

Trout Point Lodge Limited, Vaughn Perret and Charles Leary

v

Doug Handshoe & Jane Doe (annemarieboudreaux@yahoo.com) - Yar No 323654

✓ Motion by Trout Point et al for order requiring Automattic, Inc., Google, Inc., Yahoo!, Inc., Google Canada Corporation, and Yahoo! Canada Co. to reveal all information in their possession or control regarding the true identity of:

- registered wordpress.com users Telemachus, unslabbed, Whitmergate, and Novelle Ecosse
- the person with the e-mail address annemarieboudreaux@yahoo.com
- the person with the e-mail address Whitmergate@gmail.com
- the person with the e-mail address yyyyy@altavista.com

NOTE: Clarify that motion being made only within action against Doug Handshoe & Jane Doe, and not also within action by Trout Point Lodge, Limited against Louisiana Media Company, LLC - Yar No 328248, as had been indicated in the notice of motion.

NOTE: Ask Trout Point to provide proof that Doug Handshoe was served with notice of motion. *Must respond to service to date - include more def. papers*
 If not, ask for proof of when he was served with Notice of Action and Statement of Claim and/or Amended Notice of Action and Statement of Claim to see if he has become dis-entitled to Notice. *- will expand def + a.s.*

- Under R 31.12, if served outside Canada, he has 45 days, as calculated under the rules, to file a notice of defence or a demand for notice, before becoming dis-entitled to notice of further steps in the proceeding. A judge can also order that he is not dis-entitled to notice even after the 45 days have expired.

- If served Sept 13, 2011, he would have until Nov 18, 2011 to file.

- Therefore, he has not become dis-entitled to notice.

- Motion made within action against him

- Determination on Motion impacts him because it has an effect on whether he will have a named co-defendant or not

- Unjust to proceed to a determination which impacts him without providing him adequate notice of the motion and a reasonable opportunity to appear and make submissions

determined
- cannot proceed to hearing of motion today

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- May 20, 2011 Ct granted order in *Trout Point Lodge, Limited v Louisisna Media Company, LLC - Yar No 328248* requiring Automattic, Inc, the, to reveal all information in its possession regarding the identity of "Sop81-1", "Telemachus", "unslabbed" and "Whitmergate".

- Automattic, Inc, in response to the order provided Trout Point the distinct e-mail IP address information and e-mail addresses for the last postings made by "Telemachus" and "Whitmergate".

- Trout was not able to identify the actual persons behind "Telemachus" and "Whitmergate" with this information

- Using "DomainTools", Trout Point traced:

> the IP address for Whitmergate to Cingular mobile telephone service, belonging to AT&T Mobility; and,

> the IP address for Telemachus to Cox Communications

- Both organizations required a court order to provide the identifying information sought

- Trout Point moved for and obtained such an order as an extension of the order it obtained in May for production from Automattic, Inc

- The order was issued in Case # 328248 on July 21, 2011.

- Charles Leary served a copy of that order on Cox Communications and AT&T Mobility

- Both companies indicated they had no materials responsive to the order and that they would require a U.S. Court Order

- Using "Mikes Marketing Tools", Charles Leary obtained a printout of a Search Engine Ranking Report showing how frequently the slabbed blog in slabbed.wordpress.com showed up in response to queries for "Trout Point Lodge", "Vaugh Perret" and "Charles Leary"

- The frequency these queries showed up on Google and Yahoo ranged from 13 to 40, significantly more than Bing and AOL
- hence the request for an order directed to Google and Yahoo

Must be Relevant to Proceeding

This motion is made pursuant to CPR 14.12, which permits a judge to order a 3rd party to produce a relevant document.

- The motion is made within the action against Doug Handshoe and Jane Doe (annemarieboudreaux@yahoo.com), only. The Notice of Motion indicated it was also made within the action by Trout Point Lodge, Limited against Louisiana Media Company, LLC - Yar No 328248. Counsel for Louisiana Media indicated they were not available today and wanted to appear. The Plaintiffs, have now proceeded on the basis that this motion is not being made within the Action against Louisiana Media.
- Plaintiffs seek to confirm the identity of the person with the e-mail address annemarieboudreaux@yahoo.com to add that person to the action against Doug Handshoe - It is in essence a motion for production at the pre-commencement of action stage - It is relevant to adding that person as a party - I will discuss later whether the test for that is met
- The remainder of the information sought must be relevant to the action against Doug Handshoe for the court to order production
- The Plaintiffs' action against Doug Handshoe is for Defamation, Intentional Infliction of Emotional or Mental Distress, and Assault
- The Plaintiffs have not demonstrated how the identity of other anonymous bloggers is relevant to determining whether Doug Handshoe's blogs constitute Defamation, Intentional Infliction of Emotional or Mental Distress, and /or Assault
- The identity of the anonymous bloggers was found to have relevance, for the purposes of production, in action bearing Yar No **328248**. However, that was only to the extent that their identity would assist in determining whether the interpretation of Louisiana Media's broadcasts reflected in the blogs was the product of bias or reflective of the interpretation of a reasonable audience of average intelligence. In turn that would affect what, if any, light the bloggers' interpretation would shed on deducing the meaning of Louisiana Media's Broadcasts and whether they were defamatory.
- The relevance connection was tenuous, but sufficient at the production stage, considering the principle of liberal disclosure.
- The Plaintiffs have not shown that the identity of the still unidentified anonymous bloggers would assist in determining the meaning of Doug Handshoe's blogs. They are participants in the

blogging exchanges. They are not unconnected, impartial observers. Thus, their interpretation would not be relevant to determining the meaning of Doug Handshoe's blogs. Similarly, there is no evidence of how the identity of the anonymous bloggers is relevant to Doug Handshoe's intentionality.

- The Plaintiffs have not shown how else it is relevant to the action against Doug Handshoe.

- So, in this motion, I need only deal with whether information concerning the identity of the person with the e-mail address annemarieboudreaux@yahoo.com should be produced

Test for Production

- As noted in my decision of May 20, 2011, the 5 part test to be applied on this motion is that which often referred to as the "Norwich Test" and which was outlined in *Warman v Wilkins-Fournier*, 2010 ONSC 2126, and approved by the Supreme Court of Nova Scotia in *A.B. v Bragg Communications Inc.*, 2010 NSSC 215. An even more extensive discussion of the test is found in *Community Living Fort Frances and District v TbayTel*, 2011 ONSC 2734, at paras 34 to 44.

I will address the 5 parts of the test.

1. The requirement of a prima facie case:

- The Statement of Claim alleges this person published blogs using the moniker "unslabbed"

- some of the postings are reproduced and exhibited to filed affidavits

- Some of the alleged content of those blogs would tend to lower the Plaintiffs' reputation in the eyes of a reasonable person. If they remained unexplained and were not justified, they would constitute defamation. As such they are prima facie defamatory. The blogging exchanges show that they, more likely than not, were communicated to persons other than the Plaintiffs.

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2. The Yahoo Companies are connected to or involved in the misconduct in the sense that they :

What is Yahoo's connection / involvement re posting of blogs by Jane Doe?

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What is Yahoo's connection / involvement re that person's e-mail address?

- Yahoo hosts the e-mail address

Where is that established on the evidence?

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What is Google's connection / involvement re posting of blogs by Jane Doe?

-

What is Google's connection / involvement re that person's e-mail address?

-

Where is that established on the evidence?

-

What is Autommatic, Inc's connection / involvement re posting of blogs by Jane Doe?

- it hosts Wordpress.com, which hosts slabbed.wordpress.com where "slabbed" posts

What is Autommatic, Inc's connection / involvement re that person's e-mail address?

-

Where is that established on the evidence?

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3. Trout Point must establish is that the 3rd parties in question are the only practical source of the information in question.

- Aff of Charles Leary, sworn Oct 7, 2011 states Cox Communications and AT&T Mobility had no materials responsive to the previous order.

- There is no indication of any other practical source

4. There is no issue regarding the 3rd parties being reasonably compensated. The costs associated with providing the information should be negligible. There is no indication they are opposing the order. Therefore, they should not incur legal costs.

5. Trout Point must establish that the public interest in disclosure outweighs the legitimate privacy interests and interest in freedom of expression.

- In the May motion, there was evidence of Automattic, Inc's privacy policy. It revealed a diminished expectation of privacy in posting of defamatory material.

- Considering this diminished expectation of privacy, among the other considerations, I concluded that the public interest in disclosure outweighed the privacy interests and the interest in freedom of expression.

- In the motion before me today, there is evidence of Yahoo's privacy policy. It specifies that one of the exceptions to non-disclosure is that Yahoo responds to court orders.

- Further, it does not appear there was any such evidence in *A.B. v Bragg Communications Inc*, 2010 NSSC 215, nor in *Mosher v Coast Publishing Ltd.*, 2010 NSSC 153. Both of those cases applied the principle that the public interest in not allowing individuals to distribute defamatory materials under the cloak of anonymity will generally outweigh the public interest in protecting such a person's rights to privacy and freedom of expression. Both cases ordered disclosure.

- Based on these cases and on the points outlined in my May 20, 2011 decision on this element of the test, in addition to the evidence of Yahoo's privacy policy, I find Trout Point has shown that the public interest in disclosure outweighs the legitimate privacy interests and interest in freedom of expression.

Conclusion

- Trout Point (has / has not) established all the elements of the test.

- I (grant the order / dismiss the motion).

- If grant, draft order appears over broad:

> Simply should state (? Google, Inc., Google Canada Corporation,) Yahoo!, Inc and Yahoo! Canada Co. Is ordered to provide any and all information, in its possession or under its control, leading to the true identity of the registered wordpress.com user “unslabbed” and of the person with the e-mail address annemarieboudreaux@yahoo.com

> Automattic, Inc has already been ordered to provide info re identity of anonymous blogger “unslabbed”

Therefore, order should only require Automattic, Inc to provide info re identity of person with e-mail address annemarieboudreaux@yahoo.com