WHEN ANONYMITY IS SET ASIDE TO AVOID IMPUNITY

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PRECIS : In *York University v. Bell Canada Enterprises* [2009 CanLII 46447 (ON S.C.)], The Ontario Superior Court of Justice granted York University a *Norwich* order requiring Bell Canada Enterprises ("Bell") and Rogers Communications Inc. ("Rogers") to disclose information necessary to obtain the identity of the anonymous author(s) of defamatory e-mails and web site postings.

On January 26th, 2009, York President Mamdouh Shoukri announced that Professor Martin Singer had been named the inaugural dean of the new Faculty of Liberal Arts & Professional Studies launched on July 1st, 2009. In reaction to this nomination, an anonymous group or individual(s) identified as "York Faculty Concerned about the Future of York University" ("YFCFYU"), sent on February 3rd an e-mail to undisclosed recipients which stated that this appointment constituted nothing less than an "outrageous fraud". According to the YFCFYU, Martin Singer, although described in the President's press release as "a renowned scholar of Chinese history", was neither renowned nor a scholar, but rather unpublished and unheard of. Therefore, for Singer's detractors, this promotion was "a scandal and a disgrace to the academic profession", "an insult to the York community and a threat to the academic reputation" of the University. These statements were renewed later by means of additional e-mails and a post on the Internet. It is to be noted that Professor David Noble, to whom the initial e-mail referred people for more information, did not respond to several letters and telephone calls from York's general counsel requesting, amongst other things, the identity of the individuals involved in YFCFYU. York therefore turned to the tribunals to obtain such information using the expedient of a *Norwich* order.

Justice Strathy first recalled that this order was introduced by the House of Lords in *Norwich Pharmacal Co. v. Commissioners of Customs and Excise* ([1974] A.C. 133 (H.L.)). This case, as summarized by the judge, held that "where a person becomes

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involved in the tortious acts of others, even innocently, that person has a duty to give full information to the injured party, by way of discovery, to disclose the identity of the wrongdoer". With this order, York was therefore aiming at what is referred to by Justice Strathy as a "pre-action discovery", in order to properly identify the defendants in an action for libel. Citing the Court of Appeal of Ontario in *GEA Group AG v. Ventra Group Co*. [2009 ONCA 619] the Judge then stated that the *Norwich* order was "an equitable, discretionary and flexible remedy", but also an "intrusive and extraordinary" one that must consequently be exercised with caution. The allowance of this relief would indeed occur only if the applicant met specific criteria set out by the Court of Appeal of Ontario in the *GEA Group AG* decision, cited above.

First off, it was necessary to establish that the applicant had provided evidence sufficient to raise a valid, bona fide or reasonable claim. The Court held that York's claim was indeed reasonable, since the University demonstrated a *prima facie* case of actionable defamation. In fact, a reasonably charged jury could certainly found the statements contained in the e-mails and the Internet post harmful to one's reputation. Secondly, the applicant had to demonstrate that the third party from whom the information was sought was somehow involved in the acts complained of. Here, the Court expressed the view that even though Bell and Rogers were certainly not liable for YFCFYU's wrongful acts, they were not "mere witnesses", as they provided the "conduit" for the communication of the e-mails. In other words, without the internet services provided by them, the e-mails at issue could not have been sent at all… Thirdly, York had to prove that Bell and Rogers were the only practicable source of the information available. This demonstration was easily done, since Professor Noble, the only other potential holder of the information sought, refused to reveal it. As for the fourth criterion, it dealt with the cost of compliance: can the third party – here, Bell and Rogers - be indemnified for costs to which it may be exposed because of the disclosure? In the case at bar, the answer was yes, the applicant having agreed to pay these costs.

Finally, the last criterion, the most discussed of the five, required that the interests of justice favoured obtaining the disclosure. This examination called for a balance between the benefit to the applicant of revealing the information against the prejudice to the alleged wrongdoer in releasing this same information. This, according to the Court, demanded to take into consideration "the nature of the information sought, the degree of confidentiality accorded to the information by the party against whom the order is sought, and the degree to which the requested order curtails the use to which the information can be put". On the matter of confidentiality, the Court pointed out that both Bell and Rogers had privacy policies explicitly warning their customers that their right to privacy was not an absolute one. Personal information, otherwise confidential, could therefore be revealed in limited situations, if necessary. Furthermore, both had service agreements with these customers - service agreements to which the said customers gave their consent - limiting their

reasonable expectations of privacy in certain circumstances. Moreover, these service agreements contained an “Acceptable Use Policy” prohibiting the use of the services offered in order to defame.

The Court also leaned on Section 7(3)(c) of the *Personal Information Protection and Electronic Documents Act* [S.C. 2000, c. 5], which authorizes the disclosure of such information by an organization, for instance a service provider, without its customers’ consent in order to comply with a court order. The Judge finally mentioned that the disclosure of the information was required in the case at bar for the limited purpose of enabling the plaintiff to commence litigation. Also in favour of the granting of the order was the fact that without the information possessed by Bell and Rogers, York would quite simply be without a remedy.

For the reasons discussed above, Justice Strathy therefore granted the *Norwich* order.

Interestingly enough, YFCFYU has reacted to the order by yet another post on the internet, consisting in a warning that partially reads as follows: “If you send an anonymous email that exposes wrongdoing at York, the York University administration will pay Google, Rogers and Bell, and enlist the assistance of the courts to try to Track You Down”! To read the warning in its entirety, follow this link: http://www.ottawaactivists.org/yfcfyu/CourtOrder.html.

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