

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

PHYLLIS MORRIS

Plaintiff

- and -

**RICHARD JOHNSON, WILLIAM "BILL" HOGG,
and ELIZABETH BISHENDEN,
JOHN DOE a.k.a. 'auroracitizen.ca',
JANE DOE a.k.a. 'For a fistful of dollars',
JAMES DOE a.k.a. 'For a few dollars more'
and AUTOMATTIC, INC. d/b/a wordpress.com**

Defendants

**FACTUM OF THE INTERVENER,
THE CANADIAN CIVIL LIBERTIES ASSOCIATION
(motion of the plaintiff for production of identity information returnable January 13, 2010)**

PART I –OVERVIEW

1. On this motion the plaintiff seeks an order requiring Richard Johnson, William Hogg and Elizabeth Bishenden (together, the “individual named defendants”), the individual named defendants’ lawyer, Jordan Goldblatt, and Automatic, Inc., which is the host of the website auroracitizen.ca, to provide the plaintiff with all identity information in their possession in respect of the unnamed defendants for the purpose of proceeding with this defamation claim against them.

2. By the order of Justice Whitaker made December 31, 2010, the Canadian Civil Liberties Association (the “CCLA”) was granted leave to intervene in this motion as a friend of the court given the important civil liberties and *Charter* interests engaged by this motion.

3. This motion raises issues regarding the relationship between privacy and anonymity on the Internet, the right to freedom expression guaranteed by the *Charter*, and the disclosure obligations of defendants and non-parties in actions for defamation against anonymous Internet users engaged in political speech.

4. The test for production of identity information in respect of anonymous defendants in defamation cases is well established. The CCLA will focus, in its submissions, on the following two key issues:

- (1) The second component of the test is that the plaintiff establish a *prima facie* claim in defamation. This certainly requires pleadings that specify the allegedly defamatory statements.
- (2) The fourth component of the test is the necessary reconciliation of the public interests in the pursuit of defamation claims on the one hand and the strong public interest in freedom of expression on the other hand. At this stage of the test, significant weight should be given to the nature of the speech.

5. A *prima facie* case of defamation against an anonymous party cannot be established where, as in this case, the precise words complained of have not been set out in the claim. While the anonymity of Internet users should not be protected absolutely, the anonymity of Internet users engaged in commenting on and criticizing an elected public official in the performance of his or her duties should be afforded significant protection. Perceived threats to the safety of a

plaintiff should not be considered under the test for production of identity information in a tort action for defamation.

PART II – FACTS

6. As an intervener the CCLA’s focus is on only those key facts that are relevant to the issues above. Those key facts are as follows:

- (1) The plaintiff in this action, Phyllis Morris, was the mayor of the Corporation of the Town of Aurora at all material times, commenced this action in her capacity as Mayor, and complains of damage to her reputation in respect of her conduct as mayor. The affidavit affirmed in support of the plaintiff’s motion was affirmed by Christopher C. Cooper, the Director of Legal Services and Town Solicitor of the Corporation of the Town of Aurora. At the cross-examination on his affidavit, Mr. Cooper refused to answer whether the Town of Aurora was funding this litigation.

Statement of Claim, paras. 2, 13

Notice of Action, motion record of the plaintiff, tab 3

Affidavit of Christopher C. Cooper affirmed October 19, 2010, motion record of the plaintiff, tab 2, para. 1

Transcript of the Cross-Examination of Christopher C. Cooper, on behalf of the plaintiff, on his Affidavit Affirmed October 19, 2010 (“Cooper Cross-Examination”), p. 11

- (2) The website auroracitizen.ca is a forum for political speech.

Exhibits B, C, D, E and F to the Affidavit of Christopher C. Cooper affirmed October 19, 2010, motion record of the plaintiff, tabs “2B”, “2C”, “2D”, “2E” and “2F”

- (3) The precise words complained of have not been set out in the claim. There is no evidence before this Court as to the falsehood or veracity of the allegedly defamatory statements.

Statement of Claim, para. 12

Affidavit of Christopher C. Cooper affirmed October 19, 2010, motion record of the plaintiff, tab 2

- (4) The plaintiff alleges in her claim that she has been threatened by anonymous persons over the Internet, and that unless the defamatory behaviour complained of “is halted, these types of personal threatening attacks will continue”. Counsel for the plaintiff has advised that the plaintiff has already reported these alleged threats to the proper authorities, i.e., the police.

Statement of Claim, para. 16

Transcript of the Cross-Examination of Christopher C. Cooper, on behalf of the plaintiff, on his Affidavit Affirmed October 19, 2010 (“Cooper Cross-Examination”), p. 63

PART III – LAW & ARGUMENT

7. This motion requires the court to reconcile the interests of a party seeking to sue for defamation and the public interest served by protecting freedom of expression, including political speech, on the Internet.

8. Freedom of expression is among the most fundamental rights possessed by Canadians. It makes possible our liberty, our creativity and our democracy. It does this by protecting not only “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.

R. v. Sharpe, [2001] 1 S.C.R. 45 at para. 21, intervener’s book of authorities, tab 1

9. Freedom of expression, as guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*, is essential to the functioning of Canadian democracy. The Internet promotes the exercise of freedom of expression since it fosters a veritable “marketplace of ideas” online and facilitates debate and political participation on controversial topics. It permits open, robust debate and the airing of minority views.

Grant v. Torstar Corp., [2009] S.C.R. 61 (“*Grant*”) at paras. 1, 49 quoting *R v. Keegstra*, [1990] 3 S.C.R. 698 at p. 803, plaintiff’s book of authorities, tab 13

10. The Supreme Court of Canada has held that while the law must protect reputation, freedom of expression must be considered in defamation claims and must be given proper weight. The reconciliation of these important values must be done in a manner that encourages vigorous public discourse and does not chill “free wheeling debate.”

Grant at paras. 2, 3, 52, plaintiff’s book of authorities, tab 13

The test for production of identity information

11. The plaintiff seeks an order for production of identity information against Automattic, Inc., a defendant, the individual named defendants, and the individual named defendants’ lawyer, Jordan Goldblatt, who is a non-party.

12. The Divisional Court has recently confirmed the test that must be met on a motion to compel production of identity information about an unnamed defendant from a named defendant in a defamation action. The court must consider:

- (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.

Warman v. Fournier et al., 2010 ONSC 2126, para. 34, 40, 41,
plaintiff's book of authorities, tab 1

13. On a motion for production of identity information from a third party the court must also be satisfied that the following prerequisites are met:

- (1) the third party against whom discovery is sought must be in some way connected to or involved in the misconduct;
- (2) the third party must be the only practical source of the information available to the applicant; and
- (3) the third party must be reasonably compensated for expenses and legal costs arising out of compliance with the discovery order.

Warman v. Fournier et al., 2010 ONSC 2126, paras. 30, plaintiff's
book of authorities, tab 1

Issue 1: Establishing a *prima facie* claim

14. In *Warman v. Fournier*, the Divisional Court recognized that the relevance of information was not sufficient to require disclosure and a higher threshold was required for defamation claims. Given the importance of freedom of expression, a *prima facie* claim must be shown, not merely a *bona fide* claim. A prerequisite to the establishment of a *prima facie* defamation claim is a proper pleading which specifies the words complained of.

Warman v. Fournier et al., 2010 ONSC 2126, paras. 40, 42, plaintiff's book of authorities, tab 1

York University v. Bell Canada Enterprises, 2009 CarswellOnt 5206 (Ont. S.C.J. Sep 09, 2009), para. 25, plaintiff's book of authorities, tab 3

15. Pleadings in defamation cases are critically important. They require specificity where possible and a certain minimum level of material fact in the pleading itself, not simply in response to a demand for particulars. In a defamation case the words complained of should be set out with as much particularity as possible in the pleading itself. Ideally they should be set out verbatim, or, at a minimum, with sufficient particularity as to allow the defendant to respond.

114931 Ontario Ltd. v. Canada (Attorney General), 2008 CarswellOnt 6932, para. 7, intervener's book of authorities, tab 2

Leahy v. Canada, 2008 FC 620 (CanLII), para. 21, intervener's book of authorities, tab 3

16. Where a plaintiff has not pleaded the words complained of in the claim with sufficient particularity, that plaintiff cannot establish that the impugned statements are *prima facie* defamatory.

17. As set out further below, regard must also be had to the nature of the expression at issue. 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 give due consideration to the crucial freedom of expression interests at stake.

Warman v. Fournier et al., 2010 ONSC 2126, para. 42, plaintiff's book of authorities, tab 1

18. Given the important *Charter* rights at stake, a properly pleaded statement of claim is a necessary prerequisite, but is not itself sufficient. Also required is evidence that the words complained of are untrue.

19. The CCLA submits that the material before the court does not approach the minimal threshold required to be met to establish a *prima facie* case.

Issue 2: Balancing the Public Interests

20. The fourth component of the test is the reconciliation of the public interests in the protection of reputation on the one hand and the strong public interest in freedom of expression on the other hand. At this stage of the test significant weight should be given to the political nature of the speech in question and the plaintiff's position as an elected official. Further, while a defamation action may, in some cases, lead to the disclosure of personal identifying information, disclosure is not warranted based on allegations that the statements complained of are threatening. Individuals should seek the assistance of law enforcement officials to address concerns about personal threats, not the civil courts.

Anonymous political speech respecting elected officials should be significantly protected

21. Courts must have regard for the privacy interests of anonymous users of the Internet before granting an order for the production of identity information, even where the issue does not involve freedom of expression.

Warman v. Fournier et al., 2010 ONSC 2126, para. 29, plaintiff's book of authorities, tab 1

22. Where freedom of expression and privacy interests are raised, a more robust standard is required to address the chilling effect on freedom of expression that will result from disclosure.

Warman v. Fournier et al., 2010 ONSC 2126, para. 42, plaintiff's book of authorities, tab 1

23. While the anonymity of Internet users should not be protected absolutely, the anonymity of Internet users engaged in commenting on and criticizing an elected public official in the performance of his or her duties should be afforded significant protection, since:

- (a) the very threat of exposure of one's identity as a result of being sued by an elected public official for criticizing that official may have a chilling effect on political expression;
- (b) elected public officials ought to tolerate greater criticism in connection with the discharge of their public duties;
- (c) remarks critical of elected public officials are likely to have less of an impact on reputation than similar remarks made against others in different circumstances; and
- (d) persons who take up elected office generally have greater access to channels of effective communication to rebut allegations.

Perceived threats should not be considered under the test for production

24. Perceived threats to the safety of a plaintiff should not be considered under the *Warman v. Fournier* test for production of identity information regarding an anonymous Internet user in an action for defamation.

25. Perceived threats are matters for investigation by law enforcement officials. It is a criminal offence to knowingly convey, or cause any person to receive, a threat to cause death or bodily harm to any person. Where a threat is viewed by law enforcement officials as credible, they can investigate and, if appropriate, and by means of the appropriate procedures for doing so, acquire the information necessary to identify an individual for the purposes of pursuing a criminal prosecution.

Criminal Code, R.S.C. 1985, Chap C-46, 264.1(1)(a)

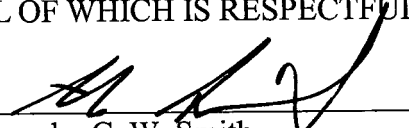
Other parts of the test

26. The CCLA has confined its written submissions to the second and fourth parts of the test that must be met on a motion to compel production of identity information from a named defendant in a defamation action. The CCLA takes no position on the other factors at issue on this motion.

ORDER REQUESTED

27. In accordance with the order of Justice Whitaker granting leave to intervene, the CCLA does not seek costs and asks that it not be liable for costs to any party.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Alexander C. W. Smith
Counsel for the intervener,
the Canadian Civil Liberties Association

SCHEDULE A - LIST OF AUTHORITIES

1. *R. v. Sharpe*, [2001] 1 S.C.R. 45
2. *Grant v. Torstar Corp.*, [2009] S.C.R. 61
3. *Warman v. Fournier et al.*, 2010 ONSC 2126
4. *York University v. Bell Canada Enterprises*, 2009 CarswellOnt 5206 (Ont. S.C.J. Sep 09, 2009)
5. *114931 Ontario Ltd. v. Canada (Attorney General)*, 2008 CarswellOnt 6932
6. *Leahy v. Canada*, 2008 FC 620 (CanLII)

SCHEDULE B – STATUTES

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Criminal Code, R.S.C. 1985, Chap C-46, 264.1(1)(a)

(1) Everyone commits an offence who, in any manner, knowingly utters, conveys or causes any person to receive a threat

(a) to cause death or bodily harm to any person[.]

PHYLLIS MORRIS v. RICHARD JOHNSON et al.
Plaintiff Defendants

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Proceeding commenced at TORONTO

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

Torys LLP
79 Wellington St. W., Suite 3000
Box 270, TD Centre
Toronto, ON M5K 1N2
Fax: 416.865.7380

Alexander C.W. Smith (LSUC #: 57578L)
Tel: 416.865.8142

Lawyers for the Intervener,
the Canadian Civil Liberties Association