



## Olsen v. Facebook Inc., 2016 NSSC 155 (CanLII)

Date: 2016-06-17

Docket: ST449544

Citation: Olsen v. Facebook Inc., 2016 NSSC 155 (CanLII), <<http://canlii.ca/t/gs4t7>>, retrieved on 2017-09-26

---

**SUPREME COURT OF NOVA SCOTIA**  
**Citation:** *Olsen v. Facebook Inc.*, 2016 NSSC 155

**Date:** 20160617  
**Docket:** ST449544  
**Registry:** Truro

**Between:**

Warren Olsen and Steve Sampson

Applicants

v.

Facebook Inc.

Respondent

---

**LIBRARY HEADING**

---

**Judge:** The Honourable Justice Michael J. Wood

**Heard:** June 7, 2016, in Truro, Nova Scotia

**Written Decision:** June 17, 2016

**Subject:** Civil Procedure – *Norwich* Order

**Summary:** Applicants sought order requiring Facebook to disclose information to assist in identifying authors of allegedly defamatory comments made online. Comments relate to applicants' activities as CAO and councillor for municipality.

**Issues:** Should a *Norwich* order be issued and, if so, on what terms?

**Result:** Although Facebook was notified it did not take any position on the application or otherwise participate. Court felt the targets of the order should have notice and opportunity to make submissions. Granted interim order requiring Facebook to preserve the information and held a second hearing on whether there should be disclosure to the applicants. Notice of second hearing given through Facebook accounts of anonymous posters. Court weighed the strength of the applicants' defamation action and the posters' interests of freedom of expression and privacy. Fact that comments were made about public officials was also relevant. Granted disclosure order for two of the three Facebook accounts.

***THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION. QUOTES MUST BE FROM THE DECISION, NOT THIS LIBRARY SHEET.***

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Olsen v. Facebook Inc.*, 2016 NSSC 155

**Date:** 20160617

**Docket:** ST449544

**Registry:** Truro

**Between:**

Warren Olsen and Steve Sampson

Applicants

v.

Facebook Inc.

Respondent

## Decision

**Judge:** The Honourable Justice Michael J. Wood

**Heard:** June 7, 2016, in Truro, Nova Scotia

**Counsel:** Michelle Awad, for the Applicants  
Respondent notified but did not participate

### By the Court:

[1] Warren Olsen is the chief administrative officer of the Municipality of the County of Richmond and Steve Sampson is a councillor. They both feel they have been defamed by comments made on a public Facebook group called “Taxpayers of Richmond County, NS”. The group page was created and administered by someone using a Facebook profile under the name Jake Sampson. The allegedly defamatory statements have been posted by Jake Sampson as well as through Facebook profiles bearing the names Paul Burke and Jim Davis.

[2] Messers Olsen and Sampson believe the names Jake Sampson, Paul Burke, and Jim Davis, are pseudonyms and want to find out who is actually behind the Facebook postings so they can be sued. They have initiated this application to force Facebook to provide information concerning the creation of the three Facebook accounts in order to pursue that litigation.

[3] The application proceeded through two hearings and resulted in a final order requiring Facebook to provide information with respect to the Sampson and Davis Facebook accounts but not the Burke account. At the time the order was granted I advised counsel for the applicants that I would prepare a written decision setting out my reasons as well as describing the procedure which was followed in order to provide guidance should similar issues arise in the future.

### **Nature of the Application – *Norwich* Order**

[4] The Applicants seek an order requiring Facebook to disclose information necessary to identify the anonymous authors of allegedly defamatory postings. This is usually referred to as a *Norwich* order (from *Norwich Pharmacal Co. v. Commissioners of Customs & Excise*, [1974] A.C. 133 (H.L.)). Such an order is an equitable remedy which is both discretionary and flexible.

[5] The Ontario Superior Court of Justice granted a *Norwich* order in *York University v. Bell Canada Enterprises* [2009 CanLII 46447 \(ON SC\)](#), [2009] O.J. No. 3689, requiring an internet service provider to disclose information necessary to identify the anonymous author of allegedly defamatory emails and website postings. The Court described the factors to be considered in deciding whether to grant a *Norwich* order as follows:

[13] On August 21, 2009, the Court of Appeal for Ontario released its decision in *GEA Group AG v. Ventra Group Co.*, [2009] O.J. No. 3457, [2009 ONCA 619 \(CanLII\)](#) ("*GEA Group*"), which conducted an extensive review of the Canadian cases in which *Norwich* orders have been granted and discussed "the circumstances in which this extraordinary discretionary relief may be obtained in Ontario" (at para. 1). The Court of Appeal agreed with earlier authorities that the following factors govern the determination of whether to grant a *Norwich* order [at para. 51]:

- (a) whether the applicant has provided evidence sufficient to raise a valid, bona fide or reasonable claim;
- (b) 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 somehow involved in the acts complained of;
- (c) whether the third party is the only practicable source of the information available;

- (d) whether the third party can be indemnified for costs to which the third party may be exposed because of the disclosure...; and
- (e) whether the interests of justice favour obtaining the disclosure.

[6] In *Warman v. Wilkins-Fournier* 2010 ONSC 2126 (CanLII), the Ontario Divisional Court considered a request for a *Norwich* order to obtain identifying information for a defamation action against an administrator and moderator of an internet message board as well as unknown posters of allegedly defamatory messages. The Court concluded that the request for disclosure raised issues of freedom of expression and privacy which are recognized by the *Canadian Charter of Rights and Freedoms*. In such circumstances the Divisional Court concluded that an applicant should be expected to establish their claim on a *prima facie* basis rather than simply show a “valid, bona fide or reasonable claim”. The Court’s rationale for doing so is found in the following passage:

[42] In addition, because this proceeding engages a freedom of expression interest, as well as a privacy interest, a more robust standard is required to address the chilling effect on freedom of expression that will result from disclosure. It is also consistent with the recent pronouncements of the Supreme Court that establish the relative weight that must be accorded the interest in freedom of expression. In the circumstances of a website promoting political discussion, the possibility of a defence of fair comment reinforces the need to establish the elements of defamation on a *prima facie* basis in order to have due consideration to the interest in freedom of expression. On the other hand, there is no compelling public interest in allowing someone to libel and destroy the reputation of another while hiding behind a cloak of anonymity. The requirement to demonstrate a *prima facie* case of defamation 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.

[7] The Ontario Court of Appeal, in *1654776 Ontario Limited v. Stewart* 2013 ONCA 184 (CanLII), criticized the *Warman* decision for requiring a *prima facie* case of defamation as a precondition to granting a *Norwich* order. That case involved an application to obtain disclosure of the identities of confidential journalist sources. While the Court rejected the requirement to show a *prima facie* case it acknowledged that the strength of the plaintiff’s potential claim is a relevant factor to consider in light of the equitable nature of the remedy. The Court described its conclusions as follows:

[58] What I draw from these authorities is that the threshold for granting disclosure is designed to facilitate access to justice by victims of wrongdoers whose identity is not known. Judicial treatment of the *Norwich* application procedure should reflect its nature as an equitable remedy.

[59] There is no requirement that the applicant show a *prima facie* case. The nature and apparent strength of the applicant's potential action should be weighed together with the other relevant factors.

[60] The lower threshold at step one does not make *Norwich* relief widely available. *Norwich* relief is not available against a mere witness. *Norwich* relief is only available, as Lord Reid explained in *Norwich*, at p. 175, against a person who is "mixed up in the tortious acts of others so as to facilitate their wrongdoing" even though this is "through no fault of his own". Most significantly the apparent strength of the applicant's case may be considered in applying the other factors.

[8] This Court considered the production of identifying information concerning anonymous Facebook postings in *A.B. v. Bragg Communications Inc.* [2010 NSSC 215 \(CanLII\)](#). In that case Justice LeBlanc ordered the disclosure for the following reasons:

[20] On the question of whether the author had a reasonable expectation of anonymity in the circumstances, I note the comment in *Warman*, at para. 42, that

there is no compelling public interest in allowing someone to libel and destroy the reputation of another, while hiding behind a cloak of anonymity. The requirement to demonstrate a *prima facie* case of defamation 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.

[21] I agree. The reasonableness of an expectation of anonymity must be assessed on a case-by-case basis. In view of a *prima facie* case of defamation, and the absence of any suggestion of a compelling interest that would favour anonymity (such as fair comment), the expectation of anonymity in these circumstances is not a reasonable one. Anonymity is not an automatic shield for defamatory words.

[22] As to the question of 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, I am mindful that [Charter](#) values of freedom of expression and privacy are involved here, and that "[t]he requirement to demonstrate a *prima facie* case of defamation 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" (*Warman* at para. 42). Defamatory speech does not lose its character as defamation simply because it is anonymous. In these circumstances, where a *prima facie* case of defamation is established, and no public interest beyond the general right of freedom of expression is offered in support of maintaining the author's anonymity, I am satisfied that the public interest favouring disclosure prevails.

[9] Although Justice LeBlanc relied on the now discredited requirement for a *prima facie* case from *Warman*, his balancing of the competing interests of freedom of expression, privacy, and the right not to be defamed, are instructive.

[10] The weight to be given to the interests of privacy and anonymity will depend on the context. The following passage from the decision of Justice Goodridge in *King v. Power*, 2015 NLTD(G) 32, illustrates the point very well:

[24] There will be many circumstances where the interests of privacy and freedom of expression support a reasonable expectation of anonymity of persons engaged in

communications through social media. Preserving this anonymity can be a positive feature of a free and democratic society, for example, when it promotes debate and discussion on controversial issues. However, preserving this anonymity cannot be automatic and the reasonableness of an expectation of anonymity must be assessed on a case-by-case basis.

[11] It is clear from all of these authorities that a *Norwich* order may be granted to require production of identifying information with respect to persons who post anonymous comments online. Whether to do so will depend on the particular circumstances and necessitate a balancing of competing interests. The five factors identified in *York University* will govern the determination. I would expect that in many cases the application will be resolved by deciding whether the interests of justice favour the disclosure which involves consideration of the strength of the plaintiff's potential claim and the interests of privacy and freedom of expression. Whether the allegedly defamatory comments relate to a matter of public interest or are limited to a dispute between private persons is also relevant.

### **Procedural Issues – Two Stage Hearing**

[12] The Applicants initiated this procedure as an application in chambers which typically results in a single hearing that disposes of the matter. In this case Facebook was served and took no position on the application. The applicants did not want the holders of the three Facebook accounts to become aware of the pending hearing out of fear that the accounts might be deleted or otherwise made inaccessible.

[13] The jurisprudence which I reviewed made it clear that in some circumstances the targets of the *Norwich* order should be given notice and the opportunity to participate. For example in *York University* Justice Strathy said:

[21] The lower court decision in *Totalise v. Motley Fool Ltd.* was appealed to the Court of Appeal on the question of costs. In the course of its reasons, the Court of Appeal suggested that the protection of the privacy rights of the underlying service subscriber was an important consideration, particularly in light in the *Contempt of Court Act* 1981 (U.K.), 1981, c. 49 and the [Human Rights Act](#) 1998 (U.K.), 1998, c. 42. The Court of Appeal indicated that it might be difficult to do a privacy analysis in the context of a dispute where the plaintiff wanted the information and the service provider or website operator simply wanted "to get out of the cross-fire as rapidly and as cheaply as possible" (at para. 26). It suggested that in an appropriate case the website operator could notify the user of the proceedings and inform the claimant and the court of any reason put forward by the user for not wishing to have his or her identity disclosed. Further, the court could make notification of the user a condition-precedent to the making of the order. [page703]

[14] This sentiment was adopted with approval by the Divisional Court in *Warman* where it said:

[43] Finally, as Strathy J. noted in *York University*, there may be circumstances in which it is appropriate that notice of a motion for disclosure be given to a John Doe defendant. The case law suggests that any such determination is to be made on a case-by-case basis, and

we agree. In a defamation action, 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. For such purpose, a plaintiff is required to establish only the elements of defamation within its control. However, in other cases a John Doe defendant may have 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.

[15] A party receiving notice of an application for a *Norwich* order could decide to participate through legal counsel or an agent without losing their anonymity. In that way they could bring to the court's attention any relevant factors that should be taken into account.

[16] In this case the offending comments relate to the handling of public funds by the applicants. I concluded that it was possible that the account holders may wish to make submissions on whether production should be ordered and for that reason I informed Ms. Awad that I would not grant the *Norwich* order without some attempt to notify them. This was particularly so since Facebook took no position with respect to whether the order should be granted and did not participate in the proceeding.

[17] Ms. Awad suggested that I issue an interim preservation order directed to Facebook requiring them to secure and preserve the identifying information. Once that took place there could be a second hearing to decide whether Facebook should be ordered to produce this information to the applicants. The second hearing could take place on notice to the account holders. I agreed with her suggestion as a reasonable compromise in the circumstances and granted the interim preservation order.

[18] Once the applicants received confirmation from Facebook that the information being sought had been preserved arrangements were made to schedule the second hearing. I directed that notice be provided to the account holders by way of a message to their Facebook account including the interim preservation order and all supporting motion materials.

[19] By the time the preservation order was obtained the Paul Burke Facebook account could no longer be located and as a result no information was sent to that account. At the hearing for the *Norwich* order nobody appeared on behalf of the Sampson or Davis account holders.

## **Analysis and Disposition**

[20] According to the affidavit of Mr. Olsen the Sampson Facebook account posted offensive material to the Taxpayers of Richmond County, NS website on 15 days in January, February, and March, 2016. The affidavit also identifies two postings by each of the Davis and Burke Facebook accounts during that timeframe.



[21] An illustration of the type of comment posted by Jake Sampson is the following one from March 1, 2016:

From the financial records thus far, a layperson can see that there's blatant fraudulent behaviour and consistent disregard of policy by the CAO. It's baffling why some Councillors continue to protect and support Olsen. If anyone can shed light on "why", from a valid source, please share in this group.

[22] The posting by the Jim Davis account on February 27, 2016, states in part:

This coming Monday its gonna be funny to see what councillors don't show up again to the meeting and what excuses they have this time. Rumour has it that the puppet master and his followers have invited Mr. Ken Meech (a liberal buddy buddy) of Mr. Olsen and Mr. Michel Samson and Steve Sampson to the council meeting Monday to vote him in as a specialist to help hide the wrong doings.

[23] There is only one comment by Paul Burke that the applicants take exception to and it is a cartoon posted on February 7, 2016. It shows a wagon which is labeled "gravy train" with an individual sitting in it. There is one individual pushing the wagon and the other pulling it. I am advised by counsel for the applicants that one of the individuals can be identified as Mr. Olsen.

[24] In deciding whether to exercise my discretion and issue the *Norwich* order I must consider the five factors identified by Justice Strathy in *York University*. I am satisfied that the governing factor is whether the interests of justice favour disclosure. As part of that analysis I will consider the strength of the applicants' potential defamation claim as well as the interests of persons who describe themselves as taxpayers to comment anonymously on how public money is spent.

[25] I agree with the sentiment that internet anonymity cannot be used to shield people who unfairly damage another's reputation from being held accountable. I also recognize that there may be circumstances where the protection of anonymity allows the exposure of conduct which might otherwise not come to light. This is particularly so in a small community where the actors in question are those in charge of the local government. I believe this is the sort of circumstance contemplated by Justice Goodridge in *King v. Power* when he suggests that preserving anonymity may be reasonable where it promotes debate and discussion on controversial issues.

[26] Anonymous posters should not have a licence to defame without consequences however, those who comment on matters of public interest should not have their anonymity stripped away simply because they are critical of public figures who take offence. It is a question of finding a reasonable balance of these competing values in light of the nature of the comments and the strength of the potential claim.

[27] I put no weight on the lack of response from the account holders. They may not have actually seen the motion materials or could be concerned they might lose their

anonymity by coming forward. Even if they had seen the materials they would have only had a few days to retain and instruct counsel.

[28] Ms. Awad argued that I could not consider any possible defences, such as fair comment, without participation of the potential defendants. I disagree. Just as the strength of the defamation action can be discerned from the words used, so too can the existence of some potential defences. All of these issues form part of the weighing process in deciding whether the interests of justice favour disclosure.

[29] I am satisfied that the nature and number of postings by the Sampson and Davis Facebook accounts override any reasonable expectation that those persons should be entitled to remain anonymous. As a result I will order Facebook to release to the applicants the preserved information which they have concerning those two accounts.

[30] The cartoon posted by the Paul Burke Facebook account does not directly suggest improper conduct and wrong doing in the same way that the Davis and Sampson posts do. The reference to riding a “gravy train” suggests being well paid for minimal work but not necessarily dishonest behaviour. It may well raise issues of fair comment relating to the conduct of the affairs of Richmond County. I am satisfied that the issues of privacy and freedom of expression are such that the interests of justice do not require disclosure of the preserved information. For this reason I will dismiss the applicants’ request for a *Norwich* order directed to the Paul Burke Facebook account.

[31] The Applicants indicated that the sole reason for their request was to obtain information for purposes of a potential defamation action. In the circumstances I think it appropriate to include a provision in the order limiting the use of the information to this purpose. This is in accordance with the order issued in *York University*.

Wood, J.

