon in this day and age for one who has been sexually victimized to seek counselling or therapy in relation to this occurrence. It therefore stands to reason that disclosure rules or practices which make mental health or medical records

> routinely accessible in sexual offence proceedings will have disproportionately invasive consequences for women, particularly those with disabilities, and children.

20. In *R.* v. *Mills*, the Court, at paragraph 92, cited with approval Professor Karen Busby, who cautioned that the use of records at large:

> . . . will subject those whose lives already have been subject to extensive documentation to extraordinarily invasive review. This would include women whose lives have been documented under conditions of multiple inequalities and institutionalization such as Aboriginal women, women with disabilities, or women who have been imprisoned or involved with child welfare agencies. ('Discriminatory Uses of Personal Records in Sexual Violence Cases' (1997), 9 C.J.W.L. 148, at pp. 161-62.)

21. It is evident that the lives of women and the disabled are more heavily documented by third parties. They are therefore more vulnerable to applications for production of private information held by non-parties. For these reasons, great care must be taken in deciding on the procedures by which disclosure of this information is to be made in civil litigation, if it is to be made at all.

(i) ***Inappropriate Use of Inaccurate Records***

22. In applying the equality values based on section 15(1) of the *Charter*, the Supreme Court of Canada has used a contextual analysis which compares the relative positions of the parties. For instance, in *A.M.* v. *Ryan*, *supra*, at paragraph 30, the Court considered the disadvantaged position of sexual assault victims who are often women. Similarly, in *R.* v. *Mills*, *supra*, at paragraph 90 the Court considered the context of the myths and stereotypes that surround sexual violence. Further, the Court held that equality concerns in this context must inform the balancing of full answer and defence with privacy. In both cases, the relative positions of the parties and potential harms to those in disadvantaged positions were assessed in determining a procedure that balances competing interests. The Intervenors submit that a similar analysis should take place in determining the production of non-party records.

Law Society of British Columbia v. *Andrews*, [1989] 1 S.C.R. 143 at para. 26

23. The need to appreciate myths and stereotypes in balancing competing rights is applicable to a variety of contexts, such as the context of the past history and credibility of women, the disabled and the poor. For example, the stereotype that consultation with a psychiatrist is an indication of untrustworthiness is an equally invidious myth. Similarly, the stereotype that the poor cheat the welfare system is another inappropriate myth.

R. v. *Mills, supra*, at para. 119

24. An extensive study on health records revealed that non-party records themselves will be subject to the personal filters, biases, values and standpoints of the record-keeper and can include myths and stereotypes.

> British Columbia, Woman's Abuse Response Program: British Columbia's Women's Hospital and Health Centre, *Reasonable Doubt: The Use of Health Records in Legal Cases of Violence Against Women in Relationships*, (January 2003) (Contributing authors Jill Cory et al., Funded by The Law Foundation of British Columbia), online: British Columbia Centre of Excellence for Women's Health http://www.bccewh.bc.ca/PDFS/reasonabledoubt.pdf, at pp. 33, 52, 56, 111 and 113 (the "Cory Health Records Study")

25. The following survey responses are illustrative of the potential biases of non-party record-keepers:

> 'A young, First Nations woman was sexually assaulted. She went to hospital, the doctor refused to do a physical exam because she had tracks on her harm [sic]. He decided the forensic exam wasn't necessary. She begged him for drugs for STDs and the morning after-pill [sic]. He refused. What did those records say?'
>
> 'I got a call from the hospital that a woman was drunk and needed to go to a transition shelter. She had been beaten up by her son. When I talked to her I found out that she was diabetic and that she needed to go home and get her insulin, but she was scared. The woman hadn't had a drink for years. What did that nurse write down? I had to advocate to get the doctor to get her a shot [of insulin].'
>
> 'The whole family sees the same physician. The doctor gave all the information to the husband. 'Suicidal and depressed' was what was written in the chart. This left out the fact that husband was

having an affair and had taken the baby and refused to return the baby.'

Cory Health Records Study, *supra*, at pp. 91-92

26. Inappropriate and inaccurate information contained in private records may improperly allow a lawyer to attack a complainant's credibility by pointing to inconsistencies which are the fault of the record keeper. Records, although made to look like a verbatim report, are often written after the fact. Language used and information recorded is influenced by the record keeper's needs, theoretical perspectives, subjectivity, and economic, confidentiality and safety concerns.

Cory Health Records Study, *supra*, at pp. 3, 42-43, 53,64

27. In fact, 76% of medical practitioners that participated in the Cory Health Records Study were skeptical about the objectivity of records. Further, 57% did not know whether or not they had difficulty recalling or interpreting their notes and 30% answered that they had trouble recalling and interpreting their notes most of the time (at pp. 66 and 82).

28. Courts must recognize that both a request for non-party records and the content of the documents themselves may be informed by negative stereotyping and biases and therefore production and use of such records may offend *Charter* equality values. Further, the objective reliability which is often imputed to third party records is inaccurate, and such records may have no real probative value to the issues in the case. Recognition of equality rights as guaranteed by the *Charter* requires carefully reviewing document requests to ensure that the document relevance analysis is not based on discriminatory stereotypes. Further, document requests ought not to be used in an attempt to intimidate or to undermine credibility by revealing private information which is subject to social stigma, such as the stigma attached to people on welfare, or to women who have had multiple sexual partners.

(ii) ***Barriers to Access to Justice and Important Services***

29. Courts, academics and researchers have noted that failure to protect privacy may have negative effects on an individual's therapy, cause mental and emotional distress regarding potential disclosure to the opposition, court, family and friends, and create a deterrent for

those individuals seeking justice or therapy, especially those whose lives have been heavily documented.

R. v. *Mills*, *supra*, at paras. 82-85 and 92
R. v. *O'Connor*, *supra*, at paras. 112, 121 and 132
A.M. v. *Ryan*, *supra*, at paras. 10, 25 and 29
Stoodly v. *Ferguson* (2001), Alta. L.R. (3d) 78; 2001 A.B.Q.B. 227, at para. 8
Wells (Litigation Guardian of) v. *Paramsothy* (1996), 32 O.R. (3d) 452, at p. 454, para. h
Cory Health Records Study, *supra*, at pp. 8, 11, 86, 90

30. The risk of loss of privacy to the party whose documents are sought will be more acute where there exists a prior relationship between the parties. For example, in cases of abuse against disabled individuals 56% of the abusers had a social relationship with the accused such as family or an acquaintance and 44% of abusers were service providers. A woman is also more likely to be the victim of violence at the hands of someone who knows her, rather than a stranger.

D. Sobsey, *supra*, at p. 248
J. Roberts, *supra*, at p. 3

31. In considering section 15(1) of the *Charter*, the Supreme Court of Canada in *A.M.* v. *Ryan*, *supra*, at paragraph 30, recognized that an individual may be doubly victimized as a result of disclosure of private records and may have difficulty in obtaining redress if the privacy interest is not considered, as follows:

> The intimate nature of sexual assault heightens the privacy concerns of the victim and may increase, if automatic disclosure is the rule, the difficulty of obtaining redress for the wrong. The victim of sexual assault is thus placed in a disadvantaged position as compared with the victim of a different wrong. The result may be that the victim of sexual assault does not obtain the equal benefit of the law to which s. 15 of the Charter entitles her. She is doubly victimized, initially by the sexual assault and later by the price she must pay to claim redress – redress which in some cases may be part of her program of therapy. These are factors which may properly be considered in determining the interests served by an order for protection from disclosure of confidential patient-psychiatrist communications in sexual assault cases.

32. In the criminal context, academics and courts have noted that the willingness of women to make criminal complaints can be directly impacted by the degree of invasiveness into their private lives. An example was noted by Wendy Murphy, *supra*, at page 16:

> In one case I was forced to tell a teenage rape victim that the judge had granted her attacker access to her therapy records. She began to cry. The victim's records, which predated the crime, revealed that she was struggling with an eating disorder. This was an intensely private matter that she had not shared with anyone but her therapist. She knew that if such information were shared with the defendant, her uncle, it would surely make its way to other family members. This disclosure was a prospect she could not bear. When the victim left my office that day, I knew she would not return. The case was dismissed.

33. A survey of sexual assault survivors by the Department of Justice Canada reported 17% who cited fear of record disclosure as reason for not reporting sexual assault.

> Tina Hattem, Survey of Sexual Assault Survivors: Report to Participants (Ottawa: Department of Justice, 2000), online: Canadian Association of Sexual Assault Centres <http://www.casac.ca/issues/survey.htm>

34. The same fears about invasion of privacy and production of personal records that applies to victims of sexual assault, who may for this reason be deterred from making a criminal complaint, equally apply to civil litigation generally. The Cory Health Records Study, *supra*, reported, at page 54, that 20% of the lawyers surveyed said that the prospect of document disclosure makes their clients reluctant or unwilling to proceed.

35. The relevance and reliability of governmentally-collected information to litigation must not be assumed. All of the issues identified above with respect to inaccurate medical records may apply even more to government files. Individuals who must rely on scarce government assistance for their survival should not live in fear that their records may be used as a weapon against them, thereby discouraging them from asserting themselves when dealing with government employees or from accessing services which are important to their well-being.

36. These concerns are equally applicable to the context of non-government support agencies from which individuals may seek assistance and whose records also contain private information which may be threatened by disclosure. Like the therapeutic relationships

protected in *A.M.* v. *Ryan*, *supra*, the successful functioning of these agencies is often dependent upon being able to accommodate client concerns of confidentiality and privacy.

37. Both the provincial and federal governments have reacted to an increasing public concern about confidentiality and privacy by enacting legislation seeking to protect privacy:

Canadian Human Rights Act SC 1976-77, c. 33 R.S.C. 1985 c. H-6 — repealed 1983
Privacy Act R.S.C. 1985, c. P-21 (replaced above)
Access to Information Act R.S. 1985 c. A-1
Privacy Act R.S.B.C. 1996 c. 373 (public sector regulation; tort of invasion of privacy)
Canadian Criminal Code R.S. 1985, c. C-46, s. 278 (known as Bill C-46 introduced in 1985 — sexual assault victim's privacy protected)
Freedom of Information and Protection of Information Act R.S.B.C. 1996 c. 165 S.B.C. 1992 c. 61
Freedom of Information and Protection of Information Amendment Act 1993 S.B.C. 1993 c. 46
Personal Information Protection and Electronic Documents Act (PIPEDA) S.C. 2000 c.5 (private sector regulation)

(iii) ***Loss of Dignity and Personal Autonomy***

38. Another concern about production of irrelevant private records is based on the loss of dignity that results from exposure of one's personal information to others. In addressing the existence and scope of privacy rights the courts have referred to a number of different interests including: "physical integrity", "sphere of personal autonomy", "dignity" and "self-worth". These interests parallel the human dignity interests protected by section 15(1) of the *Charter*.

Rodriguez v. *B.C.*, [1993] 3 S.C.R. 519, at para. 200
Godbout v. *Longeueil (City)*, [1997] 3 S.C.R. 844, at para. 65
R. v. *O'Connor*, *supra*, at para. 119
Law v. *Canada*, *supra*, at para. 53

39. The protection of the above types of dignity interests through the protection of privacy is certainly relevant to all litigants. However, loss of control over these interests are most often experienced by marginalized groups as a result of their having to seek out support services and place varying degrees of control over their lives in the hands of others. The

potential inaccuracy of the records, if produced and used in unrelated civil litigation, further threatens marginalized groups.

40. It is for these reasons that the Intervenors submit that the Halliday order, if liberally applied, provides a procedure which appropriately returns control and dignity to the person whose privacy is affected by the records in question.

C. *Charter* Values Apply to Document Production Procedures

41. A proper balance between competing interests involved in a dispute regarding production of non-party records can be achieved through the use of appropriate procedural mechanisms informed by *Charter* values of privacy and equality.

42. The Supreme Court of Canada in *A.M.* v. *Ryan*, *supra*, at paragraph 10 held that in each case the Court should consider whether the particular invasion of privacy is necessary to the proper administration of justice, and if so, whether terms are appropriate to limit that invasion. The Court approved of the procedure that some of the documents be disclosed under protective terms whereby inspection was confined to the opposing party's counsel and experts, none of whom could disclose their contents to anyone else or copy them. It should be noted that in that case the plaintiff had not sought a Halliday order and so it was not the subject of judicial comment (see *A.M.* v. *Ryan*, [1993] B.C.J. No. 1234 (B.C.S.C.) in Chambers).

43. However, the Supreme Court of Canada commented favourably on the Halliday order procedure as a means of balancing an individual's right to privacy with the public interest in the efficient administration of justice, in *Frenette* v. *Metropolitan Life Insurance Co. Ltd.*, [1992] 1 S.C.R. 647, at paragraphs 74-75.

44. As it was put in *R.* v. *O'Connor, supra*, at paragraph 130, privacy and equality must not be sacrificed willy-nilly on the altar of trial fairness. Further, the right to a fair trial applies to both sides of the litigation, not simply the party seeking production of documents.

R. v. *Mills, supra*, at para. 72

45. As held at paragraph 61 of *R.* v. *Mills*, *supra*:

> At play in this appeal are three principles, which find their support in specific provisions of the Charter. These are full answer and defence, privacy, and equality. No single principle is absolute and capable of trumping the others; all must be defined in light of competing claims.

See also *R*. v. *O'Connor*, *supra*, at paras. 107 and 130

46. In *A.M.* v. *Ryan, supra*, at paragraph 36, the Supreme Court of Canada held that the balance is more on the side of privacy in the civil context:

> … the interest in disclosure of a defendant in a civil suit may be less compelling than the parallel interest of an accused charged with a crime. The defendant in a civil suit stands to lose money and repute; the accused in a criminal proceeding stands to lose his or her very liberty. As a consequence, the balance between the interest in disclosure and the complainant's interest in privacy may be struck at a different level in the civil case, where the privacy interest of the complainant may more easily outweigh the defendant's interest in production.

47. The Appellant asserts that a civil litigant waives all rights to personal privacy and confidentiality by pursuing litigation. This proposition is wrong. The Supreme Court of Canada has expressly rejected the argument that a civil litigant waives all rights to personal privacy and confidentiality by bringing a lawsuit. A litigant only waives privacy with respect to relevant and non-privileged documents that are necessary for the disposition of the litigation. A litigant retains privacy rights over irrelevant or privileged documents.

A.M. v. *Ryan, supra*, at para. 38
Stoodly v. *Ferguson*, *supra*, at para. 25
Swirski v. *Hachey* (1995), 16 B.C.L.R. (3d) 281 at para. 20

48. As stated by this Court:

> A legal system which has no decent respect for the privacy of litigants is as tyrannical as a legal system in which rights are determined behind closed doors.

Interclaim Holdings Limited v. *Down*, 2003 B.C.C.A. 266 at para. 32

D. The Halliday Order Should be Applied Liberally

49. While *Halliday* v. *McCulloch*, *supra*, was decided only a few years after the *Charter* was adopted, and years before *R.* v. *Mills*, *supra*, *R.* v. *O'Connor*, *supra* and *A.M.* v. Ryan, *supra*, it devised a procedure which, if applied liberally, can be used to balance the right to privacy, equality rights, and the right to a fair trial.

50. In addition, the Halliday order is an efficient procedure because it puts the initial burden of production on the litigant, relying on the integrity and independence of the Bar, and avoids putting the Court in the position of having to review each and every document.

Halliday v. *McCulloch*, *supra*, at page 198

51. The central problem with the Appellant's position on this appeal is that it does not take into account privacy and equality rights. Instead, the Appellant's position skews the process in favour of disclosure of irrelevant private documents, where disclosure would be capable of causing harm, and disproportionately so to women and the disabled. On the other hand, a liberal application of the Halliday order allows a proper balancing of privacy rights and the need for full disclosure of relevant information, thus also fulfilling the goal of ensuring equal benefit of the law and equal access to justice.

52. Contrary to the Appellant's argument, the Halliday order does not prejudice the party seeking production of the documents. The very premise of all civil document discovery in British Columbia is that, on demand, each party will fulfill his or her obligation to provide all documents "relating to any matter in question in the action" pursuant to Rule 26(1) of the Supreme Court Rules. This Rule works well because of the integrity of the Bar. The obligation continues to apply when the party receives documents by way of a Halliday order. The Appellant's argument that this prejudices the opponent is based on the implicit suggestion that plaintiffs' counsel cannot be trusted to fulfill their document discovery obligations and duties to the Court when they receive third party documents by way of a Halliday order. This suggestion is without merit.

Boxer v. *Reesor*, [1983] B.C.J. No. 149, at para. 21
Hope v. *Brown* (1991), 52 B.C.L.R. (2d) 234 at p. 237

53. Further, the Appellant's suggestion that the implied undertaking as to confidentiality will protect an opposing litigant's privacy is, with respect, a misunderstanding of the nature of privacy rights. Privacy is not an all or nothing right. If irrelevant but private third party documents are produced in the first instance to the opposite party, the implied undertaking as to confidentiality will do nothing to remedy the litigant's loss of privacy vis-à-vis that litigant and the opposite party, that party's insurer, counsel and counsel's entire law firm. The implied undertaking rule does not remedy the harms that are caused by fear of production of irrelevant private information, such as aversion to therapy and justice.

R. v. *Mills, supra,* at para. 108

54. It is difficult to obtain redress for an infringement of privacy since it is not possible to repair much of the harm that has been caused, including the loss of dignity. However, whatever remedy might be available is even more elusive for those in marginalized groups who may not have the resources to pursue redress.

55. As to the burden on the applicant to establish that the third party documents are likely relevant, this should not be met by reliance on negative stereotyping and speculation, but should be informed by equality concerns and determined by unbiased analysis.

R. v. *Mills*, *supra*, para. 90
R. v. *O'Connor*, *supra*, para. 132

56. This Court in *A.M.* v. *Ryan*, [1994] B.C.J. No. 213 (C.A.) reviewed the history of the predecessor of Rule 26(11), which contained an express requirement of materiality. This Court held at paragraph 39, with respect to Rule 26(11) applications for non-party documents:

> First, despite the absence of an express requirement of materiality, the document must be material in the sense of relevant. To order the production by a non-party of an immaterial document would be absurd.

57. It is obvious that the Respondent's social assistance documents, sought by the Appellant in the case at bar, are private. The Appellant put forward mere speculation below that there might be something in the records relevant to the Respondent's physical or mental

abilities, which are at issue in the litigation. As shown by the Cory Health Records Study, *supra*, we ought not to assume that third party records are reliable.

58. Given the invasion of privacy involved, and the potential harm caused by readily producing these types of documents which can be used to intimidate plaintiffs who are conscious of the social stigma attached to being on welfare, one has to ask the question: why were these documents ordered produced at all? The answer in this case is because this particular plaintiff was not adverse to production so long as it was by way of Halliday order. But the Intervenors submit that had the plaintiff not conceded this below, the proper result would have been to dismiss the application for production of these records.

59. Further, it should be recognized that the fact that a party might concede that there are potentially relevant documents within a category of documents being sought does not eliminate potential concerns about private and irrelevant or privileged material being mixed in with relevant material.

Hope v. *Brown*, *supra*, p. 238

60. The Appellant seeks to impose an impossible burden on a party seeking the Halliday form of order, namely, a requirement that the party adduce evidence that the documents are irrelevant or privileged, before seeing the documents. This evidentiary requirement is impractical, and it simply encourages the unhelpful practice of lawyers swearing affidavits containing argument and speculation about the potential documents and their content. With respect, a more sensible approach is to recognize that by the very nature of the type of documents sought the opposite party has privacy interests in the documents and to order the documents produced by Halliday order to ensure that no irrelevant private documents are unnecessarily disclosed. Additional evidence should rarely be required.

Hope v. *Brown*, *supra*, pp. 237-238

61. Documents do not have to be personally embarrassing to be private and worthy of protection from disclosure. This Court held in *A.M.* v. *Ryan*, *supra*, at paragraph 45:

> In considering whether to make an order compelling disclosure of private documents, whether in possession of a party or a non-party, the Court ought to ask itself whether the particular invasion of

> privacy is necessary to the proper administration of justice and, if so, whether some terms are appropriate to limit that invasion. There need not be a privilege against testimony in the classic sense for this to be a relevant question. By "private documents" I mean documents which are not public documents. I do not limit this question to what might be thought of as personally embarrassing documents.

E. Summary

62. In summary, the prejudice that arises from the production of irrelevant and private non-party records is likely to have a larger impact upon women and disabled litigants and as such can prevent equal access to justice and equal benefit of the law, as well as impede access to important services. The Halliday order is a procedure used in the production of a third party's records which appropriately balances the need for full disclosure of relevant information with the protection of privacy and equality rights. No prejudice arises to either party by the imposition of this procedure, but extreme prejudice can result if it is not applied in cases where a party has a privacy interest in the documents. The procedure is also efficient. As such, the procedure ought to be applied liberally whenever the very nature of the documents is such that they may contain private information.

PART 4 — NATURE OF ORDER SOUGHT

63. The Intervenors seek an order that:

(a) the Halliday procedure be reaffirmed as a procedure that should be applied liberally, when ordering the production of non-party records; and

(b) the appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Counsel for the Intervenors
Susan A. Griffin

DATED: July 7, 2003

PART 5 — TABLE OF AUTHORITIES

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