

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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1 **PART 1 — FACTS**
2

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

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

13 Where a document is in the possession or control of a person who
14 is not a party, the court, on notice to the person and all other
15 parties, may order production and inspection of the document or
16 preparation of a certified copy that may be used instead of the
17 original
18

19 Supreme Court Rules, B.C. Reg. 221/90
20

21
22 3. This appeal also concerns the “Halliday” order, named after the case of *Halliday v.*
23 *McCulloch* (1986), 1 B.C.L.R. (2d) 194 (C.A.). On application by party A for a category
24 of documents in the possession of a non-party which relate to party B, a Halliday order
25 provides that the non-party documents be first produced to party B for review as to issues
26 of relevance and privilege. Party B then has an obligation to produce all the documents
27 to party A, subject to any claims of privilege or relevance within the meaning of the test
28 set out in *Compagnie Financière et Commercial du Pacifique v. The Peruvian Guano*
29 *Company* (1882), 11 Q.B.B. 55 (C.A.).
30

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

1 disproportionately adverse impact on women and the disabled. An approach to document
2 production which recognizes privacy and equality rights supports liberal use of the
3 Halliday order.
4

- 5 5. The Courts below upheld the application of the Halliday procedure. The Intervenors
6 support the Respondent's position that the appeal be dismissed.
7

8 **PART 2 — ISSUE ON APPEAL**
9

- 10 6. Should the Halliday order procedure be restricted, or applied liberally?
11

12 **PART 3 — ARGUMENT**
13

14 **A. The *Charter***
15

- 16 7. The Intervenors submit that this Court should consider the values enshrined in the
17 *Charter* as they relate to privacy and equality in determining this appeal. Although the
18 *Charter* does not directly apply to civil litigation, the courts have held that the common
19 law should be developed in accordance with *Charter* values, including in cases dealing
20 with privacy concerns.
21

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

- 24 8. The *Charter* provides:
25

26 7. Everyone has the right to life, liberty and security of the person
27 and the right not to be deprived thereof except in accordance with
28 the principles of fundamental justice.
29

30 8. Everyone has the right to be secure against unreasonable search or
31 seizure.
32

33 ...
34

35 15.(1) Every individual is equal before and under the law and has the
36 right to equal protection and equal benefit of the law without
37 discrimination and, in particular, without discrimination based on
38 race, national or ethnic origin, colour, religion, sex, age or mental
39 or physical disability.
40

- 1 9. The purpose of section 15(1) of the *Charter* was explained by the Supreme Court of
2 Canada in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R.
3 497, at paragraph 51:

4
5 It may be said that the purpose of s. 15(1) is to prevent the
6 violation of essential human dignity and freedom through the
7 imposition of disadvantage, stereotyping, or political or social
8 prejudice, and to promote a society in which all persons enjoy
9 equal recognition at law as human beings or as members of
10 Canadian society, equally capable and equally deserving of
11 concern, respect and consideration.

- 12
13 10. The Supreme Court of Canada held in *Law v. Canada, supra*, at paragraphs 53 and 54:

14
15 Human dignity means that an individual or group feels self-respect
16 and self-worth. It is concerned with physical and psychological
17 integrity and empowerment. Human dignity is harmed by unfair
18 treatment premised upon personal traits or circumstances which do
19 not relate to individual needs, capacities, or merits. It is enhanced
20 by laws which are sensitive to the needs, capacities, and merits of
21 different individuals, taking into account the context underlying
22 their differences. Human dignity is harmed when individuals and
23 groups are marginalized, ignored, or devalued, and is enhanced
24 when laws recognize the full place of all individuals and groups
25 within Canadian society. Human dignity within the meaning of the
26 equality guarantee does not relate to the status or position of an
27 individual in society per se, but rather concerns the manner in
28 which a person legitimately feels when confronted with a
29 particular law. Does the law treat him or her unfairly, taking into
30 account all of the circumstances regarding the individual affected
31 and excluded by the law?

32
33 The equality guarantee in s. 15(1) of the *Charter* must be
34 understood and applied in light of the above understanding of its
35 purpose. The overriding concern with protecting and promoting
36 human dignity in the sense just described infuses all elements of
37 the discrimination analysis.

- 38
39 11. Section 8 of the *Charter* protects a right to privacy, the scope of which is a reasonable
40 expectation of privacy. Privacy is at the heart of liberty. It includes the right to be free
41 from intrusion and to control the dissemination of confidential information.

42
43 *R. v. Mills*, [1999] 3 S.C.R. 668, at paras. 62, 77 and 79
44 *R. v. Wise*, [1992] 1 S.C.R. 527 at para. 3

- 1
2 12. An order for production of documents is a seizure within the meaning of Section 8 of the
3 *Charter*. In *Gernhart v. R.*, an income tax return that had been turned over to court and
4 made public without the consent of the individual was held to constitute an unlawful
5 search and seizure.

6
7 *Gernhart v. R.* (1999), 181 D.L.R. (4th) 506 (Fed. C.A.),
8 [2000] 2 F.C. 292 (C.A.)
9 *R. v. Mills*, *supra*, at para. 77

- 10
11 13. In *R. v. Plant*, it was held that government records and information searches require
12 authorization where they are of a personal and confidential nature. The Court held that
13 the *Charter* seeks to protect “a biographical core of information which individuals in a
14 free and democratic society would wish to maintain and control from dissemination to the
15 state”.

16
17 *R. v. Plant*, [1993] 3 S.C.R. 28, at para. 20

- 18
19 14. Privacy interests are also protected under Section 7 of the *Charter*. Section 7 has been
20 held to include a right over personal decisions and an “irreducible sphere of personal
21 autonomy”.

22
23 *R. v. O’Connor*, [1995] 4 S.C.R. 411, at para. 110
24 *R. v. Morgentaler*, [1993] 3 S.C.R. 519, at para. 166
25 *Godbout v. Longueuil (City)*, *supra*, at para. 66

26
27 **B. Failure to Protect Privacy of a Litigant Can Result in Inequality**
28

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

- 34
35 16. Statistics Canada’s national Violence Against Women survey found that 39% of all
36 Canadian women have experienced sexual assault since the age of 16 and over half of
37 those had experienced more than one incident. Further, approximately 83% of women
38 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 of 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 than 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’Heureux-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

1 routinely accessible in sexual offence proceedings will have
2 disproportionately invasive consequences for women, particularly
3 those with disabilities, and children.
4

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

7
8 . . . will subject those whose lives already have been subject to
9 extensive documentation to extraordinarily invasive review. This
10 would include women whose lives have been documented under
11 conditions of multiple inequalities and institutionalization such as
12 Aboriginal women, women with disabilities, or women who have
13 been imprisoned or involved with child welfare agencies.
14 ('Discriminatory Uses of Personal Records in Sexual Violence
15 Cases' (1997), 9 C.J.W.L. 148, at pp. 161-62.)
16

- 17 21. It is evident that the lives of women and the disabled are more heavily documented by
18 third parties. They are therefore more vulnerable to applications for production of private
19 information held by non-parties. For these reasons, great care must be taken in deciding
20 on the procedures by which disclosure of this information is to be made in civil litigation,
21 if it is to be made at all.
22

23 (i) ***Inappropriate Use of Inaccurate Records***
24

- 25 22. In applying the equality values based on section 15(1) of the *Charter*, the Supreme Court
26 of Canada has used a contextual analysis which compares the relative positions of the
27 parties. For instance, in *A.M. v. Ryan, supra*, at paragraph 30, the Court considered the
28 disadvantaged position of sexual assault victims who are often women. Similarly, in
29 *R. v. Mills, supra*, at paragraph 90 the Court considered the context of the myths and
30 stereotypes that surround sexual violence. Further, the Court held that equality concerns
31 in this context must inform the balancing of full answer and defence with privacy. In
32 both cases, the relative positions of the parties and potential harms to those in
33 disadvantaged positions were assessed in determining a procedure that balances
34 competing interests. The Intervenor submit that a similar analysis should take place in
35 determining the production of non-party records.
36

37 *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143
38 at para. 26
39

- 1 23. The need to appreciate myths and stereotypes in balancing competing rights is applicable
2 to a variety of contexts, such as the context of the past history and credibility of women,
3 the disabled and the poor. For example, the stereotype that consultation with a
4 psychiatrist is an indication of untrustworthiness is an equally invidious myth. Similarly,
5 the stereotype that the poor cheat the welfare system is another inappropriate myth.
6

7 *R. v. Mills, supra*, at para. 119
8

- 9 24. An extensive study on health records revealed that non-party records themselves will be
10 subject to the personal filters, biases, values and standpoints of the record-keeper and can
11 include myths and stereotypes.
12

13 British Columbia, Woman's Abuse Response Program: British
14 Columbia's Women's Hospital and Health Centre, *Reasonable*
15 *Doubt: The Use of Health Records in Legal Cases of Violence*
16 *Against Women in Relationships*, (January 2003) (Contributing
17 authors Jill Cory et al., Funded by The Law Foundation of
18 British Columbia), online: British Columbia Centre of
19 Excellence for Women's Health
20 <http://www.bccewh.bc.ca/PDFS/reasonabledoubt.pdf>, at pp. 33,
21 52, 56, 111 and 113 (the "Cory Health Records Study")
22

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

26 'A young, First Nations woman was sexually assaulted. She went
27 to hospital, the doctor refused to do a physical exam because she
28 had tracks on her harm [sic]. He decided the forensic exam wasn't
29 necessary. She begged him for drugs for STDs and the morning
30 after-pill [sic]. He refused. What did those records say?'

31
32 'I got a call from the hospital that a woman was drunk and needed
33 to go to a transition shelter. She had been beaten up by her son.
34 When I talked to her I found out that she was diabetic and that she
35 needed to go home and get her insulin, but she was scared. The
36 woman hadn't had a drink for years. What did that nurse write
37 down? I had to advocate to get the doctor to get her a shot [of
38 insulin].'
39

40 'The whole family sees the same physician. The doctor gave all
41 the information to the husband. 'Suicidal and depressed' was what
42 was written in the chart. This left out the fact that husband was

1 having an affair and had taken the baby and refused to return the
2 baby.’

3 Cory Health Records Study, *supra*, at pp. 91-92
4

- 5 26. Inappropriate and inaccurate information contained in private records may improperly
6 allow a lawyer to attack a complainant’s credibility by pointing to inconsistencies which
7 are the fault of the record keeper. Records, although made to look like a verbatim report,
8 are often written after the fact. Language used and information recorded is influenced by
9 the record keeper’s needs, theoretical perspectives, subjectivity, and economic,
10 confidentiality and safety concerns.
11

12 Cory Health Records Study, *supra*, at pp. 3, 42-43, 53,64
13

- 14 27. In fact, 76% of medical practitioners that participated in the Cory Health Records Study
15 were skeptical about the objectivity of records. Further, 57% did not know whether or
16 not they had difficulty recalling or interpreting their notes and 30% answered that they
17 had trouble recalling and interpreting their notes most of the time (at pp. 66 and 82).
18

- 19 28. Courts must recognize that both a request for non-party records and the content of the
20 documents themselves may be informed by negative stereotyping and biases and
21 therefore production and use of such records may offend *Charter* equality values.
22 Further, the objective reliability which is often imputed to third party records is
23 inaccurate, and such records may have no real probative value to the issues in the case.
24 Recognition of equality rights as guaranteed by the *Charter* requires carefully reviewing
25 document requests to ensure that the document relevance analysis is not based on
26 discriminatory stereotypes. Further, document requests ought not to be used in an
27 attempt to intimidate or to undermine credibility by revealing private information which
28 is subject to social stigma, such as the stigma attached to people on welfare, or to women
29 who have had multiple sexual partners.
30

31 (ii) ***Barriers to Access to Justice and Important Services***
32

- 33 29. Courts, academics and researchers have noted that failure to protect privacy may have
34 negative effects on an individual’s therapy, cause mental and emotional distress regarding
35 potential disclosure to the opposition, court, family and friends, and create a deterrent for
36

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.

- 1 32. In the criminal context, academics and courts have noted that the willingness of women
2 to make criminal complaints can be directly impacted by the degree of invasiveness into
3 their private lives. An example was noted by Wendy Murphy, *supra*, at page 16:
4

5 In one case I was forced to tell a teenage rape victim that the judge
6 had granted her attacker access to her therapy records. She began
7 to cry. The victim's records, which predated the crime, revealed
8 that she was struggling with an eating disorder. This was an
9 intensely private matter that she had not shared with anyone but
10 her therapist. She knew that if such information were shared with
11 the defendant, her uncle, it would surely make its way to other
12 family members. This disclosure was a prospect she could not
13 bear. When the victim left my office that day, I knew she would
14 not return. The case was dismissed.
15

- 16 33. A survey of sexual assault survivors by the Department of Justice Canada reported 17%
17 who cited fear of record disclosure as reason for not reporting sexual assault.
18

19 Tina Hattem, Survey of Sexual Assault Survivors: Report to
20 Participants (Ottawa: Department of Justice, 2000), online:
21 Canadian Association of Sexual Assault Centres
22 <<http://www.casac.ca/issues/survey.htm>>
23

- 24 34. The same fears about invasion of privacy and production of personal records that applies
25 to victims of sexual assault, who may for this reason be deterred from making a criminal
26 complaint, equally apply to civil litigation generally. The Cory Health Records Study,
27 *supra*, reported, at page 54, that 20% of the lawyers surveyed said that the prospect of
28 document disclosure makes their clients reluctant or unwilling to proceed.
29

- 30 35. The relevance and reliability of governmentally-collected information to litigation must
31 not be assumed. All of the issues identified above with respect to inaccurate medical
32 records may apply even more to government files. Individuals who must rely on scarce
33 government assistance for their survival should not live in fear that their records may be
34 used as a weapon against them, thereby discouraging them from asserting themselves
35 when dealing with government employees or from accessing services which are
36 important to their well-being.
37

- 38 36. These concerns are equally applicable to the context of non-government support agencies
39 from which individuals may seek assistance and whose records also contain private
40 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. Longueuil (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

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

- 3
4 40. It is for these reasons that the Intervenors submit that the Halliday order, if liberally
5 applied, provides a procedure which appropriately returns control and dignity to the
6 person whose privacy is affected by the records in question.

7
8 **C. Charter Values Apply to Document Production Procedures**
9

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

- 13
14 42. The Supreme Court of Canada in *A.M. v. Ryan, supra*, at paragraph 10 held that in each
15 case the Court should consider whether the particular invasion of privacy is necessary to
16 the proper administration of justice, and if so, whether terms are appropriate to limit that
17 invasion. The Court approved of the procedure that some of the documents be disclosed
18 under protective terms whereby inspection was confined to the opposing party's counsel
19 and experts, none of whom could disclose their contents to anyone else or copy them. It
20 should be noted that in that case the plaintiff had not sought a Halliday order and so it
21 was not the subject of judicial comment (see *A.M. v. Ryan*, [1993] B.C.J. No. 1234
22 (B.C.S.C.) in Chambers).

- 23
24 43. However, the Supreme Court of Canada commented favourably on the Halliday order
25 procedure as a means of balancing an individual's right to privacy with the public interest
26 in the efficient administration of justice, in *Frenette v. Metropolitan Life Insurance Co.*
27 *Ltd.*, [1992] 1 S.C.R. 647, at paragraphs 74-75.

- 28
29 44. As it was put in *R. v. O'Connor, supra*, at paragraph 130, privacy and equality must not
30 be sacrificed willy-nilly on the altar of trial fairness. Further, the right to a fair trial
31 applies to both sides of the litigation, not simply the party seeking production of
32 documents.

33
34 *R. v. Mills, supra*, at para. 72
35

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

2
3 At play in this appeal are three principles, which find their support
4 in specific provisions of the Charter. These are full answer and
5 defence, privacy, and equality. No single principle is absolute and
6 capable of trumping the others; all must be defined in light of
7 competing claims.
8

9 See also *R. v. O'Connor*, *supra*, at paras. 107 and 130
10

11 46. In *A.M. v. Ryan*, *supra*, at paragraph 36, the Supreme Court of Canada held that the
12 balance is more on the side of privacy in the civil context:
13

14 ... the interest in disclosure of a defendant in a civil suit may be
15 less compelling than the parallel interest of an accused charged
16 with a crime. The defendant in a civil suit stands to lose money and
17 repute; the accused in a criminal proceeding stands to lose his or
18 her very liberty. As a consequence, the balance between the
19 interest in disclosure and the complainant's interest in privacy may
20 be struck at a different level in the civil case, where the privacy
21 interest of the complainant may more easily outweigh the
22 defendant's interest in production.
23

24 47. The Appellant asserts that a civil litigant waives all rights to personal privacy and
25 confidentiality by pursuing litigation. This proposition is wrong. The Supreme Court of
26 Canada has expressly rejected the argument that a civil litigant waives all rights to
27 personal privacy and confidentiality by bringing a lawsuit. A litigant only waives privacy
28 with respect to relevant and non-privileged documents that are necessary for the
29 disposition of the litigation. A litigant retains privacy rights over irrelevant or privileged
30 documents.
31

32 *A.M. v. Ryan*, *supra*, at para. 38

33 *Stoodly v. Ferguson*, *supra*, at para. 25

34 *Swirski v. Hachey* (1995), 16 B.C.L.R. (3d) 281 at para. 20
35

36 48. As stated by this Court:
37

38 A legal system which has no decent respect for the privacy of
39 litigants is as tyrannical as a legal system in which rights are
40 determined behind closed doors.
41

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

1
2 **D. The Halliday Order Should be Applied Liberally**
3

4 49. While *Halliday v. McCulloch*, *supra*, was decided only a few years after the *Charter* was
5 adopted, and years before *R. v. Mills*, *supra*, *R. v. O'Connor*, *supra* and *A.M. v. Ryan*,
6 *supra*, it devised a procedure which, if applied liberally, can be used to balance the right
7 to privacy, equality rights, and the right to a fair trial.
8

9 50. In addition, the Halliday order is an efficient procedure because it puts the initial burden
10 of production on the litigant, relying on the integrity and independence of the Bar, and
11 avoids putting the Court in the position of having to review each and every document.
12

13 *Halliday v. McCulloch*, *supra*, at page 198
14

15 51. The central problem with the Appellant's position on this appeal is that it does not take
16 into account privacy and equality rights. Instead, the Appellant's position skews the
17 process in favour of disclosure of irrelevant private documents, where disclosure would
18 be capable of causing harm, and disproportionately so to women and the disabled. On
19 the other hand, a liberal application of the Halliday order allows a proper balancing of
20 privacy rights and the need for full disclosure of relevant information, thus also fulfilling
21 the goal of ensuring equal benefit of the law and equal access to justice.
22

23 52. Contrary to the Appellant's argument, the Halliday order does not prejudice the party
24 seeking production of the documents. The very premise of all civil document discovery
25 in British Columbia is that, on demand, each party will fulfill his or her obligation to
26 provide all documents "relating to any matter in question in the action" pursuant to
27 Rule 26(1) of the Supreme Court Rules. This Rule works well because of the integrity of
28 the Bar. The obligation continues to apply when the party receives documents by way of
29 a Halliday order. The Appellant's argument that this prejudices the opponent is based on
30 the implicit suggestion that plaintiffs' counsel cannot be trusted to fulfill their document
31 discovery obligations and duties to the Court when they receive third party documents by
32 way of a Halliday order. This suggestion is without merit.
33

34 *Boxer v. Reesor*, [1983] B.C.J. No. 149, at para. 21
35 *Hope v. Brown* (1991), 52 B.C.L.R. (2d) 234 at p. 237
36

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

10
11 *R. v. Mills, supra*, at para. 108
12

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

17
18 55. As to the burden on the applicant to establish that the third party documents are likely
19 relevant, this should not be met by reliance on negative stereotyping and speculation, but
20 should be informed by equality concerns and determined by unbiased analysis.

21
22 *R. v. Mills, supra*, para. 90
23 *R. v. O'Connor, supra*, para. 132
24

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

29
30 First, despite the absence of an express requirement of materiality,
31 the document must be material in the sense of relevant. To order
32 the production by a non-party of an immaterial document would be
33 absurd.
34

35 57. It is obvious that the Respondent's social assistance documents, sought by the Appellant
36 in the case at bar, are private. The Appellant put forward mere speculation below that
37 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 Intervenor 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

1 privacy is necessary to the proper administration of justice and, if
2 so, whether some terms are appropriate to limit that invasion.
3 There need not be a privilege against testimony in the classic sense
4 for this to be a relevant question. By “private documents” I mean
5 documents which are not public documents. I do not limit this
6 question to what might be thought of as personally embarrassing
7 documents.
8

9 **E. Summary**
10

11 62. In summary, the prejudice that arises from the production of irrelevant and private
12 non-party records is likely to have a larger impact upon women and disabled litigants and
13 as such can prevent equal access to justice and equal benefit of the law, as well as impede
14 access to important services. The Halliday order is a procedure used in the production of
15 a third party’s records which appropriately balances the need for full disclosure of
16 relevant information with the protection of privacy and equality rights. No prejudice
17 arises to either party by the imposition of this procedure, but extreme prejudice can result
18 if it is not applied in cases where a party has a privacy interest in the documents. The
19 procedure is also efficient. As such, the procedure ought to be applied liberally whenever
20 the very nature of the documents is such that they may contain private information.
21

22 **PART 4 — NATURE OF ORDER SOUGHT**
23

24 63. The Intervenors seek an order that:
25

- 26 (a) the Halliday procedure be reaffirmed as a procedure that should be applied
27 liberally, when ordering the production of non-party records; and
28
29 (b) the appeal be dismissed.
30

31 ALL OF WHICH IS RESPECTFULLY SUBMITTED.
32
33
34

35 _____
36 Counsel for the Intervenors
37 Susan A. Griffin

38 DATED: July 7, 2003
39

PART 5 — TABLE OF AUTHORITIES

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