
CANADA / JUDGMENT

Lewis v. Frye et al

2007 BCSC 89

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 89 Lewis v. Frye et al

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lewis v. Frye et al,

2007 BCSC 89

Date: 20070118

Docket: S80467

Registry: New Westminster

Between:

Rob Lewis

Plaintiff/Appellant

And

Joseph Frye, Versatile Leasing Incorporated

also known as Versatile Leasing,

Langley Motor Sport Centre dba Langley Hyundai,

also known as Langley Motor Sport Centre Ltd.

Defendants/Respondents

Before: The Honourable Mr. Justice Hood

Reasons for Judgment

Counsel for the Plaintiff:

O. Wilson

Counsel for the Defendants:

J.S. Dyer

Date and Place of Trial:

September 22, 2006

New Westminster, B.C.

- [1] This action arises out of a motor vehicle accident which occurred on June 13, 2002, as a result of which the Plaintiff/Appellant alleges that he suffered numerous personal injuries and resulting loss and damages. I will refer to the Appellant as the Plaintiff, and the Respondents as the Defendants, as Counsel have done.
- [2] The Plaintiff appeals the order dated June 16, 2006, of Master Keighley of this Court, whereby the Plaintiff was ordered to execute authorizations for the production of documents, namely, medical records of the Plaintiff, which are held by, or are in the possession of, three of his doctors, Dr. Yakura, Dr. Murray and Dr. Taunton, and by the Medical Services Plan of British Columbia, as set out in the said order.
- [3] The Plaintiff also appeals an order that the Plaintiff produce, directly to the Defendants, copies of the records of Kitsilano Workout Fitness Centre. Mr. Wilson for the Plaintiff, volunteered that the first issue pertaining to the authorizations is the most important issue; that the second issue relating to the Fitness Centre documents is a "power order", a technical argument in that the documents were not in the possession or control of the Plaintiff. It is, I would suggest, more a matter of convenience than anything. There is no doubt that the Fitness Centre documents are relevant and must be produced. They should be produced if for no other reason than that the costs of doing it the long way, if that were necessary, are avoided and Counsel can get on with more important matters.
- [4] All of the "record holders" in this case are in the Lower Mainland and I am not directly concerned with the situation where the authorizations are with respect to records in the possession of a third party who resides outside of British Columbia and the jurisdiction of this Court; although I must deal with that situation as it relates to the Plaintiff's analogy argument.
- [5] At the commencement of the hearing I was told that the application would take approximately one hour. It took a full day. Counsel's submissions, both written and oral, were lengthy, detailed and expansive, perhaps demonstrating the perceived importance of the issues to be decided. It is quite evident also that there are numerous related or side issues arising in this said to be unsettled area of the law, as well as conflicting cases, most of which hopefully I will not need to address, leaving them for another day, and perhaps another Court.

- [6] In these circumstances, it is more appropriate that I immediately state the narrow issue which I must determine: that is, whether the Master exceeded his jurisdiction when he issued the order compelling the Plaintiff to sign authorizations for the production of the documents by record holders residing within the Province of British Columbia. I propose to confine these Reasons, as best I can, although it is easier said than done, to that issue. I will observe also at this point that the Masters of this Court have for a number of years granted this type of order on an almost daily basis, and usually in motor vehicle related personal injury cases.
- [7] It is also appropriate that I state concisely the narrow position of the Plaintiff, as I understand it, from his Counsel's lengthy written and oral submissions. His position is that a Supreme Court Judge only has jurisdiction to order the signing of such authorizations by virtue of his or her inherent jurisdiction; that since a Master does not have inherent jurisdiction, the Master had no jurisdiction to make the order. While conceding that there are no authorities directly on point, Counsel argues by analogy, that cases dealing with the situation where the records sought are in the possession of third parties who reside outside of British Columbia and the jurisdiction of this Court, and the Court has found that it had no such jurisdiction, are equally applicable to the situation where the record holders reside in the Province, and are within the jurisdiction of the Court, and in this case are determinative; although his oral argument before the Master was simply that there was no authority in the Rules of Court enabling the Master to make the order. It will be seen that I am unable to agree with these submissions.
- [8] I should state as well the primary position of the Defendants. They say that the Learned Master had the same jurisdiction as a Supreme Court Judge and did not exceed his jurisdiction. There is no merit in the Plaintiff's submission by analogy, and there are authorities on point which favour the Defendants.

THE TEST

- [9] Mr. Wilson said that the issue of jurisdiction is a matter of law, and that the test, therefore, is whether or not the Master was correct. The Master exceeded his jurisdiction. Mr. Dyer, for the Defendants, said that the order is purely interlocutory, and unless the Plaintiff can establish that the Master was clearly wrong, the Court must not disturb the order. It seems to me that it is not simply a question of which test is to be applied. In my view, the standard to be applied on the issue of whether the Master had jurisdiction to make the order impugned, is correctness. If I find that the Master had jurisdiction to make the order, and it will be seen that I do so, then in a given situation the question of whether or not the actual order made was clearly wrong may arise. It will be seen that I am satisfied, then, that the Master had jurisdiction to make the impugned order and that it has not been shown that the actual order made was clearly wrong in any respect.

PROCEEDINGS BEFORE THE MASTER

- [10] At the hearing before the Master, Counsel for the Plaintiff relied solely on the decision of Mr. Justice Davies in *Allen-Trenholme v. Simmie*, 2006 BCSC 542, 52 B.C.L.R. (4th) 175, reversing the decision of Master Bolton, 2006 BCSC 384, 147 A.C.W.S. (3d) 194; although before me he also referred to other cases, such as *Wolansky*, *infra*, for the same proposition. In *Allen-Trenholme* the issue was whether a Master had the power to order that the plaintiff sign authorizations for the release of documents to the defendant held by record holders outside the Province of British Columbia. Mr. Justice Davies held that a Master did not have that jurisdiction. In doing so His Lordship followed the brief Oral Reasons for Judgment of Mr. Justice Williamson in *Benekritis v. Taylor* (May 5, 2005), Vancouver Registry M023575 (B.C.S.C.).
- [11] Mr. Wilson's submission on the point before the Master was, as I have said, by analogy, that *Allen-Trenholme* should be equally applicable to the situation where the record holders reside within British Columbia, as in effect in both cases the Court was exercising its jurisdiction over the Plaintiff himself in compelling him to sign the authorizations, and not exercising any jurisdiction over the third-party record holders.
- [12] In rejecting this submission, the Learned Master distinguished *Allen-Trenholme*, stating in his oral Reasons:

The Defendant seeks to obtain these records by way of authorization

rather than application pursuant to Rule 26(11) seeking to obtain the documentation directly from the physicians and PharmaNet.

Mr. Wilson, for the Plaintiff, takes the position that by virtue of the *Allen-Trenholme v. Simmie* case, ... I, as a Master, do not have jurisdiction to order the Plaintiff to sign authorizations with respect to production of documentation and information from these individuals and the entity [sic] more general. I have reviewed the *Allen-Trenholme* case and I am not satisfied that it stands for that proposition. There, the Court was asked, on appeal from a Master's decision, to deal with the issue of whether a Master had the power to order the Plaintiff to sign authorizations for the release of documents held by parties outside the Province; in that case, documents held in Colorado; Albany, New York, Halifax, Nova Scotia; and Toronto, Ontario. The Court determined that a Master did not have jurisdiction to compel the Plaintiff to sign an authorization with respect to documents of that nature.

Here, the entities and individuals from which the documents are sought are all within the Province of British Columbia. Such orders are commonly made and until there is a clear prohibition from this Court or the Court of Appeal, with respect to this issue, I assume jurisdiction.

(My emphasis added).

[13] It may be more appropriate to deal with Master Bolton's decision in Allen-Trenholme, and the decision of Mr. Justice Davies on appeal, in some detail, before returning to the Master's Reasons in the case at bar. Both are thoughtful decisions in this unsettled area of the law, and were referred to by Counsel to some extent. This approach will involve careful consideration of Allen-Trenholme's foundation, that is, the decision in Benekritis.

[14] In Allen-Trenholme, Master Bolton went directly to the issue of the Master's jurisdiction in para. 3, where he states:

The issue of a master's jurisdiction can be dealt with quickly. There is no doubt that a master has no inherent jurisdiction. But in none of the cases cited to me where orders for production were made did the court rely on inherent jurisdiction. The issues here fall to be decided in accordance with specific rules of court. Counsel for the plaintiff cites the recent oral decision of Williamson, J. in Benekritis v. Taylor (May 4, 2005) Vancouver Registry M023575, where His Lordship concluded:

The master did not have the jurisdiction to make the orders he made compelling the plaintiff to sign authorization with respect to out-of-jurisdiction persons.

But it is clear from the context of the case that His Lordship's decision was that it was the court, not just a master, which had no jurisdiction to make the order sought under Rule 26(11); there is no suggestion that a judge could or should have made the order relying on inherent jurisdiction.

(My emphasis added).

[15] I observe on this point that I agree with Master Bolton's interpretation of Benekritis on its face. From a reading of Mr. Justice Williamson's brief Reasons one can reasonably conclude that His Lordship was only concerned with an order sought under Rule 26(11). His Lordship commenced his brief Reasons by referring to that Rule, and ended them expressing his concern as to whether or not proper notice had been given under that Rule. However, that Rule does not apply, whether a Judge or a Master hears the application, where the record holders reside outside of the Province and the jurisdiction of the Court. I will return to the point in a moment.

[16] I will observe also at this point that in Benekritis, after stating that a Master did not have jurisdiction to make the orders he made compelling the Plaintiff to sign authorizations with respect to out of Province jurisdiction persons, Mr. Justice Williamson went on to say:

(3) However, I am satisfied that he could make the order with respect to those persons from whom production of documents is sought where those persons reside within the province of British Columbia, and I make that order.

Thus His Lordship decided the issue in the case at bar. However, what His Lordship seemingly was saying was that the Master had jurisdiction on an application under Rule 26(11) where the record holders resided within the Province and the jurisdiction of this Court; which I observe, is the law, provided that the documents are not in the possession, control or power of a party.

- [17] Before leaving Rule 26(11) I will refer to some comments pertaining to it by Mr. Justice Bouck in a recent decision, *Reischer v. Love* 2005 BCSC 580, 10 C.P.C. (6th) 211. In that case Justice Bouck noted, and it should be emphasized, that Rule 26(1) only concerns party-versus-party documents, (which, of course, now include documents within a party's power), while Rule 26(11) deals with third party documents, not party-versus-party documents.
- [18] In *Reischer* the defendants sought an order for production of third party documents, from record holders in the Province, pursuant to Rule 26(11), to be sent directly to them. In this regard His Lordship said:
- [42] Since the third parties did not appear on this motion, they apparently do not object to disclosing the documents.
- [43] Ordering production of third party documents is discretionary. Many judges and masters have written helpful judgments on the interpretation of Rule 26(11). In most instances, it is not a question of a defendant's right to obtain disclosure rather, it is a question of the mechanics of the disclosure.
- [44] In *Halliday v. McCulloch* (1986), 1 B.C.L.R. (2d) 194, our Court of Appeal dealt extensively and helpfully with the issue.

(My emphasis added).

- [19] His Lordship then went on to discuss the mechanics of the disclosure of the documents laid down by Halliday, and the rights of the plaintiff which they were said to protect, observing that Rule 26(11) does not give the plaintiff those rights, or the rights to the protective mechanics or means of production. I note that the former have developed out of common law or statute, while the latter have developed, in more recent years, out of the wide and discretionary provisions of Rule 1(12). His Lordship then concluded at para. 72:

In my view, Rule 26(11) never intended that disclosure of third party documents should be as cumbersome and unsatisfactory as it has become. There are dozens, if not hundreds of Judges' and Masters' decisions discussing Rule 26(11). Many conflict with one another. There is no way to rationalize them.

(My emphasis added).

I observe that other Judges and Masters have expressed some concern, and it appears, as well, that Counsel have sought less cumbersome and less costly mechanisms or procedures for disclosure and production of documents in these personal injury cases; the obtaining of an order compelling authorization for the production of documents apparently being the speediest, least costly and least disruptive mechanism or procedure for all concerned. See in this regard *Bhandari v. Waddington* (2003), 13 B.C.L.R. (4th) 373.

- [20] I return to Master Bolton's decision in *Allen-Trenholme*. His Honour then discussed the decision of Master Powers, as he then was, in *Wolansky v. Harlen* (1992), 67 B.C.L.R. (2d) 211. There, on similar facts, where the application was for an order compelling the Plaintiff

to sign an authorization to obtain medical and clinical records in the possession of doctors in Alberta, Master Powers concluded that since the documents were not in the possession or control of the Plaintiff, there was no jurisdiction under the Rules to order production of documents held by a foreign non-party, (documents held by a record holder outside the Province), and that therefore he had no jurisdiction. He nevertheless thought that a Judge, unlike a Master, may be able to do so by relying on inherent jurisdiction. I observe that in the case at bar the documents in question are within the power of the Plaintiff.

- [21] Master Bolton observed that if a Judge is unable, or unwilling, to exercise inherent jurisdiction, "it is apparent that a master has no lesser jurisdiction in such matters than does a judge of the court". He then concluded that all of the objections to the documents sought before him could be dealt with solely by reference to the Rules of Court without any regard to inherent jurisdiction.
- [22] His Honour then went on to deal with the issue of whether the Court had jurisdiction to order a party to sign authorizations directed to persons who are out of the jurisdiction, noting that the Benekritis and Wolansky cases were authority for the proposition that the Court had no such jurisdiction.
- [23] Master Bolton noted that in Wolansky, Master Powers concluded that even though the result, which effectively allowed a party to hide documents, created "an unthinkable situation", a Master was unable to direct the signing of authorizations to third parties to produce records. He stated at para. 14:

The learned master came to that decision after a careful review of authorities led him to the conclusion that production of documents was confined to documents in the possession or control of the party, and where (as here, with respect to the former employer's personnel records) the party has no enforceable right to obtain the documents, they are not in his control. The facts of the present case are, in all essentials, indistinguishable from Wolansky, and therefore unless a change in the law requires a different result, the same decision should follow.

(My emphasis added).

I observe again that in the case at bar the documents in question are within the power of the Plaintiff.

- [24] His Honour then turned to the provisions of Rule 26(1.1) which were enacted some time after the decision in Wolansky came down in 1995, noting that by its provisions, the Court could order a party to deliver to any other party a list of documents that relate to the matter in question in the action, and that although not in the possession or control of the party against whom the order is made, are within that party's power. In this regard he stated at para. 16:

What precisely is intended by this new jurisdiction to deal with documents in the "power" of a party was not canvassed in detail for me at the hearing. It is, however, clear from mere fact of the amendment to the Rules, as well as the decision of Allan J. in *Sunnar v. U-Haul Co. (Canada)*,

[1998] B.C.J. No. 1850 that "power" is broader than "control". The decision of Master Powers in Wolansky is very useful in this context, as he there distinguished several Ontario cases cited by the applicant on the basis that the Ontario Rules, unlike those of British Columbia, provided for production of documents "in the possession, control or power" of a party.

(My emphasis added).

[25] His Honour then opined that with the enactment of Rule 26(1.1), it was no longer apparent that Ontario decisions must be distinguished; that in the circumstances he was satisfied that following the enactment of Rule 26(1.1) Wolansky was no longer good law. I agree.

[26] In doing so His Honour found the result in *Parr v. Butkovick* (1978), 20 O.R. (2d) 491 (H.C.) which was referred to in *Wolansky*, to be logically compelling. In that case the plaintiffs were ordered to execute written permission to enable the records in question, which by statute were within the power of the plaintiffs, to be produced to the defendants. See also *Zerr v. Ragh*n (1987), 22 C.P.C. (2d) 44 (Sask. Q.B.) which followed *Parr*. There, pursuant to the Saskatchewan Rules of Court, the defendants applied for an order:

- (1) Requiring the plaintiff to produce to the defendants the medical records in her possession or in the possession of the record holders;
- (2) Directing the plaintiff to request from the record holders all documents in their possession relating to her and make them available for inspection by the defendant;
- (3) Directing the plaintiff to request a particular hospital to produce and make available all of its records to the defendants.

[27] In *Zerr* at p.48 Mr. Justice Walker had this to say about *Parr*:

Such reasoning appeals to me and I adopt it in the context of the Rules in this jurisdiction.

(My emphasis added).

[28] Further down the page His Lordship had this to say with regard to the Court compelling production by the plaintiff requesting the record holders to produce their documents, which in my view amounts to authorization:

The applicants do not now seek an order directly against the hospital, notwithstanding the broad terms of the notice of motion, although they reserve the right to make such an application in the future. They seek the order only as against the plaintiff to compel this production.

The modern tendency is toward full and complete disclosure and flexibility in the manner of obtaining it. In keeping with the principle of broad discovery and in all common sense, it is appropriate to order the plaintiff to make a request to all physicians, physiotherapists and chiropractors for the various documents referred to by the defendants as requested. It is within the power of the plaintiffs to cause the professionals and the hospital to produce the documents. The plaintiff must make her best efforts. Until the medical people and the hospital refuse the plaintiff's request, the documents are in the plaintiff's power. Another approach, not requested in

this application, is that the plaintiff be ordered to request these same medical people, with respect to the same documents, to permit the defendants to inspect and copy them and to communicate their response to the defendant.

(My emphasis added).

[29] I pause at this point to note that in both Parr and Zerr, by their respective statutes, in effect documents in the possession of the record holders were found to be within the power of the plaintiffs, and both plaintiffs were ordered to request or authorize the record holders to produce the documents to the defendants. In my opinion, what was in fact being done in these cases, as in the case at bar, was that the plaintiffs were being compelled to produce the documents by a particular means, by requesting or authorizing their production by the respective record holders.

[30] In *Sunnar v. U-Haul Co. (Canada) Ltd.* (1998), 24 C.P.C. (4th) 179, a decision of Allan J. of this Court, the documents sought were in the possession of persons outside the Province, and thus the jurisdiction of this Court. However, Madam Justice Allan ordered the defendant U-Haul to produce the documents sought on the basis that the defendant had access to the records in question and therefore had the power to produce them.

[31] At p.184 Her Ladyship states:

In British Columbia, relevant non-privileged documents are compellable in a civil suit. If the documents are not in the possession, control or power of a party, they may be compelled from third parties within the Court's jurisdiction, pursuant to Rule 26(11). In this case, the documents are apparently in the possession of entities which have no legal presence in this jurisdiction. The corporate structure of U-Haul, Amerco, the Insurer and the Adjuster thwarts the disclosure of relevant documents.

(My emphasis added).

I observe that in this case while the documents are not in the possession or control of the Plaintiff, they are within his power. In this regard see *Bachmann v. Sandoz (Can.) Ltd.* (1978) 6 B.C.L.R. 57, a decision of Trainor J., at pp.61 and 62, and *Lacker v. Lacker* (1982), 42 B.C.L.R. 188, a decision of Huddart L.J.S.C., then sitting as a local judge of this Court, at pp.195 and 196. Production of the documents should be sought through the Plaintiff party rather than through third parties. It is a pre-condition of the application of Rule 26(11) that the documents sought are not in the possession, control or power of a party.

[32] Further down the page Madam Justice Allan continues:

Nevertheless, on the evidence, I conclude that U-Haul has "access" to the records in question and therefore the power to produce them. It would lie ill in the mouth of a defendant who was part of a corporate structure that has deliberately attempted to place beyond its control, access to relevant documents in actions where it is a defendant, to reply that it had no power or control over the documents in the possession of a "sibling" company. In view of the importance of

disclosure in our civil justice system, such a refusal would invite an inquiry into the entitlement of such a defendant to continue its defence.

In my opinion, "power" is broader than "control" and U-Haul has the power under Rule 26(1.1) to list those documents in the possession of the Adjuster or Insurer relating to all accidents where sway or lack of brakes is referenced or alleged to be factors.

(My emphasis added).

[33] See also the observations of Sinclair Prowse J. of this Court in *Saunders v. Nelson* (1994), 35 C.P.C. (3d) 168. There, all of the injured plaintiff's medical and other records were held by third parties who resided outside the Province. At the time Rule 27(20) provided that a person to be examined for discovery was required to produce for inspection on the examination "all documents in his or her possession or power, not privileged, relating to the matters in question in the action". As a mechanism for obtaining copies of these documents, the defendant made request for their production during the plaintiff's examination for discovery. The defendant then applied for an order that the plaintiff comply with the request. Her Ladyship ordered the plaintiff to produce the documents requested by the defendant.

[34] The headnote sets out Madam Justice Sinclair Prowse's reasoning:

The court had jurisdiction to order a party to produce documents that were in the possession of a third party but to which the party had access. The plaintiff had an interest in and a right to inspect the documents requested, and therefore the requested documents could be characterized as documents in the possession of third parties but to which the plaintiff had a right of access. Under R. 27(20), documents in the "possession or power" of the person being examined that were not privileged and that related to the matters in question in the action had to be produced. The term "power" as used in R. 27(20) extended to documents that were in the possession of a third party but to which the party (to whom the request was made) had access. If the interpretation of "power" was wrong, the court had the inherent jurisdiction to order production of the documents. The order was necessary to ensure justice between the parties. It was only because the third parties were in another jurisdiction that the defendant did not have a right to apply under R. 26(11) for the documents.

[35] I observe that in my opinion Her Ladyship's interpretation of the word "power" was clearly correct, and she did not have to resort to her inherent jurisdiction. I observe also that since the decision was handed down Rules 26 and 27 have been amended, one of the amendments being the deletion of the words "or power" from Rule 27(20) in favour of "or control". However, in my view, the introduction of the words "within that party's power" in Rule 26(1.1) maintains *Saunders* as an instructive authority.

[36] Returning to Master Bolton's decision, His Honour then turned to the decision of Williamson J. in *Benekritis* where His Lordship found that a Master did not have the jurisdiction to make the orders he made compelling the Plaintiff to sign authorizations with

respect to out-of-jurisdiction persons. Master Bolton noted that it was likely that Williamson J.'s fundamental reason for dismissing the application was a lack of jurisdiction over the out-of-jurisdiction persons, since in the next paragraph His Lordship ordered authorizations to be directed to persons residing in the Province.

[37] His Honour then stated, referring to Benekritis:

[23] The result of this decision, however, is contrary to the result in *Fiege v. Rupitz*, [2001] B.C.J. No. 1579, 2001 BCCA 482, a decision of Levine, J.A. in Chambers. In that case the court had ordered a plaintiff to provide authorizations for the delivery of documents by the U.S. tax authorities. The order was appealed on several grounds, not including a lack of jurisdiction. The appeal was dismissed, and although it is silent on the issue before this court, it is clear that neither the learned judge below nor Levine, J.A. (nor, indeed, the appellant's counsel) had any doubts about the court's ability to order a party before the court to authorize a non-resident non-party to produce documents.

(My emphasis added).

[38] Master Bolton then concluded that because of the conflicting results of the Benekritis and Fiege decisions, there was no binding authority on the point. He continued:

[25] In my view, any court must proceed very cautiously when asked to make orders involving persons who are not parties to the action and do not reside in the jurisdiction. The reason, to my understanding, is that orders should not be made which are unenforceable or are likely to trespass on the jurisdiction of a foreign court.

[26] But neither these reasons for caution, nor any others that occur to me, exist here. The order sought from this court does not even request, let alone order, these foreign employers to do anything at all. It would simply require the plaintiff, a resident party to the action, to authorize the delivery of certain documents, held by non-residents, which the defendant is unable to obtain directly because of issues of privacy or privity.

[27] Given the lack of any reasons in principle to refuse the order, and the great evil of allowing a party to hide documents that could ensue if the order were indeed refused, I am satisfied that the order should go as sought.

[39] On the appeal, Mr. Justice Davies noted that Master Bolton had considered Wolansky and that:

[6] The learned Master then considered Rule 26(1.1) of the Rules of Court, which was enacted after Wolansky, and broadened the basis upon which documentation could be obtained from parties to litigation to include the production of documents in the possession, control or power of a party.

- [7] The Master also considered Justice Levine's decision in *Fiege v. Rupitz* ..., which approved the order of Justice Preston ordering a Plaintiff to sign extra-provincial authorizations for the delivery of documents by U.S. tax authorities.
- [8] The Master then found that, given the decision of the Court of Appeal in *Fiege* and the enactment of Rule 26(1.1), *Wolansky* no longer applied so that a master had the jurisdiction to make the orders sought.

(My emphasis added).

- [40] Mr. Justice Davies observed that His Honour's conclusions were at odds with Williamson J.'s decision in *Benekritis*. His Lordship refused to decline to follow Williamson J.'s decision, stating:
- [11] While the enactment of Rule 26(1.1) may impact upon the jurisdiction of a master to make such orders, I am not satisfied that the criteria for the refusal to follow a decision of this court, as established by *Hansard Spruce Mills*, [1954] 4 D.L.R. 590 ... has been met in this case.
- [12] While it may be that Justice Williamson did not consider Rule 26(1.1), I do not know that to be the case, and I note also that that was not the basis upon which the learned Master refused to follow *Benekritis*. Rather, the Master referred to what he considered to be a conflict between *Fiege* and *Benekritis* and concluded that he should follow *Fiege*.
- [41] With regard to the *Fiege* decision, His Lordship stated:
- [13] As I read *Fiege*, Justice Levine did not address whether a master has jurisdiction to make the order sought. Her decision was concerned with the jurisdiction of a judge to make the impugned order and did not require consideration of whether that jurisdiction was founded upon the Rules of Court (under which a master would have jurisdiction) or by way of inherent jurisdiction as suggested by Master Powers in *Wolansky* (in which case a master would not have jurisdiction).

(My emphasis added).

- [42] His Lordship's views as to what may have been considered may be contrasted with those of Master Bolton, who, it may be recalled, expressed the view that neither the judge below, nor Levine J.A. in the Court of Appeal, nor the Appellant's counsel, had any doubts about the Court's ability to order a party before the Court to authorize a non-resident non-party to produce documents. In this regard I would add to the mix my understanding of the general practice in this Court, and that is, that a judge who intends to rely upon inherent jurisdiction expressly states that he or she is doing so.
- [43] His Lordship also observed:

[15] It may be that the judgments of Master Powers in *Wolansky*, *supra*, and Justice Williamson in *Benekritis*, *supra*, have been overtaken by Rule 26(1.1) but, in my view, that is a matter for determination by the Court of Appeal.

He then followed *Benekritis*, allowing the appeal and setting aside the Master's order requiring the Plaintiff to sign the extra jurisdictional authorization. I observe at this point that it would appear that Mr. Justice Davies did not analyze Mr. Justice Williamson's decision in *Benekritis* to any extent, but simply found that he was bound to follow *Benekritis*; probably as a result of the brevity of the submissions before him, and the failure of counsel to refer him to contrary authorities to which His Lordship makes no reference.

[44] Mr. Justice Davies concluded his Reasons with the following:

[17] Although I need not consider further those orders made by the Master, I do observe by way of obiter dicta, that I would not have ordered the production of documents obtained by way of the authorization except by way of production in first instance to counsel for the plaintiff (as with a Halliday order ...); in order to appropriately address any issues of irrelevancy, confidentiality and privacy that might arise.

[45] In his written submission Counsel for the Defendants states:

[65] References are made in obiter and contained in Paragraph 17 of *Allen-Trenholme*, to the ability of the master to have made an order regarding the production of documents obtained by way of authorization except by way of "production in first instance to counsel for the plaintiff".

[66] The Defendants say the inference to be made is that the court, on hearing the appeal in *Allen-Trenholme*, accepted it as the stated law in British Columbia that a master can make an order compelling the party to sign an authorization for the production of records subject to Halliday considerations.

(My emphasis added).

[46] I observe that the order suggested by Mr. Justice Davies, that is, compelling the Plaintiff to sign an authorization for the production of records subject to Halliday considerations or terms, is the order which the Plaintiff was prepared to consent to in the case at bar. Counsel couples this with the fact that before the Master the Plaintiff was not opposed to the production of the PharmaNet printout by way of authorization, and says that the Plaintiff should be found to be estopped from arguing that the Master had no jurisdiction to order production of clinical records by way of authorization; that he cannot acknowledge the Master's jurisdiction to make the order on the one hand, and then on the other hand maintain that the Master has no jurisdiction to do so.

- [47] On this point, it seems to me that the real dispute between the parties, what brought them before the Court, was not really a question of jurisdiction, rather it was more likely a question of the mechanics or method of production to be followed in this case. Should the authorization order be made unconditionally, (the Defendants' position) and the one with which in the end the Master agreed, or should it provide that it contain Halliday order provisions as well, (the Plaintiff's position).
- [48] It is apparently a common issue in many of these cases. See in this regard Bhandari, supra, a decision of Master Nitikman, particularly at paras. 9 through 15. In Bhandari the defendant applied for production of the plaintiff's complete, unedited MSP claims history printout from a particular date to the present. In response to the defendant's motion, the plaintiff's Counsel agreed to an order for production from a different date, provided "it was a Halliday order". The plaintiff had not provided any affidavit evidence establishing a basis or any reason for a Halliday order, and Her Honour found that the defendant was entitled to a "non-Halliday order" for production of the plaintiff's MSP printout from the date sought.
- [49] In the case at bar then, it seems that the Plaintiff's main opposition to the Defendants' application for the authorizations was that the Plaintiff insisted that the order be in the "Halliday format". The "Halliday format" was evolved from the decision of the Court of Appeal in Halliday v. McCulloch (1986), 1 B.C.L.R. (2d) 194. Broadly speaking, such an order enables the Plaintiff to obtain the records sought by the Defendants, in the first instance, so that the Plaintiff's Counsel may vet the documents and determine in his or her view what is relevant, what is privileged, and what is private and confidential or potentially embarrassing to the Plaintiff, if asserted by him, before the documents are delivered to the Defendants' Counsel. The Plaintiff generally insists on this type of order, as in this case, while the Defendants wish to avoid what he or she considers to be cumbersome, inconvenient and costly procedures, where the physicians and hospitals very rarely oppose production, and when the Plaintiff is not entitled to such procedure as a right, but must establish a specific and reasonable basis for the Halliday procedure.
- [50] In the case at bar, the Learned Master dealt with the Plaintiff's assertion that the records of Dr. Yakua, Dr. Murray and Dr. Taunton should only be produced in a Halliday format, and the Plaintiff's reasons or basis therefore given in his affidavit. In the main these reasons were that these records might contain information, not related to the motor vehicle accident dated June 12, 2002, which could embarrass him, and he wished his "privacy kept". He put it this way at discovery, that he believed that his records:

... may contain information that may be embarrassing and/or confidential that is not relevant or material to this within action and I wish to protect and maintain my privacy and confidentiality in all lawful regards over such material.

(My emphasis added).

It is apparent that the Plaintiff did not see the records, but felt that he might be embarrassed by them.

[51] In this regard the Master stated at p.3 of his brief Reasons for Judgment:

Numerous decisions of this court, from both judges and masters, have dealt with issue of whether disclosure should be in Jones v. Nelson or Halliday and McCulloch form. It is clear from those decisions that more than the mere assertion of a possibility of prejudice or embarrassment must be advanced to secure a Halliday-type order. There must be some indication of a specific concern, and although the threshold is a relatively low one, the plaintiff has not met it in this case.

(My emphasis added).

[52] His Honour also had this to say, in response to the submission of Counsel for the Plaintiff:

I have no evidence before me as to the extent to which these injuries and the treatment of them might have influenced his eligibility for work with the Royal Canadian Mounted Police. It appears to me that the question of a head injury, headaches and a shoulder injury, together with the suggestion that he underwent spinal surgery at the age of 18, may have some relevance in this proceeding, and may assist the defendants in the defence of the plaintiff's claim, or may lead to a train of inquiry which will so assist the defendant.

It is seen that in my view the Master was not clearly wrong in making these determinations which in fact I would have made as well.

[53] His Honour then ordered the signing of authorizations for the production of the clinical records of Dr. Yakura from January 1, 1991, and those of Dr. Murray and Dr. Taunton from the date of the accident, June 12, 2002. Similar orders were granted pertaining to the Pharmacare printout and the Plaintiff's MSP claims.

[54] His Honour also ordered that within 14 days of the making of the order the Plaintiff was required to provide "those documents and satisfy those requests for information, authorization and documentation made at his examination for discovery on December 8, 2004". This included "a copy of the records of Kitsilano Workout Fitness Centre relating to the Plaintiff".

THE SUBMISSIONS

[55] Mr. Wilson's primary submission again was the submission he made to the Learned Master, that Allen-Trenholme, which he described as the only case on point, should be equally applicable to the situation where the record holders reside within British Columbia, as the Court was exercising its jurisdiction over the Plaintiff himself in compelling him to sign the authorizations, and not exercising any jurisdiction over the third-party record holders. He submitted that when the Court makes an order compelling a party to execute an authorization it is exercising its in personam jurisdiction over that party. Once the

authorization has been signed, then the order has been complied with, and the Court takes no further interest in the authorization itself. It will be seen that I am in agreement in the main with this submission, save for the proposition that Allen-Trenholme should determine the issue before me.

[56] Mr. Wilson emphasized that there is no inherent jurisdiction in the office of the Master and that his jurisdiction is limited by the Rules of Court. There is no specific rule permitting Masters to order the signing of authorizations. Hence, Master Keighley lacked the jurisdiction to make the order compelling the Plaintiff to sign authorizations. The application should have been brought before a Supreme Court Judge who would have inherent jurisdiction. It will be seen that I do not agree.

[57] Reference was also made to the decision of the Supreme Court of Canada in Ontario (Attorney General) v. Victoria Medical Building Ltd., [1960] S.C.R. 32 whereat Mr. Justice Judson, speaking for the majority of the Court, sets out a clear picture of the situation at p.43:

While it is true that the Master's jurisdiction is very varied in character, it is, I think, largely concerned with preliminary matters and proceedings in an action, necessary to enable the case to be heard, and with matters that are referred to that office under a judge's order. There is no inherent jurisdiction in the office as there is in the office of a Superior Court Judge. I am content to adopt the judgment of Harvey C.J.A. in *Polson Iron Works v. Munns* (1915), 24 D.L.R. 18, for its account of the historical origins of the office and the broad outlines of the jurisdiction, and it is sufficient to say that everything the Master does must be authorized by the Rules of Practice, The Judicature Act or some other statute. This does not mean, however, that the Legislature can assign any and all work to him. Section 96 operates as a limiting factor. If this were not so, there would be nothing to prevent the withdrawal of any judicial function from a s. 96 appointee and its assignment to the Master.

(My emphasis added).

[58] In any event, Counsel submitted, the order impugned was unnecessary as Rule 26(11) already provides a mechanism for the production of records in the hands of record holders inside the Province, although not to record holders outside the Province. I am unable to agree with this submission. Rule 26(11) is only concerned with third party documents when the documents are not in the possession or control or within the power of a party. Here the documents are within the power of the Plaintiff and the Rule is not applicable.

[59] Counsel noted that in *Allen-Trenholme*, Master Bolton said that he was satisfied that following the enactment of Rule 26(1.1) *Wolansky* was no longer good law; that he came to that conclusion because of the fact that Rule 26(1.1) had been enacted since the decision of Master Powers in *Wolansky*, and that the Rules now permit the Court to order a party to produce a list of documents, not only in their possession and control as under Rule 26(1), but within their power as well.

[60] Mr. Wilson submitted that Wolansky was still good law as there is still no specific wording in the Rules of Court to the effect that the Court may compel a party to sign an authorization. Rule 26(1.1) only permits the Court to order a party to produce a list of documents within that party's power. Counsel states:

While this may have a similar end result to ordering a party to sign an authorization of such documents, it cannot be construed as authorizing this alternate method of production. If the drafters of the Rules of Court had wished to give Masters the power to compel parties to litigation to sign authorizations for the production of documents, then they would have done so explicitly.

I do not agree. In my opinion, specific wording is not necessary, and if statutory authority is necessary for a Judge, and therefore a Master, it is provided by the Rules of Court. I will return to the point in a moment.

[61] Counsel submitted that to compel a party to sign an authorization requires resort to the inherent jurisdiction of the Court. This, he said, was the view of Madam Justice Smith in *McKay v. Passmore*, 2005 BCSC 570. There Her Ladyship stated that she had jurisdiction to grant an order requiring the Plaintiff to authorize release of her W.C.B. records from the Province of Manitoba, but was not persuaded that there was sufficient evidence to support such an order. Her Ladyship went on to say that in making her decision she was exercising her inherent jurisdiction "to ensure justice between the parties" as described in *Saunders v. Nelson* ... at para. 16". I have already dealt with this point. I have noted that in *Saunders* Madam Justice Sinclair Prowse interpreted the word "power" in then Rule 27(20) as extending to documents in the possession of a third party, but to which the party (to whom the request is being made) has access; that she then said in para. 16 that if she was wrong in this interpretation of the term, then she would draw on her inherent jurisdiction and order the plaintiff to produce the documents requested.

[62] I have also opined that Her Ladyship's interpretation was not wrong, and that she had no need to invoke her inherent jurisdiction. I do not interpret *Saunders* or *McKay* as holding that to compel a party to sign an authorization requires resort to inherent jurisdiction of the Court. I observe also that *McKay* was a case where the application was for an order that the plaintiff execute a form of authorization directed to an out-of-Province record holder.

[63] Counsel next referred to the decision of Mr. Justice Williamson in *Benekritis*, referred to earlier; noting that the case runs counter to the Plaintiff's argument that inherent jurisdiction is the only basis for the Court to order a party to sign an authorization, as set out in *Wolansky* and *McKay*. As already noted, in *Benekritis* Mr. Justice Williamson specifically found that the Master could make the order when those persons from whom production of documents is sought reside within the Province of British Columbia.

[64] Finally, Counsel submitted that I should apply the test set out in *Re: Hansard Spruce Mills Ltd.*, *infra*, and decline to follow Mr. Justice Williamson's decision in *Benekritis*, insofar as it holds that a Master can order a party to sign an authorization directed to a record holder within the Province. I decline to do so, insofar as *Benekritis* is said to be authority for the

proposition just stated. On the authorities, some of which I have referred to, I am fully satisfied that a Judge of this Court has jurisdiction to order a party to sign an authorization directed to a record holder within the Province, and that accordingly the Master had jurisdiction to make the order impugned.

- [65] On an alternative basis, Counsel referred to the requirement of notice to the third party record holders under Rule 26(11) which was of some concern to Mr. Justice Williamson, which it is said His Lordship "read in". Counsel submitted that if the Court accepted Justice Williamson's interpretation that Rule 26(11) permitted the Master to order the plaintiff to sign the authorization directed to record holders within the Province, then such an order requires that notice be given to the third party. There is no evidence before the Court that notice was given. I observe that in this case we are not concerned with Rule 26(11) and the question of notice does not arise. What the Plaintiff seeks is a party versus party documents order, not a third party documents order under Rule 26(11).
- [66] Mr. Dyer submitted that the Master did not exceed his jurisdiction when he directed that the Plaintiff execute authorizations permitting third party doctors to disclose their records directly to the Defendants. Again, the Master did not err in fact or in law, when he ordered the Plaintiff to obtain and produce the records held by Kitsilano Workout Fitness Centre.
- [67] My Dyer said that the issue on the appeal turns on the mechanism by which disclosure and production were ordered to be made. He also said that the Defendants were simply seeking to go through a party, the Plaintiff, rather than third parties, the record holders, to obtain the documents. I agree. While the records or documents are in the possession of the third party doctors, the Plaintiff, as in Sunnar, has a right of access to them and therefore the power to list and produce them directly, or through the use of authorizations.
- [68] Mr. Dyer said that the argument by analogy based on Allen-Trenholme is simply incorrect; that when the Court refers to the exercising of inherent jurisdiction in the cases, the reference is to something that would be done or occur outside the jurisdiction. Here the reference is to something which would be done or occur inside the jurisdiction, that is, the execution of the authorizations by the Plaintiff. None of the cases referred to by Mr. Wilson dealt with the issue before the Master, which was whether the Master exceeded his jurisdiction, or was clearly wrong, when he issued the order compelling the Plaintiff to sign authorizations for the production of the documents by record holders residing within the Province. I observe also that in fact Mr. Justice Williamson seemingly did deal with the issue in Benekritis.
- [69] Mr. Dyer submitted that the jurisdiction of the Master is not conferred by the Rules of Court. It is conferred by the Supreme Court Act, R.S.B.C. 1996, c.443. I took him to mean that the jurisdiction of the Master is not conferred solely by the Rules of Court, and that it is conferred primarily by the Supreme Court Act. To find the answer one must consider both the Act and the Rules.

[70] Counsel submitted that the line of reasoning which the Plaintiff seeks the Court to follow fails to consider the following:

1. The conferral of the Master's powers under the Supreme Court Act;
2. The fettering of the Master's jurisdiction by practice directions; and
3. The ruling of the Court in *Hydro Fuels Inc. v. Wilder*, [1990] B.C.J. No. 2187 (QL), 1990 CarswellBC 1121.

I would add as well, "and other authorities".

[71] Mr. Dyer referred to s. 11(7) of the Act which provides:

A master has, subject to the limitations of section 96 of the Constitution Act, 1867, the same jurisdiction under any enactment or the Rules of Court as a judge in chambers unless, in respect of any matter, the Chief Justice has given a direction that a master is not to exercise that jurisdiction.

(My emphasis added).

[72] Counsel submitted that barring any specific prohibition identified in the Practise Directions, a Master has the same power as a Justice of the Supreme Court of British Columbia in Chambers. He then referred to the Practise Directions and Notices to the profession enforced at this time, observing that they do not disclose any prohibition against the Master making an order under the provisions of Rule 26, and, in particular, against a Master making an order directing a party to produce documents directly, directing a party to sign an authorization directing third parties to release documents, or with respect to third parties in possession of documents being subject of an order. There are no Practice Directions which fetter a Master's jurisdiction.

[73] I am basically in agreement with Counsel's submission, and observe that the order impugned is a purely interlocutory order which does not conflict with the appointing power under s.96 of The Constitution Act, 1867, as was the case, for example, in *Euro Ceramics Tile Ltd., v. T & C Ceramic Tile Contractors* (1991), 60 B.C.L.R. (2d) 86 (C.A.). See also *Victoria Medical Building*, supra. However, one must not overlook the fact that it is the jurisdiction of a Supreme Court Judge, other than his or her inherent jurisdiction, which is being challenged here.

[74] Counsel then referred to *Hydro Fuels v. Wilder*, supra, a decision of Leggatt J. of this Court. There the plaintiffs applied for an order requiring certain of the defendants to provide their written authorization and consent to the Department of National Revenue to permit them to inspect and copy documents in the possession of the Department of National Revenue which were the property of the defendants and which related to the plaintiffs' action. The defendants opposed the application.

[75] In para. 2, after noting that the Court could not order the Minister of National Revenue to release private information or documents held for purposes of income tax investigation, Mr. Justice Leggatt said:

The only route available to the plaintiffs to discover documents out of the defendants' possession and in the possession of the Department of National Revenue is either through a consent form or by a court ordered authorization.

(My emphasis added).

[76] There the plaintiffs claimed that the defendants owed them some \$32 million for certain equipment which they required for carrying out two specific scientific research programs, which programs were to be financed with funds derived through the transfer or sale of scientific research tax credits to investors. The plaintiffs also claimed breach of trust and fraud. The plaintiffs claimed that the documents, which were the property of the defendants and had been seized by Revenue Canada under search warrants issued by the Federal Court, were relevant to their proceedings. The defendants said that it was nothing more than a fishing expedition.

[77] At para. 6 Leggatt J. said:

The usual order which could be made against a private citizen holding documentation belonging to the defendant cannot be made. To deny the plaintiffs the opportunity to review relevant documents could have the effect of defeating the plaintiffs' claim. Certainly, the principles outlined in the cases cited by the plaintiffs, such as *Lacker v. Lacker* (1982), 42 B.C.L.R. 188 and *Aylsworth et al v. Richardson Greenshields of Canada Limited* (1988), 24 B.C.L.R. (2d) 41 is not appropriate to the unique circumstances of the case at bar.

(My emphasis added).

[78] His Lordship then went on to determine that some authorization should be provided to the applicants and directed the form of authorization in his Reasons for Judgment. They permit the plaintiffs' agents to attend, inspect and copy specified documents in the possession of Revenue Canada.

[79] I pause at this point to note that what Mr. Justice Leggatt ordered was the production of documents owned by the defendants, and to which the defendants obviously had access and could have consented to their production, which documents were in the possession of the Department of National Revenue, by the defendants' signing authorizations which facilitated the production. The case is quite similar to both *Parr* and *Zerr* which were referred to earlier.

[80] Counsel next referred to the decision of Boyd J. of this Court in *Distinctive Photowork Company Ltd. v. Prudential Assurance Company of England Property and Casualty (Canada)* (1994), 98 B.C.L.R. (2d) 316. There the plaintiff company sued the defendant insurer for loss arising out of a fire. The defendant pleaded arson as a defence. The defendant applied for an

order compelling the company's principal and his wife to sign authorizations requiring the production of their personal income tax returns. A Master refused the order on the basis that the pleadings did not specifically raise an issue about the financial affairs of either individual and how their insolvency or financial difficulty might be related to the fire.

- [81] Madam Justice Boyd allowed the appeal, opining that the documents were relevant and ought to be compelled to be produced, referring to the *Dufault v. Stevens* (1978), 6 B.C.L.R. 199 (C.A.). Her Ladyship went on to deal with the question of whether the Court had any jurisdiction to order the Plaintiffs to execute the authorizations, a question which was raised by the Master below. Her Ladyship said that in her view that issue had been determined in the defence's favour in the Reasons for Judgment of Mr. Justice Leggatt in *Hydro Fuels*.
- [82] Counsel submitted that the decision in *Distinctive Photowork Company* is determinative of the issue before the Court and a Master of the Court has the jurisdiction to direct a party to sign an authorization.
- [83] Counsel next referred to *Tetz v. Niering* 1996 CarswellB.C. 1887, a decision of Master McCallum. There the defendant applied for an order compelling the plaintiff to provide a written authorization for release of documents in the possession of a non-party, the Ministry of Social Services, pertaining to the plaintiff's receipt of welfare payments. Under the applicable Act, such information could be obtained with the consent of the person receiving the payments, in this case, the plaintiff. On the issue of jurisdiction, Master McCallum had the following to say on p.2:
- [5] The *Hydro Fuels Inc. v. Wilder*, (unreported) case, and Madam Justice Boyd's decision in *Distinctive Photowork Company* ... are cited as authority for the proposition that parties in the situation of this defendant can require the delivery of an authorization. Madam Justice Boyd said that the court had jurisdiction to order the plaintiff to execute authorizations for income tax information. That was the point decided in the *Hydro Fuels* case.
- [6] My reading of the *Hydro Fuels* case does not persuade me that the issue of the court's authority to deal with the authorizations was argued. The issue was whether or not the prohibition against releasing information could be gotten around by the giving of an authorization. The court held in *Hydro Fuels* that the plaintiff had to provide the authorization, so I take it as decided that the court can require the giving of authorizations.
- [84] Reference, perhaps, should also be made to the decision of Lambert J.A., speaking for the Court in *Kent v. Thiessen* (1986), 1 B.C.L.R. (2d) 201. It is noted in the Headnote that this case was decided at the same time as *Halliday*, and that both cases involved the same issue, the mechanics for carrying out an order for the production of medical records. At p.201 Lambert J.A. refers to the two cases, and their basic difference, in the following passage:

The only significant difference between the facts of the two cases is

that in the Halliday case the hospital records that were requested were within British Columbia, whereas in this case the doctors' records and hospital records that were requested were in the United States, where the plaintiff was treated. The application in this case was therefore for an order directed to the plaintiff to authorize the production of the doctors' records and hospital records, rather than for an order directed to the doctors or to the hospitals themselves. Nothing turned on the propriety of this practical device and there is no need for me to endorse it.

(My emphasis added).

- [85] The use of the authorization, referred to as a "practical device" in Kent, was obviously not an issue before His Lordship; and I do not consider his comments to be negative as regards its use. However, if it is questioned, the authoritative value of the case can be decided at a later date, if necessary. I note also that His Lordship suggests that the reasons for its use in Kent was the fact that the record holders resided outside the Province and the jurisdiction of the Court. In this regard I observe that this "practical device" is also useful in the case where the record holders reside within the Province and within the jurisdiction of the Court, but where the documents sought are in the possession or control or power of one of the parties.
- [86] Mr. Dyer submitted that Hydro Fuels, Distinctive Photowork and Tetz are determinative of the primary issue before the Master and the Appeal Court, that the Judges and Masters of this Court have jurisdiction to direct a party to sign an authorization permitting production of records in the possession of a third party. I agree, and while not argued, I would add that at a minimum, these are cases which should have been brought to the attention of Mr. Justice Williamson, as well as applicable sub-Rules of Rule 26, including sub-rule (1.1), during the hearing before him.
- [87] Mr. Dyer does not dispute that Rule 26 does not contain specific wording granting jurisdiction to a Judge or a Master of this Court. He says that the Plaintiff's position that specific words must be contained in Rule 26 is erroneous, as is the Plaintiff's conclusion that the Master's jurisdiction is derived solely from the Rules of Court. He submitted that such wording is not required because Judges and Masters commonly make orders and exercise their discretion in order to govern the Court process, as was the case here. I am not in agreement with the latter part of this submission insofar as it seems to have reference to inherent jurisdiction. Further, as I have already indicated, it is my opinion that if statutory authority is necessary for a Judge, and therefore a Master, to order a plaintiff to sign an authorization, such authority is contained in the Rules of Court.
- [88] I will observe at this point that neither Counsel dealt with the provisions of Rule 26(1.1) to any extent, and I do not find it necessary to do so. I will simply note that reference is made to documents within the power of a party only in the provisions of sub-rules 1.1, 4 and 5 of Rule 26; and observe that perhaps some further amendments might have been made to make clear what is in fact my opinion, and that is, that the drafters of these provisions intended that documents in the power of a party were to be treated and produced under

Rule 26 in the same manner as documents in a party's possession or control, that these Rules would not make any sense were that not the case.

THE BENEKRITIS AND ALLEN-TRENHOLME CONCERNS

[89] I turn again to the two cases, Allen-Trenholme and Benekritis, which obviously have caused me much concern, particularly in light of Mr. Wilson's primary point, that Mr. Justice Williamson's decision in Benekritis, which was followed in Allen-Trenholme, should support and form the basis of a finding that the Master had no jurisdiction to make the order impugned. I have not been able to rationalize Benekritis, or to reconcile the decision with other authorities.

[90] I have had the opportunity to peruse the Oral Reasons for Judgment dated April 7, 2005, of the Master appealed from in Benekritis in order to ascertain what issues were before His Honour, what decisions were made, what authorities and Rules, if any, were referred to, and so on. It appears from these Oral Reasons that the only real issue seemingly before His Honour was what should be the terms of the authorizations which His Honour was going to order the plaintiff to execute. That is about it. No reference to any authority, or to any Rules of Court is contained in Counsel's submissions, or the Oral Reasons, and as I say, the only issue appeared to be the terms of the authorizations to be signed by the plaintiff which seemed to be left as a matter to be worked out or agreed to by Counsel.

[91] I have also read the Notice of Appeal from the Master's Oral decision dated April 12, 2005, in Benekritis. The Notice commences with the following:

Whereas on the 7th day of April, 2005, Master Tokarek made the decision that, inter alia, the plaintiff sign authorizations requesting production of documents outside of the Canadian jurisdiction specifically in the Philippines and in the United States.

[92] The grounds of appeal are set out in the Notice of Appeal as follows:

1. Error of law - Master Tokarek erred in the application of the legal principles set out in the case of *Wolansky v. Davidson*, (1992), 67 B.C.L.R. (2d) 211 by requiring the Plaintiff to sign authorizations for release of his medical records where the Plaintiff had no enforceable right to obtain possession of the records. Furthermore, he erred in the application of the legal principles set out in *Halliday v. McCullough* (1986) 1 B.C.L.R. (2d) 194 (C.A.). Specifically, in allowing the documents to go to the defendants in the first instance. The Plaintiff is unable to properly protect privilege, relevance and confidentiality.
2. Inherent jurisdiction - the Master lacked the jurisdiction to make such an order; and
3. Reasonableness of the Master's decision - on the evidence before Master Tokarek he is clearly wrong in his disposition in the application.

I pause to observe at this point that when I read the particulars in the Notice of Appeal under the topic "Error of Law", which makes it clear that reliance is placed on Wolansky and on the proposition that the documents were not in the power of the Plaintiff, the importance of the fact that contrary and binding authorities in case law, and Rule 26(1.1), were not referred to Mr. Justice Williamson for consideration, to which I will turn in a moment, is underscored.

[93] I turn next to Mr. Justice Williamson's brief Oral Reasons for Judgment dated May 4, 2005, in Benekritis. As I have said, His Lordship commenced by stating that he had listened to Counsel and looked at the materials, and looked again at Rule 26(11) and then gave his decision in one sentence, as follows:

[2] I am satisfied that the master did not have the jurisdiction to make the orders he made compelling the plaintiff to sign authorizations with respect to out-of-jurisdiction persons and that that portion of his order should be set aside.

He then gave his decision with respect to record holders within the Province, again in one sentence, as follows:

[3] However, I am satisfied that he could make the order with respect to those persons from whom production of documents is sought where those persons reside within the province of British Columbia, and I make that order.

[94] His Lordship then went on to deal with the issue of whether or not notice had been given under Rule 26(11) and in the end stated that he was making the order pertaining to the Master having jurisdiction to make the order relating to record holders within the Province on a conditional basis, and subject to Counsel for the Defendants filing an affidavit deposing that notice had been given. If the affidavit was filed, then the appeal would be allowed in part. If it was not filed, the appeal would be allowed on both issues.

[95] It is with this background, and with some reluctance, that I venture into the issue of when a trial Judge should follow the judgments of other Judges of the Court as discussed by Wilson J., later Chief Justice, of this Court in *Re: Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590.

[96] In *Re: Hansard* Wilson J. stated at p.592 that he would:

... only go against a judgment of another Judge of this Court if:

- (a) Subsequent decisions have affected the validity of the impugned judgment;
- (b) it is demonstrated that some binding authority in case law, or some relevant statute was not considered;
- (c) the judgment was unconsidered, a *nisi prius* judgment given in circumstances familiar to all trial Judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority.

If none of these situations exist, I think a trial Judge should follow the decision of his brother Judges.

- [97] On the basis of the materials before me, namely the Master's Oral Reasons for Judgment dated April 7, 2005, in Benekritis, the Notice of Appeal from the Master dated April 12, 2005, and the Reasons for Judgment of Mr. Justice Williamson dated May 4, 2005, I have concluded that condition (b) above existed during the hearing before Mr. Justice Williamson. I am satisfied that binding authority in case law, and relevant provisions of the Rules, were not referred to His Lordship, and were not considered by him; that had this been done, His Lordship would have considered the cases and provisions of the Rules, and would have, at a minimum, referred to them in his Reasons for Judgment.
- [98] I observe that even if the cases referred to in the Notice of Appeal, that is, Wolansky and Halliday, and the issue as stated, were referred to during the hearing before Mr. Justice Williamson, the contrary binding authorities, the real issue and the applicable Rules of Court, would not have been raised and argued and considered by His Lordship.
- [99] Additionally, I noted some apparent urgency during the hearing before Mr. Justice Williamson, such that it may be said that the Judgment was unconsidered, a nisi prius judgment given without any real opportunity to fully consider binding authorities and relevant provisions of the Rules of Court. It would seem that His Lordship attempted to accommodate Counsel and was left to do the best he could on the basis of minimal information in crucial areas which would have assisted him. It is a situation which is not unheard of today by busy Judges in Chambers.
- [100] It is for these reasons that I decline to follow Benekritis, as well as Allen-Trenholme, which followed it. In this regard I observe that the grounds of appeal and the stated issue in the Notice of Appeal in Allen-Trenholme are the same as those set out in the Benekritis Notice of Appeal, although two other cases have been added under the topic "Error of Law", Dixon v. Deacon Morgan McEwan Easson (1989), 38 B.C.L.R. (2d) 318 and Benekritis.
- [101] While the ultimate decision is left to the Court of Appeal, at this point I prefer to follow binding authorities and applicable Rules of Court, which lead me to the conclusion that Allen-Trenholme should not be considered, by analogy, as authority for the proposition that a Supreme Court Judge, and therefore a Master, does not have jurisdiction to compel a plaintiff to sign authorizations directed to record holders residing within the Province, or that the same conclusion should be reached without considering Allen-Trenholme. The authorities referred to, in addition to relevant Rules of Court, are Hydro Fuels Inc., Distinctive Photowork, Tetz, and Fiege.

THE ISSUES AND BRIEF DISCUSSION

- [102] The issue is whether the Learned Master had jurisdiction to make the order impugned, that is, to make the order compelling the Plaintiff to sign authorizations for the production of the documents held by record holders residing within the Province. This includes consideration of the nature of the jurisdiction of a Supreme Court Judge to make such an order. The answer, as I have already indicated, is in the affirmative.
- [103] For the reasons discussed earlier, I decline to apply the decision in *Allen-Trenholme*, which simply followed that portion of the decision in *Benekritis* which held that a Master does not have the jurisdiction to make an order compelling a plaintiff to sign extra-jurisdictional authorization, by analogy, to the case at Bar, and hold that the Learned Master had no jurisdiction. I am satisfied that a Judge has such jurisdiction, without regard to inherent jurisdiction.
- [104] I agree that in both situations (where the record holders are within the Province and where the record holders are without the Province) the Court is only dealing with the plaintiff, who is within the jurisdiction of the Court and who has control over the subject documents, in that they are within his power, and that the decisions should be the same; that is to say, that the Court has jurisdiction to compel a plaintiff to sign authorizations pertaining to documents in the possession of record holders, both within and without the Province.
- [105] The problem, as I have discussed, is that I am not satisfied that the part of the *Benekritis* decision, on which *Allen-Trenholme* is based, is correct. I prefer the weight of other authorities, and the provisions of the Rules of Court, including Rule 26(1.1) which have persuaded me that the Court has jurisdiction to grant an order compelling a plaintiff to sign an authorization pertaining to the production of documents held by a record holder outside the Province. In addition to the authorities I have referred to I would add *Sunnar* and *Saunders*, as in my opinion they support this position. They say that the Court has jurisdiction to order a plaintiff to produce documents in the possession of a record holder who resides outside the Province where the documents are within the power of that plaintiff. That being the case, I fail to see why the Court would not have jurisdiction to order the same plaintiff to produce the same documents using alternative mechanics or means of production, such as by signing authorizations directed to the out-of-Province record holder. For one reason or another, such means may not be the preferred means in a given case, but the jurisdiction is there.

THE NATURE OF THE ORDER IMPUGNED

[106] I set out earlier the positions of the parties on the standard to be applied on the appeal, and my opinion thereon. It seems to me, although it was not argued, that in the ordinary course of events both standards would be applied; the first question being whether the Master had jurisdiction, and if the answer is in the affirmative, the second question being whether the Master's actual decision was clearly wrong; and as I have indicated, the answer to the first question is in the affirmative and the answer to the second question is in the negative.

[107] The nature of the order, without regard to the standard on appeal, is still of some significance on the issue of jurisdiction. It must not be overlooked that the subject matter of Rule 26, and of the order impugned, is the compelling of the production of documents. It may be said that the order is poorly worded in that it only provides for the execution of the authorizations by the Plaintiff. However, at best, this is simply a convenient way of describing an order to produce. It is not simply an order to sign a piece of paper. In substance it is an order for production by the Plaintiff of documents within his power with an additional term "attached" providing for production in a particular manner, that is, by executing authorizations enabling the records to be produced to the Defendants. I will have more to say about this in a moment.

[108] In *Merth v. Merth* (1993), 18 C.P.C. (3d) 362, Saunders J., then of this Court, heard an appeal from a Master's order dismissing applications under both Rules 26 and 28. In determining that the Master's order was not clearly wrong, Saunders J. had this to say about these Rules at p.363:

In my view the order appealed from in this case is a purely interlocutory matter. Rules 26 and 28 are aids to the preparation for trial but do not, themselves, finally determine any issue.

(My emphasis added).

[109] In *Homalco Indian Band v. British Columbia* (1998), 56 B.C.L.R. (3d) 114, Smith J. of this Court had the following to say about Rule 26 at p.120:

What is the underlying purpose of Rule 26? An examination of its terms and of the authorities considering it leads to the conclusion that its purpose is to promote the resolution of disputes on their merits by forcing disclosure in advance of all documents upon which a party plans to rely at trial and, in addition, all documents which may assist the other party at trial (subject to privilege). In this manner, Rule 26 avoids surprise and prevents the destruction, suppression or fabrication of evidence. The end is trial on the basis of full information; the means is disclosure of documents. The delivery of a list of documents in turn is a means toward the end of disclosure. In

Dorchak v. Krupka (1997), 196 A.R. 81 (C.A.) the Court stated what it considered to be a central objective of an affidavit of documents (at p.85):

An affidavit of documents must show unambiguously what documents' existence it does or does not disclose. It must remove any uncertainty on the following vital question. If a piece of paper turns up later, or is tendered on a motion or a trial, has it been disclosed by the previous affidavit of documents?

...

Besides that rule of unambiguous identification, does any other principle of justice or rule of law apply? Where producible documents are concerned, I do not know of any. It seems to me that everything else is just a matter of mechanics, convenience and common sense.

(My emphasis added).

[110] In the case at bar there is no doubt that the documents in question are within the power of the Plaintiff, are relevant and are compellable. There is also no doubt that the Court has substantive jurisdiction or power pertaining to the discovery and inspection of documents under Rule 26, particularly the compelling or ordering of production of documents. As I have already said, in my view, regardless of the precise wording of the order, it is an order for the production of the documents by the Plaintiff, and in a particular manner. It is this means of achieving production, that is, by the Plaintiff signing the necessary authorizations releasing the documents, to which the Plaintiff objects. In my opinion, the manner in which production is achieved is for the Court. The Court's substantive jurisdiction or power to compel the production of documents includes the jurisdiction or power to create the mechanisms or the means by which production is made. It is not necessary that the Court rely on its inherent jurisdiction to do so; and it follows that the Master had jurisdiction to make the order.

[111] Alternatively, if I am wrong, and if the Court's jurisdiction or power to order the Plaintiff to provide the written authorizations was ever based on the Court's inherent jurisdiction, it is not the case now. In my opinion, portions of the inherent jurisdiction of this Court have been codified in the Rules of Court, with the result that while in the end the Court's jurisdiction may not have been effectively changed, a Master is authorized by the Rules to make the order impugned. I refer to Rule 1(12) and Rule 26(10).

[112] Rule 1(12) provides:

When making an order under these rules the court may impose terms and conditions and give directions as it thinks just.

(My emphasis added).

Rule 26(10) provides:

The court may order the production of a document for inspection and copying by any party or by the court at any time and place and in the manner it thinks just.

(My emphasis added).

[113] I observe that Rule 1(12) applies to all orders made under the Rules, including any order for the production of documents under any sub-rule of Rule 26. The powers granted under these Rules are discretionary and very wide. The grant under Rule 1(12) is unqualified, the only condition being that no term or condition may be imposed unless the Chambers Judge thinks it is just that it be imposed. See in this regard the decision of Aikins J.A., speaking for the Court, in *Bates v. Stubbs* (1980), 15 B.C.L.R. 65 (C.A.) at p.69, where His Lordship said that he saw no warrant for reading any unspoken qualification into the sub-rule, and that "I think it means precisely what it says".

[114] See also the decision of MacFarlane J.A., speaking for the Court of Appeal in *Serban v. Casselman* (1995) 2 B.C.L.R. (3d) 316 at 219:

I agree that the order made in this case was an exceptional order. The order did not create new substantive law however, but the term imposed was a matter of substance. There is no ambiguity that I can see in Rule 1(12) or in Rule 35(3). The legislature in giving the force of law to Rules has given the Court the power to make orders which it thinks just or to attain justice. To do so it may be necessary to make orders which are of substance.

(My emphasis added).

And at p.320:

I think it clear that there is jurisdiction under Rule 1(12) and Rule 35(3) to impose terms in granting an adjournment but the term must be just in all of the circumstances. Since the Rules have the force of law I do not think it matters that the term imposed is one of substance, but again I say it must be just. The real question on this appeal is whether an order that payments be made on account of damages prior to the assessment of damages is a just one. The question put in another way is whether it was a proper exercise of discretion to make the order.

[115] The subject matter and terms of these sub-rules suggest the application of equitable principles akin to inherent jurisdiction. Hence, I would suggest that they are in effect a codification of a part of the Court's inherent jurisdiction, the result being that the Master had statutory jurisdiction to make the order impugned. He was empowered under Rule 26 to order the Plaintiff to produce the documents, and he was empowered as well, (if it was necessary) under Rule 1(12) to make it a term of the production that it be by way of authorizations executed by the Plaintiff.

[116] Reference should be made again to *Halliday* wherein Mr. Justice Lambert, speaking for the Court, set out what he described as a "set of mechanics" for the production of hospital and clinical records where there is a claim of privilege with respect to some of the documents. The application before the Court was brought under Rule 26(11). The mechanics included decisions with respect to relevance to be made in the first instance by the Plaintiff's Counsel, and the vetting of documents which would allow the Plaintiff to avoid disclosing any information of an embarrassing or confidential nature that was completely irrelevant. The Rules, of course, did not specifically provide for those mechanics. However, Mr. Justice

Lambert makes it clear at p.196 that he was relying on Rule 1(12) which he noted permitted a Judge who makes an order under Rule 26(11) to impose terms or conditions or to give directions. It is also clear from the authorities that Rule 1(12) is not limited or confined to procedural matters, but applies as well to matters of substance. See in this regard Serban, particularly at pp.318 and 319 and the cases therein referred to and relied on.

- [117] Having dealt with Rule 1(12), I do not find it necessary to deal specifically with Rule 26(10). However, looking back, I will note that given the later words of the sub-rule, "in the manner it thinks just", it appears that the Court and a Master of it, would also have jurisdiction under it alone, that is without regard to sub-rule 1(12).
- [118] In summary, I am satisfied that the Master had jurisdiction to make the order compelling the Plaintiff to sign authorizations for the production of the documents by record holders residing within the Province. I am also of the opinion that his order that the Plaintiff produce copies of the records of Kitsilano Workout Fitness Centre directly to the Defendants has not been shown to be clearly wrong. Those documents were relevant, compellable and within the power of the Plaintiff.
- [119] With regard to the question of costs below, the Plaintiff says that the Defendants should not have recovered their costs because he offered to consent to the order. However, this is not the case. As I understand it, the Plaintiff offered to consent to the order compelling him to execute the authorizations if the Defendants would agree that the order should contain Halliday provisions. The Plaintiff then was seeking a concession to which he was not entitled, and the Master found this to be the case. This leaves the question of whether or not the costs should have been in any event of the cause, and I see no reason to disturb that order. The Defendants are also entitled to their costs of this appeal.

[120] The appeal is dismissed with costs.

"S.W. Hood, J."

The Honourable Mr. Justice S.W. Hood

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