A decision rendered on November 12, 2010, by Justice Phelan of the Federal Court (Stevens v. SNF Maritime Metal Inc., [2010] F.C.J. No. 1410, 2010 FC 1137) sheds some light on the types of damages an applicant can claim following a conclusion by the Privacy Commissioner of Canada (the “Commissioner”) that the Applicant had been the victim of a breach of privacy pursuant to the Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5 [PIPEDA].

**The Facts:**

The Applicant, employed by a third party (the “Employer”), was responsible for delivering scrap metal to the Respondents on behalf of the Employer. The Employer became concerned that its sales of scrap metal to the Respondent were below historical norms and, after communicating with the Respondent, the Employer learned that the Applicant maintained personal accounts for the sale of scrap metal to the Respondent. The Respondent provided the Employer with copies of records pertaining to the Applicant’s personal accounts, which revealed that the Applicant had been credited with, and received cash for, large quantities of scrap metal. The Applicant was dismissed from his employment.
lead to a future court challenge, and how the Air Canada
and State Farm decisions are dealt with by tribunals
and commissioners.

[Editor’s note: The author would like to acknowledge
the invaluable research assistance of Sarah Conroy,
Articled Student at Davis LLP.]

1 See protocols for claims of solicitor-client privilege available on the
websites of the B.C. and Alberta Privacy Commissioners:
<http://www.oipc.bc.ca/advise/SOLICITOR-
CLIENT_PRACTICE_NOTE_MAY2009.pdf> and
<http://www.oipc.ab.ca/Content_Files/Files/News/Protocol_Adjudi-
cation_EXTERNAL_Oct_2008.pdf>. In our view, these protocols
are practically useful, but are not entirely consistent with the deci-
sion in Blood Tribe. There do not appear to be similar protocols in
place in the Ontario or Quebec OIPCs (or equivalent offices).

2 Indeed, s. 44(2.1) of FOIPPA states that “if a person discloses to
the Commissioner a record protected by solicitor-client privilege,
the privilege is “not affected” by the disclosure. Section 44(3) of
FOIPPA states that “despite … any privilege of the law of evi-
dence”, a public body must produce a document to the Com-
misssioner where the Commissioner has ordered the public body
to do so for the purposes of an investigation or audit. Of course,
the Supreme Court of Canada has made clear in Blood Tribe

Unmasking Anonymous
Defendants in Internet Defama-
tion Cases: Recent Developments
and Unresolved Issues

Matthew Nied
Student-at-Law

Introduction

Jane Doe was a law student at the top of her class.
Despite interviews with more than a dozen employers,
she failed to receive an articling position at the end of
law school. Jane was perplexed. It wasn’t until weeks
later that she ventured to conduct an internet search of
her own name. What she found was alarming. Among
the search results was a website containing false and
offensive postings about her character, morals, and
sexuality. Horrified, Jane sent an email to the website
operator requesting that the postings be removed. The
operator ignored her request, and the postings
remained visible for the world to see.1

While the internet provides users with an environment
in which socially valuable speech can flourish, it also
provides users with an opportunity to defame others
behind a shield of anonymity. If these users can be
identified, they may be held liable for defamation.
Unfortunately for plaintiffs, the identities of these users
are usually known only by the website or internet
service provider (“ISP”) through which the statements
were made, and these third parties generally decline to
disclose a user’s identity in the absence of a court order
compelling them to do so.2 Faced with a growing
stream of applications for such orders, courts have
sought to consistently assess them in a way that strikes
an appropriate balance between the freedom of
expression and privacy interests of anonymous
defendants and the reputational interests of plaintiffs.

Currently, there are two ways for plaintiffs to compel
third parties to disclose the identity of anonymous
defendants: by seeking an equitable remedy of
discovery known as a “Norwich order”, or by seeking
pre-action discovery or production under the applicable
rules of civil procedure. Although courts have
developed these approaches to strike a more
appropriate balance between the competing interests,
two unresolved issues remain to threaten that balance.
First, while the approaches are similar, they differ with

3 Indeed, this article could have been entitled “50 Ways
to Distinguish Blood Tribe”!
4 A similar result was reached in Ontario Public Service Employees
Settlement Board).
5 It should also be noted that there are similar provisions in Alberta
FOIPPA, RSA 2000, c. F-25 (s. 59(4)), and in British Columbia
FOIPPA (s. 47(4)) and PIPA (s. 41(4)) which indicate that the Brit-
ish Columbia or Alberta Commissioners could also find them-
selves adverse in interest to an organization or public body
before them.
6 There is a pending application for judicial review in the Federal
Court of Appeal with respect to the decision in Quadrini. The
Federal Court of Appeal granted a stay of the PSLRB’s order in
Canada (Attorney General) v. Quadrini, [2010] F.C.J. No. 194,
2010 FCA 47, until a final determination of the issues is made by
the Court. A Requisition for Hearing was filed on August 16,
2010, but a hearing date has not yet been set.
7 This decision of the Northwest Territories Commissioner was
released after the Federal Court of Appeal decision in Blood
Tribe but before the Supreme Court of Canada decision in
Blood Tribe.
respect to the protection that they afford to the privacy and freedom of expression interests of anonymous defendants. Second, neither approach requires that anonymous defendants be informed of applications for the disclosure of their identities in order to enable them to represent their interests. This article surveys the two approaches, discusses the unresolved issues, and considers how courts may address them.

The Norwich approach

Plaintiffs may seek disclosure of the identity of anonymous defendants from third parties by way of an equitable remedy of pre-action discovery known as a “Norwich order”. Norwich orders were introduced in Norwich Pharmacal Co. v. Customs and Excise Commissioners in which it was held that where a third party becomes involved in the tortious acts of others, that third party has a duty to disclose the identity of the tortfeasor.

Five factors apply to the determination of whether to grant a Norwich order in the internet defamation context. These factors were set out by the Ontario Superior Court of Justice in York University v. Bell Canada Enterprises:

- whether the applicant has provided evidence sufficient to raise a valid, bona fide or reasonable claim;
- whether the applicant has established a relationship with the third party from whom the information is sought, such that it establishes that the third party is involved in the acts;
- whether the third party is the only practicable source of the information;
- whether the third party can be indemnified for costs to which it may be exposed because of the disclosure; and
- whether the interests of justice favour obtaining the disclosure.

In York University, the plaintiff sought a Norwich order to compel ISPs to disclose the identity of the anonymous author of allegedly defamatory emails and web postings that accused a university president of committing academic fraud. After concluding that the first four factors were met, the court proceeded to consider the fifth factor which, in the court’s words, required it to “balance the benefit to the applicant of revealing the desired information against the prejudice to the alleged wrongdoer in releasing the information.” The court concluded that the interests of justice favoured the disclosure of the author’s identity, primarily because the author could not have had a reasonable expectation of privacy with respect to their identity due to the terms of their ISP’s privacy policy. Significantly, while the court concluded that the plaintiff had demonstrated a prima facie case under the first factor, it did not require the plaintiff to demonstrate more than a bona fide case.

The same approach was taken in the earlier case of BMG Canada Inc. v. John Doe, albeit in a different context. In that case, the plaintiffs, a group of music recording industry companies, commenced action against internet users who were alleged to have engaged in illegal file sharing. The trial court applied the Norwich order analysis and concluded that the application should be denied. In doing so, the court held that the plaintiffs were required to demonstrate a prima facie case under the first Norwich factor. Although the Federal Court of Appeal affirmed the trial court’s decision, it clarified that the first Norwich factor only requires plaintiffs to demonstrate a bona fide belief of wrongdoing. The court expressed the concern that the imposition of the higher prima facie standard would effectively strip the plaintiff of a remedy because the plaintiff could not know the case that they wished to assert against the defendants until they knew of the identity of the persons that they wished to sue and the nature of their involvement in the file-sharing activities.

The Rules approach

Plaintiffs may also identify anonymous defendants by seeking pre-action discovery or production of information under the applicable rules of civil procedure. Although the rules of civil procedure in most provinces impose a low threshold for plaintiffs to meet before disclosure will be ordered, recent decisions have held that the Charter requires courts to strike a balance between the competing interests by requiring plaintiffs to:
• meet an evidentiary threshold;
• establish the necessity of the disclosure sought; and
• demonstrate that disclosure is favoured by a weighing of competing interests.\textsuperscript{10}

These requirements were set out by the Ontario Divisional Court of Justice in \textit{Warman v. Wilkins-Fournier.}\textsuperscript{11} In that case, the plaintiff commenced an action against the operators of an internet message board and eight anonymous participants. The alleged defamation arose from a series of postings that contained offensive comments about the plaintiff. At the document production stage, the operators of the internet message board refused to disclose documents that contained the identity of the anonymous defendants, due to privacy concerns. In response, the plaintiff brought a motion for an order compelling the operators to comply with the \textit{Rules of Civil Procedure} which required the production of those documents.\textsuperscript{12} Because the \textit{Rules} did not require the plaintiffs to satisfy the court that they had met an evidentiary threshold, the motions judge concluded that such disclosure was mandatory and automatic upon the issuance of a statement of claim. This result stood in stark contrast with earlier cases that offered protection to the privacy of internet users beyond that provided by the \textit{Rules}.\textsuperscript{13}

The Divisional Court unanimously allowed the appeal, recognizing that the anonymous posters’ privacy and right of freedom of expression under the \textit{Charter} must be taken into account in considering a request for disclosure under the \textit{Rules}. The court held that, because the \textit{Rules} did not require the plaintiffs to satisfy the court that they had met an evidentiary threshold, the motions judge concluded that such disclosure was mandatory and automatic upon the issuance of a statement of claim. This result stood in stark contrast with earlier cases that offered protection to the privacy of internet users beyond that provided by the \textit{Rules}.\textsuperscript{13}

The court set out four considerations, aimed at respecting the privacy of internet users, that should be considered by courts in deciding whether to order disclosure:\textsuperscript{15}

• whether the unknown alleged wrongdoer could have a reasonable expectation of anonymity in the particular circumstances;
• whether the plaintiff has established a \textit{prima facie} case against the unknown alleged wrongdoer and is acting in good faith;
• whether the plaintiff has taken reasonable steps to identify the anonymous party and has been unable to do so; and
• 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.

In concluding that plaintiffs should be required to meet a \textit{prima facie} standard rather than the lower \textit{bona fide} standard, the court emphasized that the “more robust standard is required to address the chilling effect on freedom of expression that will result from disclosure.”\textsuperscript{16} The court noted that the \textit{prima facie} standard “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.”\textsuperscript{17} The court also distinguished \textit{BMG Canada} where the Federal Court of Appeal expressed the concern that the imposition of the \textit{prima facie} standard would effectively strip the plaintiff of a remedy because the plaintiff could not know the case that they wished to assert against the defendants until they knew of the defendants’ identities and the nature of their involvement in the file-sharing activities. The court in \textit{Warman} held that this concern does not arise in internet defamation cases because plaintiffs will inevitably know the details of the allegedly defamatory acts at issue.\textsuperscript{18}

Courts in other provinces have followed \textit{Warman}. In \textit{A.B. v. Bragg Communications Inc.},\textsuperscript{19} the plaintiff sought an order from the Nova Scotia Court of Queen’s Bench requiring an ISP to disclose the identity of an anonymous user that created a fake Facebook profile. The profile contained the plaintiff’s picture, a variation
of her name, personal information, and offensive sexual commentary. The plaintiff's application was made pursuant to the Nova Scotia Civil Procedure Rules.\(^20\) In the course of finding that disclosure was appropriate, the court applied the considerations set out in Warman.\(^21\) The New Brunswick Court of Queen's Bench adopted the same approach in Doucette v. Brunswick News.\(^22\) In that case, the plaintiff sought an order requiring newspaper publishers to disclose the identity of a person that posted allegedly defamatory comments on their website. The plaintiff sought disclosure under both approaches by bringing a Norwich application under a provision in the New Brunswick Rules of Court.\(^23\) The court engaged in an analysis under both approaches before concluding that disclosure was appropriate.

**Evidentiary standards**

Although the approaches go some way to assist courts with the process of striking an appropriate balance between the freedom of expression and privacy interests of anonymous defendants and the reputational interests of plaintiffs, two unresolved issues remain to threaten that balance. First, while the approaches are similar,\(^24\) they differ with respect to the evidentiary threshold to be met by plaintiffs before disclosure will be ordered. Whereas the Rules approach requires plaintiffs to demonstrate a *prima facie* case due to the applicability of the *Charter*, the Norwich approach permits plaintiffs to seek disclosure by demonstrating merely a *bona fide* case. The concern is that the *Charter* protection afforded to defendants under the Rules approach is threatened if plaintiffs can circumvent it by seeking disclosure under a less onerous approach.

Courts have recognized that the *prima facie* standard is required to address the chilling effect on freedom of expression that results from disclosure.\(^25\) The unmaking of an anonymous defendant may subject them to ostracism for expressing unpopular ideas, or invite retaliation from those who oppose their views.\(^26\) The problem with the *bona fide* standard is that it may permit unjustified breaches of privacy and the right to freedom of expression by allowing for the unmasking of defendants by plaintiffs that do not have a meritorious case, as long as they honestly believe that they do.\(^27\) It may also allow plaintiffs who did not intend to pursue a claim to deprive defendants of their anonymity solely for the purpose of pursuing extra-judicial forms of relief.\(^28\)

To resolve this issue and harmonize the law, courts may adapt the Norwich approach to preclude plaintiffs from unmasking anonymous defendants on the basis of the lower standard. While Norwich jurisprudence has traditionally applied the *bona fide* standard,\(^29\) courts may not consider themselves bound to do so in internet defamation cases. As the court in Warman noted, Norwich orders are equitable remedies with principles that should be applied flexibly, and the question of whether a plaintiff must satisfy a *bona fide* or *prima facie* standard is an issue to be resolved on a case-by-case basis.\(^30\) Moreover, although the *Charter* does not apply to Norwich orders because they are made under common law authority, the principles of the common law must develop in a manner consistent with *Charter* values.\(^31\) There is no reasonable justification for maintaining different standards when the same *Charter* rights are at stake.

**Notice requirement**

Second, neither approach requires that plaintiffs or third parties make reasonable efforts to inform anonymous defendants of applications to compel the disclosure of their identities in order to enable them to represent their interests. This is a concern because there is generally no affinity of interest between anonymous defendants and third parties, who would rather decline to challenge applications for disclosure in order to evade the cross-fire of litigation as rapidly and cheaply as possible.\(^32\) As a consequence, a defendant may be stripped of their anonymity and subjected to embarrassment, social stigma, harm to their career prospects, or risk to their personal safety without notification that they have the opportunity to represent their interests by anonymously opposing the application.

Despite these concerns, courts have held that the determination of whether to give notice should be made on a case-by-case basis.\(^33\) In York University, the court noted that it “may be appropriate, in a given case, to require that the unknown publisher of the offending
material be given notice of the proceedings” but declined to do so because it did “not appear to have been done as a matter of course in other Norwich order cases” and the court “did not consider it necessary to do so in [that] case”. The court in Warman agreed that the determination of whether to give notice should be made on a case-by-case basis and commented that “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.” Nevertheless, the court stated that a notice requirement might be necessary in cases where a defendant has “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.”

Courts may question the validity of this position in future cases. The factors to be considered on an application for disclosure under either approach involve far more than a simple determination of whether a prima facie or bona fide case has been met. Both approaches involve arguable issues, such as whether the anonymous defendant could have a reasonable expectation of anonymity in the particular circumstances, and whether the public interests favouring disclosure outweigh the legitimate interests of the defendant’s freedom of expression and right to privacy. Moreover, where a defendant has a legitimate reason for wishing to remain anonymous that is not immediately obvious, a possibility that the court in Warman contemplates, it is difficult to see how that reason could come to the court’s attention in the absence of notice to the defendant.

Requiring parties to provide notice to anonymous defendants would impose a relatively light burden while providing defendants with the opportunity to defend their anonymity. While it may be appropriate for plaintiffs to pay the cost of providing notice, they should not bear the burden of doing so. Unlike third parties, plaintiffs are in a relatively poor position to give reliable notice because they lack access to the defendant’s contact information. As a result, third parties are in the best position to provide notice.

[Editor’s Note: Matthew Nied, B.Comm. (Alberta), LL.B. (Victoria) is currently clerking at the Supreme Court of British Columbia. He will commence articles in Vancouver in September 2011. The views expressed in this article are his personal opinions and not those of the judiciary.]
Although plaintiffs could be required to provide indirect notice (by checking these sources, or that the website or medium will still exist upon the defendant to publish the statements at issue, or, if the statements originated in an email, by sending notice to the defendant’s email address) there is no guarantee that a defendant will check these sources, or that the website or medium will still exist by the time that the plaintiff commences the action.

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