COURT FILE NO.: 07-CV-039927SR

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
RICHARD WARMAN	)	David Spears, James Katz and Stephanie Lewis (Student-at-Law), for the Plaintiff
	)	
	)	
Plaintiff	)	
	)	
- and -	)	
	)	
	)	
CONSTANCE WILKINS-FOURNIER and MARK FOURNIER and JOHN DOES 1-8 (AKA Klinxx; SaskBigPicture; Droid1963; conscience; Faramir; Peter O'Donnell; Padraigh; and, HR-101)	)	Barbara Kulaszka, for the Defendants
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	)	
Defendants	)	
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	)	**HEARD:** January 22, 2009

Kershman J.

[1] The issue in this case is whether the Defendants should be required to produce relevant documentary information either identifying, or that could assist the Plaintiff in identifying eight John Doe Defendants in this case.

[2] The Plaintiff succeeds on the motion for the reasons set out hereafter.

[3] The Plaintiff claims that the Defendants, as owners and operators of an internet site, freedominion.ca, have in their possession and control documents and/or electronic documents

that would assist in identifying the true identities and locations of the eight John Doe Defendants, which documents include but are not limited to:

(a) The email addresses and all personal information the John Doe Defendants used and submitted to freedominion.ca to register their access accounts, and/or profiles in the freedominion.ca site forum;

(b) The Internet Protocol ("IP") addresses of the computers used to establish the accounts in question;

(c) The IP addresses the John Doe Defendants used when making the specific postings identified in the Statement of Claim;

(d) Any and all documents relating to the establishment and ongoing operation of the website, freedominion.ca, by the Fournier Defendants, such as, but not limited to, hosting agreements, billing information, and website registrant name(s).

[4] The Plaintiff is also seeking information and control documents relating to the sale in 2008 of the internet site freedominion.ca to a Panamanian corporation.

[5] The Defendants argue that people using message boards do so with the expectation of anonymity. They claim that they make statements or provide information on message boards that they would not normally talk about in real life with family, friends, or coworkers.

[6] The Defendants also argue that the Plaintiff must establish a *prima facie* case in the affidavit evidence before disclosure can be applied (*Irwin Toy Ltd. v. Doe*, [2000] O.J. No. 3318 (Sup. Ct.)).

[7] The Plaintiff argues that there is a duty to disclose found in Rule 30.01(1)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[8] As this case is filed under the Simplified Rules, the Plaintiff further argues that Rule 76.03 requires documentary disclosure as set out therein.

[9] An Affidavit of Documents is required to disclose, to the full extent of a party's knowledge, information and belief, all documents relating to any matter in issue in the action that are or have been in the party's possession, control or power.

[10] In addition, the Affidavit of Documents must include a list of the names and addresses of the persons who might reasonably be expected to have knowledge of the matters in issue in the action, unless the court orders otherwise.

[11] In my view, the *Rules of Civil Procedure* impose a high standard of discovery upon the litigants.

[12] Furthermore, as this matter is proceeding under the Simplified Rules, there are additional obligations required. Specifically, an Affidavit of Documents includes a list of names and addresses of the persons who might reasonably be expected to have knowledge of the matters in issue in the action.

[13] The Plaintiff relies on the case of *Lillie v. Bisson*, [1999] O.J. No. 3677 (C.A.), a case in which the Ontario Court of Appeal says that courts should encourage a liberal interpretation of Rule 76 in order to reduce the cost of litigating modest sums.

[14] In my view, the Defendants are under an obligation to disclose all documents in their power or control.

[15] The Defendant relies on *Irwin Toy* for the proposition that disclosure should not be automatic upon the issuance of a Statement of Claim:

> If such were to be the case, the fact of the anonymity of the internet could be shattered for the price of the issuance of spurious Statement of Claim and the benefits obtained by the anonymity lost in inappropriate circumstances.

[16] The Defendants argue that the Plaintiff must establish a *prima facie* case by way of affidavit evidence before disclosure is ordered.

[17] The *Irwin Toy* case was decided in 2002 and cites no other case law. At that time Justice Wilkins may have simply felt that the issue was too novel.

[18] Justice Wilkins held that there were some public policy reasons in protecting the privacy of an internet service provider ("ISP") customer, and therefore disclosure was not required upon filing the Statement of Claim as the plaintiff could have filed such a claim in a spurious manner, simply to identify an anonymous individual.

[19] Justice Wilkins considered the public policy as it relates to privacy of internet users are paragraphs 10 and 11 as follows:

> Implicit in the passage of information through the internet by utilization of an alias or pseudonym is the mutual understanding that, to some degree, the identity of the source will be concealed. Some internet service providers inform the users of their services that they will safeguard their privacy and/or conceal their identity and, apparently, they even go so far as to have their privacy policies reviewed and audited for compliance. Generally speaking, it is understood that a person's internet protocol address will not be disclosed. Apparently, some internet service providers require their customers to agree that they will not transmit messages that are defamatory or libellous in exchange for the internet service to take reasonable measures to protect the privacy of the originator of the information.
>
> In keeping with the protocol or etiquette developed in the usage of the internet, some degree of privacy or confidentiality with respect to the identity of the internet protocol address of the originator of a message has significant safety value and is in keeping with what should be perceived as being good public policy. As far as I am aware, there is no duty or obligation upon the internet service provider to voluntarily disclose the identity of an internet protocol address, or to provide that information upon request.

[20] It is important to note that the rules in question in *Irwin Toy* were two that required the plaintiff to seek leave of the court. They were seeking leave under Rules 30.10 and 31.10 to order production of documents from a non-party and to examine a non-party.

[21] In the case at bar, the Plaintiff is merely seeking a further and better Affidavit of Documents since the ones provided by the Defendants do not comply with the mandatory rules.

[22] In any case, the test laid out by Wilkins J. in *Irwin Toy* for granting leave to order production of documents and examination of a non-party is as set out in paragraph 12:

> In the case at bar, the moving party has demonstrated on a prime facie basis that the originator of the message in question has released, by electronical mailing, words which are capable of being construed by a properly charged jury as being defamatory. Similarly, a prima facie case has been demonstrated that the unidentified originator of the message had access to two private and confidential electronic files wrongfully removed from the corporate plaintiffs' computer system, and converted by the originator of the message to their own use.

[23] The Defendants claim that the Plaintiff did not make out a *prima facie* case. In my view, there was no need for the Plaintiff to do so.

[24] In fact, the obligation is on the Defendants to disclose. In the case of *Kitchenham v. AXA Insurance Canada*, [2008] O.J. No. 5413 (C.A.), the Court of Appeal held at paragraph 50: "If the information is relevant and not protected by privilege, it must be produced."

[25] The Defendants also argue that the *BMG Canada Inc. v. John Doe (F.C.)*, [2004] 3 F.C.R. 241 indicates that a *bona fide* claim was required in order for the information to be released.

[26] In *BMG Canada*, Justice von Finckenstein at paragraph 9 described as common ground the proposition that:

> ISP account holders have an expectation that their identity will be kept private and confidential. This expectation of privacy is based on both the terms of their account agreements with the ISPs and sections 3 and 5 of the PIPEDA.

[27] At paragraph 39, the judge went on to note:

> However while the law protects an individual's right to privacy, privacy cannot be used to protect a person from the application of either civil or criminal liability. Accordingly, there is no limitation in PIPEDA restricting the ability of the Court to order production of documents related to their identity.

[28] Furthermore, at paragraph 40 he held:

> Thus, both PIPEDA as well as the test set out in *Norwich, supra* and *Glaxo, supra*, require the Court to balance privacy rights against the rights of other individuals and the public interest.

[29] The judge reviewed the history of similar proceedings and noted that the case before him was not a novel one; in several previous cases, parties had sought disclosure of personal information that had been previously only available through IP addresses. He noted that in none of those cases had the privacy or other concerns weighed against disclosing the information. In the end, the court dismissed the request for disclosure because there was insufficient evidence linking the pseudonyms to any alleged defendants.

[30] *BMG Canada* is distinguishable for two reasons. First, that case dealt with the *Federal Court Rules*. The disclosure provisions in question used permissive language, allowing a Federal Court judge to order disclosure if satisfied that certain conditions were met.

[31] This is in sharp contrast to the *Rules of Civil Procedure* which are at play in this case. The *Rules of Civil Procedure* impose a mandatory disclosure obligation on the parties directly.

[32] Secondly, the court discussed public policy concerns at some length. While there is certainly a public interest in upholding copyright law, it may not be as high as the interests at stake in some of the cases to which he referred, those with parties including the Canadian Blood Services in one application and the Ontario First Nations Limited Partnership in another case.

[33] In the case before the court, we are dealing with an anti-hate speech advocate and Defendants whose website is so controversial that it is blocked to employees of the Ontario Public Service.

[34] The Federal Court of Appeal upheld the decision in *BMG Canada v. John Doe (F.C.A.)*, [2005] 4 F.C.R. 81 (C.A.).

[35] I note that in the Defendants' Factum, they rely on the appellate decision for the proposition that the older the information sought, the less reliable it is. Some of the disclosure the Plaintiff seeks, however, is related to posts as recent as December 9, 2008.

[36] In the case of *R. v. Kwok*, [2008] O.J. 2414 (Ct. J.) Justice Gorewich considered the argument that police violated an accused's rights under s. 8 of the *Canadian Charter of Rights*

and Freedoms by relying on *PIPEDA* to obtain other information in a child pornography investigation. He held at paragraph 35:

> I find that personal information such as names and addresses of customers held by companies, in this case Rogers, would tend to disclose intimate details of lifestyle and choices. The acquiring of such information, even in the investigation relating to the enforcement of any law in Canada, or enforcing any law in Canada, in my view, should be scrutinized by a neutral body, a judicial authority. These determinations, in the circumstances of this case, were not made by neutral parties...

[37] Even though the court found there was a privacy interest, the court held that such information could be properly sought by means of a court order. Justice Gorewich concluded that there was a reasonable expectation of privacy associated with an IP address.

[38] There is a recent case of *R. v. Wilson* (2 February, 2008), St. Thomas 4191/08 (Ont. Sup. Ct.). In this case, Justice Leitch considered *Kwok*, but was not bound by it as the decision is from the Ontario Court of Justice. Justice Leitch held that there was no reasonable expectation of privacy in information connected with one's IP address.

[39] As in *Kwok*, the accused claimed that his rights under s. 8 of the *Charter* were violated because police failed to obtain a warrant before requesting his name from an ISP. The accused was charged with two counts related to child pornography. As Justice Leitch noted in paragraph 4: "it is possible for someone to Google how to find an IP address on the internet and the information to determine who owns that address, in this case Bell Canada, is also publicly available."

[40] In terms of the issue of a reasonable expectation of privacy of one's IP address information, Justice Leitch concludes at paragraphs 42 and 43:

> In my view, the applicant had no reasonable expectation of privacy in the information provided by Bell considering the nature of that information. One's name and address or the name and address of your spouse are not "biographical information" one expects would be kept private from the state. It is information available to anyone in a public directory and it does not reveal, to use the words of Sopinka J in *Plant*, "intimate details of the lifestyle

and personal choices or decisions of the applicant". As Nadal J. observed in *Friers* at para. 24:

> Account information, per se, reveals very little about the personal lifestyle or private decisions of the occupant's of the defendant's residence other than they have chosen to have some form of internet connection installed in that residence. Moreover, the prevalence of wireless and handheld technology makes a particular address an even less significant fact so far as internet use is concerned, since that use is no longer tied to a land line tied to a particular address.

In addition, in this case the terms of the contract with the internet provider is one of the factors to be considered in assessing whether the asserted expectation of privacy is reasonable in the totality of the circumstances. That contract includes an agreement that the service provider could disclose any information necessary to satisfy any laws, regulations or other governmental request from any applicable jurisdiction. Further, the agreement contained a provision that by subscribing to the service, one consents to the collection, use and disclosure of personal information as described in the Bell Customer Privacy Policy and the Bell Code of Fair Information Practices. This privacy statement includes a provision that Bell Canada may also provide personal information to law enforcement agencies. Therefore by virtue of the contractual terms on which the internet service was provided an expectation of privacy is not reasonable.

[41] As such, the court's most recent pronouncement on this is that there is no reasonable expectation of privacy.

[42] Accordingly, the paramount obligation in this matter is to follow the disclosure rules in the *Rules of Civil Procedure*.

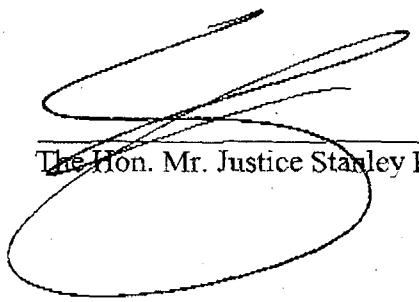
[43] I have considered the argument in *Irwin Toy* and I have considered the public policy arguments for and against disclosure. I conclude that the arguments in favour of disclosure outweigh those against disclosure. Accordingly, a further and better Affidavit of Documents is ordered to be provided by the Defendants within ten days of the release of this decision.

Costs

[44] Both parties have submitted cost outlines.

[45] As the Plaintiff was successful in this case and having reviewed the cost outline, I fix costs in this matter at the sum of $4,950.00 payable within the next 30 days. In the event that the costs are not paid within that time, the Defendant will not be allowed to take any fresh step in the proceedings.

[46] Order accordingly.



The Hon. Mr. Justice Stanley Kershman

DATE RELEASED: March 23, 2009

COURT FILE NO.: 07-CV-039927SR
DATE HEARD: 2009/01/22

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

RICHARD WARMAN

Plaintiff

- and –

CONSTANCE WILKINS-FOURNIER and MARK FOURNIER and JOHN DOES 1-8 (AKA Klinxx; SaskBigPicture; Droid1963; conscience; Faramir; Peter O'Donnell; Padraigh; and, HR-101)

Defendants

REASONS FOR JUDGMENT

The Honourable Mr. Justice Stanley Kershman

DATE RELEASED: March 23, 2009