

CITATION: Warman v. Fournier et al, 2010 ONSC 2126

DIVISIONAL COURT FILE NO.: 09-DV-1512

DATE: 2010/05/03

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

KENT, HEENEY, AND WILTON-SIEGEL JJ.

BETWEEN:

Richard Warman

Plaintiff

*James Katz and Stephanie Lewis, for the
Respondent/Plaintiff*

– and –

Constance Wilkins-Fournier and Mark
Fournier

Defendants

*Barbara Kulaszka, for the
Appellants/Defendants, Constance Wilkins-
Fournier and Mark Fournier*

– and –

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

Third Parties

*Wendy Matheson and Natalie Biderman, for
the Intervenor Canadian Civil Liberties
Association*

*Tamir Israel, for the Intervenor Samuelson-
Glushko Canadian Internet Policy and Public
Interest Clinic*

HEARD: April 9, 2010

WILTON-SIEGEL J.

[1] The appellants, Constance Wilkins-Fournier and Mark Fournier (the “Appellants”), appeal an order of Kershman J. dated March 23, 2009 ordering the Appellants to provide a further and better Affidavit of Documents to the respondent Richard Warman (the “Respondent”) listing all documents in their possession relating to the identities of the defendant John Does 1-8 in the action, including their e-mail addresses and the internet protocol (“IP”) addresses used by

them when making the specific postings identified in the Respondent's statement of claim. The issue in the proceeding is whether such disclosure is automatic if the Respondent is able to demonstrate relevance and an absence of protection under one of the traditional categories of privilege or whether the Court must also consider the interests of privacy and freedom of expression of the John Doe defendants and, if so, in what manner.

Background

[2] The Respondent has commenced a defamation action under the Simplified Procedure provided for under Rule 76 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended, against the Appellants as named defendants, and the eight John Doe defendants with respect to messages posted on an internet message board named "Free Dominion" (hereinafter referred to as the "Message Board").

[3] The Appellants are the administrators and moderators of the Message Board, which allows registered users to post messages on various political and social topics. The eight John Doe defendants posted allegedly defamatory messages on the Message Board using pseudonyms.

[4] The Respondent seeks from the Appellants the IP addresses for the allegedly defamatory postings made by the John Doe defendants as well as the e-mail addresses with which they registered as users of the Message Board and any associated subscriber data provided at the time of registration. He seeks this information for the purpose of identifying the John Doe defendants in order to serve them with the statement of claim.

[5] An IP address is a unique identifier for a computer on the internet. It is assigned to a computer by a subscriber's internet service provider (an "ISP") when the subscriber signs on to the internet. The Message Board did not capture the IP of a new user when a new user account was created. It did, however, record and store the IP address for each message posted, including those of the eight John Doe defendants. With the IP address of each message and the time of the message (disregarding an issue as to the accuracy of the Message Board's software clock, which is not relevant to this appeal), the Respondent can, at a minimum, seek the identity of the subscriber who was assigned the particular IP address at the time of the message from the relevant ISP.

[6] There is no dispute that the IP addresses and e-mail addresses of the John Doe defendants constitute "documents" for purposes of Rule 30.06.

[7] As a practical matter, there is some question as to whether, even if he obtains this information, the Respondent will be able to identify the John Doe defendants without a further motion to compel the ISPs associated with the IP addresses to provide the names of their customers. It is quite possible that the John Doe defendants registered as users of the Message Board with e-mail addresses that were used and immediately discarded, such that an internet search of the e-mail address will not identify the parties. It is also likely that the IP addresses, on their own, will not be useful.

[8] Nevertheless, the motion before Kershman J. and the hearing before this Court, proceeded on the basis that it is possible that the documents sought by the Respondent could, on their own, reveal the identity of one or more of the John Doe defendants. The motions judge properly did not make any finding of fact regarding the possible frailty of the disclosure sought. Of critical importance, the hearing has also proceeded on the basis that, by accessing other e-mail messages and postings by an individual on the internet using an e-mail address and possibly an IP address, the Respondent might be able to obtain, to use the words of Sopinka J. in *R. v. Plant* [1993] 3 S.C.R. 281 at para. 20, "intimate details of the lifestyle and personal choices" of that individual which are revealed by other anonymous use of the internet and are entirely unrelated to the action.

[9] Since the date of the hearing before Kershman J., the John Doe defendants associated with the pseudonyms SaskBigPicture, Droid 1963, Faramir and Peter O'Donnell have been identified. The order of Kershman J., and this appeal, have therefore been stayed on consent in respect of these defendants.

Decision of Kershman J.

[10] The motion before Kershman J. proceeded under Rule 30.06 and Rule 76.03 of the *Rules of Civil Procedure*. The motions judge rejected the Appellants' submission that the Respondent was required to establish a *prima facie* case of defamation by affidavit evidence before disclosure could be ordered. He concluded that disclosure by the Appellants was mandatory because the Respondent established that the information was relevant and not protected by privilege.

[11] In reaching his conclusion, the motions judge distinguished the decisions in *Irwin Toy Ltd. v. Doe*, [2000] O.J. No. 3318 (S.C.J.), in which the plaintiff was required to demonstrate a *prima facie* case on the merits, and *BMG Canada Inc. v. John Doe*, [2004] 3 F.C.R. 241 (F.C.), in which the plaintiff was required to demonstrate a *bona fide* claim, on the grounds that each was a discretionary order and involved motions brought against third party ISPs.

[12] The motions judge did, however, consider the impact of public policy concerns, specifically the right to privacy, and appears to have concluded for two reasons that the public interest in disclosure heavily outweighed the argument against disclosure.

[13] First, he relied on the decision of Leitch J. in *R. v. Wilson*, [2009] O.J. No. 1067 (S.C.J.) as authority for the proposition that an individual has no reasonable expectation of privacy in information connected with one's IP address (by which she appears to mean the IP address associated with an individual's e-mail message). Second, he concluded that, in the particular circumstances which involved, as he saw it, an anti-hate speech advocate and a controversial website, the public interest in disclosure was considerably stronger than in *BMG*, in which the disclosure was denied.

Analysis of the Applicable Law

[14] The legal issue arising in this proceeding is whether there are *Charter* values that the Court must take into account in considering the Respondent's request for disclosure and, if so, the manner in which the Court is to balance such *Charter* protected interests against the public interest in promoting the administration of justice by providing the Respondent with full access to the information which will enable him to pursue his defamation action against the alleged wrongdoers.

Are Charter Values Engaged by the Respondent's Request for Disclosure?

[15] In this case, it is clear that both the right of freedom of expression, guaranteed by section 2(b) of the *Charter*, as well as privacy interests that are also recognized by the *Charter*, are engaged.

[16] As expressed by the Supreme Court, freedom of expression is among the most fundamental of rights possessed by Canadians: see *R. v. Sharpe*, [2001] 1 S.C.R. 45 at para. 21. The values underlying the right to free expression include individual self-fulfillment, finding the truth through the open exchange of ideas, and the political disclosure fundamental to democracy: see *R. v. Sharpe* at para. 23.

[17] Of particular relevance to the present proceeding, there is also some support in the case law for the proposition that the removal of an individual's right to remain anonymous may constitute an unjustified breach of freedom of expression: see *Canada (Elections Canada) v. National Citizen's Coalition*, [2003] O.J. No. 3420 at paras. 20-21 (O.C.J.). That is the law in the United States, where the right to publish anonymously is a well established aspect of freedom of speech protected by the First Amendment: see, for example, *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 at paras. 3-4 (1995). The Supreme Court of Canada has also made it clear that freedom of expression must be given consideration in defamation claims and that, in the context of a defamation claim, giving proper weight to the value of freedom of expression on matters of public interest requires a broadening of the defences available in respect of the communication of facts it is in the public's interest to know: see *Grant v. Torstar Corp.*, 2009 S.C.C. 61.

[18] At the same time, the Supreme Court has also recognized that privacy has been accorded constitutional protection: see *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 21. In *R. v. Tessling*, [2004] 3 S.C.R. 432 at para. 24, the Supreme Court referred to personal, territorial and informational privacy as separate but often overlapping categories. Informational privacy is defined in *R. v. Tessling* at para. 23 as the claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about them is communicated. It involves protection of the "biographical core of personal information" according to Sopinka J. in *Plant* at p. 293. 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: see *R. v. Cuttell*, [2009] O.J. No. 4053 at paras. 14-16 (O.C.J.), citing *Plant* at p. 293.

[19] Privacy interests arise for consideration in the present case in favour of both the plaintiff and the John Doe defendants. As the Supreme Court ruled in *Hill*, the good reputation of an individual is intimately connected to his right to privacy, and thus the right to privacy of the plaintiff may be affected by the allegedly libelous postings. At the same time, the John Doe defendants who made the allegedly libelous postings arguably had a reasonable expectation of privacy, having expressly elected to remain anonymous when they did so.

[20] In *Irwin Toy Ltd.*, which arose in the context of a defamation action, Wilkins J. suggested at para. 11 that, in keeping with the protocol or etiquette developed in the usage of the internet, some degree of confidentiality regarding identifiers of the originator of a message, "has significant safety value and is in keeping with what should be perceived as being good public policy." His statement is consistent with an implicit understanding of citizens that, to some degree at least, their identities will be protected when they use the internet anonymously. In *Cuttell* at para. 27, the court also held that there was a reasonable expectation of privacy in a party's subscriber information which linked the party's identity to internet usage.

[21] The Appellants submit that the Respondent's request for disclosure raises a concern for informational privacy because the disclosure sought would not only permit identification of the John Doe defendants but would also provide the Respondent with the means to assemble a complete informational profile of each defendant based on other use of the internet in respect of which the defendants would have a legitimate expectation of privacy.

Role of the Court of Where Charter Values are Engaged

[22] While the *Charter* does not apply to strictly private litigation between litigants not invoking state action, the Divisional Court has held that, because the *Rules of Civil Procedure* have the force of a statute, they must be interpreted in a manner consistent with *Charter* rights and values: see *D.P. v. Wagg*, [2002] O.J. No. 3808 at paras. 65-66 (Div. Ct.). In that case, the court held that whenever one party to a civil suit invokes or relies upon government action (in that case, the *Rules of Civil Procedure*, as enforced by the machinery of the administration of justice) to produce what amounts to the infringement of another party's *Charter* rights, *Charter* values are invoked.

[23] On appeal, Rosenberg J.A., speaking for the Court, was prepared to assume, for purposes of that case, that *Charter* values should inform the discovery process: *D.P. v. Wagg* (2004), 71 O.R. (3d) 229 at para. 61 (C.A.). However, the appeal was ultimately decided on the principle that the Superior Court has inherent jurisdiction to control the discovery and production process under the *Rules of Civil Procedure* to ensure that important state and other third party interests, including *Charter* interests, are protected, even if the particular documents do not, strictly speaking, fall within a recognized category of privilege: see para. 28.

Manner in Which Courts Address the Need to Take Charter Rights into Consideration in Relation to a Request for Disclosure

[24] In circumstances where *Charter* rights are engaged and therefore courts are required to take such interests into consideration in determining whether to order disclosure, the case law

indicates that the *Charter* protected interests are balanced against the public interest in disclosure in the context of the administration of justice by a combination of (1) a requirement of an evidentiary threshold, (2) fulfillment of conditions establishing the necessity of the disclosure sought, and (3) an express weighing of the competing interests in the particular circumstances of the litigation. In order to prevent the abusive use of the litigation process, disclosure cannot be automatic where *Charter* interests are engaged. On the other hand, to prevent the abusive use of the internet, disclosure also cannot be unreasonably withheld even if *Charter* interests are engaged.

[25] There is no case law that specifically addresses the relevant considerations to be taken into account by a Court on a motion for an order that a defendant make disclosure under Rule 30.06 in an on-going action. However, there is ample authority in the analogous circumstances of proceedings taken against third parties to obtain the identities of prospective defendants.

[26] In civil litigation, the courts have developed the equitable remedy of “pre-action discovery” to permit a plaintiff to discover the identity of a proposed defendant. The remedy has most recently been upheld by the Ontario Court of Appeal in *GEA Group AG v. Flex-N-Gate Corporation* (2009), 96 O.R. (3d) 481 at paras. 40-54, which confirmed the principles originally set out in *Norwich Pharmacal Co. v. Comrs. of Customs and Excise*, [1974] A.C. 133 (H.L.).

[27] The fundamental premise of *Norwich Pharmacal* is that, where privacy interests are involved, disclosure is not automatic even if the plaintiff establishes relevance and the absence of any of the traditional categories of privilege. *Norwich Pharmacal* requires the court to go on to consider five factors including: (1) whether the plaintiff has provided evidence sufficient to raise a valid, *bona fide* or reasonable claim; (2) whether the third party is the only practicable source of the information available; and (3) whether the interests of justice favour obtaining the disclosure: see *Glaxo Wellcome PLC v. Canada (Minister of National Revenue)*, [1998] 4 F.C. 439 (F.C.A.).

[28] An important point, reaffirmed by the Ontario Court of Appeal in *GEA*, is that, being an equitable remedy, the principles in *Norwich Pharmacal* are to be applied flexibly and will vary as the particular circumstances of each case require. In this connection, we note that, while there may be some uncertainty as to whether the House of Lords required the plaintiff to satisfy a *bona fide* standard or a *prima facie* standard in *Norwich Pharmacal*, that issue is now resolved on a case-by-case basis. We will return to this issue later.

[29] The principle in *Norwich Pharmacal* was applied by the Federal Court of Appeal in *BMG Canada Inc. v. John Doe* [2005] 4 F.C.R. 81 at paras. 39-41 (F.C.A.) (“BMG”), aff’g [2004] 3 F.C.R. 241 (F.C.) in the context of an application for disclosure by ISPs of customer information in order to identify anonymous internet users who were sharing music files on the internet. *BMG* illustrates that a court must have regard to the privacy interests of anonymous users of the internet before granting a *Norwich Pharmacal* order, even where the issue involved pertains to property rights and does not engage the interest of freedom of expression. In that decision, disclosure was sought under Rule 238(1) of the *Federal Court Rules*, 1998, SOR/98-106, which contemplate leave of the Court to examine for discovery a non-party to an action having relevant

information. The Federal Court of Appeal upheld the order of the motions judge denying such disclosure.

[30] In doing so, the Federal Court of Appeal expressly stated that the proceeding could have been brought either under Rule 238 or by invoking the common law principles in *Norwich Pharmacal* and that, in either case, the same principles — the principles in *Norwich Pharmacal* — would be applicable because the same issues were at stake. The Federal Court of Appeal held that the following factors governed determination of whether to grant the order:

- (1) the applicant must establish a *bona fide* claim against the unknown alleged wrongdoer;
- (2) the third party against whom discovery is sought must be in some way connected to or involved in the misconduct;
- (3) the third party must be the only practical source of the information available to the applicant;
- (4) the third party must be reasonably compensated for expenses and legal costs arising out of compliance with the discovery order; and
- (5) the public interest in favour of disclosure must outweigh the legitimate privacy interests.

[31] The earlier decision in *Irwin Toy* also involved a motion for disclosure from ISPs, but in the context of a defamation action. Wilkins J. held that Rule 30.10 and Rule 31.10 of the *Rules of Civil Procedure*, which in the case of Rule 31.10 is similar to Federal Rule 238, could be used to compel production from an ISP of the identity of a subscriber for whom the plaintiffs had obtained the IP address. While Wilkins J. did not expressly adopt the principles in *Norwich Pharmacal*, he did, in substance, consider the factors enumerated in that decision and addressed in *BMG*. In particular, Wilkins J. expressly considered whether the applicant had demonstrated on the affidavit evidence a *prima facie* case of defamation against the John Doe defendant in that action.

Application of the Relevant Principles to the Present Proceeding

[32] The principles applied in *BMG* and *Irwin Toy* are equally applicable in the present circumstances. There is no meaningful basis for distinguishing the circumstances or the issue before the Court. The same issues are at stake and the same principles articulated in *Norwich Pharmacal* are applicable. While it is correct that *BMG* and *Irwin Toy* address disclosure from third parties, for which leave of the Court was required, whereas the case at bar concerns disclosure from a party defendant, this is not a meaningful distinction for present purposes. As has been pointed out, a third party can be made a defendant for the price of issuing a statement of claim. Moreover, the fact that the motion engages the important Charter value of freedom of expression, as well as the right to privacy, heightens the need to have regard to considerations beyond the traditional concerns of relevance and privilege.

[33] Further, neither the operation of the deemed undertaking rule in Rule 30.1, which is itself grounded in a concern for privacy, nor the requirement in Rule 76.03 for very broad documentary disclosure is sufficient, in the present circumstances, to displace the requirement to take the *Charter* values into consideration. In particular, the deemed undertaking rule is insufficient to address the potential for abuse of the *Rules of Civil Procedure*. If disclosure were automatic, a plaintiff with no legitimate claim could misuse the *Rules of Civil Procedure* by commencing an unmeritorious action for the sole purpose of revealing the identity of anonymous internet commentators, with a view to stifling such commentators and deterring others from speaking out on controversial issues. For this reason, the commencement of a defamation claim does not trump freedom of expression or the right to privacy.

[34] Given the circumstances in this action, the motions judge was therefore required to have regard to the following considerations: (1) whether the unknown alleged wrongdoer could have a reasonable expectation of anonymity in the particular circumstances; (2) whether the Respondent has established a *prima facie* case against the unknown alleged wrongdoer and is acting in good faith; (3) whether the Respondent has taken reasonable steps to identify the anonymous party and has been unable to do so; and (4) whether the public interests favouring disclosure outweigh the legitimate interests of freedom of expression and right to privacy of the persons sought to be identified if the disclosure is ordered.

[35] Although, as mentioned, there is no case directly on point, these principles emerge from the decisions referred to above. They are also consistent with the decisions of the Superior Court of Justice in *Irwin Toy* and in *York University v. Bell Canada Enterprises*, [2009] O.J. No. 3689, which was released after the decision of the motions judge. We note that an English court reached a similar conclusion in *Sheffield Wednesday Football Club Ltd. and others v. Hargreaves*, [2007] EWHC 2375 (Q.B.).

[36] The decision in *R. v. Wilson*, upon which the motions judge relied, is not applicable to the present circumstances. In that decision, Leitch J. concluded that there was no reasonable expectation of privacy in the information provided by a particular ISP, Bell Canada, based on the contractual terms on which the internet service was provided as well as the nature of the information sought – the name and address of the customer, which Leitch J. found was not information that one could reasonably expect would be kept private from the state. This conclusion was fact-specific and entirely reasonable given several significant differences between *R. v. Wilson* and the present case.

[37] *R. v. Wilson* involved an allegation of a violation of rights under section 8 of the *Charter* in a criminal context, rather than in the context of civil litigation. In *R. v. Wilson*, the privacy issue was raised on a retrospective basis. The disclosure had already occurred and the use made of that information was known. It was limited to obtaining the name and address of the ISP subscriber. The issue before the Court was whether that use violated section 8 of the *Charter*, thereby invalidating the search warrant obtained as a result of the disclosure. The issue was not whether future use of the disclosed information could raise concerns regarding breach of an individual's right of informational privacy as in the present case.

[38] We note that there are several important differences between the factors that, in our view, should have been considered by the motion judge in this proceeding, and the factors outlined by the Federal Court of Appeal in *BMG*. These differences reflect the fact that the Court's inherent jurisdiction to control its procedures, and its equitable jurisdiction, are applied flexibly to meet the particular circumstances of each case. Two differences, in particular, require elaboration.

[39] First, in the present circumstances, the Court need not consider either the second or the fourth requirements in *BMG*, which apply only to third party respondents. These are not appropriate requirements where disclosure is sought against a co-defendant who has established and administers a website on which the allegedly defamatory statements were posted.

[40] Second, and more significantly, as in *Irwin Toy Ltd.*, and *York University*, a *prima facie* standard, rather than merely a *bona fide* standard, is appropriate, for two reasons.

[41] In para. 34 of *BMG*, the Federal Court of Appeal expressed the concern that, in that case, imposition of a *prima facie* case standard would effectively strip an applicant of a remedy because the plaintiff could not know the actual case it wished to assert against the defendants until it knew not only their identities but also the nature of their involvement in the file-sharing activities. Because the present proceeding is a defamation action, that concern does not arise. Unlike *BMG*, the Respondent knows the details of precisely what was done by each of the unknown alleged wrongdoers.

[42] In addition, because this proceeding engages a freedom of expression interest, as well as a privacy interest, a more robust standard is required to address the chilling effect on freedom of expression that will result from disclosure. It is also consistent with the recent pronouncements of the Supreme Court that establish the relative weight that must be accorded the interest in freedom of expression. In the circumstances of a website promoting political discussion, the possibility of a defence of fair comment reinforces the need to establish the elements of defamation on a *prima facie* basis in order to have due consideration to the interest in freedom of expression. On the other hand, there is no compelling public interest in allowing someone to libel and destroy the reputation of another, while hiding behind a cloak of anonymity. The requirement to demonstrate a *prima facie* case of defamation furthers the objective of establishing an appropriate balance between the public interest in favour of disclosure and legitimate interests of privacy and freedom of expression.

[43] Finally, as Strathy J. noted in *York University*, there may be circumstances in which it is appropriate that notice of a motion for disclosure be given to a John Doe defendant. The case law suggests that any such determination is to be made on a case-by-case basis, and we agree. In a defamation action, little would generally be added by such a step, because any defences that might be raised are not relevant to a determination as to whether a *prima facie* case has been made out. For such purpose, a plaintiff is required to establish only the elements of defamation within its control. However, in other cases a John Doe defendant may have compelling reasons for wishing to remain anonymous that are not immediately obvious, such as a risk to personal safety, and such grounds could not be put before the court absent notice.

Conclusion

[44] Returning to the decision of the motions judge, it would appear that he did not have the benefit of the extensive submissions on these issues provided to the Court by the two intervenors in this proceeding. Notwithstanding, it is clear that he was alert to the need to take into consideration the privacy interests of the unknown alleged wrongdoers. It does not appear, however, that the need to consider the interest in freedom of expression was raised by the parties or was otherwise considered by the motions judge.

[45] In addition, the motions judge did not take into consideration whether the Respondent had established a *prima facie* case of defamation before ordering disclosure of the documents sought by the Respondent. In our view, the omission to do so constituted an error of law.

[46] Accordingly, the appeal is allowed and the matter is remitted to a different motions judge for re-consideration based on the principles set out above.

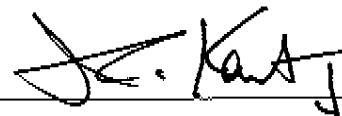
Costs

[47] The intervenors do not seek costs in respect of this appeal. The appellants are entitled to costs on a partial indemnity basis payable by the Respondent in the amount of \$10,000 on an all inclusive basis in respect of the motion, leave to appeal and the hearing of the appeal.



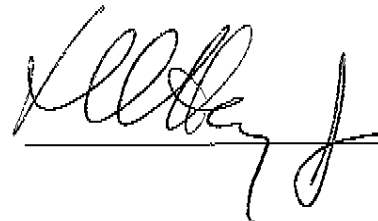
Wilton-Siegel J.

I agree.



Kent J.

I agree.



Heeney J.

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Third Parties

REASONS FOR JUDGMENT

Wilton-Siegel J.

Released: May 3, 2010