Court File No. CV-10-00412021-0000

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 RESPONDENTS RICHARD JOHNSON, WILLIAM "BILL" HOGG, ELIZABETH BISHENDEN AND JORDAN GOLDBLATT
(motion returnable January 13, 2010)

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PART I - OVERVIEW

1. The moving party, Phyllis Morris ("Morris"), brings this motion for disclosure of personal information sufficient to identify anonymous commentators on the auroracitizen.ca web-blog who allegedly defamed her. Morris seeks this information from defendants Richard Johnson, Bill Hogg and Elizabeth Bishenden (collectively the "Individual Defendants"), as well as their counsel in this action, Jordan Goldblatt.

(a) The Individual Defendants are allegedly moderators of the auroracitizen.ca web-blog, who have information about the identities of the anonymous commentators.

2. Morris bears a substantial onus on the motion, which she cannot discharge:

(a) This Court has nothing before it upon which it can evaluate the underlying merits of the claim for defamation. Nothing filed with the Court particularizes the defamatory words upon which Morris' claim is based. In the absence of this information, this Court is in no position to adjudicate whether the moving party should be permitted the significant and unusual order it seeks;

(b) Morris cannot make out a *prima facie* cause of action against any party to this proceeding (including, the anonymous commentators) as she has failed to comply with the notice provisions under the *Libel and Slander Act.* The claim is a nullity;

(c) Morris cannot make out a *prima facie* case against any party to this proceeding (including, the anonymous commentators) as the allegedly defamatory statements were made about her in her capacity as Mayor of the Town of Aurora and therefore

cannot be properly subject of a claim in defamation. A government actor cannot be defamed;

(d) Morris does not meet the test for a Norwich Order;

(e) Morris has no evidence of urgency or irreparable harm that she will suffer if the mandatory order is not granted;

(f) It is not in the public interest for this Court to order disclosure of the information sought by Morris where the anonymous commentators have a right to remain anonymous in their criticism of an elected government official.

3. This motion should be dismissed with costs on a substantial indemnity basis.

PART II - THE FACTS

Overview of the Litigation

4. The moving party plaintiff, Morris, was the Mayor of the Town of Aurora until December 1, 2010. She was defeated in a general election on October 25, 2010.

5. Morris "in her capacity as Mayor of the Corporation of the Town of Aurora" issued a Notice of Action naming the Individual Defendants as parties to a claim for defamation on October 8, 2010. The claim has since been amended, and is now brought in Morris' name as private citizen. The Notice of Action has not been altered but for the alteration of the name of the Plaintiff.

Reference: Moving Party's Motion Record, at Tab 3, Notice of Action ("Notice of Action").

6. The Notice of Action alleges that the Individual Defendants are the "moderators of the Aurora Citizen blog with the power to public, republish, encourage or delete the [defamatory] postings made thereon." The Individual Defendants are not alleged to be the authors of the defamatory postings.

Reference: Notice of Action, para. 5.

7. The Notice of Action alleges that the defamatory postings were authored by anonymous defendants John Doe a.k.a. 'auroracitizen.ca', Jane Doe a.k.a 'For a fistful of dollars', and James Doe a.k.a. 'For a few Dollars more'.

Reference: Notice of Action, para. 2.

8. Town Council of Aurora passed a motion with respect to the issues in this litigation in the early morning of September 15, 2010. By October 27, 2010, i.e., six weeks after Council's decision, no document other than the herein Motion Record and the Notice of Action had been served.

Reference: Cross-Examination of Christopher C. Cooper, December 14, 2010 at pg 18 line Q. 80; pg. 21, q 95;

The Motion

9. The affiant in support of the motion is Christopher C. Cooper ("Cooper"), who swore the affidavit in his capacity as "Director of Legal Services and Town Solicitor of the corporation of the Town of Aurora". Morris herself has proffered no evidence on this motion.

Reference: Moving Party's Motion Record, Affidavit of Christopher C. Cooper, affirmed October 19, 2010 ("Cooper Affidavit") at ¶ 1.

10. Cooper was cross-examined on his affidavit on December 14, 2010. Despite acknowledging that he was an Officer of the Court, Cooper was evasive and argumentative, as more fully set out below.

11. The allegation made against the Individual Defendants on this motion is that they are moderators of the web-site who have access to IP addresses that can be used to track down the identities of the anonymous bloggers.

Reference: Cross-Examination of Christopher C. Cooper, December 14, 2010 at pg 45 Q. 206

12. However, Cooper accepted on cross-examination that he has "no information with regard to whether moderators are provided with IP addresses."

Reference: Cross-Examination of Christopher C. Cooper, December 14, 2010, at pg. 45, Question 202 to 203.

13. The Individual Defendants are not alleged to be owners of the web-site, who presumably may have IP information. With regard to who owns the auroracitizen.ca web-site, the information before the Court is as sworn to in Cooper's Affidavit: "the owner of the web-site is unknown to me."

Reference: Cooper Affidavit at para. 5.

The Individual Defendant: Hogg

14. The Cooper Affidavit affirms that the Individual Defendant Mr. Hogg is a "moderator" of the auroracitizen.ca webpage, and that "he [Mr. Hogg] has informed me [Mr. Cooper] that he has the moderator abilities with respect to this website".

Reference: Cooper Affidavit, at para . 5.

15. On Cross-Examination, Cooper more candidly admitted that Mr. Hogg never told him that he was a moderator of the auroracitizen.ca.

Reference: Cross-Examination of Christopher C. Cooper, December 14, 2010 at pg 78, Q. 347.

The Individual Defendant: Bishenden

16. The Cooper Affidavit alleges that the Individual Defendant, Ms. Bishenden was "at some point in time a prior moderator of the auroracitizen.ca webpage".

Reference: Cooper Affidavit at ¶6.

17. On cross-examination, Cooper admitted that the source of this information was an October 13, 2010 letter written by counsel for the Individual Defendants to counsel for Morris. Cooper "relied on this letter as the source of information in [his] Affidavit", and that he did not believe anything in the letter to be untruthful. Cooper thereafter was cross-examined on whether anywhere in the October 13, 2010 Letter records that Ms. Bishenden was a "prior moderator" as affirmed in Cooper's Affidavit:

> Q: So when you say she was a prior moderator, you're guessing, aren't you or to use your word, you're inferring?
>
> A: Let's say I'm inferring based on the information that you've given, yes.

Reference: Cross-Examination of Christopher C. Cooper, December 14, 2010 at pg 34, Q. 154 to 157; . 38, Q. 175; Exhibit #1, Letter October 13, 2010 from Goldblatt

18. Ms. Bishenden is not alleged to have been a moderator at the time that the defamatory postings were made. Although Cooper accepted that as an Officer of the Court, he needed to be fair, fulsome, not overstate evidence and not mislead the court in giving evidence, it is clear that he did just that in 'inferring' the involvement of Ms. Bishenden and Mr. Hogg in the auroracitizen.ca web-site.

Reference: Cross-Examination of Christopher C. Cooper, December 14, 2010 at pg 5, Q. 14

19. Further, Cooper admitted that other statements in the October 13, 2010 letter were not included in his affidavit. In particular, and as concerns Ms. Bishenden:

- That "she does now know who posted the allegedly defamatory comments" (pg. 35, Q. 160);

- That "she has no ability to determine IP addresses" (pg. 36, Line 167).

The Individual Defendant: Johnson

20. The Cooper Affidavit only alleges against Mr. Johnson that he is a "frequent poster on the auroracitizen.ca website." There is no allegation in the affidavit material that Mr. Johnson ever was or is a moderator.

Reference: Cooper Affidavit, ¶ 7.

21. Cooper admitted on cross-examination that Mr. Johnson is not alleged to be a moderator, and that there is no allegation that Mr. Johnson defamed Morris.

Reference: Cross-Examination of Christopher C. Cooper, December 14, 2010 at pg 40, Q. 181 to 185

22. Counsel was interventionist when the straightforward question was asked of Cooper why Mr. Johnson is even a named respondent on the motion before the Court.

Reference: Cross-Examination of Christopher C. Cooper, December 14, 2010 at pg 40, Q. 186

Goldblatt

23. The non-party respondent, Goldblatt, is the current counsel to the Individual Defendants. Allegations that Goldblatt has information about the anonymous commentators derive from two sources: (1) A "without prejudice" voicemail message left for counsel for Morris on October 15, 2010; (2) a press release that appeared on the auroracitizen.ca web-page with details of the litigation that Cooper affirmed were "not publicly available" (and therefore, could only have been surreptitiously provided from either Goldblatt or an Individual Defendant to the auroracitizen.ca).

Reference: Cooper Affidavit at para. 13, 14.

24. Cooper admitted on cross-examination that there is no allegation against Goldblatt that he actually is or was ever involved in any of the defamatory postings. There is no claim against Goldblatt.

Reference: Cross-Examination of Christopher C. Cooper, December 14, 2010 at pg 69, Q. 307

25. The voice-mail itself (a) uses the words "without prejudice"; (b) clearly references settlement discussions [indeed, part of it is redacted in the motion record before the court as the moving party has drawn an arbitrary line between what it views as settlement discussions, and what it discloses]; and (c) reveals that Goldblatt doesn't know the identities of the anonymous individuals: "I'm saying plural but for all I know it could be one person[.]"

Reference: Cooper Affidavit at para. 13.

26. On cross-examination, Cooper was confronted with the fact that details from the 'not publicly available press release' were in fact publicly reported in the Auroran, a weekly publication on current events in Aurora.

Reference: Cross-Examination of Christopher C. Cooper, December 14, 2010 at pg 55, Q. 251

<u>No Urgency To This Matter/ Other Sources of Information Available</u>

27. This motion was originally returnable October 22, 2010. Cooper confirmed that he was not available to be cross-examined on his affidavit on October 22, 2010.

Reference: Cross-Examination of Christopher C. Cooper, December 14, 2010 at pg 17, Q. 76

28. Cooper conceded on cross-examination that "nothing had come to [his] attention or was brought to [his] attention or concern" regarding continued defamatory statements about Morris on the auroracitizen.ca web-site since the Notice of Action was issued and served.

Reference: Cross-Examination of Christopher C. Cooper, December 14, 2010 at pg 68, Q. 305

29. Cooper admitted on cross-examination that he was not aware of any letter sent by registered mail to 'anyone' asking for the names and addresses of the owners and operators of the web-site.

Reference: Cross-Examination of Christopher C. Cooper, December 14, 2010 at pg 59, Q. 270

30. Counsel for Morris, on Cooper's cross-examination, acknowledged that Morris had made "many police complaints" against the anonymous bloggers, but that the police "have not assisted her in determining this information".

Reference: Cross-Examination of Christopher C. Cooper, December 14, 2010 at pg 63, Q. 285

Undertaking as to Damages

31. Morris has sworn an undertaking as to damages on this motion. Cooper refused to discuss this document on his cross-examination, but did acknowledge that Morris was no longer the Mayor, and he did not know if she was even employed

Reference: Cooper Affidavit, Exhibit "J", Morris Undertaking as to Damages; Cross-Examination of Christopher C. Cooper, December 14, 2010 at pg 71, Q. 315

PART III - LAW AND ARGUMENT

Overview of Argument

32. The moving party must overcome three unique legal hurdles in order to succeed on its motion.

33. In particular:

(a) the order the plaintiff seeks is a mandatory order-- a significant legal remedy. Morris falls far short of the test she must meet;

(b) Morris must establish an underlying claim exists: the words complained of have never been particularized; the plaintiff is a government actor that cannot sue for defamation; and the notice provisions under the *Libel and Slander Act* have not been complied with; and

(c) Morris does not meet the test for a Norwich Order.

Preliminary Issue: The Ramcharan Affidavit

34. The moving party has filed an affidavit of Ranita Ramcharan, sworn January 5, 2011 (i.e., after Cooper's cross-examination). While the content of the affidavit is not factually controversial, the issues raised therein require a response.

35. In particular, the Ramcharan affidavit appends a string of e-mail correspondence reflecting that although Morris demanded a cross-examination of the Individual Defendants

on the motion, the Individual Defendants took the position that such a cross-examination was inappropriate.

Reference: Affidavit of Ranita Ramcharan, sworn January 5, 2011, at Exhibit "A".

36. This Court should draw no inference from this string of events. Had Morris genuinely believed that the Individual Defendants had information relevant to this motion, she could have brought a motion to compel the cross-examination. She did not. No inference can be, or should be, drawn.

37. Furthermore, the moving party's conduct in this regard is best set out in its November 16, 2010 letter to counsel, Exhibit "B" to Ms. Ramcharan's affidavit. In particular, counsel for Morris writes that, in his view, "it is our position that your request to cross-examine Mr. Cooper in the *Norwich* motion is abusive."

Reference: Affidavit of Ranita Ramcharan, sworn January 5, 2011, at Exhibit "B".

38. Clearly, counsel's letter of November 16, 2010 is germane on the motion: if Mr. Cooper had no relevant information such that his cross-examination was "abusive", and the moving party did not supplement the record either by compelling a cross-examination of the Individual Defendants, or proffering further evidence (as it did with Ms. Ramcharan's belated affidavit), on what basis can the moving party satisfy <u>any</u> evidentiary hurdle?

<u>I. No Mandatory Order Should Issue</u>

39. In its Notice of Motion, the moving party refers to the order it seeks as a "mandatory order". These respondents accept that characterization.

Reference: Moving Party's Motion Record at p. 3, Notice of Motion.

40. In the normal course of litigation, IP addresses and email addresses likely constitute "documents" for the purpose of disclosure and litigation. Indeed, in the normal course, these are documents that may otherwise be produced to the extent that the defendants have these in their possession, power or control, and the production of these documents offends no other legal obligation.

Reference: Rule 30.01 of the *Rules of Civil Procedure*

Warman v. Wilkins-Fournier, [2010] ONSC 2126 (Div. Crt) ("*Fournier*") at ¶ 6.

41. For instance, in *Fournier*, a motion to reveal IP information of anonymous 'bloggers' came before the Court in the context of a motion for a further and better affidavit of documents from the defendants. This not the case here. Accordingly, in addition to meeting the Norwich test set out in *Fournier*, Morris must also meet the test for a mandatory order.

42. While the test for a mandatory order is analogous to the test to be applied where a party seeks injunctive relief, the test must be even more stringently applied for a mandatory order. The test considers that:

(a) there must be a serious question to be tried;

(b) there must be irreparable harm should the order not issue; and

(c) the balance of convenience must favour the applicant.

Reference: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

43. On the facts before this Court, there is no serious question to be tried. The moving party has never particularized the defamatory statements she complains of. There is good reason to doubt whether or not statements about Morris, who alleges defamation in her capacity as Mayor, may be defamed. There is good reason to doubt whether the Statement of Claim has been served in compliance with the *Libel and Slander Act*. The statements referenced in Cooper's affidavit are not *prima facie* defamatory, or are easily defensible. The moving party admits through Cooper that there is no claim against Mr. Johnson, who was never a moderator, and Ms. Bishenden, who was not a moderator at the relevant time.

44. These legal issues are further refined below on submissions respecting that Morris cannot make out a *prima facie* case. In the absence of a serious issue to be tried, a mandatory order cannot issue.

45. There is no evidence that Morris will be irreparably harmed should no order issue.

46. Tellingly, the affiant, Cooper, refused questions regarding the irreparable harm that would befall Morris should a mandatory order not issue. Although Cooper's affidavit speaks of 'reputational harm', Cooper refused questions on this area, and hid behind purported solicitor-client privilege:

> Q: What information do you have, if any, sir, that the Plaintiff was concerned that the maliciousness of the post[s] would cause reputational harm and distress to her going forward?
>
> A: I am mindful of the fact that I may be straying into an area which is cloaked in solicitor/client privilege.

However, I will answer the question by saying merely that she indicated as much to me....

Q: Well, to the extent that you're relying on the information [from Morris] as the source of the belief in your Affidavit, I'm not sure that solicitor/client privilege is going to apply.

A: It may not. However, I throw in that caveat only insofar to let you know that I will answer the question by merely saying that she told me that.

Q: Told you what?

A: That the repetitiveness and the maliciousness of these posts have caused or will cause reputational harm, to answer your question, sir.

Q: Anything else to add to that answer or that's the extent of what you're prepared to tell me?

A: That's the extent of what I'm prepared to tell you Mr. Goldblatt.

Q: In paragraph 17 [of your affidavit] where you say: "The plaintiff is also concerned that the individuals in charge of this website, once identified, will attempt to utilize other anonymous blog accounts to publish defamatory comments about the plaintiff". Are you prepared to tell me about that conversation with Ms. Morris?

A: No.

Q: And again, you're invoking solicitor/client privilege?

A: Yes.

Reference: Cross-Examination of Christopher C. Cooper, December 14, 2010 at pg 65, Q. 293 to 299

47. Cooper admitted that he was aware of no further defamatory postings on the auroracitizen.ca since this claim was issued.

Reference: Cross-Examination of Christopher C. Cooper, December 14, 2010 at pg 68, Q. 305

48. There is no evidence before this Court that Morris continues to be defamed, let alone defamed by individuals associated with the auroracitizen.ca website. Further, the bald statements in Cooper's Affidavit regarding the irreparable harm Morris may suffer (i.e., reputational damage) cannot be accepted by the Court.

49. The balance of convenience must clearly favour that a mandatory order not be granted. As set out below, this Court must engage in a balancing and weighing of considerations under the *Charter of Rights and Freedoms,* and in particular a weighing of the rights of the anonymous commentators to remain anonymous where speaking about political issues.

50. Further, on October 28, 2010, the Attorney General received a report from the Anti-SLAPP[1] Advisory Panel (the "SLAPP Report"), which conclusions are relevant on the motion at least as concerns balancing interests.

> Reference: Anti-Slapp Advisory Panel, Report to the Attorney General, October 28,2010 (http://www.attorneygeneral.jus.gov.on.ca/english/anti_slapp/anti_slapp_final_report_en.pdf)

51. The SLAPP Report notes that:

> the very fabric of democracy is woven daily from the acts of citizens who engage in public discussion and contribute in countless ways to creating a civil society alive to the interests and rights of its members. It will always be important to recognize and protect these activities, but more than ever it seems crucial to encourage public participation as voter turnouts decline, society's needs become ever more complex and individual feel increasingly powerless to effect meaningful change.

[1] The acronym "SLAPP" stands for "Strategic Litigation Against Public Participation", and is defined as a lawsuit against one or more individuals or groups that speak out or takes a position on an issue of public interest.

Reference: SLAPP Report at ¶4.

52. The SLAPP Report also notes that defamation litigation commenced by politicians, funded by the public, are "likely to be unequal". In the circumstances, this unequal playing field affects the balance of convenience such that the order sought should not issue.

Reference: SLAPP Report at ¶91

53. The auroracitizen.ca is a web-site that fosters debate and discussion about politics in Aurora. To have that web-site stripped of its ability to provide anonymity to its commentators on matters of public interest would be a significant imposition, and would chill public political discourse. Conversely, where Morris can point to no countervailing consideration that warrants the granting of a mandatory order, the balance of convenience lies with the status quo, and not ordering disclosure.

54. There is no harm to Morris should she not obtain this information. Indeed, "many" police complaints have already been initiated, such that if there were any legitimate threat to her, one would assume the Police would take ample precautions.

55. As the moving party has failed to meet the test for a mandatory order, this motion can be decided on that basis alone and dismissed.

II. No Cause of Action for Defamation

56. Morris' claim for defamation is not tenable.

57. Where a Norwich Order requires a balancing of *Charter* values, the moving party must demonstrate a *prima facie* claim against the unknown wrongdoers.

Reference: *Fournier* at para. 34.

(a) No *prima facie* case: words are not defamatory

58. The plaintiff has failed to plead, anywhere, defamatory words. This Court cannot assess the underlying merits of the claim without knowing upon which words the plaintiff bases her action.

59. It is trite law that an action for defamation relies upon words in order to determine whether those words are defamatory. In the absence of these words, this Court simply cannot decide whether the action will succeed. No *prima facie* can be made out.

Reference: *Barry's Retail Merchants' Association* [1924] 1 W.W.R. 1279 (Sask. C.A.).

60. Even if this court decides to entertain the extracts of the so-called Defamatory Postings in Cooper's Affidavit as those upon which Morris may one day ground her claim for defamation, it is clear and obvious that these comments are not, *prima face* defamatory, and cannot form the basis of a claim for defamation:

(a) The 'defamatory comment' at paragraph 8 of Cooper's Affidavit, i.e., that an individual wishes to kick the Mayor [i.e. the plaintiff] in the head, is not defamatory. It would not lower the reputation of the Mayor in public opinion. More likely, it is hyperbole, or figurative speech;

(b) the comments excerpted by Cooper at paragraph 9 of his affidavit are clearly comments with regard to Morris' reputation as Mayor, and acts that she did as Mayor.

These comments have to do with a "governing reputation" which cannot be subject to an action in defamation. As held by this Court:

> Courts are not a fit institution to sit in judgment on the fairness, or otherwise, of critical comments made about government.

A government has no reputation apart from a governing reputation, which cannot be defamed. No cause of action for defamation exists on the basis of these statements. Further, these comments likely attract a defence of public interest privilege in that, even if they are defamatory, they were made on a matter of public importance, i.e., how Morris, as Mayor, was performing, and in good faith. In that the claim advanced by Morris was initially styled as a claim by Morris "in her capacity as Mayor" it is abundantly clear that the comments that are complained of have to do with a governing, not a personal, reputation;

Reference: *Halton Hills (Town) v. Cerouak*, 2006 CanLII 12970 (ONSC) ("*Halton Hills*").

(c) It is worth noting that the SLAPP Report to the Attorney General specifically references Morris' claim, calling it a "recent cas[e] in which municipal councillors have sued someone for criticisms aimed at the municipality or municipal interests generally." The SLAPP Report continues: "The question arises whether this is a way of avoiding the general prohibition against municipal libel actions." It is submitted that the claim before the Court is indeed a municipal libel action, funded at first instance by the municipality, advanced by a government actor at first instance, and doomed to fail in the result;

Reference: SLAPP Report, at ¶91-92.

(d) the reference to the quote at paragraph 10 of Cooper's affidavit, that Morris should be "hanged with her own chains", is not defamatory. While this language may be colourful, it is rhetorical speech designed to convey an emotion rather than action; and

(e) the statement at paragraph 11 of Cooper's affidavit that Morris "wilfully and knowingly distorts and twists the truth to try and serve her own purposes" must be read in its full context as attached as Exhibit "F" to Cooper's Affidavit. The post in question is part of a longer article where it is clear that the issues in question have to do with whether Morris received a cease and desist letter from lawyers for the Town's integrity commissioner. Again, these statements are fair comment on a matter of public interest. Further, the comments are protected by privilege, as they are covered by the defence of responsible communication on matters of public interest. At the very least, the comments that are complained of are about a Mayor that has no reputation that can be defamed.

Reference: Motion Record, p. 61;
Halton Hills, supra.
Quan v. Cusson, 2009 SCC 62 at para. 28, quoting *Grant v. Torstar Corp.*, 2009 SCC 61.

(b) **No *prima facie* case: failure to comply with provisions of the *Libel and Slander Act***

61. The *Libel and Slander Act* R.S.O. 1990, c. L.12 sets out rigid deadlines for the commencement of a claim for defamation.

62. Section 5(1) of the *Act* provides that no action for libel lies unless the plaintiff has, within six weeks after the alleged libel has come to the plaintiff's knowledge, given to the defendant notice in writing, specifying the matter complained of.

Reference: *Libel and Slander Act* R.S.O. 1990, c. L.12 at s. 1(1), 5(1)

63. What is clear is that the plaintiff knew of the allegedly defamatory postings by no later than September 14, 2010 (the date where Aurora Council discussed the litigation). What is also clear is that by October 27, 2010, the date six weeks from September 14, 2010, the defendants had never been served with a notice setting out the "matter complained of", i.e. the defamatory words.

64. Accordingly, as Morris did not give the defendants notice of the words complained of under the *Libel and Slander Act* within the time period stipulated, the claim is statute barred.

III. Morris cannot meet the test for a Norwich Order

65. In *Fournier*, the Divisional Court heard an appeal from a decision of the Superior Court of Justice where the moving party obtained an order requiring the administrators and moderators of a Message Board to disclose IP information of anonymous commentators. The Divisional Court held that the lower court applied the incorrect test, and in particular, did not fully consider *Charter* values in ordering the disclosure. Accordingly, the Court held that the following test need be considered the moving party seeks to defrock an anonymous commentator of his or her right to anonymity:

> 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.

Reference: *Fournier* at para. 34.

66. It is respectfully submitted that the test in *Fournier* must be even more stringently applied where the party allegedly defamed is a government actor, and the comments made about her were made "in her capacity as Mayor".

(a) The anonymous commentators had an expectation of privacy

67. The exhibits appended to the Cooper Affidavit provide this Court with a basic understanding of the operation of the auroracitizen.ca web-site. For instance, some users (i.e., the Individual Defendant, Richard Johnson) post comments under their own name. Other users post under the name "Anonymous", while others select aliases (i.e. "For a Few Dollars More).

Reference: Cooper Affidavit, Exhibit "B"

68. The individuals who post on the auroracitizen.ca are therefore free to determine for themselves their level of privacy. They can choose, or not choose, as the case may be, to be associated with their comments.

69. Undoubtedly, the anonymous commentators posted comments on the auoroacitizen.ca in the firm belief and expectation that they would not be identified. Their right to privacy, albeit not absolute, is significant, especially when espousing what must be deemed to be a political opinion.

(b) no prima facie case against the unknown alleged wrongdoer; claim not brought in good faith

70. As set out above, Morris has no *prima facie* case for defamation for the reasons set out above.

71. In *BMG Canada Inc. v. John Doe*, a motion to compel disclosure of IP addresses of individuals allegedly infringing copyright was denied, in part because of the moving party's failure to provide the Court with cogent evidence that connected the infringers' pseudonyms with IP addresses. Similarly, there is no cogent evidence before this court that connects the respondents with either (a) the auroracitizen.ca blog, or (b) the ability to obtain IP information from the anonymous commentators.

Reference: Cooper Cross-Examination at pg. 45, Question 202 to 206
BMG Canada Inc. v. John Doe, [2005] F.C.J. No. 858 (C.A.) at para. 23. ("*BMG*")

72. The moving party's affiant 'infers' that Mr. Hogg is a moderator and that Ms. Bishenden was at some point a moderator (although not at the time subject to the claim for defamation). He has admitted that Mr. Johnson was never a moderator. The moving party's affiant admits that he does not even know if moderators have access to IP information. The evidence before the Court in support of the order that the moving party seeks is inadequate.

73. Further, Morris' conduct in this litigation makes it clear that she has not acted in good faith: she served a Notice of Action without a Statement of Claim (issued in the name of a government office without power to sue for defamation), has not particularized the words complained of, and has named the Individual Defendants' counsel as a respondent on a motion for no compelling reason. She has never, to the best of the information of her affiant, requested the names of the owners or operators of the auroracitizen.ca blog.

Reference: Cross-Examination of Christopher C. Cooper, December 14, 2010 at pg 59, Q. 270

74. This Court should also not ignore the suspect timing of this litigation in that it was commenced precisely within the closing precious moments of a political campaign.

(c) Morris has yet to take reasonable steps to identify the anonymous commentators

75. Morris has not yet taken reasonable steps to identify the anonymous commentators.

76. In particular she can take no step, and see if these documents are disclosed 'in the normal course':

> Q: My question to you, sir, is isn't it true that that these documents may be producible in the normal course of a civil proceeding? These documents meaning the documents requested in the motion?
>
> A: Yes.

Reference: Cooper Cross-Examination, pg. 61, q. 208.

77. Morris has also made a criminal complaint against the anonymous bloggers. It is possible that the information she seeks on this motion may be producible through a criminal investigation, as defamation is an offence under the Criminal Code of Canada.

Reference: S. 298 to 301, *Criminal Code of Canada*, R.S., 1985, c. C-46.

(d) The public interest does not favour disclosure; the legitimate interests of freedom of expression and a right to privacy must prevail

78. Privacy concerns are "important considerations" on Norwich motions. They are significant and must be protected.

Reference: *BMG*, *supra* at para. 37, 38.

79. Here, the public interest must consider that the nature of the comments that are alleged to be defamatory in this action have to do with the performance of a sitting Mayor. The 'chilling effect' that lies at the heart of the guarantee of freedom of expression is all the more engaged where public citizens must be fearful that their anonymous comments about a Mayor regarding her performance, "in her capacity *as* Mayor", may find them the target of a civil proceeding.

80. There can be no doubt that on this motion this Court must consider the *Charter*, and whether an Order obligating the respondents to disclose the information the moving party seeks violates the freedom of expression interests of the anonymous commentators. As held by the Divisional Court in *Fournier*, "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."

Reference: *Fournier*, supra at para. 15;
Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 112(b) ("*Charter*") at s.2(b);

81. Canadian Courts have consistently and frequently held that freedom of expression is of crucial importance in a democratic society:

> It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized. No doubt that was the reason why the framers of the Charter set forth s. 2(b) in absolute terms which distinguishes it, for example, from s. 8 of the Charter which guarantees the qualified right to be secure from unreasonable search. It seems that the rights enshrined in s. 2(b) should therefore only be restricted in the clearest of circumstances.

Reference: *Libman v. Quebec*, [1997] 3 S.C.R. 569 (S.C.C.) at para. 28.

82. This importance of freedom of expression must be all the more sedulously protected where the expression at issue is political discourse. The right to freedom of expression, especially related to political discourse, is subject to "the highest level of protection." As held by Justice Dickson of the Supreme Court of Canada:

> The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity. The state therefore cannot act to hinder or condemn a

> political view without to some extent harming the openness of Canadian democracy and its associated tenet of equality for all.

Reference: *R. v. Keegstra*, [1990] 3 S.C.R. 697 at para. 89 (emphasis added).

83. The comments Morris takes issue with are political expression. The test for determining expression is not onerous. Where the speech in question is geared towards attaining truth, where it is regarding political decision-making, and where self-fulfilment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment, the speech in question must be protected. While Morris may not agree with the comments about her governing reputation, they are nonetheless constitutionally protected.

Reference: *R. v. Lawrence*, [1992] A.J. No. 610 (Q.B.), aff'd [1993] 7 W.W.R. 121 (C.A.), leave to appeal to S.C.C. dismissed [1993] S.C.C.A. No. 286, quoting *Irwin Toy v. Quebec (Attorney General)*, (1989) 1 S.C.R. 927.

84. Here, the Court is being asked to deny the anonymous commentators their rights to anonymous expression on political issues, by way of an interim motion. This Court must jealously guard against the encroachment on fundamental freedoms that the moving party seeks.

IV: Motion Against Goldblatt

85. While the legal grounds that bar the motion against the Individual Defendants apply equally to bar the motion against Goldblatt, this Court should also cautiously order counsel to disclose information to an opposing party in the course of litigation, which is communicated as part of settlement discussions.

86. Goldblatt's voicemail opens with the explicit words "without prejudice". It proceeds to delineate a settlement proposal- i.e., "one of the strangest outcomes or possible outcomes of a case I've ever had". Goldblatt further invokes that he "can't tell you by whom [he's been approached]...but what I've been told is that the people who made the anonymous post are prepared to have settlement discussions with you." Goldblatt concludes the reproduced portions of the voicemail, by stating "the other side of that at least from my client's perspective..."

Reference: Cooper Affidavit, at para. 13,

87. This Court, therefore, is being asked to compel counsel to disclose information: (a) that was delivered, at the very least, under a belief that it was 'without prejudice', and would lead to a 'strange outcome'; (b) was being communicated with an expectation of confidentiality ("I can't tell you by whom I've been approached"); and (c) was premised on a quid pro quo of 'something' happening *vis* Goldblatt's clients.

88. Parties should be encouraged to resolve disputes without recourse to litigation, or trial, as the case may be. The corollary of this must be that these discussion cannot then form part of the litigation, itself. These discussions are privileged.

Reference: *The Law of Evidence in Canada*, Bryant, Lederman and Fuerst, 3d. Ed., (Toronto: Lexis Nexis)("*The Law of Evidence*") at §14.313

89. For recognition of this privilege, the communication must be: (a) with regard to a litigious dispute; (b) made with the express or implied intention that it not be disclosed to the court; and (c) the purpose of the communication must be to attempt to effect a settlement. It is

clear that test (a) and (b) are easily made out. Litigation had been commenced, and there was an express intention to invoke privilege through the use of the words "without prejudice".

Reference: *The Law of Evidence* at §14.322;
Rule 49.05 of the *Rules of Civil Procedure.*

90. Courts have held that determining whether a communication's purpose was to effect a settlement may be broadly interpreted. For instance, where the communication is part of correspondence which the parties intend will reasonably lead to a compromise or settlement, privilege will attach. This will include letters that are designed to *open* negotiations, as here. The communication need not contain an actual offer of settlement, merely an intent to engage such a dialogue.

Reference: *The Law of Evidence* at §14.327 to §14.330.

91. Here, the moving party admits that in its view, at least part of the voicemail references settlement discussions. Morris has drawn an arbitrary line to suit her purposes. The clear intention of the voicemail was to notify opposing counsel of a potential resolution of the action, with the intention that it not bind any party, and be informational in nature.

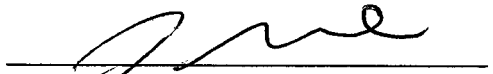
92. To transform the voicemail into the basis for a disclosure motion places a chill on counsel's ability to negotiate with fellow officers of the court with a view towards settlement.

93. In any event, there is no suggestion that Goldblatt has any information about the anonymous commentators other than which appears in the voicemail message.

PART IV - ORDER REQUESTED

94. These respondents request that this motion be dismissed with costs against the moving party on a full or substantial indemnity basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of January, 2011.



Charles Sinclair/Jordan Goldblatt
Sack Goldblatt Mitchell LLP

Lawyer for the Respondents Hogg, Bishenden and Johnson

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Warman v. Wilkins-Fournier*, [2010] ONSC 2126 (Div. Crt)

2. *RJR-McDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

3. Anti-Slapp Advisory Panel, Report to the Attorney General, October 28,2010 (http://www.attorneygeneral.jus.gov.on.ca/english/anti_slapp/anti_slapp_final_report_en.pdf)

4. *Barry's Retail Merchants' Association* [1924] 1 W.W.R. 1279 (Sask. C.A.).

5. *Halton Hills (Town) v. Cerouak*, 2006 CanLII 12970 (ONSC).

6. *Quan v. Cusson*, 2009 SCC 62 (CanLii).

7. *BMG Canada Inc. v. John Doe*, [2005] F.C.J. No. 858 (C.A.)

8. *Libman v. Quebec*, [1997] 3 S.C.R. 569 (S.C.C.)

9. *R. v. Keegstra*, [1990] 3 S.C.R. 697.

10. *R. v. Lawrence*, [1992] A.J. No. 610 (Q.B.), aff'd [1993] 7 W.W.R. 121 (C.A.)

11. *The Law of Evidence in Canada*, Bryant, Lederman and Fuerst, 3d. Ed., (Toronto: Lexis Nexis)

SCHEDULE "B"
RELEVANT STATUTES

1. Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 112(b) at s.2(b)

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

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

(c) freedom of peaceful assembly; and

(d) freedom of association.

2. Rule 30.01(1)(a) of the *Rules of Civil Procedure*

(1) In rules 30.02 to 3011,
(a) "document" includes a sound recording, videotape, film, photograph, chart graph, map, plan, survey, boook of accoutn and data and information electronic form

3. Rule 49.05 of the *Rules of Civil Procedure*

An offer to settle shall be deemed to be an offer of compromise made without prejudice

4. *Criminal Code,* R.S.C. 1985, C. c-46, s. 298

DEFAMATORY LIBEL

Definition

298. (1) A defamatory libel is matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published.

Mode of expression

(2) A defamatory libel may be expressed directly or by insinuation or irony
(*a*) in words legibly marked on any substance; or

(*b*) by any object signifying a defamatory libel otherwise than by words.

R.S., c. C-34, s. 262.

Publishing

299. A person publishes a libel when he

(*a*) exhibits it in public;

(*b*) causes it to be read or seen; or

(*c*) shows or delivers it, or causes it to be shown or delivered, with intent that it should be read or seen by the person whom it defames or by any other person.

R.S., c. C-34, s. 263.

Punishment of libel known to be false

300. Every one who publishes a defamatory libel that he knows is false is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

R.S., c. C-34, s. 264.

Punishment for defamatory libel

301. Every one who publishes a defamatory libel is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

R.S., c. C-34, s. 265.

5. *Libel and Slander* Ac R.S.O. 1990, c. L.12 at s. 1(1), 5(1)

6.

Definitions

1. (1) In this Act,

"broadcasting" means the dissemination of writing, signs, signals, pictures and sounds of all kinds, intended to be received by the public either directly or through the medium of relay stations, by means of,

(a) any form of wireless radioelectric communication utilizing Hertzian waves, including radiotelegraph and radiotelephone, or

(b) cables, wires, fibre-optic linkages or laser beams,

and "broadcast" has a corresponding meaning; ("radiodiffusion ou télédiffusion", "radiodiffuser ou télédiffuser")

"newspaper" means a paper containing public news, intelligence, or occurrences, or remarks or observations thereon, or containing only, or principally, advertisements, printed for distribution to the public and published periodically, or in parts or numbers, at least twelve times a year. ("journal") R.S.O. 1990, c. L.12, s. 1 (1).

5(1) 5. (1) No action for libel in a newspaper or in a broadcast lies unless the plaintiff has, within six weeks after the alleged libel has come to the plaintiff's knowledge, given to the defendant notice in writing, specifying the matter complained of, which shall be served in the same manner as a statement of claim or by delivering it to a grown-up person at the chief office of the defendant.

Morris
Plaintiff
and
Johnson et al
Defendants

Court File No: CV-10-00412021-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at TORONTO

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