

Internet and E-Commerce Law in Canada

**Editor-in-Chief: Professor Michael A. Geist, Canada Research Chair in Internet and E-Commerce Law
University of Ottawa, Faculty of Law**

VOLUME 11, NUMBER 3

Cited as (2010-11) 11 I.E.C.L.C.

JULY 2010

• APPELLATE COURT CLARIFIES LIMITS OF INTERNET ANONYMITY •

Wendy Matheson and Natalie Biderman
Torys LLP

The recent Ontario Divisional Court decision in *Warman v. Fournier*,¹ set a significant Internet law precedent by ruling that the identity of an anonymous Internet user will not be automatically disclosed to a plaintiff in civil litigation, even though the information is in the possession of a named

defendant. The decision confirmed that identity information should only be disclosed when the plaintiff's claim is legitimate and after a consideration of the public interests at stake.

The *Warman* case is now the leading authority in Ontario for the proposition that although an Internet user's anonymity should not be protected absolutely, the mere commencement of a lawsuit will not give rise to an automatic entitlement to identity information. Instead, the courts must balance the right of a plaintiff to seek redress against the public interests served by anonymous Internet activity.

BACKDROP TO *WARMAN*

The jurisprudence before *Warman* arose in a number of different legal contexts:

- in the criminal context, particularly search and seizure cases;
- in proceedings for *Norwich* orders, seeking third-party discovery; and
- in cases following *Irwin Toy Ltd. v. Joe Doe*,² a relatively early case on disclosure of the identity of anonymous Internet users that is now usually referenced in the *Norwich* cases.

These lines of cases have one thing in common: in every one of them, the court has required a screening process. Disclosure is not automatic. Each context was considered in *Warman*.

• In This Issue •

APPELLATE COURT CLARIFIES LIMITS OF INTERNET ANONYMITY

Wendy Matheson and Natalie Biderman.....21

WITH THE CLICK OF A MOUSE: EMPLOYEE FIRED FOR DISSEMINATING INAPPROPRIATE E-MAIL AT WORK

Alix P. Herber.....25

CRTC ISSUES DECISIONS ON GROUP-BASED LICENSING AND NEGOTIATED COMPENSATION REGIME FOR CONVENTIONAL TELEVISION BROADCASTERS

Communications Law Practice Group.....26



INTERNET AND E-COMMERCE LAW IN CANADA

Internet and E-Commerce Law in Canada is published monthly by LexisNexis Canada Inc., 123 Commerce Valley Drive East, Suite 700, Markham, Ontario L3T 7W8

© LexisNexis Canada Inc. 2010

All rights reserved. No part of this publication may be reproduced or stored in any material form (including photocopying or storing it in any medium by electronic means and whether or not transiently or incidentally to some other use of this publication) without the written permission of the copyright holder except in accordance with the provisions of the *Copyright Act*.

ISBN: 0-433-42472-9 ISSN 1494-4146
 ISBN: 0-433-44385-5 (print & PDF)
 ISBN: 0-433-44674-9 (PDF)

Subscription rates: \$190 plus GST per year (print or PDF)
 \$285 plus GST per year (print & PDF)

Please address all editorial inquiries to:

Boris Roginsky, Journals Editor
 LexisNexis Canada Inc.
 Tel. (905) 479-2665; Toll-Free Tel. 1-800-668-6481
 Fax (905) 479-2826; Toll-Free Fax 1-800-461-3275
 Internet e-mail: ieclc@lexisnexis.ca.

EDITORIAL BOARD

EDITOR-IN-CHIEF

Michael A. Geist, LL.B., LL.M., J.S.D., Canada Research Chair in Internet and E-Commerce Law, University of Ottawa, Faculty of Law, Ottawa

ADVISORY BOARD MEMBERS

• **Peter Ferguson**, Industry Canada, Ottawa • **Bradley J. Freedman**, Borden Ladner Gervais, Vancouver • **John D. Gregory**, Ministry of the Attorney General, Toronto
 • **Dr. Sunny Handa**, Blake Cassels & Graydon, Montréal • **Mark S. Hayes**, Hayes eLaw LLP, Toronto • **Ian R. Kerr**, University of Ottawa, Faculty of Law, Ottawa • **Cindy McGann**, Halogen Software Inc., Kanata • **Suzanne Morin**, Bell Canada, Ottawa • **Roger Tassé**, Gowling Lafleur Henderson, Ottawa.

Note: This newsletter solicits manuscripts for consideration by the Editor-in-Chief, who reserves the right to reject any manuscript or to publish it in revised form. The articles included in *Internet and E-Commerce Law in Canada* reflect the views of the individual authors. This newsletter is not intended to provide legal or other professional advice and readers should not act on the information contained in this newsletter without seeking specific independent advice on the particular matters with which they are concerned.



CRIMINAL CONTEXT

The issue of whether to order disclosure of information identifying an Internet user first arose in the context of criminal investigations involving search and seizure. Since s. 8 of the *Canadian Charter of Rights and Freedoms* applies to informational privacy, the courts have developed a test to determine whether, in any particular case, there is a “reasonable expectation of privacy.”³ The test requires the court to consider not only the accused’s subjective expectation of privacy but also a number of other factors. Ultimately, the court’s decision is based on the “context of the disclosure and the totality of the circumstances.”⁴

The cases involving the identity of an Internet user, which have been fairly frequent in the criminal context, have had different outcomes, depending on the circumstances. The most recent case discussing this issue in detail held that “there is a reasonable expectation of privacy” in a party’s subscriber information, which links his or her identity to Internet usage.⁵ The Court of Justice found that a name and address can be a “critical link between the [Internet user] and very private information.” None of that information is meaningful until it is associated with the person, by name and contact information. And when the person’s identity is known, his or her privacy is invaded.⁶ However, this has not always been the view of the judges deciding s. 8 cases.⁷

The common thread in the criminal cases is the requirement that a court consider all the circumstances when deciding whether to order disclosure. Disclosure is not automatic.

NORWICH ORDERS

In civil litigation, an equitable remedy of “pre-action discovery” has developed to permit a plaintiff to discover the identity of a proposed defendant. It was developed in an early U.K. case, *Norwich Pharmacal Co. v. Comrs. of Customs and Excise*⁸ — hence a “*Norwich* order.” A plaintiff must meet a multipart test to obtain a *Norwich* order. There is no automatic entitlement.

Norwich orders are now routinely sought to discover the identity of anonymous Internet users. A leading decision is that of the Federal Court of Appeal in *BMG v. John Doe*, a case about music sharing on the Internet. In *BMG*, music companies wished to sue Internet users for copyright infringement. The music companies started an action against a number of “John Does” and then brought third-party motions against Internet service providers seeking disclosure of the customer information that would potentially identify the John Does. The Court followed the

Norwich line of cases, holding that the following factors govern the determination whether to grant the order:

1. The applicant must establish a *bona fide* claim against the unknown alleged wrongdoer.
2. The third party from whom discovery is sought must, in some way, be involved in the matter under dispute.
3. The third party must be the only practical source of the information available to the applicant.
4. The third party must be reasonably compensated for expenses and legal costs arising out of compliance with the discovery order.
5. The public interests in favour of disclosure must outweigh the legitimate privacy concerns.⁹

In reaching its decision, the Federal Court of Appeal dealt extensively with the Internet users' privacy interests, stating that they are "significant and they must be protected."¹⁰ Ultimately, the Court upheld the decision of the motions judge that the evidence put forward in support of the motion was insufficient to justify making the order.

The Ontario Court of Appeal recently considered the test for *Norwich* orders outside the Internet context and observed that a *Norwich* order is intended to be an exceptional, though flexible, equitable remedy. There is no automatic disclosure.¹¹

IRWIN TOY

A similar approach was taken by the Ontario Superior Court of Justice in the relatively early case of *Irwin Toy*,¹² in which the plaintiff wished to sue the anonymous author of certain emails for libel. The Court concluded that the disclosure of the identity and address of the defendant should not be automatic. It held that the moving party must first demonstrate in affidavit material that it has a *prima facie* case against "John Doe" in respect of the allegations made in the statement of claim. Since the plaintiff had shown a *prima facie* case and had been unable to obtain the information by other means, the Court concluded that the information should be disclosed.¹³

Both *Irwin Toy* and *BMG* are now routinely referenced in motions for third-party disclosure of identity information about Internet users. The recent decision in *York University v. Bell Canada Enterprises*,¹⁴ another libel claim, is a helpful example that includes an extensive review of the law.

UNIQUE FACTS IN *WARMAN*

Warman is a libel action against the operators of an Internet message board and several anonymous

Internet users who allegedly posted libelous comments about the plaintiff on the message board. Although the plaintiff knew the identities of the message board operators and sued them by name, he did not know the identities of the posters. He therefore sued them under the pseudonyms they used on the message board.

At the document-production stage, the defendant message board operators refused to disclose the documents that might have identified the anonymous Internet posters, citing privacy and other concerns for the website users. The plaintiff then moved for an order compelling the production of those documents. The plaintiff relied on the *Rules of Civil Procedure*, requiring that all relevant documents be produced unless privileged. The named defendants admitted the relevance of the documents and that there was no recognized privilege. The plaintiff therefore sought the identity information on the basis that it was already in the hands of a named party with seemingly mandatory discovery obligations. The plaintiff argued that disclosure should be automatic. The motion judge agreed, but was ultimately overturned by the Divisional Court.

DIVISIONAL COURT DECISION IN *WARMAN*

The Divisional Court began by considering the *Charter* rights and values engaged by the request for disclosure. The Court found that the case engaged both freedom of expression, guaranteed by s. 2(b) of the *Charter*, and privacy interests also protected by the *Charter*.

FREEDOM OF EXPRESSION

The Divisional Court observed that "freedom of expression is among the most fundamental of rights possessed by Canadians" and that an individual's right to remain anonymous can be a factor in exercising that right.¹⁵ It recognized that a relationship existed between freedom of expression and anonymity, referencing the Ontario Court of Justice in *Canada (Elections Canada) v. National Citizen's Coalition*. The *Elections Canada* case was a constitutional challenge of the reporting requirements of certain parts of the *Canada Elections Act*.¹⁶ In that case, the Court held that the removal of individuals' right to remain anonymous constituted an unjustified breach of the *Charter* right to freedom of expression.¹⁷

The *Elections Canada* decision is consistent with the well-established law in the United States that has repeatedly held that a person's decision to remain anonymous is an aspect of the freedom of speech protected by the First Amendment. This principle was developed before the Internet and recognizes that people from time to time throughout history

have been able to criticize oppressive practices and laws “either anonymously or not at all.”¹⁸ Protection is not, however, absolute.

PRIVACY

Quite apart from the role of anonymity in fostering freedom of expression, the Divisional Court also recognized that privacy interests must be considered. It observed that the Supreme Court has recognized that privacy is a value deserving constitutional protection.¹⁹ Further, the Divisional Court observed that informational privacy includes protecting the “biographical core of personal information” and that courts have developed various tests to determine whether in given circumstances there exists a reasonable expectation of privacy.²⁰

The Divisional Court recognized that privacy interests arose in favour of both the plaintiff and the John Doe defendants:

As the Supreme Court ruled in *Hill*, the good reputation of an individual is intimately connected to his right to privacy, and thus the right to privacy of the plaintiff may be affected by the allegedly libelous posts. At the same time, the John Doe defendants who made the allegedly libelous postings arguably had a reasonable expectation of privacy, having expressly elected to remain anonymous when they did so.²¹

The Divisional Court acknowledged that these conflicting privacy interests were engaged by the *Warman* claim.

IMPACT OF THE RULES OF CIVIL PROCEDURE

Having decided that the *Warman* case did engage *Charter* rights and values, the Divisional Court then had to address the mandatory nature of the disclosure obligations under the *Rules of Civil Procedure*. The Court held that, since the *Rules* have the force of a statute, they must be interpreted in a manner consistent with the *Charter* and a court has inherent jurisdiction to control the production and discovery process. The Divisional Court followed *D.P. v. Wagg*, another production case in which the Court crafted a screening process to be used before producing Crown briefs in civil litigation, despite the mandatory nature of the *Rules*.²²

The Divisional Court in *Warman* ultimately held that

the fact that the motion engages the important *Charter* value of freedom of expression, as well as the right to privacy, heightens the need to have regard to considerations beyond the traditional concerns of relevance and privilege.²³

WARMAN TEST

The Divisional Court imposed a screening process. It held that, in determining whether to order production, a court should apply the principles articulated in *BMG* and *Irwin Toy* and that the motions judge was therefore required to have regard to the following considerations:²⁴

- whether the unknown alleged wrongdoer could have a reasonable expectation of anonymity in the particular circumstances;
- whether the plaintiff has established a *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 interest favouring disclosure outweighs the legitimate interests of freedom of expression and right to privacy of the persons sought to be identified if the disclosure is ordered.²⁵

This test differs from *BMG* since some of the *BMG* considerations are unnecessary where disclosure is sought from a defendant rather than a third party. As well, the threshold for the plaintiff’s claim is *prima facie*, rather than *bona fide*, since the *Charter* right of freedom of expression is engaged.

The Divisional Court also acknowledged that there may be circumstances in which other procedural protections may be required, but declined to impose a requirement to give notice, for example, in the circumstances of this case.

In imposing this screening test, the Divisional Court used its inherent jurisdiction to bring consistency to this area of the law. The Divisional Court observed that there “is no meaningful basis for distinguishing the circumstances or the issue before the Court” from *BMG* and *Irwin Toy*. Disclosure of identity information should not be automatic. Otherwise, a plaintiff with no legitimate claim could misuse the court rules by, for example, commencing a frivolous action against an Internet service provider for the sole purpose of unmasking an anonymous Internet commentator. As the Court said, “a third party can be made a defendant for the price of issuing a statement of claim.” The *Warman* decision ensures that this tactic would not mean that the developed law can be avoided altogether.

[*Editor’s note:* Wendy Matheson’s civil litigation practice focuses on corporate and commercial matters, technology and intellectual property, product

liability, defamation and other media law issues, privacy, professional discipline and negligence and human rights.

Natalie Biderman's civil litigation practice focuses on corporate/commercial litigation, including class actions, broker/dealer litigation and public law.]

¹ [2010] O.J. No. 1846, 2010 ONSC 2126 (Div. Ct.) [*Warman*].

² *Irwin Toy Ltd. v. Joe Doe*, [2000] O.J. No. 3318, 12 C.P.C. (5th) 103 at paras. 11–12, 18 (Ont. S.C.J.) [*Irwin Toy*].

³ *R. v. Cuttell*, [2009] O.J. No. 4053 at paras. 14–16 (Ont. C.J.) [*Cuttell*], citing *R. v. Plant*, [1993] S.C.J. No. 97, [1993] 3 S.C.R. 281 at 292, 293 [*Plant*]; *R. v. Edwards*, [1996] S.C.J. No. 11, [1996] 1 S.C.R. 128 at para. 45; *R. v. Tessling*, [2004] S.C.J. No. 63, [2004] 3 S.C.R. 432 at para. 32.

⁴ *Cuttell*, *ibid.*

⁵ *Ibid.* at paras 3, 27.

⁶ *Ibid.* at paras. 22-25.

⁷ See, for example, *R. v. Wilson*, [2009] O.J. No. 1067 (S.C.J.).

⁸ [1974] A.C. 133 (H.L.); *GEA Group AG v. Flex-N-Gate Corporation*, [2009] O.J. No. 3457, 96 O.R. (3d) 481 at paras. 40-54 (C.A.) [*GEA*].

⁹ *BMG Canada Inc. v. John Doe*, [2005] F.C.J. No. 858, [2005] 4 F.C.R. 81 at paras. 15(e), 30, 32

(F.C.A.), aff'g [2004] F.C.J. No. 525, [2004] 3 F.C.R. 241 at para. 13 (F.C.) [*BMG*].

¹⁰ *Ibid.* at para. 38 (F.C.A.).

¹¹ *GEA*, *supra* note 8 at paras. 48-51, 62, 91.

¹² *Supra* note 2.

¹³ *Ibid.* at paras. 11-12, 18.

¹⁴ [2009] O.J. No. 3689 (S.C.J.).

¹⁵ *Warman*, *supra* note 1 at paras. 15-17.

¹⁶ S.C. 2000, c. 9.

¹⁷ *Warman*, *supra* note 1 at para. 17, citing *Canada (Elections Canada) v. National Citizen's Coalition*, [2003] O.J. No. 3420 at paras. 18, 20-21, 34, 36-38, s. 1 analysis [2003] O.J. No. 3939 at paras. 29-30, 32 (Ont. C.J.).

¹⁸ See, for example, *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 at paras. 3-4 (1995).

¹⁹ *Warman*, *supra* note 1 at para. 18, citing *Hill v. Church of Scientology of Toronto*, [1995] S.C.J. No. 64, [1995] 2 S.C.R. 1130 at para. 21.

²⁰ *Warman*, *ibid.* at para. 18, citing *Plant*, *supra* note 3, and *Cuttell*, *supra* note 3.

²¹ *Warman*, *ibid.* at para. 19.

²² *D.P. v. Wagg*, [2004] O.J. No. 2053, 71 O.R. (3d) 229 (C.A.), aff'g [2002] O.J. No. 3808, 61 O.R. (3d) 746 (Div. Ct.).

²³ *Warman*, *supra* note 1 at para. 32.

²⁴ *Ibid.* at para. 34.

²⁵ *Ibid.*