SCHEDULE A

TAB 2

Court of Queen's Bench of Alberta

Citation: R. v. McCarthy, 2008 ABQB 215

Date: 20080407
Docket: 051153146Q1
Registry: Edmonton

Between:

Rene Michael Ross McCarthy

Applicant

- and -

Her Majesty the Queen

Respondent

- and -

Chief of Police, Edmonton Police Service and Cst. Schindeler, Cst. Hladky, Cst. Hewison, Cst. Hawrylenko, Cst. Garga, Cst. Simpson, Cst. Jenkinson, Cst. Cunningham, Cst. Toma and Cst. Darda

Interveners

Reasons for Judgment
of the
Honourable Mr. Justice W.P. Sullivan

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[1] The accused, Rene McCarthy (the "Applicant") seeks disclosure of all records of complaints made to the Edmonton Police Service ("EPS") against the named officers (the "Respondent Officers") pursuant to the *Police Act*, R.S.A. 2000, c. P-17 or the *Criminal Code* R.S.C. 1985, c. C-46 and relating to allegations of excessive force, abuse of authority or dishonesty (the "Complaint Files"). In addition, the Applicant seeks disclosure of all information

relating to any alerts received through IA Pro by the EPS Professional Standards Branch in relation to the Respondent Officers (the "Alerts").

[2] The Applicant is charged with disarming or attempting to disarm a police officer of his handgun, resisting a police officer in the execution of his duty, assaulting a police officer, theft of the officer's vehicle, driving while disqualified and dangerous driving.

[3] To date, the Applicant has not filed a complaint with the EPS against any of the Respondent Officers in connection with the events leading to his arrest, thus there are no complaint or disciplinary records relating to this specific incident. The records the Applicant is seeking pertain to unrelated incidents involving the Respondent Officers.

[4] Previously, I determined that the Complaint Files and the Alerts are third party records and therefore subject to the disclosure process set out in *R. v. O'Connor*, [1995] 4 S.C.R. 411 ("*O'Connor*"). The Applicant has now made an *O'Connor* application for disclosure.

[5] The Applicant's request does not deal with records relating to sexual offences and therefore is not governed by ss. 278.1 to 278.91 of the *Criminal Code*. Rather, the common law rules set out in *O'Connor* apply in these circumstances: *R v. Luong* (2005), 63 W.C.B. (2d) 311, 2005 ONCJ 5 ("*Luong*"), at para. 10.

[6] *O'Connor* sets out a two-stage test for disclosure. At the first stage, the applicant must bring an application, on notice to the third party in possession of the records and any other party with a privacy interest in them, for disclosure of the requested information or records. At this stage, the onus is on the applicant to show that the records or information sought are "likely to be relevant": *O'Connor*, at para. 21. In other words, the Applicant must show that there is "a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify": *O'Connor*, at para. 22 [Emphasis in original].

[7] If the Applicant successfully satisfies this threshold requirement, the application for disclosure moves to the second stage. At this stage, the records are produced to the Court, who determines whether they should be disclosed to the Applicant. In making this determination, the Court must balance the accused's right to a full answer and defence against the third party's right to privacy and other constitutional rights: *O'Connor*, at para. 30. However, it must be emphasized that this stage, referred to as the "balancing stage", only comes into play if the Applicant discharges his onus of establishing "likely relevance".

[8] This application deals primarily with the first stage of the *O'Connor* test. At issue here is whether the Applicant has satisfied the Court that the Complaint Files and the Alerts are likely to be relevant to an issue at trial or the competence of a witness to testify.

Analysis:

[9] In the normal course, an accused bringing an *O'Connor* application must bring a formal written application setting out the grounds for disclosure, supported by an affidavit: *O'Connor*, at para. 20. In this case, the Applicant has not complied with this requirement. The evidence provided by the Applicant consists of affidavits sworn by a legal assistant, along with various attachments. The difficulty the Court has with proceeding in these circumstances is that the Applicant has not directed the Court's attention to exactly what evidence he seeks or expects to receive if successful on this application. Despite these difficulties, I will consider the merits of the application.

"Likely Relevant" Threshold

[10] The "likely relevant" threshold places the onus on the applicant to show that the records sought are likely to be relevant to an issue at trial or the credibility of a witness. The burden on the applicant is not unduly onerous: *O'Connor*, at para. 24. Indeed, the purpose of this standard is not to prevent the applicant from obtaining materials relevant to his or her ability to make a full answer and defence, but rather to prevent the applicant from engaging in "speculative, fanciful, disruptive, unmeritorious, obstructive, and time-consuming requests": *R. v. Chaplin*, [1995] 1 S.C.R. 727 ("*Chaplin*") at para. 32.

[11] In order to meet the "likely relevant" threshold, the applicant must convince the Court that there is a reasonable possibility that the records sought will be useful to the defence: *Chaplin*, at para. 30. Accordingly, the applicant must establish a connection between the circumstances of the case and the information sought. The mere fact that a document or record might be useful to the defence is not sufficient; rather, there must be "a reasonable possibility that they will be logically probative": *R. v. Dykstra* (2007), 76 W.C.B. (2d) 193 (Ont. Sup. Ct. J.) ("*Dykstra*"), at para. 20-21.

[12] Admittedly, where the existence of the records sought is itself in dispute, the applicant faces an added challenge. Specifically, the onus on the applicant in such circumstances is two-fold: he or she must establish both the *existence* and the *relevance* of the records. Sopinka J. makes this point in *Chaplin* at para. 30:

> Once the Crown alleges that it has fulfilled its obligation to produce it cannot be required to justify the non-disclosure of material the existence of which it is unaware or denies. Before anything further is required of the Crown, therefore, the defence must establish a basis which could enable the presiding judge to conclude that there is in existence further material which is potentially relevant. [Emphasis added.]

[13] The authorities are clear that disclosure will not be ordered where the applicant's request is based on mere speculation and conjecture respecting the records' existence: *Chaplin* at para. 35; *R. v. Quinn,* [2005] O.J. No. 4206 at para. 16; *O'Neill v. Canada (Attorney General)* (2005), 198 C.C.C. (3d) 143, 131 C.R.R. (2d) 299, at paras. 51-53.

(a) Constables Hladky, Hewson, Simpson, Jenkinson, Toma and Darda

[14] With respect to Constables Hladky, Hewson, Simpson, Jenkinson, Toma and Darda, much of the Applicants' request is based on mere speculation. Indeed, the Applicant has not provided any evidence whatsoever to establish that any Complaint Files or Alerts exist in relation to these officers. The onus is clearly on the Applicant to provide the Court with some evidentiary foundation on which to conclude that the records sought actually exist. However, none of the material submitted in affidavit form or as attachments to the affidavits relates to any of these officers. Accordingly, the Applicant's request is entirely speculative and amounts to little more than a fishing expedition.

[15] Moreover, given that these officers arrived on the scene towards the end of any altercation between the Applicant and Constable Schindeler, any information contained in any disciplinary or other records in relation to these officers would not meet the "likely relevant" threshold.

(b) Constables Cunningham, Gargan and Hawrylenko

[16] With respect to Constables Cunningham, Gargan and Hawrylenko, the Applicant has submitted some evidence indicating that there may be Complaint Files for these officers relating to the circumstances surrounding the arrest of a third party (hereinafter referred to as the "Turvey Incident"). While the Applicant's evidence regarding these officers is limited primarily to the Turvey Incident, his request for records is considerably broader. He is seeking disclosure of all records of any complaints made against the Respondent Officers, including complaints that were substantiated, those that are under investigation, were never investigated, were never the subject of a disciplinary hearing or were found to be unsubstantiated.

[17] Evidence of unsubstantiated allegations is insufficient by itself to establish that the Complaint Files will be relevant to an issue at trial or the credibility of a witness. In *Luong* the Court held at para. 28 that the "likely relevant" threshold is not satisfied by evidence of unsubstantiated complaints:

> The Applicants made much of the fact that the O.P.P. had investigated the DEU. However, the mere fact of an investigation establishes little. This applies not only to the completed O.P.P. investigation but also to the ongoing internal Durham Regional Police one with respect to potential Police Service Act charges. [Emphasis added.]

[18] The allegations or complaints that the Applicant has provided evidence of are unsubstantiated. There is no evidence that any of these officers have been convicted of any charges under the *Police Act* or found to have used excessive force by any administrative tribunal or court. Unproven allegations are not relevant to the officer's competence to testify.

[19] Moreover, the Applicant's claim that the Complaint Files are relevant to the issue of witness credibility is not sufficient to warrant ordering production. As noted in *Luong* at para: 25:

> "Likely relevence" [sic] must be established by the Applicants. This onus is not discharged by bald assertions. This also applies to matters of credibility. A bald assertion that the third party record may be relevant to credibility is insufficient to justify production of the record in the absence of evidence that there is likely to be something in the record relevant to the credibility of the witness with respect to a particular issue in the case before the court: *R. v. Batte* (2000), 145 C.C.C. (3d) 449 (O.C.A.); *R. v. Barbosa* (1994) 92 C.C.C. (3d) 131 (B.C.C.A).

[20] Given that these officers arrived at the scene towards the end of or after any altercation between the Applicant and Constable Schindeler, I do not find that Complaint Files in relation to these officers would likely be relevant to an issue at trial or the credibility of these officers as witnesses.

[21] The Applicant has not provided any evidence that any Alerts exist in relation to Constables Cunningham, Gargan or Hawrylenko. Accordingly, I have no reason to believe any of these officers have been the subject of an Alert and I am not prepared to order production based on mere speculation that such records may exist.

(c) Constable Schindeler

[22] In relation to the Applicant's request in respect of Constable Schindeler, the Applicant has not provided sufficient evidence on which the Court could rely to order production. The best evidence provided by the Applicant is an affidavit sworn by a legal assistant. Her evidence is that she spoke to an individual who provided information concerning another individual who was arrested by Constable Schindeler. The affidavit provides a number of details about the condition of that individual, the circumstances surrounding his arrest and the eventual stay of charges against him. However, all of that information appears to be based on hearsay. The least the Court would expect is that there would be an affidavit from the individual himself, setting out what happened to him and attaching a portion of the trial transcript detailing the testimony given regarding the circumstances of his arrest.

[23] Furthermore, the fact alone that the Crown stayed the charges against another individual is not enough to establish that records may exist in relation to Constable Schindeler that would likely be relevant to the Applicant's trial. Charges are stayed for a variety of reasons and, without more, I find the fact of a stay alone is not sufficient to establish either that Complaint Files exist in relation to Constable Schindeler, or that such records would be relevant to his credibility or an issue at trial.

[24] As recently noted by Justice Sanderman in oral reasons in *R. v. Jara*, Transcript No. 040381261Q1, September 6, 2005, unreported, the applicant must establish that the records exist

and that they deal with matters related to an issue at trial. In this case, hearsay evidence relating to the stay of charges against an individual arrested by Constable Schindeler is not sufficient to establish that Complaint Files exist that would shed light on Constable Schindeler's propensity for violence or credibility as a witness.

[25] As with the other officers, the Applicant has not provided any evidence that any Alerts exist in relation to Constable Schindeler, thus I am not prepared to grant the Applicant's request.

Conclusion

[26] The "likely relevant" threshold is not intended to be unduly onerous, thus in considering whether the Applicant has met the threshold requirement for disclosure under *O'Connor*, the Applicant shall not be held to a particularly high standard. However, given that breadth of the Applicant's request, the sensitivity of the records themselves and the fact that a number of individuals, including the officers and any third parties named in the Complaint Files or Alerts, have a significant privacy interest in the records, the onus is on the Applicant to convince the Court that his request is based on more than mere speculation or conjecture. As I am not satisfied the Applicant has discharged this onus, I must dismiss the application.

Heard on the 3rd day of March, 2008.
Dated at the City of Edmonton, Alberta this 1st day of April, 2008.

W.P. Sullivan
J.C.Q.B.A.

Appearances:

Thomas M. Engel
for the Applicant

David Sullivan
Julie Morgan
for the Respondent

Katrina M. Haymond
for the Chief of Police, Edmonton Police Service

Ritu Khullar
for the Interveners

SCHEDULE A

TAB 3

M. (A.) *v.* Ryan, [1997] 1 S.C.R. 157

A. M. *Appellant*

v.

Clive Ryan and Dr. Kathleen Parfitt *Respondents*

Indexed as: M. (A.) *v.* Ryan

File No.: 24612.

1996: October 2; 1997: February 6.

Present: La Forest, L'Heureux-Dubé, Sopinka, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for british columbia

Evidence -- Disclosure -- Counselling records -- Victim bringing civil action for damage allegedly caused by defendant's sexual conduct -- Defendant seeking production of psychiatrist's counselling records and notes -- Whether documents privileged -- Whether records and notes should be produced -- British Columbia Supreme Court Rules, Rule 26(11).

When the appellant was 17 years old, she underwent psychiatric treatment from the respondent R. In the course of treatment, R had sexual relations with her. He also committed acts of gross indecency in her presence. The appellant asserts that this

conduct injured her and has sued R for damages. In order to deal with the difficulties allegedly caused by the sexual assault and gross indecency as well as other problems, the appellant sought psychiatric treatment from the respondent P. The appellant was concerned that communications between her and P should remain confidential, and P assured her that everything possible would be done to ensure that this was the case. At one point, the appellant's concerns led P to refrain from taking her usual notes. At the hearing before the Master of R's motion to obtain disclosure, P agreed to release her reports, but claimed privilege in relation to her notes. Counsel for the appellant was present. He supported P's objections to production, but did not assert a formal claim to privilege on behalf of the appellant. The Master found that P had no privilege in the documents and ordered that they all be produced to R. The British Columbia Supreme Court affirmed that decision. P's appeal to the Court of Appeal was allowed in part. The court ordered disclosure of P's reporting letters and notes recording discussions between her and the appellant. The disclosure ordered was protected by four conditions: that inspection be confined to R's solicitors and expert witnesses, and that R himself could not see them; that any person who saw the documents should not disclose their contents to anyone not entitled to inspect them; that the documents could be used only for the purposes of the litigation; and that only one copy of the notes was to be made by R's solicitors, to be passed on as necessary to R's expert witnesses.

Held (L'Heureux-Dubé J. dissenting): The appeal should be dismissed.

Per La Forest, Sopinka, Cory, McLachlin, Iacobucci and Major JJ.: The common law principles underlying the recognition of privilege from disclosure proceed from the fundamental proposition that everyone owes a general duty to give evidence relevant to the matter before the court, so that the truth may be ascertained. To this fundamental duty, the law permits certain exceptions, known as privileges, where it can

be shown that they are required by a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth. The common law permits privilege in new situations where reason, experience and application of the principles that underlie the traditional privileges so dictate. It follows that the law of privilege may evolve to reflect the social and legal realities of our time, including the *Canadian Charter of Rights and Freedoms*. The first three conditions for privilege for communications between a psychiatrist and the victim of a sexual assault are met in this case, since the communications were confidential, their confidence is essential to the psychiatrist-patient relationship, and the relationship itself and the treatment it makes possible are of transcendent public importance. The fourth requirement is that the interests served by protecting the communications from disclosure outweigh the interest of pursuing the truth and disposing correctly of the litigation.

If the court considering a claim for privilege determines that a particular document or class of documents must be produced to get at the truth and prevent an unjust result, it must permit production to the extent required to avoid that result. On the other hand, the need to get at the truth and avoid injustice does not automatically negate the possibility of protection from full disclosure. An order for partial privilege will more often be appropriate in civil cases where, as here, the privacy interest is compelling. Disclosure of a limited number of documents, editing by the court to remove non-essential material, and the imposition of conditions on who may see and copy the documents are techniques which may be used to ensure the highest degree of confidentiality and the least damage to the protected relationship, while guarding against the injustice of cloaking the truth. While a test for privilege which permits the court occasionally to reject an otherwise well-founded claim for privilege in the interests of getting at the truth may not offer patients a guarantee that communications with their psychiatrists will never be disclosed, the assurance that disclosure will be ordered only

where clearly necessary and then only to the extent necessary is likely to permit many to avail themselves of psychiatric counselling when certain disclosure might make them hesitate or decline.

It is open to a judge to conclude that psychiatrist-patient records are privileged in appropriate circumstances. In order to determine whether privilege should be accorded to a particular document or class of documents and, if so, what conditions should attach, the judge must consider the circumstances of the privilege alleged, the documents, and the case. While it is not essential in a civil case that the judge examine every document, he or she may do so if necessary to the inquiry. A court, in a case such as this, might well consider it best to inspect the records individually to the end of weeding out those which were irrelevant to this defence, but the alternative chosen by the Court of Appeal of refusing to order production of one group of documents and imposing stringent conditions on who could see the others and what use could be made of them cannot be said to be in error and should not be disturbed.

The appellant's alleged failure to assert privilege in the records before the Master does not deprive her of the right to claim it. If the appellant had privilege in the documents, it could be lost only by waiver, and the appellant's conduct does not support a finding of waiver.

Where the doctrine of privilege applies, it displaces any residual discretion which might otherwise be thought to inhere in favour of the party claiming privilege. A two-step process which requires a judge to consider first privilege and then a residual discretion under Rule 26(11) would be redundant and confusing.

Per L'Heureux-Dubé J. (dissenting): Direct disclosure of all of the information shared in the course of therapy to defence counsel and professionals who are assisting the defence constitutes a very serious breach of the plaintiff's interests in privacy as regards these communications. While the plaintiff's privacy interests in the records may receive some protection under the doctrine of privilege, this is only to the degree they serve the greater purpose of promoting relationships sufficiently valued by the public. McLachlin J.'s approach to partial privilege is agreed with, but it cannot displace the residual discretion to order production of documents in a manner which effects an appropriate balance of the *Charter* values engaged in the appeal. The source of this discretion is a common law discretionary rule governing the exercise of powers established under the B.C. Rules of Court. Since the appellant has asserted her privacy interest in private records independently of her claim for privilege, it is necessary to determine whether this interest has received adequate attention.

The traditional common law approach to the power conferred upon the courts to order the production of documents for discovery in civil proceedings holds that all relevant documents which are not privileged must be produced. An alternative approach, that taken by the Court of Appeal in this case, is one which places an outer limit on this discretion, a limit which ensures that the discovery procedures not work injustice, even where a claim of privilege has not been successful and it appears that information in the document is relevant to an issue at trial. The latter approach is more consistent with the wording of the Rules governing discovery, the origins of the procedure, the common law discretionary rules governing information regarding non-parties, and the effect of the *Charter* on the exercise of common law and statutory discretion in civil proceedings. In any event, the court must ensure that the approach followed reflects an adequate balance of the values underlying the *Charter*.

As the records at issue here are of the same nature as those mentioned in *O'Connor*, the appellant has established a reasonable expectation of privacy in the records. Rather than having waived her right to privacy by instituting an action, the appellant has engaged a process where her reasonable expectation of privacy must be balanced against the society's need to ensure that such litigation be conducted fairly and effectively. The *Charter*-related value of a fair trial for all litigants, as a fundamental principle of justice, is also affected in such cases and must be balanced with the privacy interests of the appellant. The value of equality must further guide the procedure of discovery in tort cases involving sexual assault.

Given the distinguishing and shared features of the criminal and civil contexts for production of private records, the following procedure seems the appropriate one in the context of civil discovery. The party seeking production must notify those with an interest in the confidentiality of the records. Before a court may order production of private records to the defence for the purposes of discovery, it must first ascertain what documents are likely to be relevant to an issue at trial. In civil cases the required information will be provided by the affidavit of the party seeking the order. The court must then order production of the likely relevant documents to the court for screening and removal of any information which the court deems is not likely relevant or otherwise exempt from production given the balancing of the interests involved. A number of factors to guide in this evaluation are suggested. A judge may also ask the guardian of the documents for an inventory of those in his or her possession to assist in the screening process.

These additional procedures will not confuse trial judges. In many cases, such as the one before us, the privilege claim will be settled by the judge on the basis of affidavit evidence. Even where inspection may be required, the fourth branch of the

Wigmore test should be applied to the documents as a whole. Once the privilege claim has been settled, the judge would then undertake the screening procedures described above to those documents which are not protected, provided their likely relevance has been established.

Here the Court of Appeal did not review the documents before ordering their production. By failing to screen private records in such cases, the court creates an impermissible hierarchy of *Charter* values, where interests in privacy and equality may be seriously affected for records or information which may provide very little if any benefit to the defence or be unnecessary to ensure the fairness of proceedings. The decision of the Court of Appeal should be set aside, except as regards the notes which were not disclosed, and the matter remitted to the Master for determination in a manner consistent with these reasons.

Cases Cited

By McLachlin J.

Not followed: *Jaffee v. Redmond*, 116 S. Ct. 1923 (1996), aff'g 51 F.3d 1346 (1995); **referred to:** *Trammel v. United States*, 445 U.S. 40 (1980); *Slavutych v. Baker*, [1976] 1 S.C.R. 254; *R. v. Gruenke*, [1991] 3 S.C.R. 263; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130; *R. v. O'Connor*, [1995] 4 S.C.R. 411.

By L'Heureux-Dubé J. (dissenting)

A. (L.L.) v. B. (A.), [1995] 4 S.C.R. 536; *R. v. Gruenke*, [1991] 3 S.C.R. 263; *R. v. Swain*, [1991] 1 S.C.R. 933; *R. v. Beare*, [1988] 2 S.C.R. 387; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Baron v. Canada*, [1993] 1 S.C.R. 416; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. Salituro*, [1991] 3 S.C.R. 654; *R. v. Park*, [1995] 2 S.C.R. 836; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Young v. Young*, [1993] 4 S.C.R. 3; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130; *Dufault v. Stevens* (1978), 6 B.C.L.R. 199; *Frenette v. Metropolitan Life Insurance Co.*, [1992] 1 S.C.R. 647; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145.

Statutes and Regulations Cited

British Columbia Supreme Court Rules, Rule 26(10), (11).

Canadian Charter of Rights and Freedoms, ss. 1, 7, 8, 15.

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Cudmore, Gordon D. *Choate on Discovery*, 2nd ed. Scarborough, Ont.: Carswell, 1992 (loose-leaf updated 1993).

McLachlin, Beverley M., and James P. Taylor. *British Columbia Practice*, 2nd ed., vol. 1. Vancouver: Butterworths, 1979 (loose-leaf updated September 1996, issue 26).

Wigmore, John Henry. *Evidence in Trials at Common Law*, vol. 8. Revised by John T. McNaughton. Boston: Little, Brown, 1961.

APPEAL from a judgment of the British Columbia Court of Appeal (1994), 98 B.C.L.R. (2d) 1, 119 D.L.R. (4th) 19, [1995] 1 W.W.R. 677, 51 B.C.A.C. 135, 84

W.A.C. 135, 32 C.P.C. (3d) 66, allowing in part the respondent Parfitt's appeal from a decision of Vickers J. (1993), 81 B.C.L.R. (2d) 180, [1993] 7 W.W.R. 480, affirming an order of Master Bolton (1993), 40 A.C.W.S. (3d) 730, [1993] B.C.W.L.D. 1680, ordering the respondent Parfitt to produce a copy of her records relating to the appellant. Appeal dismissed, L'Heureux-Dubé J. dissenting.

Brian J. Wallace, *Q.C.*, and *Carolyn McCool*, for the appellant.

Christopher E. Hinkson, *Q.C.*, and *William S. Clark*, for the respondent Ryan.

No one appeared for the respondent Parfitt.

//McLachlin J.//

The judgment of La Forest, Sopinka, Cory, McLachlin, Iacobucci and Major JJ. was delivered by

1 MCLACHLIN J. -- After having been sexually assaulted by the respondent Dr. Ryan, the appellant sought counselling from a psychiatrist. The question on this appeal is whether the psychiatrist's notes and records containing statements the appellant made in the course of treatment are protected from disclosure in a civil suit brought by the appellant against Dr. Ryan. Put in terms of principle, should a defendant's right to relevant material to the end of testing the plaintiff's case outweigh the plaintiff's expectation that communications between her and her psychiatrist will be kept in confidence?

I. The Facts and History of Proceedings

2 When the appellant was 17 years old, she underwent psychiatric treatment from Dr. Ryan. In the course of treatment, Dr. Ryan had sexual relations with her. He also committed acts of gross indecency in her presence. The appellant asserts that this conduct injured her and has sued Dr. Ryan for damages. Dr. Ryan does not deny that this sexual conduct occurred. He contends, however, that the appellant consented to the acts. He also takes the position that the conduct was not the cause of the injury for which the plaintiff sues.

3 The appellant alleges that the sexual assault and gross indecency caused her mental distress and anguish, loss of dignity and self-esteem, humiliation and embarrassment, difficulty in forming and maintaining relationships with other persons, lasting psychological and emotional trauma, continuing fear and anxiety, foregone career and educational opportunities, inability to verbalize emotions and recollections of the events, repeated suicide attempts, severe depression and post-traumatic stress disorder. In order to deal with these difficulties as well as other problems, the appellant sought psychiatric treatment from Dr. Parfitt.

4 The appellant was concerned that communications between her and Dr. Parfitt should remain confidential. Dr. Parfitt assured her that everything possible would be done to ensure that their discussions would remain confidential. At one point, the appellant's concerns led Dr. Parfitt to refrain from taking her usual notes.

5 The British Columbia Rules of Court permit each party to an action to examine the other for discovery and to obtain discovery of all documents in the possession of the other party that are relevant to the lawsuit and not protected from disclosure by privilege or some other legal exemption. If a party has not voluntarily produced a required document, the court may order that it be produced. The rules also provide for documents to be obtained from third parties. Failing voluntary production, an application for production may be brought under Rule 26(11).

6 During the examination for discovery of the appellant, counsel for Dr. Ryan requested production of Dr. Parfitt's records and notes. The appellant's counsel advised that they would not be produced without a court order. Accordingly, Dr. Ryan's counsel brought a motion to obtain disclosure. At the hearing before Master Bolton, Dr. Parfitt agreed to release her reports, but claimed privilege in relation to her notes. Counsel for the appellant was present. He supported Dr. Parfitt's objections to production, but did not assert a formal claim to privilege on behalf of the appellant.

7 The Master found that Dr. Parfitt had no privilege in the documents and ordered that they all be produced to Dr. Ryan. In his view, there is no blanket privilege for communications between patient and physician. The only basis upon which privilege could be asserted would be under the principles approved by this Court for case-by-case privilege, sometimes referred to as the "Wigmore test". The first branch of this test requires that the communications originate in confidence. The Master ruled that this was not the case here, since the appellant had been fearful throughout that the doctor's notes would be disclosed and Dr. Parfitt had assured her only that everything possible would be done to ensure that their discussions were kept private. The Master went on to consider whether the discretion granted by the Rules of Court permitted him to accede to Dr. Parfitt's claim for confidentiality. He found the notes to be relevant. The only

remaining question was whether Dr. Parfitt's "embarrassment" at revealing the notes outweighed this probative value. It did not, in the Master's view. Although he acknowledged the legitimate interest of keeping patient-therapist discussions free-ranging and confidential, he held that this was not a factor that he could consider under the law as it stood.

8 Dr. Parfitt appealed to the Supreme Court of British Columbia. That appeal was dismissed: (1993), 81 B.C.L.R. (2d) 180, [1993] 7 W.W.R. 480. Vickers J. agreed that the notes were not privileged, not on the ground that they had not been made in confidence as the Master had found, but on the ground that the public interest in the proper administration of justice outweighed confidentiality concerns where the appellant had placed the matters in issue by initiating the suit.

9 Dr. Parfitt appealed to the British Columbia Court of Appeal. The appeal was allowed in part: (1994), 98 B.C.L.R. (2d) 1, 119 D.L.R. (4th) 19, [1995] 1 W.W.R. 677, 51 B.C.A.C. 135, 84 W.A.C. 135, 32 C.P.C. (3d) 66. Southin J.A. began by stating that she was only concerned with Dr. Parfitt's privilege and not the plaintiff's, since the plaintiff had not properly claimed privilege. A physician could only assert privilege if disclosure would harm the physician. Dr. Parfitt had not shown this to be the case. Therefore, no claim for privilege could be made by anyone, and the matter fell to be considered exclusively under the Rules of Court.

10 Under Rule 26(11), relevant or "material" documents should be produced unless the order is oppressive of the plaintiff or will have such an adverse effect on her that it would be unjust to order production, the Court of Appeal ruled. In applying this test, 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. On the one hand, a plaintiff should not be "scared away" from suing by fear of disclosure. On the other hand, a defendant should not be deprived of an assessment of the true loss caused by the alleged wrong. There is no perfect balance to be struck, in the court`s view.

11 Southin J.A. ordered disclosure of Dr. Parfitt's reporting letters and notes recording discussions between her and the appellant. Southin J.A. did not order disclosure of Dr. Parfitt's personal notes which she uses to make sense of what the patient is telling her. These notes were not disclosed because the appellant assured the court that Dr. Parfitt would not be called at trial and therefore her diagnosis was "of no moment" (p. 19 B.C.L.R.). The disclosure ordered was protected by four conditions: that inspection be confined to Dr. Ryan's solicitors and expert witnesses, and that Dr. Ryan himself could not see them; that any person who saw the documents should not disclose their contents to anyone not entitled to inspect them; that the documents could be used only for the purposes of the litigation; and that only one copy of the notes was to be made by Dr. Ryan's solicitors, to be passed on as necessary to Dr. Ryan's expert witnesses.

12 The appellant objects to this order for limited production and appeals to this Court.

II. The Legislation

13 British Columbia Supreme Court Rules, Rule 26(11)

> 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. An order under Rule 41(16) in respect of an order under this subrule may be made if that order is endorsed with an acknowledgment by the person in possession or control of the document that the person has no objection to the terms of the proposed order.

III. Preliminary Issues

14 The findings of the courts below raise three preliminary issues. The first is whether the appellant's alleged failure to assert privilege in the records before the Master deprives her of the right to claim it. I respectfully dissent from the Court of Appeal's view that it did. If the appellant had privilege in the documents, it could be lost only by waiver. The appellant's conduct does not support a finding of waiver. It is true that she did not claim privilege to the notes and records at issue in her affidavit of documents. However, the notes and records were not in her possession but Dr. Parfitt's. The argument that they were technically in her control and hence should have been mentioned establishes at best omission from the affidavit of documents, not a conscious waiver of privilege. The motion for production before the Master was directed not at the appellant but at Dr. Parfitt. As a result, the appellant was not called upon directly to assert privilege in the documents. However, she appeared through counsel and supported Dr. Parfitt's claim for privilege. Far from waiving privilege, the appellant has asserted it throughout the proceedings.

15 A second preliminary issue concerns the relationship between the Rules of Court and the common law rule of privilege. In my view, the present appeal falls to be decided solely on the law of privilege. Where the doctrine of privilege applies, it displaces any residual discretion which might otherwise be thought to inhere in favour of the party claiming privilege. A two-step process which requires a judge to consider

first privilege and then a residual discretion under Rule 26(11) would be redundant and confusing.

16 Where the person objecting to production is a party to the action and privilege is raised, there is no need for a supplementary discretion under Rule 26(11), since in considering whether privilege exists on a case-by-case basis, the judge must take into account the interest of the person being asked to disclose. The fourth branch of the Wigmore test for privilege requires the judge to consider whether the interests served by protecting the communications from disclosure outweigh the interest in getting at the truth and correctly disposing of the litigation. This means that the complainant's privacy interest and interest in maintaining a productive and healing relationship with her psychiatrist must be considered and weighed in determining whether privilege lies. The fact that her privacy interest arises and hence falls to be considered in the context of her relationship to her psychiatrist does not negate the fact that what is at issue is her privacy interest and whether it should, in the circumstances of the case, prevail over the defendant's right to disclosure. It thus becomes unnecessary to reconsider the same matters after having decided whether privilege lies. Having determined the issue of privilege, nothing remains to be considered under the Rule.

17 Requiring the judge to reconsider the matter under a residual discretion conferred by Rule 26(11) according to a different methodology would, moreover, be confusing for trial judges. Even more serious, it might on occasion result in a conflicting conclusion. This would amount to a procedural rule enacted not by the Legislature but by Order in Council, trumping the common law. Such a result would be wholly inappropriate.

18 A third preliminary issue concerns the distinction between absolute or blanket privilege, on the one hand, and partial privilege on the other. While the traditional common law categories conceived privilege as an absolute, all-or-nothing proposition, more recent jurisprudence recognizes the appropriateness in many situations of partial privilege. The degree of protection conferred by the privilege may be absolute or partial, depending on what is required to strike the proper balance between the interest in protecting the communication from disclosure and the interest in proper disposition of the litigation. Partial privilege may signify that only some of the documents in a given class must be produced. Documents should be considered individually or by sub-groups on a "case-by-case" basis.

IV. General Principles

19 The common law principles underlying the recognition of privilege from disclosure are simply stated. They proceed from the fundamental proposition that everyone owes a general duty to give evidence relevant to the matter before the court, so that the truth may be ascertained. To this fundamental duty, the law permits certain exceptions, known as privileges, where it can be shown that they are required by a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth": *Trammel v. United States*, 445 U.S. 40 (1980), at p. 50.

20 While the circumstances giving rise to a privilege were once thought to be fixed by categories defined in previous centuries -- categories that do not include communications between a psychiatrist and her patient -- it is now accepted that the common law permits privilege in new situations where reason, experience and application of the principles that underlie the traditional privileges so dictate: *Slavutych v. Baker*, [1976] 1 S.C.R. 254; *R. v. Gruenke*, [1991] 3 S.C.R. 263, at p. 286. The

applicable principles are derived from those set forth in *Wigmore on Evidence*, vol. 8 (McNaughton rev. 1961), § 2285. First, the communication must originate in a confidence. Second, the confidence must be essential to the relationship in which the communication arises. Third, the relationship must be one which should be "sedulously fostered" in the public good. Finally, if all these requirements are met, the court must consider whether the interests served by protecting the communications from disclosure outweigh the interest in getting at the truth and disposing correctly of the litigation.

21 It follows that the law of privilege may evolve to reflect the social and legal realities of our time. One such reality is the law's increasing concern with the wrongs perpetrated by sexual abuse and the serious effect such abuse has on the health and productivity of the many members of our society it victimizes. Another modern reality is the extension of medical assistance from treatment of its physical effects to treatment of its mental and emotional aftermath through techniques such as psychiatric counselling. Yet another development of recent vintage which may be considered in connection with new claims for privilege is the *Canadian Charter of Rights and Freedoms*, adopted in 1982: *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at pp. 592-93; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at pp. 876-77; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 121.

22 I should pause here to note that in looking to the *Charter*, it is important to bear in mind the distinction drawn by this Court between actually applying the *Charter* to the common law, on the one hand, and ensuring that the common law reflects *Charter* values, on the other. As Cory J. stated in *Hill*, *supra*, at paras. 93 and 95:

> When determining how the *Charter* applies to the common law, it is important to distinguish between those cases in which the constitutionality of government action is challenged, and those in which there is no

> government action involved. It is important not to import into private litigation the analysis which applies in cases involving government action.
>
> . . .
>
> The most that the private litigant can do is argue that the common law is inconsistent with *Charter* values. It is very important to draw this distinction between *Charter* rights and *Charter* values. Care must be taken not to expand the application of the *Charter* beyond that established by s. 32(1), either by creating new causes of action, or by subjecting all court orders to *Charter* scrutiny. Therefore, in the context of civil litigation involving only private parties, the *Charter* will "apply" to the common law only to the extent that the common law is found to be inconsistent with *Charter* values. [Emphasis in original.]

23 While the facts of *Hill* involved an attempt to mount a *Charter* challenge to the common law rules of defamation, I am of the view that Cory J.'s comments are equally applicable to the common law of privilege at issue in this case. In view of the purely private nature of the litigation at bar, the *Charter* does not "apply" *per se*. Nevertheless, ensuring that the common law of privilege develops in accordance with "*Charter* values" requires that the existing rules be scrutinized to ensure that they reflect the values the *Charter* enshrines. This does not mean that the rules of privilege can be abrogated entirely and replaced with a new form of discretion governing disclosure. Rather, it means that the basic structure of the common law privilege analysis must remain intact, even if particular rules which are applied within that structure must be modified and updated to reflect emerging social realities.

V. Privilege for Communications Between Psychiatrist and Patient

24 The first requirement for privilege is that the communications at issue have originated in a confidence that they will not be disclosed. The Master held that this condition was not met because both the appellant and Dr. Parfitt had concerns that

notwithstanding their desire for confidentiality, the records might someday be ordered disclosed in the course of litigation. With respect, I do not agree. The communications were made in confidence. The appellant stipulated that they should remain confidential and Dr. Parfitt agreed that she would do everything possible to keep them confidential. The possibility that a court might order them disclosed at some future date over their objections does not change the fact that the communications were made in confidence. With the possible exception of communications falling in the traditional categories, there can never be an absolute guarantee of confidentiality; there is always the possibility that a court may order disclosure. Even for documents within the traditional categories, inadvertent disclosure is always a possibility. If the apprehended possibility of disclosure negated privilege, privilege would seldom if ever be found.

25 The second requirement -- that the element of confidentiality be essential to the full and satisfactory maintenance of the relation between the parties to the communication -- is clearly satisfied in the case at bar. It is not disputed that Dr. Parfitt's practice in general and her ability to help the appellant in particular required that she hold her discussions with the appellant in confidence. Dr. Parfitt's evidence establishes that confidentiality is essential to the continued existence and effectiveness of the therapeutic relations between a psychiatrist and a patient seeking treatment for the psychiatric harm resulting from sexual abuse. Once psychiatrist-patient confidentiality is broken and the psychiatrist becomes involved in the patient's external world, the "frame" of the therapy is broken. At that point, it is Dr. Parfitt's practice to discontinue psychotherapy with the patient. The result is both confusing and damaging to the patient. At a time when she would normally find support in the therapeutic relationship, as during the trial, she finds herself without support. In the result, the patient's treatment may cease, her distrustfulness be exacerbated, and her personal and work relations be adversely affected.

26 The appellant too sees confidentiality as essential to her relationship with Dr. Parfitt. She insisted from the first that her communications to Dr. Parfitt be held in confidence, suggesting that this was a condition of her entering and continuing treatment. The fact that she and Dr. Parfitt feared the possibility of court-ordered disclosure at some future date does not negate the fact that confidentiality was essential "to the full and satisfactory maintenance" of their relationship.

27 The third requirement -- that the relation must be one which in the opinion of the community ought to be sedulously fostered -- is equally satisfied. Victims of sexual abuse often suffer serious trauma, which, left untreated, may mar their entire lives. It is widely accepted that it is in the interests of the victim and society that such help be obtained. The mental health of the citizenry, no less than its physical health, is a public good of great importance. Just as it is in the interest of the sexual abuse victim to be restored to full and healthy functioning, so is it in the interest of the public that she take her place as a healthy and productive member of society.

28 It may thus be concluded that the first three conditions for privilege for communications between a psychiatrist and the victim of a sexual assault are met in the case at bar. The communications were confidential. Their confidence is essential to the psychiatrist-patient relationship. The relationship itself and the treatment it makes possible are of transcendent public importance.

29 The fourth requirement is that the interests served by protecting the communications from disclosure outweigh the interest of pursuing the truth and disposing correctly of the litigation. This requires first an assessment of the interests served by protecting the communications from disclosure. These include injury to the

appellant's ongoing relationship with Dr. Parfitt and her future treatment. They also include the effect that a finding of no privilege would have on the ability of other persons suffering from similar trauma to obtain needed treatment and of psychiatrists to provide it. The interests served by non-disclosure must extend to any effect on society of the failure of individuals to obtain treatment restoring them to healthy and contributing members of society. Finally, the interests served by protection from disclosure must include the privacy interest of the person claiming privilege and inequalities which may be perpetuated by the absence of protection.

30 As noted, the common law must develop in a way that reflects emerging *Charter* values. It follows that the factors balanced under the fourth part of the test for privilege should be updated to reflect relevant *Charter* values. One such value is the interest affirmed by s. 8 of the *Charter* of each person in privacy. Another is the right of every person embodied in s. 15 of the *Charter* to equal treatment and benefit of the law. A rule of privilege which fails to protect confidential doctor/patient communications in the context of an action arising out of sexual assault perpetuates the disadvantage felt by victims of sexual assault, often women. 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 a 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.

31 These criteria, applied to the case at bar, demonstrate a compelling interest in protecting the communications at issue from disclosure. More, however, is required to establish privilege. For privilege to exist, it must be shown that the benefit that inures from privilege, however great it may seem, in fact outweighs the interest in the correct disposal of the litigation.

32 At this stage, the court considering an application for privilege must balance one alternative against the other. The exercise is essentially one of common sense and good judgment. This said, it is important to establish the outer limits of acceptability. I for one cannot accept the proposition that "occasional injustice" should be accepted as the price of the privilege. It is true that the traditional categories of privilege, cast as they are in absolute all-or-nothing terms, necessarily run the risk of occasional injustice. But that does not mean that courts, in invoking new privileges, should lightly condone its extension. In the words of Scalia J. (dissenting) in *Jaffee v. Redmond*, 116 S. Ct. 1923 (1996), at p. 1941:

> It is no small matter to say that, in some cases, our federal courts will be the tools of injustice rather than unearth the truth where it is available to be found. The common law has identified a few instances where that is tolerable. Perhaps Congress may conclude that it is also tolerable. . . . But that conclusion assuredly does not burst upon the mind with such clarity that a judgment in favor of suppressing the truth ought to be pronounced by this honorable Court.

33 It follows that if the court considering a claim for privilege determines that a particular document or class of documents must be produced to get at the truth and prevent an unjust verdict, it must permit production to the extent required to avoid that result. On the other hand, the need to get at the truth and avoid injustice does not automatically negate the possibility of protection from full disclosure. In some cases,

the court may well decide that the truth permits of nothing less than full production. This said, I would venture to say that an order for partial privilege will more often be appropriate in civil cases where, as here, the privacy interest is compelling. Disclosure of a limited number of documents, editing by the court to remove non-essential material, and the imposition of conditions on who may see and copy the documents are techniques which may be used to ensure the highest degree of confidentiality and the least damage to the protected relationship, while guarding against the injustice of cloaking the truth.

34 In taking this approach, I respectfully decline to follow the all-or-nothing approach adopted by the majority of the Supreme Court of the United States of endorsing an absolute privilege for all psychotherapeutic records in *Jaffee v. Redmond*, *supra*. The Court of Appeals in the judgment there appealed from, 51 F.3d 1346 (1995), had held that the privilege could be denied if "in the interests of justice, the evidentiary need for the disclosure of the contents of a patient's counseling sessions outweighs that patient's privacy interests" (p. 1357). The majority in the Supreme Court, *per* Stevens J., rejected that approach, stating that to make confidentiality depend upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would be "little better than no privilege at all" (p. 1932).

35 It must be conceded that a test for privilege which permits the court to occasionally reject an otherwise well-founded claim for privilege in the interests of getting at the truth may not offer patients a guarantee that communications with their psychiatrists will never be disclosed. On the other hand, the assurance that disclosure will be ordered only where clearly necessary and then only to the extent necessary is likely to permit many to avail themselves of psychiatric counselling when certain disclosure might make them hesitate or decline. The facts in this case demonstrate as much. I am reinforced in this view by the fact, as Scalia J. points out in his dissenting

reasons in *Jaffee v. Redmond*, that of the 50 states and the District of Columbia which have enacted some form of psychotherapist privilege, none have adopted it in absolute form. All have found it necessary to specify circumstances in which it will not apply, usually related to the need to get at the truth in vital situations. Partial privilege, in the views of these legislators, can be effective.

36 The view that privilege may exist where the interest in protecting the privacy of the records is compelling and the threat to proper disposition of the litigation either is not apparent or can be offset by partial or conditional discovery is consistent with this Court's view in *R. v. O'Connor*, [1995] 4 S.C.R. 411. The majority there did not deny that privilege in psychotherapeutic records may exist in appropriate circumstances. Without referring directly to privilege, it developed a test for production of third party therapeutic and other records which balances the competing interests by reference to a number of factors including the right of the accused to full answer and defence and the right of the complainant to privacy. Just as justice requires that the accused in a criminal case be permitted to answer the Crown's case, so justice requires that a defendant in a civil suit be permitted to answer the plaintiff's case. In deciding whether he or she is entitled to production of confidential documents, this requirement must be balanced against the privacy interest of the complainant. This said, 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 and criminal case; documents produced in a criminal case may not always be producible in a civil case, where the privacy interest of the complainant may more easily outweigh the defendant's interest in production.

37 My conclusion is that it is open to a judge to conclude that psychiatrist-patient records are privileged in appropriate circumstances. Once the first three requirements are met and a compelling *prima facie* case for protection is established, the focus will be on the balancing under the fourth head. A document relevant to a defence or claim may be required to be disclosed, notwithstanding the high interest of the plaintiff in keeping it confidential. On the other hand, documents of questionable relevance or which contain information available from other sources may be declared privileged. The result depends on the balance of the competing interests of disclosure and privacy in each case. It must be borne in mind that in most cases, the majority of the communications between a psychiatrist and her patient will have little or no bearing on the case at bar and can safely be excluded from production. Fishing expeditions are not appropriate where there is a compelling privacy interest at stake, even at the discovery stage. Finally, where justice requires that communications be disclosed, the court should consider qualifying the disclosure by imposing limits aimed at permitting the opponent to have the access justice requires while preserving the confidential nature of the documents to the greatest degree possible.

38 It remains to consider the argument that by commencing the proceedings against the respondent Dr. Ryan, the appellant has forfeited her right to confidentiality. I accept that a litigant must accept such intrusions upon her privacy as are necessary to enable the judge or jury to get to the truth and render a just verdict. But I do not accept that by claiming such damages as the law allows, a litigant grants her opponent a licence to delve into private aspects of her life which need not be probed for the proper disposition of the litigation.

VI. Procedure for Ascertaining Privilege

39 In order to determine whether privilege should be accorded to a particular document or class of documents and, if so, what conditions should attach, the judge must consider the circumstances of the privilege alleged, the documents, and the case. While it is not essential in a civil case such as this that the judge examine every document, the court may do so if necessary to the inquiry. On the other hand, a judge does not necessarily err by proceeding on affidavit material indicating the nature of the information and its expected relevance without inspecting each document individually. The requirement that the court minutely examine numerous or lengthy documents may prove time-consuming, expensive and delay the resolution of the litigation. Where necessary to the proper determination of the claim for privilege, it must be undertaken. But I would not lay down an absolute rule that as a matter of law, the judge must personally inspect every document at issue in every case. Where the judge is satisfied on reasonable grounds that the interests at stake can properly be balanced without individual examination of each document, failure to do so does not constitute error of law.

VII. Application to This Case

40 The Court of Appeal declined to order production of Dr. Parfitt's notes to herself on the ground that they were unnecessary given that she would not be called to testify. It ordered the production of notes and records of consultations with the appellant, but under stringent conditions. While the Court of Appeal did not proceed on the basis of privilege, its orders are supported by the principles relating to privilege that I have attempted to set forth.

41 The interest in preserving the confidentiality of the communications here at issue was, as discussed, compelling. On the other hand, the communications might be

expected to bear on the critical issue of the extent to which the respondent Dr. Ryan's conduct caused the difficulties the appellant was experiencing. A court, in a case such as this, might well consider it best to inspect the records individually to the end of weeding out those which were irrelevant to this defence. However, the alternative chosen by the Court of Appeal in this case of refusing to order production of one group of documents and imposing stringent conditions on who could see the others and what use could be made of them cannot be said to be in error. In the end, the only persons to see the documents in question will be the lawyers for the respondent Dr. Ryan and his expert witnesses. Copies will not be made, and disclosure of the contents to other people will not be permitted. In short, the plaintiff's private disclosures to her psychiatrist will be disclosed only to a small group of trustworthy professionals, much in the fashion that confidential medical records may be disclosed in a hospital setting. I am not persuaded that the order of the Court of Appeal should be disturbed.

VIII. Conclusion

42 I would dismiss the appeal with costs.

//L'Heureux-Dubé J.//

The following are the reasons delivered by

43 L'HEUREUX-DUBÉ J. (dissenting) -- This appeal raises the questions of whether and to what extent a psychiatrist's notes and records, made in the course of treatment, of a plaintiff in a tort action resulting from sexual assault, are protected from disclosure. In the case before us, the civil suit was brought by that plaintiff against the perpetrator of the assault, himself a psychiatrist. He had earlier been convicted of

"indecent assault", which was the applicable offence in force at the time the assaults occurred.

44 I have had the advantage of reading the reasons of Justice McLachlin. As my colleague has recounted the facts and proceedings, I need not review them here. In essence, the plaintiff asserts her right to privacy in challenging an order to produce the records of the therapist, whom she saw subsequent to the occurrence of the offence, for the purposes of discovery in her civil claim for damages resulting from the sexual assault. In so doing, the appellant has raised two issues. The first relates to the privileged nature of the communications between her and her psychiatrist. The second concerns her right to privacy in the records kept by that psychiatrist of these communications.

45 In addressing the first issue, McLachlin J. finds that the appellant has in no way waived her claim to privilege. My colleague also holds that the common law rules governing privilege must be updated to reflect both modern circumstances and the values which underlie the *Canadian Charter of Rights and Freedoms*. Accordingly, McLachlin J. concludes that partial privilege, a variation of a case-by-case privilege, is appropriate in such cases. Although I agree in principle, I disagree with the result which my colleague reaches and the process which she approves in order to deal appropriately with this issue. Furthermore, I wish to provide additional reasons and more extensive reference to recent jurisprudence of this Court which has addressed the issue of privileged communications in circumstances similar to those which surround this appeal.

46 As regards the second issue raised by the appellant, McLachlin J. concludes that adapting the common law rules governing privilege is the only appropriate means through which to dispose of this appeal. Where a claim of privilege is unsuccessful, my colleague concludes that the court should have no further discretion to control the

process of discovery so as to protect private records or parts thereof from disclosure. With this conclusion, I firmly disagree. The assertion by a plaintiff of her privacy interests in the records affected by the production order requires a re-evaluation of the approaches to discovery taken by the Master, Chamber judge, and Court of Appeal in this case. We must ensure that their exercise of the discretion to order production conforms with the values underlying the *Charter*.

47 After considering the wording of the British Columbia Rules of Court governing discovery, the history of the procedure, the legislative and regulatory sources of the Rules, and the common law approach to exercising this power, I conclude that whenever a court orders production of documents, it is nonetheless exercising a discretion. While the courts may have developed an approach to this discretion which refrains from unduly limiting the procedures except where required by privilege, this discretion has not been eliminated by the common law. Moreover, I agree with the B.C. Court of Appeal's assertion that, in exercising this discretion, the court may further control the discovery procedures to ensure that they do not cause injustice to one of the parties.

48 The exercise of a judicial discretion, whether common law or statutory in origin, must comport with the values underlying the *Charter*. In applying this principle, this Court has recently held, albeit in the criminal law context, that a court must exercise its discretion to order the production of private records in a manner which comports with the *Charter* values underlying the rights to privacy, equality, and a fair trial. These same values are engaged in the instant appeal in the context of civil proceedings. Keeping in mind the important differences between the criminal and civil contexts, I nonetheless find that the discretion as exercised by the Court of Appeal in the case before us gave insufficient regard to the values of privacy and equality. My colleague has affirmed the

process followed by the Court of Appeal in dealing with the psychiatrist's notes and records in this case. On the basis of the conclusion I reach on this issue, I find myself unable to agree with this result.

I. Principles

A. *Privilege*

49 In *A.(L.L.) v. B.(A.)*, [1995] 4 S.C.R. 536 (hereinafter *L.L.A.*), our Court unanimously found that a complainant in a case involving the criminal offence of sexual assault may obtain protection from disclosure of private records to the defence via a case-by-case privilege. In that case, various institutions which had been involved in providing counselling to the complainant after the alleged assault were ordered to produce the records of this treatment to the defence. The order was appealed to this Court on the ground that the records were privileged.

50 Writing for the Court on this issue, and with reference to the majority reasons in the recent case of *R. v. Gruenke*, [1991] 3 S.C.R. 263, I observed, at pp. 562-63, that our Court has recognized two common law categories of privilege, a "class" privilege and a "case-by-case" privilege:

> A class privilege entails a *prima facie* presumption that such communications are inadmissible or not subject to disclosure in criminal or civil proceedings and the onus lies on the party seeking disclosure of the information to show that an overriding interest commands disclosure. In order for the privilege to attach, compelling policy reasons must exist, similar to those underlying the privilege for solicitor-client communications, and the relationship must be inextricably linked with the justice system.
>
> In a case-by-case privilege, the communications are not privileged unless the party opposing disclosure can show they should be privileged according to the fourfold utilitarian test elaborated by Wigmore (*Evidence*

> *in Trials at Common Law* (McNaughton rev. 1961), vol. 8, at § 2285). [Emphasis added.]

51 After reviewing developments in the law of privilege in Canada and other jurisdictions, the Court rejected the notion of a class privilege shielding all such private records from disclosure. This conclusion was reached after a careful weighing of the policy arguments for a class privilege in this context against the detrimental effects of such a privilege on the administration of our justice system. The policy arguments supporting a class privilege included: the need for confidentiality in effective therapy for sexual assault victims, the deterrent effect of potential disclosure on both the seeking of counselling and consequent making of complaints, the inherent unreliability of such records, and the need to reflect the values enshrined in the *Charter*, particularly those ensuring equality and privacy, in our development of the common law. The following countervailing concerns are also involved: the necessity of relevant information in the truth-finding process which is the foundation of our justice system, the possibility that records will contain highly relevant information, the effects of a blanket protection from disclosure of relevant information on the accused's constitutional right to make full answer and defence, and the difficulty in delimiting this class of relationships.

52 Having weighed these two sets of arguments, the Court held, at p. 580, that while a class privilege for private records was not warranted, a case-by-case privilege might well be established, provided that the Wigmore criteria were met:

> Given the nature of the relationship between counsellors and sexual assault complainants, the first three criteria will easily be met in most cases. . . . The fourth criterion involves the balancing of the relative values which favour finding these records privileged with those which favour production,

> if, of course, the records are found to be likely relevant either to an issue in the proceedings or to the competence of the witness to testify (see *O'Connor*, *supra*). This is where the arguments for and against production, which I have discussed earlier, will be examined.

The fourth branch of the Wigmore test requires the party claiming privilege to establish that the injury which would inure to the relationship in question is greater than the benefit gained for the correct disposal of the civil or criminal litigation. The decision in *L.L.A.*, *supra*, has thus delineated the various public policy factors which must be weighed in determining whether this criterion has been satisfied. It has also held that the likely relevance of the documents must be established by the defence before the court will undertake the balancing required by the fourth Wigmore criterion.

53 Case-by-case privilege was not, however, seen as a desirable source of protection, for its *ad hoc* nature would interfere with the primary policy objective which underlies privilege in this context. Privilege is advocated in these cases on the grounds that its assurance of confidential counselling will encourage complainants to seek therapy and to report the assault. The Court held that the procedural restrictions on disclosure, which are dictated by the *Charter* values underlying the complainant's rights to privacy and equality, would better fulfill these objectives.

54 In the instant appeal, McLachlin J. has developed a form of case-by-case privilege which she terms "partial privilege". It allows the application of the Wigmore test not only to a particular relationship in a specific set of circumstances, which is what was envisioned in *L.L.A.*, *supra*, but also to classes of records, individual documents, or even parts thereof. In applying the fourth part of this test, the judge is called upon to

balance the interest served by non-disclosure, that is, the promotion of the confidential relationship in which the records arose, with the interest in the correct disposal of the litigation. In so doing, the judge has the broad discretion to decide whether and to what extent to order the disclosure of certain documents. If the records contain information which is clearly relevant to a defence or claim, and without which a false result may ensue, the judge may order their disclosure. However, it is open to him or her to place limits on the reproduction and dissemination of the records once disclosed, to inspect the documents before releasing them to the defence, and/or to remove irrelevant or unnecessary information from the records.

55 In addition to my colleague's elaboration of the appropriate approach, one must not lose sight of two principles which were established by this Court in *L.L.A.*, *supra*, and which apply *mutatis mutandis* in a civil proceeding as well. First, before a judge may apply the fourth branch of the Wigmore test, the defence must establish the likely relevance of the documents, whether to an issue at trial or to the competence of a witness to testify. This threshold will not be overcome by mere speculation as to the contents of the records or biased hypotheses about such plaintiffs. Second, in undertaking the balancing of public policy concerns under the fourth branch of the Wigmore test, factors in addition to those mentioned by my colleague must be considered. These include the inherent unreliability of such records given the purposes for which they are made and the deterrent effect the lack of protection will have on the seeking of civil compensation for the injury sustained.

56 "Partial privilege" was nonetheless found by McLachlin J. to uphold the order of the Court of Appeal in the case before us. This order allowed direct and complete disclosure to the defence of all of the records Dr. Parfitt had made of her interactions with the appellant, albeit subject to certain restrictions on their reproduction

and dissemination. Only those notes which Dr. Parfitt had made to herself for diagnostic purposes were withheld from the defence. In deciding which documents to order produced, the Court of Appeal relied on the affidavits which the parties had submitted in conjunction with the proceedings. Direct disclosure of all of the information shared in the course of therapy to professionals who are assisting the defence, including defence counsel, constitutes a very serious breach of the plaintiff's interests in privacy as regards these communications.

57 Although greatly expanded and updated to comport with both modern circumstances and *Charter* values, as a substantive rule applied on a case-by-case basis, the doctrine of "partial privilege" remains fundamentally *ad hoc* in nature. As such, it fails to provide an adequate means of fulfilling its own primary policy rationale. In this context, the doctrine's policy objectives are to ensure that plaintiffs who are victims of sexual assault not be discouraged from seeking therapy if they may potentially wish to take civil action or, if they have already received counselling, unduly deterred from seeking compensation for the injury sustained. As defendants in such cases will likely challenge the cause and quantum of the injury claimed, it may be relatively easy for them to establish, in certain cases, that some information shared in counselling sessions will be likely relevant to an issue at trial. At the same time, much of the information contained in such private records may be completely irrelevant or of extremely limited probative value and/or highly prejudicial. If the result is that all records, and thus all of the information they contain, are released to the defence, albeit subject to restrictions, many plaintiffs will be deterred from undertaking civil suits and/or therapy to address the assault's effects on them.

58 Moreover, while the doctrine of privilege allows for some balancing of interests, we must not forget that its aim is to balance the public's interest in fostering

particular relationships with its interest in correctly disposing of legal disputes. The four criteria involved in the Wigmore test reflect this policy rationale. As such, the plaintiff's privacy interests in the records may receive some protection, but only to the degree that they serve the greater purpose of promoting a particular relationship. This relationship must be found to be sufficiently confidential, dependent upon such confidence, and valued by the community to warrant the balancing of its value with potential effects on the trial.

59 Where a judge determines that any or all of the first three Wigmore criteria are not fulfilled, the plaintiff's privacy interests are no longer considered. Moreover, while her interests in privacy are balanced under the fourth branch, they are only valued to the degree that they affect the relationship in which the communications arose. This doctrine does nothing to ensure protection of her privacy interests in records which, although containing information of a highly private nature, may not have arisen in the context of a relationship which meets the strict requirements for privilege. For this reason, as the plaintiff has asserted her privacy interest in private records independently of her claim for privilege, we are required to determine whether this interest has received adequate attention.

B. *Balancing Charter Values*

60 In addition to her privilege claim, the appellant is asserting a right to privacy in the documents. The court order to produce the documents was made on the basis of a regulatory "Rule of Court" -- Rule 26 -- which grants a broad discretion to the courts to control discovery procedures. This rule is authorized by the executive branch of the British Columbia government through statute and regulation and has the objective of controlling the process of discovery between private parties to civil litigation.

61 As will be explained in more detail, in exercising their powers under this rule, courts have developed two somewhat conflicting common law approaches. While differing in the extent to which a court may control the production of documents, both of these approaches establish a structured discretion on the part of the court in making this determination. Thus, in the context of civil discovery, while the power in the courts has been created by the regulatory rule, common law rules to control and govern this discretion have been developed. The context of discovery may provide a somewhat unique interaction of the common law and procedural rules of court, in that the substantive common law as to what is or is not discoverable has had to develop in response to this fairly modern procedural entitlement. This is different from the procedures in the present rules which govern the determination of the admissibility of evidence, for example.

62 This Court has held that where a provision or regulation or, alternatively, a common law rule establishes discretion in terms which allow judicial action respectful of the *Charter*, the provision or rule will not be struck down: *R. v. Swain*, [1991] 1 S.C.R. 933, *per* L'Heureux-Dubé J., dissenting; *R. v. Beare*, [1988] 2 S.C.R. 387, *per* La Forest J. for the Court, at p. 410; see also *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, *per* Lamer J. (as he then was), at p. 1078. Indeed, a residual discretion may be required in some instances to ensure that a legislative provision or common law rule not violate the *Charter*: *Baron v. Canada*, [1993] 1 S.C.R. 416. It is rather the exercise of discretion that the courts will scrutinize.

63 In many cases, the exercise of discretion, through the making of an order, for example, will not constitute direct state action and therefore cannot be subject to the same constitutional scrutiny as legislation or the acts of state officials. Where this occurs,

this Court has nonetheless found that the exercise of discretion must adequately reflect the values underlying the *Charter*. In the criminal context, a proportional balance of the effects on *Charter* rights is required: *R. v. O'Connor*, [1995] 4 S.C.R. 411; *L.L.A.*, *supra*; see also *R. v. Salituro*, [1991] 3 S.C.R. 654; *R. v. Park*, [1995] 2 S.C.R. 836. In cases of non-criminal law powers exercised in the context of legislation with a public purpose or other such state action, the court must also reflect a balance of *Charter* values when exercising a statutory or common law discretion: *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, *per* Lamer C.J., for the majority, at p. 875; *Baron v. Canada*, *supra*; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, at p. 558.

64 The fact that the discretion exercised here involves procedural entitlements in a civil dispute between private parties rather than a criminal trial does not fundamentally alter the analysis. There are a number of civil cases involving private parties which found that the discretionary powers granted by statute or a common law rule must be exercised in a manner which comports with the values underlying the *Charter*: *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, *per* McIntyre J. at p. 603, *Young v. Young*, [1993] 4 S.C.R. 3, *per* L'Heureux-Dubé, dissenting, at pp. 71 and 92; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R 1130. In such cases, however, the balancing of values may be somewhat more flexible than in those involving the state as a party: *Hill*, *supra*, *per* Cory J., at paras. 94 and 97. In the appeal before us, the appellant is thus entitled to challenge the exercise of discretion by the trial judge and the Court of Appeal on the grounds that they did not reflect an appropriate balance of *Charter* values.

65 A three-step analysis is required to determine whether the appellant can succeed in her claim. First, the court must identify the source of the common law or legislative discretion that has been exercised. Second, it must identify the *Charter* values

that are engaged in or affected by the exercise of this discretion. Finally, it must determine whether and in what manner the exercise of discretion needs to be altered to reflect an appropriate balance of these *Charter* values. In the instant appeal, we are aided greatly in the second and third tasks by the analysis already undertaken by this Court in *O'Connor*, *supra*, which addressed a similar procedural discretion, albeit in the context of a criminal prosecution.

(i) Discretion

66 The traditional common law approach to the power conferred upon courts to order the production of documents for discovery in civil proceedings holds that "all relevant documents which are not privileged must be produced": Beverley M. McLachlin and James P. Taylor, *British Columbia Practice* (2nd ed. 1996 (loose-leaf)), vol. 1, at p. 26-1. In British Columbia, there has nonetheless been some dispute as to the scope of this judicial discretion:

> R 26(10) provides that the court "may" order the production of documents for inspection and copying by any party or by the court "at a time and place and in the manner it thinks just". One interpretation of "may" is that the order will go, subject to terms, if the documents are shown to be relevant and no claim to privilege is established. Another interpretation would be that "may" confers a wider discretion.
>
> (McLachlin and Taylor, *supra*, at p. 26-115.)

Madame Justice McLachlin and Professor Taylor refer to the Court of Appeal decision in the case before us, (1994), 98 B.C.L.R. (2d) 1, as an indication that the second approach is gaining favour, although that decision was based on Rule 26(11), which deals with orders for documents in the hands of a third party, and did not specifically consider the scope of the discretion encompassed in the term "may" in either Rule 26(10) or Rule 26(11). I agree with their view, for the Court of Appeal in this case spoke of a

broader discretion which applied regardless of whether the guardian of the documents was a party to the litigation or a third party.

67 My colleague has chosen the first or traditional approach to the powers of the court to control the discovery of documents. In so doing, she rejects the Court of Appeal's method while affirming their result. I prefer to affirm the Court of Appeal's characterization of its powers, for reasons which I will delineate, and then to determine whether the discretion as exercised by the trial judge and the Court of Appeal adequately comports with *Charter* values. In this latter task I am guided by recent jurisprudence of this Court. However we choose to characterize their powers, the Master, Chambers judge and Court of Appeal clearly exercised a discretion to order the production of documents for discovery. The guidance they sought as to the appropriate exercise of these powers arises from the approach defined in the case law applying the discretionary Rules of Court. As such, the task of assessing whether the exercise of the discretion complies with *Charter* values cannot be avoided. I see no reason to distinguish between this case and others where this Court has held that discretionary judicial procedures developed at common law or in a statute must comport with *Charter* values. The discretion exercised by the Master, Chambers judge, and the Court of Appeal is open to the challenge asserted by the appellant.

68 An examination of the sources of the modern procedures governing discovery supports this finding. These procedures have their earliest roots in equity. The English Courts of Chancery developed rudimentary procedures for mutual disclosure in response to the problem in the common law courts of one party unfairly using the trial procedures to the detriment of the other party. The goal of discovery was, and has continued to be, the achievement of a more efficacious and accessible justice for the parties to an action. In Canadian provinces, including British Columbia, the procedures

which we use today are not simply a reproduction of those available in equity, but have been largely expanded and developed through either statutory or regulatory reform. Canadian provinces have generally followed the example of the United Kingdom in this respect. There are differences among the provinces, most particularly British Columbia and Nova Scotia where the discovery procedures were more recently instituted; nonetheless, all contain similar elements which expand upon the original equitable procedures. See G. Cudmore, *Choate on Discovery* (2nd ed. 1993 (loose-leaf)), at pp. 1-1 to 1-6.

69 In interpreting the regulatory rules governing discovery, the courts have tended to allow a "wide latitude" in exercising the discretionary powers they have been granted, in the aim of best serving the overall policy objectives of the procedural reforms. These include, *inter alia*, the clarification of issues and the strength of the case faced by each party, the shortening of trials through avoiding "ambush" or surprise, and the encouragement of out-of-court settlement. In view of these goals, while the rules may establish a broad discretion for the courts to control the process of discovery of documents, the courts have been careful to avoid unduly circumscribing the procedures. See Cudmore, *supra*, at pp. 1-6 to 1-9.

70 An alternative approach to the discretion created by the British Columbia Rules is one which places an outer limit on this discretion, a limit which ensures that the discovery procedures not work injustice, even where a claim in privilege has not been successful and it appears that information in the documents is relevant to an issue at trial. This is the principle upon which the Court of Appeal relied in the instant appeal. The court held, *per* Southin J.A. for the court, at p. 19, that in exercising the discretion to order production of a document for the purposes of discovery, whether in the hands of a party or a non-party, it should

> 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.

71 In my view, this common law approach is more consistent with the wording of the British Columbia Rules governing discovery, the origins of the procedures, the common law discretionary rules governing information regarding non-parties, and the effect of the *Charter* on the exercise of common law and statutory discretion in civil proceedings. As has already been stated, the discretion to order production of documents which is envisaged in Rules 26(10) and 26(11) is a broad one. In essence, the wording of these rules indicates that the courts may control the production and inspection of documents in whatever manner they think just.

72 This reference to justice is highly consistent with the historical source of the procedures. Rudimentary discovery procedures constituted a response by the courts of equity to the injustice which was being occasioned by some parties' use of the procedures in the common law courts. Given its origins in equity and its longstanding purpose of facilitating rather than impeding justice, it is fitting that the courts maintain an overarching discretion to ensure that discovery proceed in a just manner. While giving as broad a leeway as possible to the party seeking production of particular documents, the courts must remain cognizant of the possibility of the procedure working to the unfair detriment of one of the parties.

73 That the courts should tailor the procedures to protect against oppressive consequences is further supported by the approach which has developed in the British Columbia courts as regards documents in the hands of third parties. In *Dufault v. Stevens* (1978), 6 B.C.L.R. 199, at p. 204, for example, the British Columbia Court of Appeal held that, in making an order pursuant to Rule 26(11), the judge should compel the

production of possibly relevant documents, "unless there are compelling reasons why he should not make it", giving, as examples, privileged documents or those where production would be of such an adverse effect as to be unjust. It is partly on the basis of this decision that the Court of Appeal in the instant appeal made its order. In *Frenette v. Metropolitan Life Insurance Co.*, [1992] 1 S.C.R. 647, at p. 686, this Court described a similar approach to the discretion granted through equivalent procedural provisions in Quebec.

74 Finally, given that an exercise of common law discretion, even in the context of civil proceedings, can be scrutinized to ensure that it comports with the values underlying the *Charter*, the outer limits on the discretion in this case are justified provided that they ensure adequate compliance with these values.

75 The principle that the process by which a judge orders the production and inspection of documents may be adapted to avoid injustice to one of the parties is reflected to some degree in the reasons of my colleague. The power of a judge to place restrictions on the reproduction and dissemination of documents once produced relies on such a rationale. McLachlin J. nonetheless maintains the substance of the traditional approach to the discretion in her conclusion that documents or parts thereof which are not considered privileged cannot be withheld from the defence, regardless of the effects their production may have on the privacy interests of the plaintiff. In any event, the issue before this Court is whether the discretion as exercised by the Master, Chambers judge, and the Court of Appeal in this case complies with the values underlying the *Charter*.

76 My colleague has described my approach to this issue as "wholly inappropriate" on the grounds that a procedural rule could be found to trump the common law. I disagree. First of all, the exercise of discretion which is subject to

scrutiny in discussing this issue is not the privilege doctrine, but rather the discretionary common law rule for determining which documents should be ordered produced for discovery. If the doctrine of privilege did not exist, and the common law discretionary rule simply stated that all documents shown to contain material information will be ordered produced, could the appellant in this case not argue that this did not reflect an adequate balance of the *Charter* values of privacy, equality, and trial fairness? All that has been added to the traditional approach is that privilege will also prevent a court from ordering production.

77 As I have stated, privilege only considers the privacy interests of plaintiffs in civil litigation as they relate to relationships which are considered to be of adequate public importance. In my view, where a plaintiff is unsuccessful in her privilege claim, she may still suffer a serious incursion upon her privacy which is unwarranted given the potentially limited or non-existent benefit to the fairness of the trial of some of the disclosed information. Given this result, this Court is required to examine the common law approach to this discretion to ensure that it effects an appropriate balance of the *Charter* values engaged in this context. This process will in no way interfere with a plaintiff's claim to privilege as it only concerns those documents which have not been found to be protected by privilege.

78 While I have referred to the source of Rules 26(10) and 26(11), and its reflection in their wording, this reference is meant to demonstrate the purpose of the discovery process, viz. to render the trial process more expeditious and fair. My primary focus is not the Rules of Court, however, but rather the discretionary approach or rule developed by the courts to govern the judicial exercise of the powers relating to discovery of documents. In my view, if we determine that the discretion as exercised by the Court of Appeal does not provide an adequate reflection of *Charter* values, it is

incumbent upon this Court to alter that approach. Moreover, if the doctrine of privilege, while updated to reflect *Charter* values, provides an inadequate consideration of privacy interests asserted by the plaintiff, the traditional approach to discretion as exercised by the Master and Chambers judge must also be changed. Not only would such a result be appropriate, justice in these circumstances would require nothing less.

(ii) *Charter* Values: Privacy, Trial Fairness, and Equality

79 In the recent decision of *O'Connor*, *supra*, this Court was asked to determine whether the *Charter* protected the privacy interests which a complainant in a criminal sexual assault case would have in private records. The Court held that s. 7 of the *Charter* did include a right to privacy in such documents. At p. 477, they were referred to as "private records", which were taken to mean any records "in which a reasonable expectation of privacy lies", and could include, *inter alia*, medical or therapeutic records, school records, private diaries, and the activity logs prepared by social workers.

80 Writing for the Court on this issue, I concluded that the rights to individual liberty and security of the person as enshrined in s. 7 of the *Charter* encompassed a right to privacy. This finding was based on a number of developments in the jurisprudence of this Court. In its s. 7 jurisprudence, it has expressed great sympathy with the notion that liberty and security of the person involve privacy interests. That privacy is essential to human dignity, a basic value underlying the *Charter*, has also been recognized. Our right to security of the person under s. 7 has been found to include protection from psychological trauma which can be occasioned by an invasion of our privacy. Certainly, the breach of the privacy of a sexual assault plaintiff constitutes a severe assault on her psychological well-being. Section 8 also reveals that the *Charter* is clearly premised on a respect for the interests of individuals in their privacy. Finally, the common law torts

of defamation and trespass further recognize the validity of an individual's claim to fundamental privacy interests.

81 This Court also established that such a right is not absolute and "must be balanced against legitimate societal needs" (*O'Connor*, *supra*, at p. 485). The Court affirmed the principle that such a balancing should be effected through an assessment of the individual's reasonable expectation of privacy and a weighing of that expectation against the state's legitimate needs to interfere therein: *per* L'Heureux-Dubé J., for the Court on this issue, at p. 485, citing *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145. The records at issue in *O'Connor* were found clearly to disclose a reasonable expectation of privacy, worthy of protection under s. 7 of the *Charter*. This conclusion was not drawn on the basis of a strong public interest in the relationships through which these records arose, but rather on the nature of the records, the information contained therein, and the effects of disclosure on the person asserting her expectation of privacy. The concern or value underlying the *Charter*-based right to privacy thus differs significantly from that which founds the doctrine of privilege.

82 As the nature of privacy dictates that once violated it cannot be regained, it was held that the reasonable expectations of privacy should be protected at the point of disclosure. The Court thus found, at p. 487, that:

> s. 7 of the *Charter* requires a reasonable system of "pre-authorization" to justify court-sanctioned intrusions into the private records of witnesses in legal proceedings.

83 As the records at issue in this appeal are of the same nature as those mentioned in *O'Connor*, I conclude that the appellant has established a reasonable expectation of privacy in these documents. The respondent has argued that the appellant waived her right to privacy by putting her psychological well-being at issue in a trial. I

do not agree. As my colleague McLachlin J. has found, her privacy is not waived by the mere fact that an action was instituted. Rather, the appellant has engaged a process where the reasonable expectation of privacy must be balanced against society's need to ensure that such litigation be conducted fairly and effectively. This may mean that a respect for *Charter* values in the discovery procedures would tolerate greater access to certain information, but it will not mean that her reasonable expectation of privacy has in any way been relinquished. In my view, the appellant has established such an expectation. As such, it must be balanced with the other interests which arise in the discovery aspect of civil litigation.

84 In *O'Connor*, the complainant's privacy interests were balanced against the accused's *Charter* right to make full answer and defence. This right is an essential element of the principles of fundamental justice which are to govern criminal proceedings. In civil proceedings, while the defendant does not have a direct *Charter* right to exercise, that is, while his liberty or security are in no way endangered, similar values are at stake. A miscarriage of justice could occur if a lack of necessary relevant information might enable a trial judge or a jury to reach a false result. The *Charter*-related value of a fair trial for all litigants, as a fundamental principle of justice, is affected in such cases and may be balanced with the privacy interests of the appellant. As was the case with the accused's rights in *O'Connor*, however, these interests are no more absolute than those of the plaintiff. My statement at p. 480 applies equally in these circumstances:

> There is no question that the right to make full answer and defence cannot be so broad as to grant the defence a fishing licence into the personal and private lives of others.

85 That decision also discussed the requirement that any procedural discretion in sexual assault cases reflect the value of equality, given that (at p. 487):

> [u]nlike virtually every other offence in the *Criminal Code*, sexual assault is a crime which overwhelmingly affects women, children and the disabled.

The same observation can be made for the tort represented by sexual assault. In view of the unique nature of such cases, the possibility of biased assumptions based on the age or gender of the plaintiff must not be allowed to taint the procedure. Indeed, there may be a greater danger of such an effect, as it is monetary compensation for the injury which is sought. Biased inferences may well be made that this injury is not as great or as worthy of compensation as that caused by other forms of assault which have traditionally received greater attention in both the criminal and civil law domains.

86 This Court was asked in *O'Connor* to determine whether the judge's discretion to order the production of private records to the defence in advance of the criminal trial was exercised in a manner which comported with the *Charter* values of privacy, fair trial, and equality. As in the instant appeal, direct state action was not involved. Although the prosecution of a criminal offence formed the context for the exercise of discretion, the common law did not dictate that the court act in a certain way. At pp. 479-80, the following principles from *Dagenais*, *supra*, were found to be applicable:

> . . . the nature, scope and breadth of the production order will ultimately depend upon a balancing of *Charter* rights which seeks to ensure that any adverse effects upon one right is proportionate to the salutary effects of the constitutional objective being furthered: *Dagenais*, at p. 890.

Following this approach, the Court developed a number of procedural safeguards to guide any order for production of private records, a matter to which I will now turn as,

in my view, these principles also apply to a civil trial where the production of private records is in issue.

II. Process

87 On the basis of the principles in *Dagenais*, *supra*, and with the goal of achieving an appropriate balance of the *Charter* values of privacy, fair trial, and equality, the Court in *O'Connor* developed a number of procedural safeguards to guide any order for production of private records. These involve a two-stage test which can be undertaken once the defence has notified all parties with an interest in the confidentiality of the documents. The first stage of the judge's determination requires that the defence establish the likely relevance of the documents. More than mere speculation or biased inferences about sexual assault complainants is required. A minority of the Court particularly emphasized the danger of biased assumptions and required that the defence establish independent grounds via affidavit evidence for asserting that information in the documents was likely relevant to issues at trial or the competence of a witness to testify.

88 If the initial threshold of likely relevance is overcome, the court will order the production of those documents which were found to be likely relevant, but only to the court and for the purpose of the court's inspection. At this stage, the court is asked to decide which documents or parts of documents contain information which is likely relevant, and to weigh the effects of production on the complainant with those on the accused. A number of factors to be considered were enumerated. I further note that in both *O'Connor*, *supra*, and *L.L.A.*, *supra*, the possibility of claiming privilege with respect to these documents was not foreclosed. Where a claim of privilege is unsuccessful, the court would nonetheless be required to exercise its discretion in compliance with *Charter* values through the preceding procedures.

89 The present case requires that we determine whether and how the discretion exercised by a court in civil as opposed to criminal proceedings should be altered to comply with *Charter* values. While there are some key differences between the two contexts, the most significant factors which governed the development of the *O'Connor* procedure remain present in the context of a civil suit. Through an examination of these distinctions and commonalities, procedures for governing discovery which comport with the *Charter* values engaged in this appeal can be identified.

90 A significant difference between discovery in the civil context and disclosure in a criminal prosecution lies in the control a plaintiff has in a civil suit over whether she takes part in the proceedings. A further distinction relates to the benefit which may be derived by the plaintiff from the discovery process. Indeed, she may have a very strong interest in settling the case to avoid the traumatic experience of the trial process. A third difference is that, given the circumstances, it may be easier, in certain cases, to establish the likely relevance of the records to issues at trial. In the case before us, Dr. Parfitt was the only therapist who treated the appellant after the assault and, thus, the only professional with in-depth knowledge of the extent of the injury claimed, viz. psychological harm and its consequences for the appellant. Such circumstances may be taken into account when a judge makes an initial determination of the likely relevance of the records. A final distinction is that the state is not a party in the action where the order for production arose.

91 We must also recognize that, given the nature of discovery and the special context of civil litigation involving sexual assault, the discovery process has the potential to allow a far more serious incursion upon these plaintiffs' reasonable expectation of privacy than on plaintiffs in other types of tort cases. These circumstances are somewhat

unique. As was observed in *O'Connor*, *supra*, at pp. 487-88, the wrong involved here, sexual assault, may create a need for a therapeutic response if the victim is to restore herself to a state of healthy functioning. As Dr. Parfitt's affidavits attest, effective counselling requires that the most intimate details of a patient's life and her innermost thoughts, fears, and feelings be freely shared with the therapist. At the same time, it often requires that the counsellor keep records of what has transpired during her sessions with the plaintiff. A plaintiff may also maintain a private diary of these experiences, thoughts, and feelings.

92 Thus, by its very nature, this civil wrong creates a situation where a written record will be made of the most intimate details of the plaintiff's life. These documents may also provide a unique record of the injury which was allegedly caused. At the same time, as McLachlin J. observes, much of such information in the records will be of very limited value to the trial process. The same can be said of any private record of the plaintiff's thoughts, feelings, and experiences regarding the assault. Given this context, the traditional approach to discovery, the one where the plaintiff must rely upon the *ad hoc* protection privilege provides, will serve as a strong disincentive to plaintiffs to attempt to recover compensation for the injury caused. The mutual exchange of information for the shared purpose of expediting the search for justice is turned into a process which may prevent a plaintiff from seeking compensation in the courts or may encourage a premature and unfair settlement to avoid excessive disclosure of the private documents. Such a result cannot comport with our sense of justice, particularly as it is informed by the *Charter* values of privacy and equality. Clearly, a more predictable procedure is in order, one which addresses the unique difficulties faced by plaintiffs in these circumstances.

93 While the procedures established in *O'Connor* are not entirely appropriate in the context of civil litigation, a number of their features are equally applicable in such proceedings. The most important aspect is the "pre-authorization" element of the process. This is required by the essential nature of privacy interests. An adequate protection of privacy requires that meaningful controls be exercised at the disclosure stage. In *O'Connor*, writing for the Court on this issue, I concluded that the prevention of a breach of privacy is the best means of protecting these interests, as once breached, privacy cannot be regained. In the context of a criminal prosecution, this factor necessitated the "likely relevance" threshold and the obligation on the court to screen the documents before releasing them to the defence. Certainly, this aspect of privacy is as pertinent in the context of civil proceedings as it is in a criminal prosecution.

94 A further reason for screening the documents is the finding that much of the information in private records will, more often than not, be irrelevant to the defence or of very limited probative value given the context in which it is gathered. These considerations, too, are present in the case of civil litigation. The balancing undertaken in the *O'Connor* procedures is also warranted in the instant appeal, as the parties' *Charter*-based interests must be weighed. Furthermore, the factors which are to be considered by the judge when screening the documents under the *O'Connor* test are similarly significant in civil proceedings, with the exception that it is the defendant's as well as society's interest in a fair trial which should be weighed as opposed to an accused's *Charter* right to full answer and defence.

95 As the likely relevance of the records may, in certain cases, be more easy to establish initially under these procedures, screening the documents becomes all the more necessary in a civil suit. This is due in part to the nature of the injury. Psychological harm is a very broad notion. Almost anything a plaintiff experiences in her life could, in

the abstract, be argued to be a contributing factor in any diminishment of her psychological well-being. Many of these potential contributors might also be of a very private nature. At the same time, a perusal of the documents may well reveal a lack of a logical link to the harm alleged. In such cases, this information should not be turned over to the defence.

96 By way of example, a plaintiff might share with her therapist that, for medical reasons, she and her husband are unable to have children. This is information of a highly private nature, which may, in the abstract, appear relevant to marital troubles alleged by the plaintiff. Upon reviewing the documents, it may well become evident that this issue was only briefly mentioned to the therapist, that the couple had never had any intention of having children, or that this was simply not a concern for them in their marriage. In such circumstances, a judge may wish to delete any mention of this fact in the records.

97 Given the foregoing distinguishing and shared features of the criminal and civil contexts for production of private records, the following procedure seems to me the appropriate one in the context of civil discovery. The party seeking production must notify those with an interest in the confidentiality of the records. Before a court may order production of private records to the defence for the purposes of discovery, it must first ascertain what documents are likely relevant to an issue at trial. In order to complete this task, the court must have before it the information necessary for this determination. In civil cases, the required information will be provided by the affidavit of the party seeking the order, in which he or she makes out the necessary grounds for obtaining production of the documents in question. The court must then order production of the likely relevant documents to the court for screening and removal of any information

which the court deems is not likely relevant or otherwise exempt from production given a balancing of the interests involved.

98 In this process, the factors delineated by this Court in the context of a criminal prosecution are equally applicable, although with slight modifications to meet the requirements of civil proceedings. The court should be guided by the following considerations: the necessity of the record to ensure a fair trial, the probative value of the record, the nature and extent of the reasonable expectation of privacy in the record, whether the production of the record would be premised on any discriminatory belief, and the potential prejudice created by disclosure to the plaintiff's dignity, privacy and security of the person. The additional factors of the potential benefit both parties will gain from a fair discovery process, the control the plaintiff has over whether she undertakes civil litigation, and the potential deterrent effect of this process on plaintiffs in civil litigation of sexual assault cases must also be considered.

99 In my view, in weighing these considerations, the judge should seek to achieve a discovery process which is what it is meant to be: a fair and mutual exchange. Both parties should be empowered to access those documents or parts thereof which will allow an appropriate narrowing of the issues, the avoidance of surprise at trial, and the potential for a fair out-of-court settlement.

100 As the state is not involved as a party to such cases, the balancing may be somewhat more flexible than that described in *Dagenais*, *supra*. The focus on proportionality of effects in that case was to give effect to the substance of s. 1 of the *Charter*: *Dagenais*, *supra*, *per* Lamer C.J. for the majority, at p. 878. This method of balancing is arguably not strictly applicable in private disputes: *Hill*, *supra*, *per* Cory J. for the Court in the result, at paras. 94 and 97. Nonetheless, a hierarchy of values cannot

be created. Privacy and equality values cannot be assumed to be of lesser importance than the value of a fair trial in determining whether and to what extent to order the production of private documents. Any flexibility should be with the aim of ensuring that a mutually beneficial discovery process take place.

101 Also, a judge may ask the guardian of the documents for an "inventory" of those in his or her possession to assist in the screening process. This is consistent with the procedures developed in *O'Connor* and *L.L.A.* In my opinion, as part of this inventory, it would also be open to the judge to request a general indication of the contents of the individual records, a grouping of the documents by contents, or other assistance in sorting the documents. Such an inventory should not be given to the other party to the action at that stage.

102 My colleague has stated that these additional procedures will confuse trial judges. I do not agree. Nothing in the context of civil litigation should prevent the two separate claims from being asserted and addressed. In many cases, such as the one before us, the privilege claim will be settled by the judge on the basis of affidavit evidence. Some documents will be found privileged and others not. It is only the latter group which will be subject to the screening process. Where a judge determines that vetting the documents could be necessary to fulfill the fourth criterion of the Wigmore test, confusion could arise, however. In such cases, as the procedures I have described provide a more direct and consistent consideration of the plaintiff's privacy interests, I would recommend applying the fourth branch of Wigmore to the entire group of documents, as a whole, either with or without the benefit of inspection. Once the privilege claim has been settled, the judge would then undertake the screening procedures described above to those documents which are not protected, provided that their likely relevance has been established.

III. Application to the Case

103 The Master who originally heard the motion for disclosure ordered all of the notes and records kept by Dr. Parfitt produced to the defence as these communications had failed to satisfy the first criterion of the Wigmore test, and were therefore not privileged. He refused to undertake any balancing of the interests asserted by the plaintiff as he held that this was not permitted by the law as it stood at that time. The Chambers judge affirmed the decision and order of Master Bolton, similarly finding that privilege had not been successfully claimed, although for different reasons. Again, no further balancing of the plaintiff's interests in equality or privacy was undertaken.

104 The Court of Appeal in the present case allowed the appeal in part. It did so after attempting some balancing of the privacy interests of the plaintiff and the interests in a fair trial. Consequently, it withheld the notes made for diagnostic purposes and restricted the dissemination and reproduction of the records once produced. Nonetheless, it did not review the documents before ordering their production. In my view, such a process does not give due consideration to the appropriate balance of the *Charter* values engaged by the discovery procedures.

105 Indeed, in these particular circumstances, and given the nature of the damages claimed and the information sought by the defence, very little meaningful protection has been accorded to these private records. If plaintiffs in such cases know that the entire contents of their discussion with their therapists or any other private records may be revealed to the lawyers and expert witnesses of the defendant, they may very well be deterred from seeking civil remedies. Without anyone reviewing the documents to remove information which is private, irrelevant or of very limited

probative value, an order of production constitutes a serious breach of privacy while affording potentially limited benefit to the defence. A hierarchy of *Charter* values has been created, one where the defence is greatly advantaged while the effect on the plaintiff may be highly detrimental. In striking an appropriate balance of *Charter* values, such a hierarchy is impermissible. The Court of Appeal's decision must, therefore, be revisited. While the Court of Appeal's general approach was correct and while it did not have the benefit of our judgments in *O'Connor* and *L.L.A.*, at the time its decision was rendered, the process it adopted is infirm.

IV. Conclusion and Disposition

106 As regards the first issue, that relating to the privileged nature of the communications between the appellant and Dr. Parfitt, I agree with McLachlin J. that a successful claim of privilege has clearly been established for the records which were exempt from disclosure. I also affirm the Court of Appeal's general conclusion that it had a broader discretion to control the process of discovery for the remaining documents to ensure that it not affect one of the parties unjustly.

107 The exercise of discretion upon which the order was based did not effect an appropriate balance of the *Charter* values of privacy, equality, and fair trial. By failing to screen private records in such cases, the court creates a hierarchy of *Charter* values, where interests in privacy and equality may be seriously affected for records or parts thereof which may provide very little if any benefit to the defence or be unnecessary to ensure the fairness of the proceedings. Procedures adapted to the context of discovery in civil proceedings from the principles developed by this Court in *O'Connor* are in order.

108 I would allow the appeal with costs. The decision of the Court of Appeal should be set aside, except as regards the notes which were not disclosed, and the matter remitted back to the Master for determination in a manner consistent with the foregoing reasons.

Appeal dismissed with costs, L'HEUREUX-DUBÉ J. *dissenting*.

Solicitor for the appellant: The British Columbia Public Interest Advocacy Centre, Vancouver.

Solicitors for the respondent Ryan: Harper Grey Easton, Vancouver.

Solicitors for the respondent Parfitt: Alexander, Holburn, Beaudin & Lang, Vancouver.

SCHEDULE A

TAB 4

Update Week 99-43

Planning

Indexed as:

Hammerson Canada Inc. v. Guelph (City)

Hammerson Canada Inc. and the University of Guelph have appealed under subsection 22(7) of the Planning Act, R.S.O. 1990, C. P.13, as amended, from Council's refusal or neglect to enact a proposed amendment to the Official Plan for the City of Guelph to redesignate land located at the northeast corner of Edinburgh and Stone Roads being Part of Lots 6 and 7, Concession 3, Division-G from "Major Institutional and High Density Residential" to a site specific designation to permit a retail/commercial and residential development consisting of 300 - 900 apartment dwellings and a phased commercial area of 390,000 square feet O.M.B. File No. O970213

Hammerson Canada Inc. and the University of Guelph have appealed to the Ontario Municipal Board under subsection 34(11) of the Planning Act, R.S.O. 1990, C. P.13, as amended, from Council's refusal or neglect to amend a proposed amendment to Zoning By-law 1995-14864 of the City of Guelph to rezone lands located at the northeast corner of Edinburgh and Stone Roads being Part of Lots 6 and 7, Concession 3, Division-G from "I.2" (Institutional) and "Specialized R.4-28" (Apartment Zones) to "Specialized RC (Regional Shopping Centre) Zone and Specialized RA (Townhouse/Apartment) Zone" to permit a retail/commercial and residential development consisting of 300 - 900 apartment dwellings and a phased commercial area of 390,000 square feet O.M.B. File No. Z970137 and 6 & 7 Developments Limited has appealed to the Ontario Municipal Board under subsection

34(11) of the Planning Act, R.S.O. 1990, C. P.13, as amended, from Council's refusal or neglect to amend a proposed amendment to Zoning By-law 1995-14864 of the City of Guelph to rezone lands located at the northwest corner of Woodlawn Road (Highway #7) and Woolwich Street (Highway #6) from "UR" (Urban Reserve) Zone, "WL" (Wetland) Zone, "Specialized SC.2-3" (Service Commercial) Zone and "Specialized SC.2-7" (Service Commercial) Zone to a site specific designation to permit a phased commercial development having an ultimate size of 350,000 square feet O.M.B. File No. Z970119 and At the request of 6 & 7 Developments Limited, the Minister of Municipal Affairs has referred to the Ontario Municipal Board under subsection 22(1) of the Planning Act, R.S.O. 1990, C. P.13, from Council's refusal or neglect to enact a proposed amendment to the Official Plan for the City of Guelph to redesignate lands located at the northwest corner of Woodlawn Road (Highway #7) and Woolwich Street (Highway #6) from "Service Commercial", "Industrial" and "Provincially Significant Wetlands" to a site specific designation to permit a phased commercial development having an ultimate size of 350,000 square feet Minister's File No. 23-OP-3888-A01 O.M.B. File No. O980040 and In the matter of a hearing pursuant to s. 43 of the Ontario Municipal Board Act, R.S.O. 1990, c.O.28, arising from a decision on a request brought by Wal-Mart Canada Inc. for a review of the Board's Decision/Order numbered 1182, issued on June 18, 1999

[1999] O.M.B.D. No. 1174

15 M.P.L.R. (3d) 158

File Nos. PL971055, O970213, Z970137, Z970119, O980040

Ontario Municipal Board

S.W. Lee

October 14, 1999

(18 paras.)

COUNSEL:

J. Matera, for City of Guelph.
R. Houser, T. Friedland and M. Stewart, for 6 & 7 Developments Limited.
B.S. Onyschuk, for Hudson's Bay Company.
M.J. McQuaid, for University of Guelph.
G. Petch, for Armel Corporation.
D. Wood and M. Bull, for Wal-Mart Canada Inc.
Dr. D. Galon, for Guelph Centre of Spirituality.
I. Findlay and B. Bennett, on their own behalf and for Residents for Sustainable Development in Guelph.
Dr. G. Morgan, on his own behalf.

DECISION ON A MOTION DELIVERED BY S.W. LEE AND ORDER OF THE BOARD:--

1 The motion before the Board is a request for the production of the actual sales figures of Wal-Mart department stores for a number of cites and for the last four years. It is also a request for the commissioning of an in-mall customer survey at the Cambridge Wal-Mart Shopping Centre.

2 The motion was brought by counsel for Armel Corporation and supported by a number of parties, including the counsel for the Hudson's Bay Company, the University of Guelph and individual residents such as Mr. D Galon, Dr. Morgan and Mr. B Bennett. It arose in the course of a pre-hearing at which time such and similar issues were canvassed.

3 The Board's power in this connection can be found pursuant to Sections 37 and 38 of the Ontario Municipal Board Act, which state as follows:

> 37. The Board has jurisdiction and power;
>
> (a) to hear and determine all applications made, proceedings instituted and matters brought before it under this Act or any other general or special Act and for such purpose to make such orders, rules and regulations, give such directions, issue such certificates and otherwise do and perform all such acts, matters, deeds and things, as may be necessary or incidental to the exercise of powers conferred upon the Board under such Act;
>
> (b) to perform such other functions and duties as are now or hereafter conferred upon or assigned to the Board by statute or under statutory authority;
>
> (c) to order and require or forbid, forthwith or within any specified time and in any manner prescribed by the Board, the doing of any act, matter or thing or the omission or abstention from doing or continuance of any act, matter or thing, which any person, firm, company, corporation or municipality is or may be required to do or omit to be done or to abstain from doing or continuing under this or any other

general or special Act or order or under any agreement entered into by such person, firm, company, corporation or municipality;

(d) to make, give or issue or refuse to make, give or issue any order, directions, regulation, rule, permission, approval, certificate or direction, which it has power to make, give or issue. R.S.O. 1990, c. O.28, s. 37.

38 The Board, for the due exercise of its jurisdiction and powers and otherwise for carrying into effect the provisions of this or any other general or special Act, has all such powers, rights and privileges as are vested in the Ontario Court (General Division) with respect to the amendment of proceedings, addition or substitution of parties, attendance and examination of witnesses, production and inspection of documents, entry on and inspection of property, enforcement of its orders and all other matters necessary or proper therefor. R.S.O. 1990, c. O.28, s. 38.

4 In the alternative, Rule 1.04(2) of the Ontario Municipal Board Rules of procedure provides as follows:

> 1.04(2) Where any matter of procedure is not provided for by these Rules, the Rules of Civil Procedure may be followed where the board determines they are appropriate

5 The objections to the **production** raised by Wal-Mart are based partly on the proposition that unless there is a good demonstrative reason, **non-parties** should be immune from such **discovery.** They are also based on the grounds that the requests will yield information that is irrelevant and unimportant.

6 The relevant rule of the Rules of Civil Procedure in this connection is Rule 30.10(1) which states:

> 30.10(1) The court may, on motion by a party, order production for inspection of a document that is in the possession, control or power of a person not a party and is not privileged where the court is satisfied that,
>
> a) the document is relevant to a material issue in the action; and
> b) it would be unfair to require the moving party to proceed to trial without having discovery of the document.

7 The Board is mindful of the possible abuse of the discovery process. We are vigilant against any attempt to transform the right to discover into a licence to procure information from the world at large. We are also keenly concerned that the process should not become a Prometheus Unbound, with little concern to the inconvenience and disruption of others.

8 However, we must test the request against the relevant rule. What we must be satisfied with is that the information requested is relevant to a material issue, and that it would be unfair for the applicants to proceed to the hearing without having discovered the information.

9 First and foremost, the Board finds that the request for disclosure of the actual sales figure on a confidential basis and the in-mail survey are proposed to be made against Wal-Mart, an intended user. This singularly important fact is a feature in this motion which no one should gloss over.

10 Secondly, there is also another important feature. There is little doubt that the question of market impact will loom large in these proceedings. The debate whether the proposal would have a benign or malignant effect on the Central Business District and other commercial centres will be at the centre stage of the hearing. One of the issues in these proceedings is that the City of Guelph Official Plan requires that there is no detriment to these centres. Within this context, there cannot be any misgiving that the consideration of market evidence is central.

11 Thirdly, the Board finds that the information would be relevant, important and necessary for the construction of a theory or an hypothesis of market impact to be proffered by the applicants of the motion.

12 In Attorney General of Ontario et al. v. Stavro (1995), 26 O.R. (3d), 39 Ont. C.A. at p. 48, the Court states:

> In deciding whether to order production in the circumstances of this case, the factors to be considered by the motion judge should include:
>
> * the importance of the documents in the litigation;
> * whether production at the discovery stage of the process as opposed to production at trial is necessary to avoid unfairness to the appellant;
> * whether the discovery of the defendants with respect to the issues to which the documents are relevant is adequate and if not, whether responsibility for that inadequacy rests with the defendants;
> * the position of the **non-parties** with respect to **production;**
> * the availability of the documents or their informational equivalent from some other source which is accessible to the moving parties;
> * the relationship of the **non-parties** from whom **production** is sought, to the litigation and the parties to the litigation. **Non-parties** who have an interest in the subject matter of the litigation and whose interests are allied with the party opposing **production** should be more susceptible to a **production** order than a true "stranger" to the litigation.

13 The Board has reviewed the respective affidavits of Herman Kircher and Jeffrey Climans. We are satisfied that the requested information is important so that a realistic and factual sales profile or performance level can be arrived at.

14 It is too early to conclude, on a priori basis, as urged upon us by counsel for Wal-Mart that the requested information cannot have a utility or would be of little assistance. The final determination of the veracity of the analysis based on such information, their logical connection to the case and its persuasiveness to a particular issue must be tested and left to the hearing panel, whether at an early

stage or in the course of the adjudication. In our view, to preclude the information would be unfair to the applicants and will not serve well the hearing process.

15 The Board does not find the grouping of the 10 stores for which sales information is requested to be outlandish or unreasonable. From the affidavit materials we have reviewed, the grouping makes sense pursuant to the approach taken and appears to be cogent within the methodology it has adopted.

16 As for the in-store survey, the information is needed to test any hypothesis with regard to the volume recapture of the Guelph sales. We do not find the proposed duration intrusive or may cause an inconvenience to the customers. On the other hand, the allegation that the sample size might be too small to be reliable is not something which the Board can determine at this stage. To deny the applicant and any other party requiring the information will be unfair.

17 The Board has also taken into account the objections of Wal-Mart. The Board is mindful that the divulgence of sales information is a sensitive matter. However, given the undertaking of confidentiality, there is little harm that we can discern. In terms of the in-store survey, the Board is satisfied that it can be done with care and circumspection and constitute little affront to the business activities.

18 Accordingly, the Board grants the request and orders Wal-Mart Canada Inc.

1. to produce the actual sales figures of the Wal-Mart department stores for the last 4 years (or since their commencement of operation) in the following cities: Cambridge, Kitchener, Georgetown, Belleville, Ajax, Barrie, Peterborough, North Bay, Whitby and Cornwall subject to the execution of an Undertaking of Confidentiality in a form acceptable to Wal-Mart Canada Inc. for any and all parties in this proceeding to whom the actual sales figures are disclosed;
2. A commissioning and taking of an in-mall customer survey at the Cambridge Wal-Mart shopping centre located at the intersection of Highway No. 24 and Highway No. 401, which shopping centre is owned, directly or indirectly, by First Professional Management Inc., the parent company of 6 & 7 Developments Limited, such in-mall survey to be undertaken by Kircher Research Associates, or such other market survey or research firm as may be ordered by the Board and subject to satisfactory arrangement being made with Wal-Mart Canada Inc.

S.W. LEE, Member
R.G.M. MAKUCH, Member

qp/s/qlcct

---- End of Request ----
Print Request: Current Document: 6
Time Of Request: Saturday, September 19, 2009 16:20:05

SCHEDULE A

TAB 5

DELZOTTO, ZORZI LLP
BARRISTERS & SOLICITORS

ELVIO DELZOTTO, Q.C.
STEVEN B. WEISS
ROBERT W. CALDERWOOD
HARRY HERSKOWITZ
LORI R. TANEL
ALEXANDER A. FOUNDOS
EDWARD P. MICHELI
MICHAELE DELZOTTO
DEBRA J.M. EVELEIGH
MARY G. CRITELLI
RICHARD P. HOFFMAN

Delivered by e-mail: cmclorg@torontohydro.com

December 9th, 2009

Mr. Colin McLorg
Manager, Regulatory Policy and Relations
Toronto Hydro Electric System
14 Carlton Street
Toronto, ON M5B 1K5

Dear Mr. McLorg:

RE: Metering and Offers to Connect for 'Avonshire' Project

I am writing in my capacity as legal counsel for Residences of Avonshire Inc. ("**Avonshire**") which is under construction at 100 & 115 Harrison Garden Boulevard and 5, 7 & 9 Oakburn Crescent (the "**Project**"). I have been provided with a copy of your letter of November 27, 2009 by our Project Manager, Mr. Giuseppe Bello.

It is appropriate to summarize your letter before responding. In brief, your letter states:

(a) Subject to Avonshire satisfying the conditions demanded by THESL as set out below, THESL has changed its position in respect of this Project, and contrary to your letter of April 22, 2009, THESL is now prepared to provide a revised Offer to Connect ("**OTC**") which contemplates the Project being smart sub-metered by a licensed smart sub-metering provider;

(b) The revised OTC may result in an additional capital contribution being payable to THESL by Avonshire in an undefined amount. No economic evaluation or explanation was given for this.

(c) The revised OTC will be provided only upon Avonshire confirming in writing to THESL that it and any licensed sub-metering provider that Avonshire chooses will be in compliance with the law, as articulated by THESL;

(d) Receiving the revised OTC is further conditional upon Avonshire providing to THESL copies of "all documentation with smart sub-meterers" so that THESL can confirm compliance with the law as articulated by THESL; and

(e) Avonshire must agree to all of the above by December 14, 2009, failing which the Project will be deemed by THESL to be one where it is authorized to suite meter the Project.

We find it surprising that THESL would make such demands at a time when its conduct in respect of this Project is the subject of a compliance proceeding before the Ontario Energy Board ("**OEB**"). Additionally, we find it troubling that your letter, which is clearly written to advance THESL's position in the current OEB proceeding, is somehow premised on THESL's Conditions of Service that existed prior to February 29, 2008. Presumably, this is the reason that THESL has not sent a similar letter in respect of the Metrogate Inc. project.

In any event, as this is the first time that we have been required to accept such conditions in order to receive an OTC which contemplates a new project being smart sub-metered, we feel compelled to respond. In response to your letter, we advise as follows:

1. Avonshire continues to be desirous of receiving an OTC from THESL which contemplates the building being smart sub-metered by a licenced third party smart sub-metering provider. Given the implication in your letter that there will be an increase in the capital contribution payable, we request that the revised OTC include a copy of THESL's complete economic evaluation (including all assumptions and data relied upon) which justifies any capital contribution payable. It is certainly not reasonable to expect that Avonshire can properly evaluate any new OTC if any associated capital contribution is not identified and explained.

2. There is not now, nor has there ever been, any basis to believe or imply that Avonshire will fail to meet any applicable legal or regulatory requirement. THESL has at no prior time expressed such concern to Avonshire and we note that your letter does not indicate that THESL has any evidence or belief that Avonshire is at risk of contravening any applicable law. To be clear, your November 27 letter is THESL's first request for confirmation of compliance.

3. We are concerned by your request for copies of "all documentation with smart sub-meterers". We are unaware of any legal or regulatory requirement which makes the production of such materials a prerequisite to obtaining an OTC in connection with a building being smart sub-metered.

4. We are particularly concerned by the role which THESL appears to want to take as the entity that will make determinations, apparently unilaterally, about whether developers, condominium corporations and/or licenced smart sub-metering providers are in compliance with certain regulatory requirements. Aside from the fact that THESL would in effect be supplanting the true regulator, namely, the Ontario Energy Board, there is the further troubling fact that THESL would be in a clear conflict of interest, acting as judge and potential direct beneficiary of its decision. This cannot be right.

5. Finally, Avonshire does not accept your arbitrary deadline of December 14, 2009, failing which the Project will be deemed by THESL to be one where it is authorized to suite meter the Project. The continuing arrangement between

Avonshire and THESL is as set out in the Addendum to the OTC that Avonshire executed under duress, which expressly states, among other things:

> "The Customer will execute this Offer to Connect "under duress" and on a without prejudice basis. The Customer may, despite having executed this Offer to Connect, pursue any legal or regulatory remedy before the Courts or the Ontario Energy Board to permit it to engage a licensed smart sub-metering provider to meter the individual suites at the Project and/or to require the Toronto Hydro to take all necessary actions consistent with the Customer's desire to engage a smart sub-metering provider."

Accordingly, Avonshire will not accept the conditions set out in your letter. We continue to assert our right to receive a revised OTC, unfettered by unreasonable conditions, which contemplates that the Project will be smart sub-metered by a licensed smart sub-metering provider.

Yours very truly,
DELZOTTO, ZORZI LLP

Per: Harry Herskowitz

SCHEDULE A

TAB 6

EB-2009-0308

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, (Schedule B);

AND IN THE MATTER OF a Notice of Intention to Make an Order for Compliance against Toronto Hydro-Electric System Limited.

AFFIDAVIT OF GLENN ZACHER
(sworn December 16, 2009)

I, GLENN ZACHER, of the City of Toronto, Province of Ontario MAKE OATH AND SAY:

1. I am a lawyer with the law firm of Stikeman Elliott LLP, Compliance Counsel in this proceeding. I have personal knowledge of the matters herein deposed, except where stated to be based on information and belief, and where so stated, I verily believe same to be true.

2. On November 30, 2009, THESL's counsel, George Vegh, sent me an email attaching a letter dated November 27, 2009 from THESL to Avonshire and Mr. Vegh invited me to contact him to discuss this letter.

3. I telephoned Mr. Vegh on December 1, 2009 and Mr. Vegh told me that he had a matter he wished to discuss with me but wanted our discussion to be confidential and without prejudice. I agreed to these terms. At the conclusion of our telephone discussion Mr. Vegh asked that I consider the matters we had discussed and get back to him.

4. On December 4, 2009, I telephoned Mr. Vegh to follow-up on our December 1, telephone call. At the outset of our call, I confirmed with Mr. Vegh that our discussion was without prejudice.

5. On December 8, 2009, Mr. Vegh called and left a voicemail message for me in which he proposed, that he be able to put on the evidentiary record in this proceeding a part of our December 4, 2009 without prejudice telephone discussion — specifically, that I advised him that THESL's November 27, 2009 letter to Avonshire was not compliant with the enforceable provisions. Mr. Vegh did not state in his telephone message the purpose for which he wished to put this information on the record. In particular, he did not state that he wanted to include this information in support of a motion which he intended to file later that day and that I needed to get back to him urgently or by a specific time. Attached hereto as Exhibit "A" is a transcription of the voicemail message Mr. Vegh left for me on December 8, 2009.

6. I retrieved Mr. Vegh's December 8 voicemail message at some point during the middle of the day on December 8, but was immersed in another pressing matter and so I planned to get back to him at the end of the day.

7. Before having an opportunity to respond to Mr. Vegh, I received THESL's motion (delivered at 4:45 p.m. on December 8, 2009) in which Mr. Vegh referenced (through an affidavit sworn on information and belief by Kristyn Annis), the content of our December 4 without prejudice discussion. The specific reference to what I said to Mr. Vegh during our December 4 telephone discussion is not accurate; however, since the discussion was without prejudice, I will not disclose what I said (or what Mr. Vegh said to me).

8. I wrote to Mr. Vegh on December 9, 2009 to ask that he take steps to withdraw the references to our December 4 without prejudice telephone discussion from THESL's motion materials. Mr. Vegh refused to do so. Attached hereto and marked

collectively as Exhibit "B" is the chain of email communications exchanged between me and Mr. Vegh on December 9.

SWORN BEFORE ME at the City of Toronto, Province of Ontario on December 16, 2009.

Commissioner for Taking Affidavits

Glenn Zacher

Transcription of Voicemail Message left by George Vegh for Glenn Zacher on December 8, 2009

EXHIBIT "A"

"Hi Glenn, it's George. Glenn I just want to speak to you about the Avonshire offer and, in particular, just the way in which to get that on the record given that, you know we had a without prejudice discussion around it. What I would like to be able to do is to get on the record the fact that I forwarded you a copy of that letter on the same day it went out to Avonshire and that you advised me that, whatever it was on the Friday, that your position is that this letter is not compliant with the enforceable provisions. So I don't want to include any of our other discussions, but just the facts around that you have the letter and what your position is. I don't think that that is inconsistent with our without prejudice discussions. I just want to give you a heads up on that and if you have concerns about that let me know — 416-601-7709, thanks.

EXHIBIT "B"

Glenn Zacher

From: Glenn Zacher
Sent: Wednesday, December 09, 2009 2:31 PM
To: 'Vegh, George'
Subject: EB-2009-0308

George,

I am not pleased that you filed materials with the Board referencing our "without prejudice" discussions without obtaining my consent. You left me a voicemail message yesterday stating that you wanted to talk to me about how to get THESL's November 27, 2009 offer to Avonshire on the record and that you would also like to reference that portion of our without prejudice discussion wherein I advised you whether THESL's November 27 letter changed the Board's position. You asked that I let you know if I had any objections to this. You did not, in your voicemail, inform me that you wanted to introduce this evidence as part of a motion that you intended to file that day and that there was any urgency or that I needed to get back to you by a certain time.

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I would ask that you write to the Board Secretary by the end of the day to advise that you filed evidence that was the subject of without prejudice discussions and it should not have been filed and that you wish to withdraw your materials and re-file new materials that will not include this evidence. You can advise the Board Secretary that you have my consent.

I have purposely not copied the Board Secretary, Mr. Millar or any other counsel on this letter.

Please confirm that you will take these steps.

Regards,

Glenn

STIKEMAN ELLIOTT LLP Barristers & Solicitors

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TORONTO MONTRÉAL OTTAWA CALGARY VANCOUVER NEW YORK LONDON SYDNEY

Glenn Zacher

From: Vegh, George [gvegh@mccarthy.ca]
Sent: Wednesday, December 09, 2009 4:03 PM
To: Glenn Zacher
Subject: Re: EB-2009-0308

Hi Glenn. I do not agree that I breached a privilege. The privilege that we agreed to was your consideration of whether the approach to Avonshire could form the basis of settlement. I did not reveal a settlement discussion. The fact that THESL wrote the letter is not privileged and the fact that you continue to take the position that THESL is out of compliance with respect to Avonshire is not privileged. If you think that I misunderstood your position and you want to clarify it, you are free to do so. However, as I said, I do not agree that I breached a privilege.

From: Glenn Zacher <GZacher@stikeman.com>
To: Vegh, George
Sent: Wed Dec 09 14:30:30 2009
Subject: EB-2009-0308

George,

I am not pleased that you filed materials with the Board referencing our "without prejudice" discussions without obtaining my consent. You left me a voicemail message yesterday stating that you wanted to talk to me about how to get THESL's November 27, 2009 offer to Avonshire on the record and that you would also like to reference that portion of our without prejudice discussion wherein I advised you whether THESL's November 27 letter changed the Board's position. You asked that I let you know if I had any objections to this. You did not, in your voicemail, inform me that you wanted to introduce this evidence as part of a motion that you intended to file that day and that there was any urgency or that I needed to get back to you by a certain time.

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Glenn Zacher

From: Glenn Zacher
Sent: Wednesday, December 09, 2009 6:06 PM
To: 'Vegh, George'
Subject: RE: EB-2009-0308

George - Thanks for your reply, but disagree. Our call was expressly without prejudice; you can't pick and choose after the fact portions of our discussion that you want to exempt from privilege; you gave me a call ask me if I objected (precisely because our discussion had been without prejudice); and, yet you did not wait for my reply. If you wanted my position on the THESL letter on the record, there are ways you could have solicited this; but this was not one of them.

I would ask that you reconsider my request. If you wont, I will proceed.

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To: Glenn Zacher
Subject: Re: EB-2009-0308

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Glenn Zacher

From: Vegh, George [gvegh@mccarthy.ca]
Sent: Wednesday, December 09, 2009 6:49 PM
To: Glenn Zacher
Subject: Re: EB-2009-0308

Glenn, we will disagree. My call was to give you a heads up, not to ask for permission. If you disagree with my characterization of your position, which I thought was pretty clear, then you should clarify it for the record.

From: Glenn Zacher <GZacher@stikeman.com>
To: Vegh, George
Sent: Wed Dec 09 18:06:04 2009
Subject: RE: EB-2009-0308

George - Thanks for your reply, but disagree. Our call was expressly without prejudice; you can't pick and choose after the fact portions of our discussion that you want to exempt from privilege; you gave me a call ask me if I objected (precisely because our discussion had been without prejudice); and, yet you did not wait for my reply. If you wanted my position on the THESL letter on the record, there are ways you could have solicited this; but this was not one of them.

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TORONTO MONTRÉAL OTTAWA CALGARY VANCOUVER NEW YORK LONDON SYDNEY

IN THE MATTER OF the *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, (Schedule B);

AND IN THE MATTER OF a Notice of Intention to Make an Order for Compliance against Toronto Hydro-Electric System Limited.

EB-2009-0308

AFFIDAVIT OF GLENN ZACHER
(December 16, 2009)

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Glenn Zacher (43623P)
Tel: (416) 869-5688

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Tel: (416) 869-5257
Fax: (416) 861-0445

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor

Maureen Helt
Tel: (416) 440 7672
Compliance Counsel

SCHEDULE A

TAB 7

COURT FILE NO.: 354/09
DATE: 20091029

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

CAPUTO, DAMBROT AND SWINTON JJ.

B E T W E E N:	
INTER-LEASING, INC.	*Alexandra K. Brown,* for the Applicant (Responding Party)
Applicant (Responding Party)	
- and -	
ONTARIO (MINISTER OF FINANCE) AND BASHIR MOHAMMED	*Anita C. Veiga and Sara Blake*, for the Respondents (Moving Parties)
Respondents (Moving Parties)	**HEARD at Toronto:** October 23, 2009

SWINTON J.:

Overview

[1] The respondents to an application for judicial review have brought a motion to a panel of the Divisional Court pursuant to s. 21(5) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 to vary the order of Jennings J. dated October 5, 2009. He ordered certain material struck from the applicant's application record and factum filed for the application, but he dismissed the balance of the respondents' motion with costs against them. On this motion to vary, they submit that he erred in failing to strike the remaining material on the ground of settlement privilege.

Background

[2] Subsection 84(5) of the *Corporations Tax Act*, R.S.O. 1990, c. C.40 ("the Act") requires the Minister of Finance to deal with objections to tax assessments "with all due dispatch". In the application for judicial review, Inter-Leasing seeks an order of mandamus to compel the Minister to make a decision on its Notices of Objection dated

September 4, 2008. According to the applicant's affidavit evidence, Bashir Mohammed, a Senior Manager at the Ontario Ministry of Revenue, advised the applicant in a telephone conversation in January 2009 that no final response to the objections should be expected for 18 months and possibly not until early 2011. The applicant is unable to file an appeal to the Superior Court of Justice under the Act until the Minister responds to the objections.

[3] Since the motion to strike, the respondents have filed responding material in which they deny that this conversation occurred.

[4] The applicant's objections result from Notices of Reassessment dated March 17, 2008, in which the applicant was assessed taxes and interest totalling $55 million in respect to taxation years 2001 through 2004. The reassessments reflected the denial of a tax exemption for certain inter-company financing arrangements. The applicant paid the full amount of reassessments on March 26, 2008.

[5] In an affidavit filed for purposes of the application, Wane Stickland made reference to meetings held in 2006 in which representatives of interested governments, including Ontario, made an offer to settle. Attached to his affidavit was a letter from Deloitte Touche LLP, representative of the applicant and other companies, describing what had occurred at a meeting on July 14, 2006. Deloitte attached a letter from Canada Customs and Revenue Agency ("the O'Riordan letter"), which described the offer.

[6] The basis for the motion to strike was settlement privilege. The motions judge ordered that the O'Riordan letter be struck, because it was written "without prejudice". He also ordered that part of a letter from the applicant's counsel ("the Osler letter") be struck, as well as one sentence of the Deloitte letter.

[7] In his reasons, the motions judge concluded there would be no harm to the Minister from disclosure of the remaining material to the panel hearing the application for judicial review, as such disclosure would not affect the issue between the parties. He characterized that issue as the liability of the applicant for corporate tax. As the material would not weaken or compromise the Minister's case on tax liability, he determined that settlement privilege did not arise. He also stated that it would be contrary to the interests of justice to exclude the challenged material, with the exception of the O'Riordan letter and parts of the Deloitte and Osler letters.

[8] The respondents then brought this motion to vary, arguing that the remaining material is privileged.

The Issue

[9] The only issue on this motion to vary is whether the motions judge erred in refusing to strike out the remaining material set out in the respondents' Notice of Motion.

Analysis

[10] Communications, whether oral or written, made in furtherance of the settlement of a litigious dispute are subject to privilege. According to Bryant, Lederman and Fuerst, *The Law of Evidence in Canada* (at para. 14.322), three conditions must be present for settlement privilege to apply:

> 1. A litigious dispute must be in existence or within contemplation.
> 2. The communication must be made with the express or implied intention it would not be disclosed in a legal proceeding in the event negotiations failed.
> 3. The purpose of the communication must be to attempt to effect a settlement.

[11] A party seeking to introduce in evidence material subject to settlement privilege must show that the communication is relevant and the disclosure is necessary, either to show the agreement of the parties or to address a compelling or overriding interest of justice (*Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada*, [2005] B.C.J. No. 5 (B.C.C.A.) at para. 20). Exceptions to the privilege have arisen where there has been fraud, where production is necessary to meet a defence of laches, lack of notice or the passage of a limitation period, or where parties have made an agreement respecting evidence in the litigation (*Middlekamp v. Fraser Valley Real Estate Board* (1992), 96 D.L.R. (4th) 227 (B.C.C.A.) at 223).

[12] The motions judge ordered the O'Riordan letter struck. Clearly, that letter meets the three conditions necessary for settlement privilege to be recognized.

[13] First, there was a litigious dispute in existence or contemplation before the letter was written in July 2006. In June 2006, the Minister had determined that there was a basis under the Act to issue a reassessment proposal to the applicant for tax avoidance transactions.

[14] Second, the communications were made with the intention of non-disclosure. The O'Riordan letter was written "without prejudice" and it describes a meeting where a settlement offer was made.

[15] Third, the purpose of the communication was to attempt to effect a settlement of the tax consequences related to the transactions of the applicant and other companies then under audit.

[16] The Deloitte letter included a summary of the O'Riordan letter. Given that the O'Riordan letter is subject to settlement privilege, it logically follows that the summary of the offer in the Deloitte letter should also be struck because of settlement privilege. Otherwise, the contents of the "without prejudice" letter will be disclosed. Similarly, the second sentence of paragraph 16 of the Stickland affidavit must be struck, as it quotes from the O'Riordan letter.

[17] In my view, the motions judge erred in failing to find that most of the remaining material was also subject to settlement privilege. Paragraph 15(c) of the Stickland affidavit makes reference to settlement discussions, as do paragraphs 3, 4, 5, 6 and 9 and part of paragraph 12 of the Deloitte letter. Similarly, paragraph 3 and bullet three of the Osler letter refer to settlement discussions. Part of paragraph 12 and paragraph 13 of the applicant's factum are based on the content of settlement discussions.

[18] The motions judge held that the material was not subject to settlement privilege because its disclosure would not harm the Minister in relation to the issue of tax liability. He erred in so holding, as that is not the test to determine whether settlement privilege applies.

[19] The applicant argues that the remaining material is, nevertheless, admissible in evidence under an exception to the settlement privilege exclusion. However, the material does not appear to be relevant to the issues to be determined in the application for judicial review.

[20] The applicant seeks an order of mandamus to compel the Minister to act with due dispatch to respond to its notices of objection. The material in dispute deals with an offer to settle that was made in July 2006, prior to the issuance of the notices of reassessment in March 2008. Apparently, the applicant wishes to use the evidence of the offer of settlement to show that the Minister has a fixed position on liability, and, therefore, there is no justification for further delay in the reconsideration process. However, the issue of the applicant's liability for the tax in dispute is now before the Tax Appeals Branch. Even if a conclusion about liability was expressed during the settlement negotiations, before the notices of reassessment, that conclusion would not bind the Tax Appeals Branch in the reconsideration process.

[21] Moreover, the applicant has not satisfied the necessity test. To satisfy this test, the applicant must demonstrate a compelling or overriding interest of justice that outweighs the public interest in protecting settlement discussions from disclosure. While the applicant argues that disclosure of this information will not affect the issue of its tax liability, settlement privilege exists not only to protect a party against disclosure of information that may affect its position on liability. It extends, as well, to protect other statements against interest made in the course of settlement negotiations that a party may wish to remain confidential.

[22] The settlement offer in issue was made in the course of a dispute between the parties about the applicant's tax liability. To allow the applicant to use this type of information would place a chill on settlement negotiations and undermine the public interest in promoting settlement discussions. The applicant has not identified an overriding public interest in justice that outweighs the public interest in encouraging settlement (*Dos Santos, supra* at para. 20).

[23] This is not a case like *Dos Santos*, where the settlement discussions were disclosed in order to protect a third party against paying excessive compensation. Nor is

this a case like *Histed*, where the content of settlement discussions was disclosed in disciplinary proceedings against a solicitor who was alleged to have engaged in unprofessional communications (*Histed v. Law Society (Manitoba)*, [2008] 2 W.W.R. 189 (Man. C.A.) at para. 38). In the present case, there is no third party who would be detrimentally affected by non-disclosure.

Conclusion

[24] Therefore, the motion to vary is granted. The following material will be struck: paragraph 15(c) of the Stickland affidavit and the second last sentence of paragraph 16 where the O'Riordan letter is quoted; paragraphs 3, 4, 5, 6, and 9 and the last two sentences of paragraph 12 of the Deloitte letter; the third paragraph starting on p. 2 of the Osler letter, including all of bullet points one and three; and the last sentence of paragraph 12 and all of paragraph 13 of the applicant's factum. The applicant is given leave to file an amended application record and factum.

[25] As the moving parties have largely been successful in this motion, the costs order of the motions judge made against them is set aside. Costs of the motion to vary are fixed at $5,000.00 payable by the applicant in thirty days.

Swinton J.

Caputo J.

Dambrot J.

Released: October , 2009

COURT FILE NO.: 354/09
DATE: 20091029

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

CAPUTO, DAMBROT and SWINTON JJ.

B E T W E E N:

INTER-LEASING, INC.

Applicant (Responding Party)

- and -

ONTARIO (MINISTER OF FINANCE) AND
BASHIR MOHAMMED

Respondents (Moving Parties)

REASONS FOR JUDGMENT

SWINTON J.

Released: October 29, 2009

SCHEDULE A

TAB 8

COURT FILE NO.: 07-CV-334044PD1
DATE: 20090921

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE ESTATE OF Lyle Hallman, deceased; Wendy Jean Hallman v. Stephen Ross Cameron, Susan Joy Rempel, Thomas Lyle Hallman and James William Hallman, in their capacities as Trustees of the Pure Spousal Trust and personally; Stephen Ross Cameron, James William Hallman and William Dahms, in their capacities as executors of the Estate of Lyle Hallman and personally; Stephen Ross Cameron in his capacity as Trustee of the Wendy Jean Hallman Trust; Stanley Nahrgang, Stephen Ross Cameron and James William Hallman, in their capacities as directors of the Lyle Shantz Hallman Charitable Foundation, The Lyle Shantz Hallman Charitable Foundation and Anson Corporation

BEFORE: Justice D. M. Brown

COUNSEL: D. Joel, for the Applicant/Responding Party, Wendy Jean Hallman

V. Edwards, for the Respondents, Stephen Ross Cameron in his capacity as Trustee of the Pure Spousal Trust, Executor of the Estate of Lyle Hallman, Trustee of the Wendy Jean Hallman Trust, and personally, and William Dahms in his capacity as Executor of the Estate of Lyle Hallman and personally, Moving Parties

DATE HEARD: September 1, 2009

ENDORSEMENT

I. Issue

[1] Last year counsel for the moving party trustees sent a letter to counsel for the applicant, Wendy Hallman, the trust beneficiary. The letter was marked "Without Prejudice" and contained a settlement proposal. Earlier this year Ms. Hallman filed an affidavit on a motion in this proceeding. In it she disclosed the contents of the without prejudice letter. The moving party trustees seek to expunge that part of the applicant's affidavit; the applicant resists, contending that the trustees had waived any privilege attaching to the letter and its contents.

[2] I grant the trustees' motion.

II. Factual background

[3] Lyle Hallman died on October 26, 2003. His estate is significant and complex. He left three wills: (i) the Kastda Will; (ii) the Residuary Will; and, (iii) the Corporate Will. The latter will established three trusts, one of which is the Pure Spousal Trust, the net annual income of which is to be paid to the applicant, Wendy Hallman, the wife of the late Lyle Hallman. Prior to his death Lyle Hallman also settled a trust called the Lyle Shantz Hallman Foundation.

[4] In June, 2007, Wendy Hallman commenced an application seeking a variety of relief, including an accounting by the trustees of the Pure Spousal Trust and their removal. Ms. Hallman's basic complaint is that to date she has not received any income from the Pure Spousal Trust, a result, she contends, of various breaches of duty by the estate trustees, trustees and the directors of the Foundation.

[5] In May, 2009, Wendy Hallman brought a motion to remove the estate trustees of the estates under the Corporate Will and Residuary Will, to remove the trustees of the Pure Spousal Trust and to remove the directors of the Foundation, and then to appoint replacements.

[6] Ms. Edwards is counsel to Stephen Cameron and William Dahms. The former is an executor of Lyle Hallman's estate and a trustee of the Pure Spousal Trust; the latter is an executor of the estate.

[7] In paragraphs 58 to 61 of her affidavit in support of her May motion, Wendy Hallman stated that on April 29, 2009, Ms. Edwards sent her counsel minutes of meetings held by the estate trustees and trustees in December, 2008 and January, 2009. She attached as an exhibit to her affidavit Ms. Edwards' letter and the enclosed minutes. In her letter Ms. Edwards wrote:

> Please note that the Minutes of the Directors/Trustees meetings reference our settlement proposal (no number is attached). If you would like me to provide you with a redacted copy of the Minutes, please advise.

[8] After referring to this letter, Ms. Hallman deposed, in paragraph 60 of her affidavit:

> The Fiduciaries refuse to recognize my right to income and now take the position that they have a discretion whether to provide income to me. Although I do not agree with their position, if the Fiduciaries are exercising a discretion, they are doing so improperly by considering whether they will personally benefit from their decision to pay income to me.

[9] The appended minutes of the meeting of the trustees of the Pure Spousal Trust and Anson Corporation, a holding company of Lyle Hallman, held on January 20, 2009, make clear that the trustees decided not to make any payments to Ms. Hallman out of the Pure Spousal Trust.

[10] In paragraph 61 of her affidavit Ms. Hallman referred to those Minutes:

> As set out in the Minutes, Cameron "further recalled the without prejudice offer to settle made to Wendy Jean Hallman that was presented to the legal counsel for Wendy Hallman last year and that no formal response had been received to such offer to date.

In paragraph 62 of her affidavit Ms. Hallman explained that the "offer to settle" was a proposal the respondents had sent to her counsel by letter dated May 22, 2008 (the "Letter"). She then proceeded to describe, in detail, the offer that was made in that Letter, and she attached as an exhibit to her affidavit (Ex. 32) a copy of the Letter.

III. Positions of the parties

[11] It is common ground between the parties that the Letter was a communication made in furtherance of settlement and therefore cloaked with settlement privilege.

[12] Ms. Joel, on behalf of Ms. Hallman, also conceded that the respondents have not made an express waiver of the privilege. However, she submitted that the trustees of the Pure Spousal Trust impliedly waived any privilege over the Letter by relying on it in exercising their discretion, at the January 20, 2009, trustees' meeting, to refuse to pay any trust income to Ms. Hallman and by disclosing the Minutes of that meeting to her.

[13] The trustees contended that they never waived the settlement privilege attaching to the Letter, either expressly or impliedly, and therefore the court should strike out paragraph 62 of Ms. Hallman's affidavit describing the offer, as well as the exhibited Letter.

IV. Analysis

A. Waiver of privilege

[14] Settlement privilege is one which belongs to both parties to the communication, and neither can unilaterally waive it: *Ross River Dena Council v. Canada (Attorney General)*, [2009] Y.J. No. 7 (S.C.), para. 51. However, the privilege attaching to a communication made in furtherance of settlement may be lost if the party resisting its disclosure waives the privilege.

[15] The onus of establishing a waiver of privilege rests with the party asserting the waiver: *SNC-Lavalin Engineers & Constructors Inc. v. Citadel General Assurance Co.* (2003), 63 O.R. (3d) 226 (Master), para. 54.

[16] Waiver of privilege may be established in several ways. First, the party seeking disclosure of the communication may show that the possessor of the privilege knew of the existence of the privilege and demonstrated a clear intention to forego the privilege: Ronald Manes and Michael Silver, *Solicitor-Client Privilege in Canadian Law*, p. 187. So, too, where a party uses a privileged communication as the basis of its claim or defence, the party may be taken to have waived the privilege: *Nowak v. Sanyshyn* (1979), 23 O.R. (2d) 797 (H.C.J.), p.

800. As well, in *Bentley v. Stone* (1998), 42 O.R. (3d) 149 (Gen. Div.), Hockin J. referred to the broad description of waiver coined by Wigmore:

> 8 ... Privilege may be waived expressly or by implication. It is useful to understand these words from Wigmore as set out in The Law of Evidence, Butterworth's, Sopinka, Lederman and Bryant, at p. 666:
>
> > It has also been said that clear intention is not in all cases an important factor. In some circumstances, waiver may occur even in the absence of any intention to waive the privilege. There may also be waiver by implication only.
> >
> > As to what constitutes waiver by implication, Wigmore said:
> >
> > > Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver, i.e, not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could also control the situation. *There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final.*
> >
> > Whether intended or not, waiver may occur when fairness requires it, for example, if a party has taken positions which would make it inconsistent to maintain the privilege. (my emphasis)

B. Application of the principles to this case

[17] Ms. Hallman submitted that the respondents put the Letter into issue by relying on the Minutes as evidence that they had exercised their discretion properly. As she argued in her factum:

> The Fiduciaries have put their state of mind at issue by disclosing the basis for their exercise of discretion. The Minutes disclose that the Fiduciaries expressly relied on the [Letter] in forming their state of mind and, as such, privilege has been waived by implication.

It was Ms. Hallman's position on the motion that the Minutes revealed that the trustees had relied on her refusal to accept their offer as a ground for refusing to approve payment of any trust monies to her.

[18] I disagree with the position advanced by Ms. Hallman. The evidence filed to date in this proceeding does not disclose that the trustees are relying on their making of the offer, or Ms. Hallman's refusal to accept it, as part of the reasons for exercising their discretion not to pay out income to Ms. Hallman from the Pure Spousal Trust.

[19] First, it was not the trustees who filed the Minutes or the Letter in this proceeding; Ms. Hallman did. Ms. Edwards' letter of April 29, 2009 transmitting the Minutes, as I read it, simply involved the disclosure of information about a trust by the trustees to the beneficiary. The trustees did not then include the Minutes or the Letter in the materials they have filed in this proceeding.

[20] Second, the clear import of Ms. Edwards' transmittal letter was to put Ms. Joel on notice that the Minutes contained privileged communications. Disclosure of the communication to Ms. Joel obviously did not waive the privilege since she represented the recipient of the settlement offer. By offering to provide Ms. Joel with redacted copies of the Minutes, Ms. Edwards made it clear that the trustees were not waiving privilege over the Letter or offer by delivering the Minutes.

[21] Third, I do not share Ms. Hallman's interpretation of the Minutes that they disclose the trustees expressly relied on the Letter in exercising their discretion. The relevant part of the Minutes read:

> The Chair further recalled the without prejudice offer to settle made to Wendy Jean Hallman that was presented to the legal counsel for Wendy Hallman last year and that no formal response had been received to such offer to date.
>
> In view of the [Hallman Construction Limited] 2009 Budget, the Trustees resolved after due consideration and in the exercise of their discretion, that there was nothing further to consider or resolve in this regard at this time.

On their face, the Minutes reveal that the Trustees relied on the financial state of Hallman Construction Limited, not on the offer to settle made some nine months before, in deciding not to approve any income payments from the Pure Spousal Trust to Ms. Hallman.

[22] It is possible that when the trustees of the Pure Spousal Trust are examined later in this proceeding they may testify that other factors informed the exercise of their discretion. But it is not for me to speculate as to what their future testimony might contain. The evidence before me on this motion does not disclose that the trustees are relying, in this proceeding, on their making of the offer, or Ms. Hallman's refusal to accept the offer, as a factor in the exercise of their discretion. Consequently, I see no basis to conclude that they have impliedly waived the settlement privilege attaching to the Letter.

[23] This is not a case where there trustees have disclosed part of a privileged communication and are trying to withhold the balance. On the evidence before me I find that they have not waived privilege, expressly or impliedly, over any part of the contents of the Letter. As a result,

the Letter remains privileged, and Ms. Hallman's references to the Letter in paragraph 62 and Exhibit 32 of her affidavit violated that privilege and were improper.

V. Conclusion

[24] I grant the motion, and strike out paragraph 62 and Exhibit 32 of the affidavit of Wendy Hallman sworn May 20, 2009, without prejudice to Ms. Hallman's right at the hearing of the motion to remove to argue that further evidence adduced on the motion supports a finding that the trustees had waived the settlement privilege attaching to the Letter.

[25] I would encourage the parties to try to settle the costs of this motion. If they cannot, the Moving Party trustees may serve and file with my office written cost submissions, together with a Bill of Costs, by Wednesday, September 30, 2009. The responding party, Ms. Hallman, may serve and file with my office responding written cost submissions by Friday, October 9, 2009. The costs submissions shall not exceed three pages in length, excluding the Bill of Costs.

D. M. Brown J.

DATE: September 21, 2009