

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**(Divisional Court)**

BETWEEN:

RICHARD WARMAN

Plaintiff  
(Respondent)

- and -

CONSTANCE WILKINS-FOURNIER and MARK FOURNIER    Defendants  
(Appellants)

- and -

JOHN DOES 1-8  
(aka klinxx; SaskBigPicture; Droid1963;  
conscience; Faramir; Peter O'Donnell; Padraigh; and HR-101)

- and -

CANADIAN CIVIL LIBERTIES ASSOCIATION

Intervener

**FACTUM OF THE INTERVENER**  
**CANADIAN CIVIL LIBERTIES ASSOCIATION**

## **PART I – THE APPEAL AND THE INTERVENER**

1. The Canadian Civil Liberties Association (CCLA) has been granted leave to intervene in this appeal as a friend of the Court.

## **PART II – OVERVIEW**

2. This appeal will decide whether, in civil litigation, the disclosure of the identity of an anonymous internet poster will be automatically disclosed to a litigant or will be subject to a process that recognizes the importance of freedom of expression and privacy.

3. There are compelling public interest reasons for encouraging and safeguarding anonymous expression on the internet. The internet is a powerful tool for the exercise of freedom of expression and privacy recognized under the *Canadian Charter of Rights and Freedoms*, and anonymity fosters and promotes those values.

4. The CCLA accepts that in some cases disclosure will be appropriate, but it should not be automatic. Instead, a screening process should be required that balances the *Charter* interests at stake with the ability of an aggrieved party to pursue a remedy in court.

5. This Court has already decided, in the context of Crown briefs, that compelling policy reasons may require it to impose a screening process despite the seemingly mandatory disclosure obligations in the *Rules of Civil Procedure*. Equally compelling reasons are at stake in this case.

## **PART III – ISSUES AND ARGUMENT**

6. The CCLA's submissions are focused on the issue of how disclosure obligations under the *Rules of Civil Procedure* should be discharged where the identity information is in the possession of a named party, given the *Charter* rights and values served by anonymous expression on the internet. The following issues are addressed:

- (a) the Court's jurisdiction to require a process that is not expressly set out in the *Rules of Civil Procedure*, supplanting automatic disclosure;
- (b) the process required in other contexts where similar issues have arisen, including criminal search and seizure challenges, *Norwich* and *Irwin Toy* orders;
- (c) the *Charter* rights and values that call for a process here; and,
- (d) a suggested process for this type of case.

**(a) The Court's jurisdiction**

7. The Ontario Court of Appeal has held that the Superior Court has inherent jurisdiction to “control the discovery and production process” under the *Rules of Civil Procedure* to ensure that valuable public and third party interests, including privacy interests, are safeguarded, “even if particular documents do not, strictly speaking, fall within a recognized category of privilege.”

*D.P. v. Wagg* (2004), 71 O.R. (3d) 229 at paras. 27-28 (C.A.), aff'g (2002), 61 O.R. (3d) 746 at paras. 48-50 (Div. Ct.)

8. In *Wagg*, this Court used that jurisdiction to require a screening process to address disclosure issues regarding Crown briefs in the possession of parties to civil litigation, despite the mandatory nature of the *Rules*. The process was fashioned by the Divisional Court, and upheld by the Court of Appeal.

*Wagg* at paras. 48-50 (Div. Ct), para. 27 (C.A.)

9. Despite the fact that a straightforward application of Rule 30.02 would have required disclosure, the Court in *Wagg* found that a Crown brief should not automatically be produced in civil litigation “merely because the contents are relevant” since its contents might be subject to privacy interests and other state interests. Instead, courts should balance the public interests at stake in producing the documents against the interests of the parties to the litigation.

*Wagg* at paras. 14, 27-28 (C.A.)

10. The Court of Appeal in *Wagg* held that the implied undertaking rule in Rule 30.1 was insufficient to achieve that balance. A formal safeguard was required to adequately protect individuals who “find their privacy invaded” through production.

*Wagg* at paras. 48-49 (C.A.)

11. Under *Wagg*, where a Crown brief is in the possession of a party to a litigation, and relevant, the following steps are required:

- (a) that party must disclose its existence in its affidavit of documents, object to producing it, and give notice to the appropriate state authorities (e.g., the Attorney-General and the police);
- (b) the Crown brief must not be produced unless either:

- (i) those authorities and the parties consent to production; or,
- (ii) the court has determined whether the contents should be produced.

In making its determination, the court must consider, among other things, whether there is a prevailing social value and public interest in non-disclosure that overrides the public interest in promoting the administration of justice through full access of litigants to relevant information.

*Wagg* at para. 17 (C.A.)

12. The Court below relied on *Kitchenham* to support the conclusion that if the documents are relevant and not privileged, they must be produced. Yet that case relates to the deemed undertaking rule. It does not deal with privacy issues regarding persons not before the court, let alone the issue of *Charter* rights and values.

*Kitchenham v. AXA Insurance Canada*, 2008 ONCA 877

13. As set out in *Wagg*, the Court has jurisdiction to impose a screening process. Further, there are compelling reasons to do so in this case, including the right of freedom of expression guaranteed by section 2(b) of the *Charter*, as well as privacy interests recognized under the *Charter*.

**(b) Other contexts**

14. This is not the first case where a court has had to address the issue of disclosure of the identity of a party. The courts have dealt with this issue in a number of contexts, in each case establishing a process that provides for a balancing of the interests at stake.

15. **Criminal context.** Since section 8 of the *Charter* applies to informational privacy, the courts have developed a test to determine whether, in any particular case, there is a “reasonable expectation of privacy” based on the “context of the disclosure and the totality of the circumstances.” The test requires the court to consider not only the accused’s subjective expectation of privacy but a number of other factors.

*R. v. Cuttell*, [2009] O.J. No. 4053 at paras. 14-16 (Ont. C.J.), citing *R. v. Plant*, [1993] 3 S.C.R. 281 at 292, 293; *R. v. Edwards*, [1996] 1 S.C.R. 128 at para. 45; *R. v. Tessling*, [2004] 3 S.C.R. 432 at para. 32

16. The issue of identifying an internet user has arisen with some frequency in this context, with different outcomes depending on the circumstances. The court's most recent pronouncement holds that "there is a reasonable expectation of privacy" in a party's subscriber information, which links his or her identity to internet usage.

*Cuttell* at paras 3, 27

17. A name and address can be a "critical link between the [internet user] and very private information." None of that information is meaningful until it is associated with the person, by their name and contact information. It is once the person's identity is known that his or her privacy is invaded.

*Cuttell* at paras. 22-25

18. **Norwich orders.** In civil litigation, an equitable remedy of "pre-action discovery" called a "Norwich order" has developed to permit a plaintiff to discover the identity of a proposed defendant. There is a multi-part test that a plaintiff must meet to obtain a *Norwich* order. There is no automatic entitlement.

*Norwich Pharmacal Co. v. Comrs. of Customs and Excise*, [1974] A.C. 133 (H.L.); *GEA Group AG v. Flex-N-Gate Corporation* (2009), 96 O.R. (3d) 481 at paras. 40-54 (C.A.)

19. *Norwich* orders are now routinely sought in order to attempt to discover the identity of anonymous internet users. In one leading case, *BMG*, music companies wished to sue internet users and brought third party motions against internet service providers seeking disclosure of their customer information in order to identify the anonymous internet users.

*BMG Canada Inc. v. John Doe*, [2005] 4 F.C.R. 81 at paras. 39-41 (F.C.A.), aff'g [2004] 3 F.C.R. 241 (F.C.)

20. The Federal Court of Appeal in *BMG* followed the *Norwich* cases, holding that the following factors govern the determination of whether to grant the order:

- (a) the applicant must establish a *bona fide* claim against the unknown alleged wrongdoer;
- (b) the third party from whom discovery is sought must be in some way involved in the matter under dispute;

- (c) the third party must be the only practical source of the information available to the applicant;
- (d) the third party must be reasonably compensated for expenses and legal costs arising out of compliance with the discovery order; and
- (e) the public interests in favour of disclosure must outweigh the legitimate privacy concerns.

*BMG* at paras. 15(e), 30, 32 (F.C.A.), para. 13 (F.C.)

21. *BMG* illustrates that a court must have regard for the significant privacy interests of the anonymous internet user before granting a *Norwich* order. In reaching its decision, the Federal Court of Appeal dealt extensively with the internet users' privacy interests, stating that they are "significant and they must be protected."

*BMG* at para. 38 (F.C.A.)

22. The Ontario Court of Appeal recently considered *Norwich* orders outside the internet context and observed that a *Norwich* order is intended to be an exceptional, though flexible, equitable remedy. Disclosure is not automatic.

*GEA* at paras. 48-51, 62, 91

23. *Irwin Toy*. A very similar approach was taken by the Court in *Irwin Toy*, a defamation case where the plaintiff wished to sue the anonymous author of certain emails. While it does not appear that the *Norwich* cases were drawn to the Court's attention in *Irwin Toy*, it proceeded on similar principles.

24. The Court concluded that the disclosure of the identity and address of the defendant should not be automatic. It held that the moving party must first demonstrate on affidavit material that it has a *prima facie* case against "John Doe" in respect of the allegations made in the Statement of Claim. Since the plaintiff had shown a *prima facie* case and had been unable to obtain the information by other means, the Court concluded that the information should be disclosed.

*Irwin Toy Ltd. v. Joe Doe* (2000), 12 C.P.C. (5th) 103 at paras. 11-12, 18 (Ont. S.C.J.) (WL)

25. Both *Irwin Toy* and *BMG* are now routinely referenced in motions for third party disclosure of internet user identities, including some of the authorities before this Court.

**(c) Charter rights and the public interest**

26. This Court must consider the right of freedom of expression guaranteed by section 2(b) of the *Charter*, as well as the privacy interests recognized under the *Charter*. Courts, in interpreting legislation, must do so in a manner consistent with *Charter* rights and values. These principles apply to the disclosure obligations under the *Rules of Civil Procedure*.

*Wagg*, at paras. 65-66 (Div Ct.), para. 61 (C.A.)

27. **Freedom of Expression.** As expressed by the Supreme Court of Canada, “among the most fundamental rights possessed by Canadians is freedom of expression. It makes possible our liberty, our creativity and our democracy. It does this by protecting not only the ‘good’ and popular expression, but also unpopular or even offensive expression. The right to freedom of expression rests on the conviction that the best route to truth, individual flourishing and peaceful coexistence in a heterogeneous society in which people hold divergent and conflicting beliefs lies in the free flow of ideas and images. If we do not like an idea or an image, we are free to argue against it or simply turn away. But, absent some constitutionally adequate justification, we cannot forbid a person from expressing it.”

*R. v. Sharpe*, [2001] 1 S.C.R. 45 at para. 21

28. Notwithstanding these clear principles, the Court below appears to have been motivated, at least in part, by the nature of the speech at issue in this claim, which the Court held was controversial. To do so was an error.

*Reasons for Decision*, Appeal Book and Compendium, Tab 4 at para. 33

29. **The internet and freedom of expression.** As a communications medium, the internet is unprecedented in history. The Superior Court of Justice recently observed that “[t]he internet is the most revolutionary communications tool since the printing press. It is extraordinarily accessible and powerful... The user has the ability to roam the internet with anonymity to read and write just about anything he or she chooses.”

*York University v. Bell Canada Enterprises*, [2009] O.J. No. 3689 at para. 1 (Ont. S.C.J.)

30. Anonymous expression on the internet promotes the exercise of freedoms under the *Charter* since it fosters a veritable “marketplace of ideas” online. Anonymity reduces the possibility of identification and fear of reprisal and encourages individuals to engage in legitimate, even if unpopular, expression. The internet facilitates debate and political participation on controversial topics. It encourages open, robust debate and airing of minority views. The ability to speak one’s mind without attribution facilitates expression of otherwise socially repressed ideas. It permits participation in public debate by those who would otherwise remain silent out of fear of persecution, loss of status or ostracism. Words online can be heard and diffused to an extent that conventional methods of speech may never reach.

*Irwin Toy* at paras. 10-11; *York University* at para. 1; *Elections Canada*, [2003] O.J. No. 3420 at para. 38 (Ont. C.J.); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) at 8-9 (WL); *A.C.L.U. v. Reno*, 521 U.S. 844 (1997) at 8-9, 18, 27 (WL); *Talley v. California*, 362 U.S. 60 (1960) at 4 (WL)

31. The relationship between freedom of expression and anonymity was addressed in *Elections Canada*, where the Court found that the removal of individuals’ right to remain anonymous constituted an unjustified breach of the *Charter* right to freedom of expression.

*Elections Canada*, [2003] O.J. No. 3420 at paras. 18, 20-21, 34, 36-38, section 1 analysis [2003] O.J. No. 3939 at paras. 29-30, 32 (Ont. C.J.)

32. The *Elections Canada* decision is consistent with the well-established law in the United States, which has repeatedly held that a person’s decision to remain anonymous is an aspect of the freedom of speech protected by the First Amendment. This principle was developed before the internet, and recognizes that people from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The USSC has said, “It is plain that anonymity has sometimes been assumed for the most constructive purposes.”

*McIntyre* at 8; *Talley* at 4

33. The USSC has not yet dealt with disclosure of the identity of anonymous internet users. State courts have recognized that the right to engage in anonymous speech on the internet is a protected First Amendment right. These cases have held that a party’s constitutional right to communicate anonymously on the internet should not be undermined absent compelling reasons.

They also recognize the risk that removing anonymity could chill legitimate expression by encouraging internet posters to engage in self-censorship. A range of standards have been developed that plaintiffs must satisfy in order to obtain identity information.

*A.C.L.U. v. Reno* at 18-19, 27; *McVicker v. King*, 2010 U.S. Dist. LEXIS 18864 at 4, 7-8 (Pa. Dist. Ct.); *A.C.L.U. of Georgia v. Miller*, 977 F. Supp 1228 (1997) at 8 (N.D. Ga.) (WL)

34. **Defamation and freedom of expression.** The common law may be modified to bring it into harmony with *Charter*, and in a series of cases the Supreme Court has made it clear that freedom of expression must be considered in defamation claims and must be given proper weight.

*Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at paras. 92, 100; *WIC Radio v. Simpson*, [2008] 2 S.C.R. 420 at paras. 14-16; *Grant v. Torstar Corp.*, 2009 SCC 61 at paras. 44, 57, 65-66

35. This year, the Court expanded defamation defences, giving due weight to freedom of expression: “While the law must protect reputation, the level of protection currently accorded by the law — in effect a regime of strict liability — is not justifiable. The law of defamation currently accords no protection for statements on matters of public interest published to the world at large if they cannot, for whatever reason, be proven to be true. But such communications advance both free expression rationales mentioned above — democratic discourse and truth-finding — and therefore require some protection within the law of defamation. When proper weight is given to the constitutional value of free expression on matters of public interest, the balance tips in favour of broadening the defences available to those who communicate facts it is in the public’s interest to know.”

*Grant* at para. 65

36. Thus, the commencement of a defamation claim does not trump freedom of expression, quite the contrary. Proper weight must be given to freedom of expression.

37. **Privacy.** Quite apart from the role of anonymity in fostering freedom of expression, the privacy interests of anonymous posters must be considered. The Supreme Court has recognized that privacy “has been accorded constitutional protection”. Privacy, including informational privacy, is “[g]rounded in a [person’s] physical and moral autonomy” and “is essential for the well-being of the individual.” In short, privacy is a value deserving of protection.

*Hill* at para. 121

38. The public has a legitimate expectation of privacy in individuals' use of the internet. The cases have recognized that "there are good policy reasons for preserving anonymity of the internet" and that citizens have an implicit understanding that, to some degree at least, their identities will be concealed when they use the internet anonymously or under a pseudonym.

*Irwin Toy* at paras. 10-11; *York University* at para. 17; *BMG* at paras. 39-41 (F.C.A.)

39. In *BMG*, the Court recognized that the link between an individual's name and the activities they perform on the internet is an intrusion into that person's private life that "puts individuals at great personal risk but also subjects their views and beliefs to untenable scrutiny."

*BMG* at para. 4 (F.C.A.)

40. The ability to remain anonymous on the internet enhances privacy and therefore merits recognition and a degree of protection by the courts, independently from freedom of expression.

**(d) Screening process required**

41. Given the importance of the *Charter*-protected freedom of expression as well as privacy interests, a screening process should be required where an internet poster's identity is sought from a party to civil litigation.

42. There is no principled reason to abandon the approach adopted in the cases following *Norwich* and *Irwin Toy* and instead endorse automatic disclosure. As stated in *Irwin Toy*, anonymity should not be "shattered for the price of an issuance of a spurious Statement of Claim and the benefits obtained by the anonymity lost in inappropriate circumstances".

*Irwin Toy* at para. 17

43. Otherwise, there is a risk that the disclosure obligations of the *Rules of Civil Procedure* would be misused by plaintiffs with no legitimate claim who commence a frivolous action with the sole purpose of "unmasking" anonymous internet commentators, silencing critics or deterring others from speaking out on controversial issues. This would have the effect of violating individuals' expectation of privacy and imposing a "chill" on legitimate expression.

*Irwin Toy* at para. 17

44. If disclosure is automatic, a plaintiff could evade the principled approach developed in *BMG* and *Irwin Toy* by simply naming the internet service provider as a defendant in order to discover the information even though it is not the real target of the claim.

45. Most importantly, automatic disclosure of identity information is contrary to *Charter* rights and values. Courts ought not to apply the discovery provisions of the *Rules* in a manner that undermines freedom of expression or privacy. Instead, the courts should balance the right of a plaintiff to seek redress against the rights served by anonymous internet activity including freedom of expression and privacy. A process is required to safeguard these interests.

46. **Simplified Procedure.** The respondent relies on the obligation in Rule 76 to provide a list of witnesses and relies on the absence of oral discovery. Neither provide a basis to disregard the *Charter* rights and values at stake in this case. The anonymous internet posters are not witnesses in the conventional sense – disclosure is sought in order to sue them. Further, the disclosure issue arises in both documentary and oral discovery. The recent changes to the *Rules* now provide for oral discovery in Rule 76 cases, and questions seeking identity information in oral discovery should also be subject to a screening process.

47. The Court may be concerned about the potential for added costs associated with a screening process. That issue was raised in *Wagg*, when the Court of Appeal endorsed the screening process for Crown briefs. Simply put, the importance of the *Charter* rights and values more than justifies the potential for incremental costs.

*Wagg* at para. 50 (C.A.)

**(e) Suggested process**

48. Where disclosure of documents identifying an anonymous internet user is in the possession of a party and relevant to a civil proceeding, the following process should be required:

- (a) the party with the documents should disclose their existence in the affidavit of documents but object to producing them unless the anonymous party has already consented to the disclosure of the name;
- (b) if the party seeking the documents still wishes to obtain them, that party may bring a motion for production;

- (c) to order production, the Court must be satisfied that
  - (i) there is a *prima facie* case against the party whose identity is sought;
  - (ii) the party seeking disclosure has taken reasonable steps to identify the anonymous party and has been unable to do so; and,
  - (iii) the public interests favoring disclosure outweigh concerns for freedom of expression and privacy interests under the *Charter*.

49. ***Prima facie* claim.** Given that *Charter* rights are at stake, a *prima facie* claim should be demonstrated, rather than simply a *bona fide* claim. Evidence supporting the merits of the case may be shown by affidavit material filed with the court.

*York University* at para. 25; *Irwin Toy* at para. 18

50. The requirement to establish a *prima facie* case of actionable harm prevents unjustifiable uses of the discovery process by a plaintiff and also acknowledges the potential abuses of anonymous internet use. Those who are legitimately injured as a result of anonymous online activity will be in a position to satisfy this requirement readily.

51. **Other procedural protections.** Although the courts have not considered notice necessary in every case, where appropriate the Court may also require that an anonymous defendant be given notice of the proceedings. Similarly, in an appropriate case a court may order the identity information disclosed to the plaintiff, but ensure that the party is referred to using a pseudonym throughout the litigation.

*York University* at paras. 24, 38

52. **Balancing of interests.** Under the above process, the court would balance the benefit of revealing the desired information against the prejudice in releasing the information. In the balancing process the court would consider the *Charter* rights and values at stake in the specific factual context. Defences may be considered. The principles underlying defences to defamation also engage *Charter* rights and values, including the importance of the search for the truth and of democratic governance. Government by the free opinion of an open society demands virtually unobstructed access to and diffusion of ideas. Disclosure ought not be ordered in every case.

*Grant* at paras. 48-49

53. At this stage, the court would consider whether it would be unfair to require the plaintiff to proceed with an action without identifying that defendant, and whether, without the information, the party seeking disclosure would be without a remedy.

*York University* at para. 30; *BMG* at paras. 15(e), 39 (F.C.A.); *Irwin Toy* at para. 14

54. In defamation claims such as this one, a plaintiff can obtain full recovery from the named defendant, with no need to pursue others for compensation since all those jointly responsible for a publication are liable for it (subject to the defence of innocent dissemination, which is not advanced here).

Raymond E. Brown, *The Law of Defamation in Canada*, looseleaf, 2nd ed. (Toronto: Carswell 1994) at pp. 7-17, 7-119 – 7-124

55. **Consent.** A court process would not be needed in every case. Where there is consent, the documents would automatically be disclosed.

*York University* at para. 32; *Wagg* at para. 51 (C.A.)

56. The CCLA submits that this screening process adequately balances the value of anonymity with the right of an aggrieved party to pursue a remedy, and does not present an unjustifiable impediment to the disposition of a civil claim.

#### PART IV – ORDER REQUESTED

57. The CCLA takes no position on the ultimate disposition of this appeal on the facts of this case. In accordance with the order granting leave to intervene, the CCLA does not seek costs and requests that it not be liable for the costs of any party.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

  
\_\_\_\_\_  
Wendy Matheson

  
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Natalie Biderman

Lawyers for the Intervener  
Canadian Civil Liberties Association

## SCHEDULE A - LIST OF AUTHORITIES

1. *D.P. v. Wagg* (2004), 71 O.R. (3d) 229 28 (C.A.), aff'g (2002), 61 O.R. (3d) 746 (Div. Ct.)
2. *Kitchenham v. AXA Insurance Canada*, 2008 ONCA 877
3. *R. v. Cuttell*, [2009] O.J. No. 4053 (Ont. C.J.)
4. *Norwich Pharmacal Co. v. Comrs. of Customs and Excise*, [1974] A.C. 133 (H.L.)
5. *GEA Group AG v. Flex-N-Gate Corporation* (2009), 96 O.R. (3d) 481 (C.A.) (QL)
6. *BMG Canada Inc. v. John Doe*, [2005] 4 F.C.R. 81 (F.C.A.), aff'g [2004] 3 F.C.R. 241 (F.C.)
7. *Irwin Toy Ltd. v. Joe Doe* (2000), 12 C.P.C. (5th) 103 (Ont. S.C.J.) (WL)
8. *R. v. Sharpe*, [2001] 1 S.C.R. 45
9. *York University v. Bell Canada Enterprises*, [2009] O.J. No. 3689 (Ont. S.C.J.)
10. *Canada (Elections Canada) v. National Citizen's Coalition Inc.*, [2003] O.J. No. 3420 (Ont. C.J.); [2003] O.J. No. 3939 (Ont. C.J.)
11. *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) (U.S. Sup. Ct.) (WL)
12. *A.C.L.U. v. Reno*, 521 U.S. 844 (1997) (WL)
13. *Talley v. California*, 362 U.S. 60 (1960) at 4 (WL)
14. *McVicker v. King*, 2010 U.S. Dist. LEXIS 18864 (2010) (Pa. Dist. Ct.)
15. *A.C.L.U. of Georgia v. Miller*, 977 F. Supp 1228 (1997) (N.D. Ga.) (WL)
16. *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130
17. *WIC Radio v. Simpson*, [2008] 2 S.C.R. 420
18. *Grant v. Torstar Corp.*, 2009 SCC 61
19. Raymond E. Brown, *The Law of Defamation in Canada*, looseleaf, 2nd ed. (Toronto: Carswell 1994)

## SCHEDULE B - STATUTES AND REGULATIONS

### *Canadian Charter of Rights and Freedoms*

s. 2 Everyone has the following fundamental freedoms: ...

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; ...

### *Rules of Civil Procedure*

#### **RULE 30 - SCOPE OF DOCUMENTARY DISCOVERY**

##### *Disclosure*

30.02 (1) Every document relevant to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in rules 30.03 to 30.10, whether or not privilege is claimed in respect of the document. R.R.O. 1990, Reg. 194, r. 30.02 (1); O. Reg. 438/08, s. 26.

##### *Production for Inspection*

(2) Every document relating to any matter in issue in an action that is in the possession, control or power of a party to the action shall be produced for inspection if requested, as provided in rules 30.03 to 30.10, unless privilege is claimed in respect of the document. R.R.O. 1990, Reg. 194, r. 30.02 (2); O. Reg. 438/08, s. 26.

...

#### **RULE 76 SIMPLIFIED PROCEDURE**

##### **APPLICATION OF RULE**

76.01 (1) The simplified procedure set out in this Rule does not apply to,

- (a) actions under the Class Proceedings Act, 1992;
- (b) actions under the Construction Lien Act, except trust claims;
- (c) Rule 77. O. Reg. 19/03, s. 20; O. Reg. 131/04, s. 18.

##### *Application of Other Rules*

(2) The rules that apply to an action apply to an action that is proceeding under this Rule, unless this Rule provides otherwise. O. Reg. 284/01, s. 25.

##### **AVAILABILITY OF SIMPLIFIED PROCEDURE**

##### *When Mandatory*

76.02 (1) The procedure set out in this Rule shall be used in an action if the following conditions are satisfied:

1. The plaintiff's claim is exclusively for one or more of the following:
  - i. Money.
  - ii. Real property.
  - iii. Personal property.
2. The total of the following amounts is \$100,000 or less exclusive of interest and costs:
  - i. The amount of money claimed, if any.
  - ii. The fair market value of any real property and of any personal property, as at the date the action is commenced. O. Reg. 284/01, s. 25; O. Reg. 438/08, s. 51 (1).

(2) If there are two or more plaintiffs, the procedure set out in this Rule shall be used if each plaintiff's claim, considered separately, meets the requirements of subrule (1). O. Reg. 284/01, s. 25.

(2.1) If there are two or more defendants, the procedure set out in this Rule shall be used if the plaintiff's claim against each defendant, considered separately, meets the requirements of subrule (1). O. Reg. 132/04, s. 18 (1).

#### When Optional

(3) The procedure set out in this Rule may be used in any other action at the option of the plaintiff, subject to subrules (4) to (9). O. Reg. 284/01, s. 25.

#### Originating Process

(4) The statement of claim (Form 14A, 14B or 14D) or notice of action (Form 14C) shall indicate that the action is being brought under this Rule. O. Reg. 284/01, s. 25.

#### Action Continues to Proceed Under Rule

- (5) An action commenced under this Rule continues to proceed under this Rule unless,
- (a) the defendant objects in the statement of defence to the action proceeding under this Rule because the plaintiff's claim does not comply with subrule (1), and the plaintiff does not abandon in the reply the claims or parts of claims that do not comply;
  - (b) a defendant by counterclaim, crossclaim or third party claim objects in the statement of defence to the counterclaim, crossclaim or third party claim proceeding under this Rule because the counterclaim, crossclaim or third party claim does not comply with subrule (1), and the defendant does not abandon in the reply to the counterclaim, crossclaim or third party claim the claims or parts of claims that do not comply; or
  - (c) the defendant makes a counterclaim, crossclaim or third party claim that does not comply with subrule (1) and states in the defendant's pleading that the counterclaim, crossclaim or third party claim is to proceed under the ordinary procedure. O. Reg. 284/01, s. 25; O. Reg. 14/04, s. 39 (1).

#### Continuance Under Ordinary Procedure — Where Notice Required

(6) If an action commenced under this Rule may no longer proceed under this Rule because of an amendment to the pleadings under Rule 26 or as a result of the operation of subrule (5),

- (a) the action is continued under the ordinary procedure; and
- (b) the plaintiff shall deliver, after all the pleadings have been delivered or at the time of amending the pleadings, as the case may be, a notice (Form 76A) stating that the action and any related proceedings are continued as an ordinary action. O. Reg. 284/01, s. 25; O. Reg. 14/04, s. 39 (2); O. Reg. 438/08, s. 51 (2).

#### Continuance Under Simplified Procedure — Where Notice Required

(7) An action that was not commenced under this Rule, or that was commenced under this Rule but continued under the ordinary procedure, is continued under this Rule if,

- (a) the consent of all the parties is filed; or
- (b) no consent is filed but,
  - (i) the plaintiff's pleading is amended under Rule 26 to comply with subrule (1), and
  - (ii) all other claims, counterclaims, crossclaims and third party claims comply with this Rule. O. Reg. 263/03, s. 9; O. Reg. 14/04, s. 39 (3); O. Reg. 132/04, s. 18 (2).

(8) The plaintiff shall deliver a notice (Form 76A) stating that the action and any related proceedings are continued under this Rule. O. Reg. 284/01, s. 25.

#### Effect of Abandonment

(9) A party who abandons a claim or part of a claim or amends a pleading so that the claim, counterclaim, crossclaim or third party claim complies with subrule (1) may not bring the claim or part in any other proceeding. O. Reg. 284/01, s. 25.

## AFFIDAVIT OF DOCUMENTS

### Copies of Documents

76.03 (1) A party to an action under this Rule shall, within 10 days after the close of pleadings and at the party's own expense, serve on every other party,

- (a) an affidavit of documents (Form 30A or 30B) disclosing to the full extent of the party's knowledge, information and belief all documents relevant to any matter in issue in the action that are or have been in the party's possession, control or power; and
- (b) copies of the documents referred to in Schedule A of the affidavit of documents. O. Reg. 284/01, s. 25; O. Reg. 206/02, s. 19; O. Reg. 438/08, s. 52.

#### List of Potential Witnesses

(2) The affidavit of documents shall include a list of the names and addresses of persons who might reasonably be expected to have knowledge of matters in issue in the action, unless the court orders otherwise. O. Reg. 284/01, s. 25.

#### Effect of Failure to Disclose

(3) At the trial of the action, a party may not call as a witness a person whose name has not been disclosed in the party's affidavit of documents or any supplementary affidavit of documents, unless the court orders otherwise. O. Reg. 284/01, s. 25.

#### Lawyer's Certificate

(4) The lawyer's certificate under subrule 30.03 (4) (full disclosure in affidavit) shall include a statement that the lawyer has explained to the deponent the necessity of complying with subrules (1) and (2). O. Reg. 284/01, s. 25.

#### NO WRITTEN DISCOVERY, CROSS-EXAMINATION ON AN AFFIDAVIT OR EXAMINATION OF A WITNESS

76.04 (1) The following are not permitted in an action under this Rule:

1. Examination for discovery by written questions and answers under Rule 35.
2. Cross-examination of a deponent on an affidavit under rule 39.02.
3. Examination of a witness on a motion under rule 39.03. O. Reg. 438/08, s. 53.

#### Limitation on Oral Discovery

(2) Despite rule 31.05.1 (time limit on discovery), no party shall, in conducting oral examinations for discovery in relation to an action proceeding under this Rule, exceed a total of two hours of examination, regardless of the number of parties or other persons to be examined. O. Reg. 438/08, s. 53.

#### MOTIONS

##### Motion Form

76.05 (1) The moving party shall serve a motion form (Form 76B) in accordance with rule 37.07 and shall submit it to the court before the motion is brought and heard. O. Reg. 284/01, s. 25; O. Reg. 438/08, s. 54.

##### Place of Hearing

(2) Unless the parties agree otherwise or the court orders otherwise, the motion shall be heard in the county where the proceeding was commenced or to which it has been transferred under rule 13.1.02. O. Reg. 14/04, s. 40.

##### Procedure

- (3) Depending on the practical requirements of the situation, the motion may be made,
  - (a) with or without supporting material or a motion record;
  - (b) by attendance, in writing, by fax or under rule 1.08 (telephone and video conferences). O. Reg. 284/01, s. 25.

##### Motions Dealt With by Registrar

(4) When a motion described in subrule (5) meets one of the following conditions, the registrar shall make an order granting the relief sought:

1. The motion is for an order on consent, the consent of all parties is filed and the consent states that no party affected by the order is under disability.
2. No responding material is filed and the notice of motion or the motion form states that no party affected by the order is under disability. O. Reg. 284/01, s. 25.

(5) Subrule (4) applies to a motion for,

- (a) amendment of a pleading or notice of motion;

- (b) addition, deletion or substitution of a party whose consent is filed;
- (c) removal of a lawyer as lawyer of record;
- (d) setting aside the noting of a party in default;
- (e) setting aside a default judgment;
- (f) discharge of a certificate of pending litigation;
- (g) security for costs in a specified amount; or
- (h) dismissal of a proceeding with or without costs. O. Reg. 284/01, s. 25; O. Reg. 575/07, s. 34.

#### Disposition

- (6) The court or registrar shall record the disposition of the motion on the motion form. O. Reg. 284/01, s. 25.
  - (7) No formal order is required unless,
    - (a) the court or registrar orders otherwise;
    - (b) an appeal is made to a judge; or
    - (c) an appeal or motion for leave to appeal is made to an appellate court. O. Reg. 284/01, s. 25.
- 76.06, 76.07 REVOKED: O. Reg. 438/08, s. 55.

#### SETTLEMENT DISCUSSION AND DOCUMENTARY DISCLOSURE

76.08 Within 60 days after the filing of the first statement of defence or notice of intent to defend, the parties shall, in a meeting or telephone call, consider whether,

- (a) all documents relevant to any matter in issue have been disclosed; and
- (b) settlement of any or all issues is possible. O. Reg. 284/01, s. 25; O. Reg. 438/08, s. 56.

#### HOW DEFENDED ACTION IS SET DOWN FOR TRIAL OR SUMMARY TRIAL

##### Notice of Readiness for Pre-Trial Conference

76.09 (1) Despite rule 48.02 (how action set down for trial), the plaintiff shall, within 180 days after the first statement of defence or notice of intent to defend is filed, set the action down for trial by serving a notice of readiness for pre-trial conference (Form 76C) on every party to the action and any counterclaim, crossclaim or third party claim and forthwith filing the notice with proof of service. O. Reg. 284/01, s. 25; O. Reg. 438/08, s. 57.

- (2) If the plaintiff does not act under subrule (1), any other party may do so. O. Reg. 284/01, s. 25.

##### Certificate

(3) The party who sets the action down for trial shall certify in the notice of readiness for pre-trial conference that there was a settlement discussion. O. Reg. 284/01, s. 25.

#### PRE-TRIAL CONFERENCE

##### Notice

76.10 (1) The registrar shall serve notice of a pre-trial conference at least 45 days before the scheduled date. O. Reg. 284/01, s. 25.

- (2), (3) REVOKED: O. Reg. 438/08, s. 58 (1).

##### Documents

(4) Despite rule 50.04 (materials to be filed before pre-trial conference), at least five days before the pre-trial conference, each party shall,

- (a) file,
  - (i) a copy of the party's affidavit of documents and copies of the documents relied on for the party's claim or defence,
  - (ii) a copy of any expert report, and
  - (iii) any other material necessary for the conference; and
- (b) deliver,

- (i) a two-page statement setting out the issues and the party's position with respect to them, and
- (ii) a trial management checklist (Form 76D). O. Reg. 284/01, s. 25; O. Reg. 438/08, s. 58 (2).

#### Trial Date

(5) The pre-trial conference judge or case management master shall fix a date for trial, subject to the direction of the regional senior judge. O. Reg. 284/01, s. 25; O. Reg. 438/08, s. 58 (3).

#### Mode of Trial

(6) The parties may agree that the trial shall be an ordinary trial or a summary trial under rule 76.12; if they do not agree, the pre-trial conference judge or case management master shall determine the mode of trial that is appropriate in all the circumstances. O. Reg. 284/01, s. 25; O. Reg. 438/08, s. 58 (3).

(7) If the trial is to be a summary trial under rule 76.12, the pre-trial conference judge or case management master,

- (a) shall fix a date for the delivery of all the parties' affidavits; and
- (b) may vary the order and time of presentation. O. Reg. 457/01, s. 9; O. Reg. 438/08, s. 58 (3, 4).

#### PLACING DEFENDED ACTION ON TRIAL LIST

##### Registrar

76.11 (1) The registrar shall place a defended action on the appropriate trial list immediately after the pre-trial conference. O. Reg. 284/01, s. 25.

##### Trial Record

(2) At least 10 days before the date fixed for trial, the party who set the action down for trial shall serve a trial record on every party to the action and any counterclaim, crossclaim or third party claim, and file the record with proof of service. O. Reg. 284/01, s. 25.

(3) In the case of an ordinary trial, the trial record shall be prepared in accordance with rule 48.03. O. Reg. 284/01, s. 25.

(4) In the case of a summary trial under rule 76.12, the trial record shall contain, in consecutively numbered pages arranged in the following order,

- (a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter;
- (b) a copy of the pleadings, including those relating to any counterclaim, crossclaim or third party claim;
- (c) a copy of any demand or order for particulars of a pleading and the particulars delivered in response;
- (d) a copy of any order respecting the trial;
- (e) a copy of all the affidavits served by all the parties for use on the summary trial; and
- (f) a certificate signed by the lawyer of the party filing the trial record, stating that it contains the documents described in clauses (a) to (e). O. Reg. 284/01, s. 25; O. Reg. 575/07, s. 1.

#### SUMMARY TRIAL

##### Procedure

76.12 (1) At a summary trial, the evidence and argument shall be presented as follows, subject to any direction under subrule 76.10 (7):

1. The plaintiff shall adduce evidence by affidavit.
  - 1.1 The plaintiff may examine the deponent of any affidavit served by the plaintiff for not more than 10 minutes.
2. A party who is adverse in interest may cross-examine the deponent of any affidavit served by the plaintiff.
3. The plaintiff may re-examine any deponent who is cross-examined under this subrule for not more than 10 minutes.
4. When any cross-examinations and re-examinations of the plaintiff's deponents are concluded, the defendant shall adduce evidence by affidavit.
  - 4.1 The defendant may examine the deponent of any affidavit served by the defendant for not more than 10 minutes.

5. A party who is adverse in interest may cross-examine the deponent of any affidavit served by a defendant.
6. A party shall complete all of the party's cross-examinations within 50 minutes.
7. A defendant may re-examine any deponent who is cross-examined under this subrule for not more than 10 minutes.
8. When any cross-examinations and re-examinations of the defendant's deponents are concluded, the plaintiff may, with leave of the trial judge, adduce any proper reply evidence.
9. After the presentation of evidence, each party may make oral argument for not more than 45 minutes. O. Reg. 284/01, s. 25; O. Reg. 438/08, s. 59 (1).

(2) The trial judge may extend a time provided in subrule (1). O. Reg. 284/01, s. 25.

(3) A party who intends to examine or cross-examine the deponent of an affidavit at the summary trial shall, at least 10 days before the date fixed for trial, give notice of that intention to the party who filed the affidavit, who shall arrange for the deponent's attendance at the trial. O. Reg. 284/01, s. 25; O. Reg. 438/08, s. 59 (2).

#### Judgment after Summary Trial

(4) The judge shall grant judgment after the conclusion of the summary trial. O. Reg. 284/01, s. 25.

#### COSTS CONSEQUENCES

##### Opting In

76.13 (1) Regardless of the outcome of the action, if this Rule applies as the result of amendment of the pleadings under subrule 76.02 (7), the party whose pleadings are amended shall pay, on a substantial indemnity basis, the costs incurred by the opposing party up to the date of the amendment that would not have been incurred had the claim originally complied with subrule 76.02 (1), (2) or (2.1), unless the court orders otherwise. O. Reg. 284/01, s. 25; O. Reg. 132/04, s. 19 (1).

##### Plaintiff Denied Costs

(2) Subrules (3) to (10) apply to a plaintiff who obtains a judgment that satisfies the following conditions:

1. The judgment awards exclusively one or more of the following:

- i. Money.
- ii. Real property.
- iii. Personal property.

2. The total of the following amounts is \$100,000 or less, exclusive of interest and costs:

- i. The amount of money awarded, if any.
- ii. The fair market value of any real property and of any personal property awarded, as at the date the action is commenced. O. Reg. 284/01, s. 25; O. Reg. 438/08, s. 60 (1).

(3) The plaintiff shall not recover any costs unless,

(a) the action was proceeding under this Rule at the commencement of the trial; or

(b) the court is satisfied that it was reasonable for the plaintiff,

(i) to have commenced and continued the action under the ordinary procedure, or

(ii) to have allowed the action to be continued under the ordinary procedure by not abandoning claims or parts of claims that do not comply with subrule 76.02 (1), (2) or (2.1). O. Reg. 206/02, s. 20; O. Reg. 132/04, s. 19 (2); O. Reg. 438/08, s. 60 (2).

(4) Subrule (3) applies despite subrule 49.10 (1) (plaintiff's offer to settle). O. Reg. 284/01, s. 25.

(5) Subrule (3) does not apply if this Rule was unavailable because of the counterclaim, crossclaim or third party claim of another party. O. Reg. 284/01, s. 25.

##### Plaintiff may be Ordered to Pay Defendant's Costs

(6) The plaintiff may, in the trial judge's discretion, be ordered to pay all or part of the defendant's costs, including substantial indemnity costs, in addition to any costs the plaintiff is required to pay under subrule 49.10 (2) (defendant's offer to settle). O. Reg. 284/01, s. 25.

##### Defendant Objecting to Simplified Procedure

(7) In an action that includes a claim for real or personal property, if the defendant objected to proceeding under this Rule on the ground that the property's fair market value exceeded \$100,000 at the date the action was commenced and the court finds the value did not exceed that amount at that date, the defendant shall pay, on a substantial indemnity basis, the costs incurred by the plaintiff that would not have been incurred had the claim originally complied with subrule 76.02 (1), (2) or (2.1), unless the court orders otherwise. O. Reg. 284/01, s. 25; O. Reg. 132/04, s. 19 (3); O. Reg. 438/08, s. 60 (3).

#### Burden of Proof

(8) The burden of proving that the fair market value of the real or personal property at the date of commencement of the action was \$100,000 or less is on the plaintiff. O. Reg. 284/01, s. 25; O. Reg. 438/08, s. 60 (4).

#### Counterclaims, Crossclaims and Third Party Claims

(9) Subrules (1) to (8) apply, with necessary modifications, to counterclaims, crossclaims and third party claims. O. Reg. 284/01, s. 25.

#### Transition

(10) In the case of an action that was commenced before January 1, 2002, subrules (2), (7) and (8) apply as if "\$50,000" read "\$25,000". O. Reg. 284/01, s. 25.

(11) In the case of an action that was commenced on or after January 1, 2002 and before January 1, 2010, subrules (2), (7) and (8) apply as if "\$100,000" read "\$50,000". O. Reg. 438/08, s. 60 (5).

**RICHARD WARMAN**  
Plaintiff (Respondent)

and

**CONSTANCE  
WILKINS-FOURNIER  
and MARK FOURNIER**

and

**JOHN DOES 1-8**  
(aka klinxx; SaskBigPicture;  
Droid1963; conscience; Faramir;  
Peter O'Donnell; Padraigh;  
and HR-101)  
Defendants (Appellants)

Court File No: 09-DV-15

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(Divisional Court)**

Proceeding commenced at OTTAWA

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