

“Can you keep a secret?”

The Ontario Court balances the rights and obligations of Internet users

Have you or your business ever been the subject of an anonymous comment on the Internet which you considered to be defamatory and wondered if you could find out who made the comment? Wonder no longer. The ability to identify who is making defamatory comments on the Internet was the subject of the recent decision of the Ontario Divisional Court in *Warman v Wilkins-Fournier*.¹

In *Warman*, the court had to deal with the thorny issue of balancing the rights of Internet users and the rights of those who assert that they have been damaged by persons using the Internet to post defamatory material.

There is no question that the Internet is a powerful communicator and that the damage caused by Internet defamation is significant and far reaching. As described recently by the Ontario Court of Appeal:

The Internet represents a communications revolution. It makes instantaneous global communication available cheaply to anyone with a computer and an Internet connection. It enables individuals, institutions and companies to communicate with a potentially vast global audience. It is a medium which does not respect geographical boundaries. Concomitant with the utopian possibility of creating virtual communities, enabling aspects of identity to be explored, and heralding a new and global age of free speech and democracy, *the Internet is also potentially a medium of virtually limitless international defamation*.²

What is significant about the *Warman* decision is that, while the Court was clearly concerned about allowing the Internet to be used for defamatory purposes, it concluded that protecting the interest of a plaintiff who alleges it has been defamed on the Internet is not the only interest that the Court should protect.

¹ *Warman v Wilkins-Fournier*, 2010 ONSC 2126, 100 OR (3d) 648 (Div Ct).

² *Barrick Gold Corp. v Lopehandia* (2004), 71 OR (3d) 416, 239 DLR (4th) 577 at para 1 (CA).

facts in *Warman*

In *Warman*, the plaintiff commenced an action for defamation against two sets of defendants. The first set of defendants (the “Named Defendants”) were the administrators and moderators of an Internet message board that allowed registered users to post messages addressing various social and political issues. The second set of defendants (the “John Doe Defendants”) were the people who posted the alleged defamatory messages on the board. They were named simply as John Does in the lawsuit since the plaintiff could not identify them as their messages had been posted on the board using pseudonyms.

The plaintiff in *Warman* sought an order requiring that the Named Defendants provide documents, such as their email and IP addresses, that would identify the John Doe Defendants who made the allegedly defamatory postings.

decision in *Warman*

While not deciding whether in this particular case such documents had to be disclosed by the administrators and monitors of the Internet board, the Court in *Warman* identified the considerations that should be taken into account when deciding whether there should be production of information that might disclose the identity of Internet users.

In reaching its decision, the Court acknowledged the public interest in promoting the administration of justice by providing the plaintiff with information as to the identity of the John Doe Defendants that he needed to pursue an action for defamation. However, notwithstanding that interest, the court held that disclosure of documents that might reveal the identities of the John Doe Defendants ought not to be automatic because such disclosure impacted on values set out in the *Canadian Charter of Rights and Freedoms* (the “Charter”), such as the Internet user’s right to privacy and freedom of speech. The judge concluded, following US authority, that freedom of speech, which is among the most fundamental of rights possessed by Canadians, could include the right of Internet users to remain anonymous. The Court expressed concern that if disclosure were automatic, a plaintiff with no legitimate claim could commence an action for the sole purpose of finding out the identity of anonymous Internet commentators with a view to stifling the commentary of such users and of others on important issues. For this reason, the Court decided that the commencement of a defamation action claim ought not to automatically “trump freedom of expression or the right to privacy”.

In order to balance the two competing interests, the public interest in promoting the administration of justice and the Charter values of privacy and freedom of speech, the Court held that, prior to ordering disclosure of information that would identify anonymous Internet users, the Court should consider the following factors:

1. Whether the unknown alleged wrongdoer could have a reasonable expectation of anonymity in particular circumstances;

2. Whether the plaintiff has established a prima facie case against the unknown alleged wrongdoer and is acting in good faith;
3. Whether the plaintiff 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 order.

Warman sets a new legal framework for considering requests by plaintiffs to be provided with the identity of anonymous users of the Internet who have allegedly defamed them. In doing so, it recognized the right, in certain circumstances, for anonymous users of the Internet to remain anonymous. The circumstances in which an Internet user can remain anonymous will likely be defined in future cases. What is clear however, is that given the comparatively recent and dramatic rise of the Internet as a mode of communication, *Warman* is just one step in what will be a long journey ahead for the courts to provide solutions to novel issues that arise through its use.

by Hilary Clarke and Tina Yang, Student-at-Law

For more information on this topic, please contact:

Toronto Hilary Clarke 416.865.7286 hilary.clarke@mcmillan.ca

For further information or advice in relation to our Litigation practice, please contact:

Calgary	Peter Major	403.531.4725	peter.major@mcmillan.ca
Toronto	Dan MacDonald	416.865.7169	dan.macdonald@mcmillan.ca
Montréal	Emmanuelle Saucier	514.987.5053	emmanuelle.saucier@mcmillan.ca

a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

© McMillan LLP 2010