

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

CHRISTOPHER HUDSPETH and GEORGE SMITHERMAN

Plaintiffs

and

WILLIAM WHATCOTT, JONI WHATCOTT, ADAM ZOMBIE, BRIAN
ZOMBIE, CHRISTOPHER ZOMBIE, DOUGLAS ZOMBIE, EDWARD
ZOMBIE, FRANK ZOMBIE, XYZ CORPORATION, JANE DOES and JOHN
DOES

Defendants

FACTUM OF THE PLAINTIFFS

(Motion to compel the defendant William Whatcott to reveal the identities of the other
unknown co-defendants to the Plaintiffs)

November 04, 2016

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JOHN DOES**

Defendants

PART I - NATURE OF THE MOTION

1. The Moving Party Plaintiffs moves for an Order compelling the defendant William Whatcott ("Mr. Whatcott") to reveal the identities of the other unknown co-defendants.
2. The Plaintiffs brought a class action against the defendants and other unidentified defendants, who the Plaintiffs allege have committed the torts of civil conspiracy, intentional infliction of mental distress and defamation against the Marcher class, the Recipient class and the Liberal class, respectively.
3. Despite requests made to the defendant Mr. Whatcott to reveal the identities of the co-defendants, he has refused to do so. The other co-defendant, Stefan Jetchick ("Mr. Jetchick"), who has since identified himself, has stated that he does not know the names of the other unknown defendants.

4. Since the Plaintiffs have no other means of identifying the unknown defendants, they bring a motion to compel the defendant, Mr. Whatcott to reveal the identities of other persons and entities, including Adam Zombie, Brian Zombie, Christopher Zombie, Douglas Zombie, Edward Zombie, Frank Zombie, John Does, Jane Does, XYZ corporation and any other defendant who provided funding or other types of assistance to the Gay Zombies in distributing the offensive literature at the Pride Parade 2016.

5. The Plaintiffs submit that given the co-defendants are joint tortfeasors in civil conspiracy, intentional infliction of mental suffering and defamation, they should be identified and notified of the certification hearing as it is likely to impact them adversely, and every effort must be made to ensure they are given the opportunity to present a defence, and be heard in accordance with the principles of natural justice.

6. The Plaintiffs further submit that unless they have full knowledge of the identity and role of each and every Defendant at the Toronto Pride Parade 2016, they cannot be more specific in their statement of claim and seek remedies accordingly.

PART II - SUMMARY OF FACTS

7. This is a class action, with two Plaintiffs, Christopher Hudspeth and George Smitherman as class representatives of the two classes and one sub-class – (i) the Marcher Class, (ii) the Recipient Class and (iii) the Liberal Sub-class. Christopher Hudspeth is a long-time gay activist for the rights of Toronto's LGBTQ2SI and was the

executor of the estate of George Hislop. George Smitherman is an openly gay Liberal member and the former Deputy Premier of Ontario.¹

8. The Defendants include William Whatcott, and several other “Gay Zombies”, John Does and Jane Does and any corporation that funded these activities, whose identities are presently unknown to the Plaintiffs.²

9. In order to gain entry into the 2016 Toronto Pride Parade (“Pride Parade”), Mr. Whatcott falsely posed as “Robert Clinton”. Similarly, the other “Gay Zombies” also hid their true identities to gain access to the Pride Parade. The Defendants also falsely represented that they were the “Gay Zombies Cannabis Consumers Association” instead of disclosing their true group “Christian Truth Activists” to the Pride Parade.³

10. The Defendants used Paypal to pay the \$100 entry fee for the Pride Parade, which means that there is no way of tracking the true source of their funds.⁴

11. On July 3, 2016 Mr. Whatcott and the other Gay Zombies attended the Pride Parade. They wore green costumes that covered their faces and obscured their identities.⁵

12. The Gay Zombies distributed over 3,000 pieces of the offensive literature. Since each pamphlet would be viewed by more than one person, the total number of people estimated to have read the offensive literature is approximately 9,000. In deliberate breach of their contract, the defendants communicated hate speech directed at members

¹ Affidavit of Christopher Hudspeth, Paragraph 2

² Affidavit of Christopher Hudspeth, Paragraph 3

³ Affidavit of Christopher Hudspeth, Paragraph 11, 12 & 13

⁴ Affidavit of Christopher Hudspeth, Paragraph 9

⁵ Affidavit of Christopher Hudspeth, Paragraph 14

of the LGBTQ2SI community and defamed the Liberals who were marching in the parade with them.⁶

13. On August 14, 2016, Mr. Jetchick sent an email to R. Douglas Elliott ("Mr. Elliott"), Partner of Cambridge LLP, counsel for the Plaintiffs, identifying himself as one of the Zombies who participated in distributing the offensive materials at the Pride Parade. He, however, also clarified that the pamphlets he handed out were different from the ones that Mr. Whatcott has distributed that contained hate speech against the LGBTQ2SI and defamed the Liberals.⁷

14. Mr. Jetchick also informed Mr. Elliott in the email dated August 14, 2016 that he was not aware of the identities of the other co-defendants as he had never met them prior to the Pride Parade and that he only knew Mr. Whatcott.⁸

15. Since the Plaintiffs have no knowledge of the identities of the other co-defendants, except for Mr. Whatcott and Mr. Jetchick, Mr. Elliott wrote a letter to Dr. Charles Lugosi, counsel for the Mr. Whatcott, dated September 9, 2016, requesting that his client reveal the identity of the other co-defendants, who participated in distributing the offensive literature at the Pride Parade, 2016, but Dr. Lugosi stated that his client, the defendant Mr. Whatcott refuses to identify the other co-defendants.⁹

⁶ Affidavit of Christopher Hudspeth, Paragraph 15 & 16

⁷ Affidavit of Christopher Hudspeth, Paragraph 17

⁸ Affidavit of Christopher Hudspeth, Paragraph 18

⁹ Affidavit of Christopher Hudspeth, Paragraph 19

16. N. Joan Kasozi ("Ms. Kasozi"), Associate at Cambridge LLP, had a telephone conversation with Mr. Whatcott, in which he refused to reveal the identities of the other Zombies who participated in the Pride Parade.¹⁰

PART III - STATEMENT OF ISSUES

- (a) Does the Court have the discretion to allow the Plaintiffs' motion?
- (b) Should the Court compel the defendant, Mr. Whatcott, to reveal the identities of the co-defendants and the corporation that funded these activities?

PART IV - PLAINTIFF'S POSITION

17. The Court should grant the Plaintiff's motion for the following reasons:

- (a) The Plaintiffs further assert that Justice Perell has the discretionary power to make an Order that ensures the fair and expeditious determination of a class proceeding, including an Order to compel the defendant Mr. Whatcott to reveal the identities of the co-defendants. The Plaintiffs also respectfully submit that Justice Perell does not have to wait for certification before issuing such an Order.
- (b) The Plaintiffs also respectfully submit that the identity of the parties can be compelled at the time of discovery and hence, it is in the best interests of administration of justice that such information be obtained now, rather than adopt a more lengthy and expensive process of identifying each co-defendant at the time of discovery.

¹⁰ Affidavit of Christopher Hudspeth, Paragraph 20

- (c) Mr. Whatcott organized the unlawful activities and is the only source of information about the other anonymous co-defendants. He is not a mere bystander and hence, it is germane to seek information about the other co-defendants from him.
- (d) Mr. Whatcott is the only source of information regarding the identities of the parties. The other co-defendant, Mr. Jetchick has clearly stated that he is not aware of the identities of the other co-defendants. Further, since the Gay Zombies used false identities to register for the Parade and paid the \$100-entry fee through Paypal, it is impossible to identify the true source of their funds. Therefore, the Plaintiffs respectfully submit that there is no other way to identify the other co-defendants, except by compelling Mr. Whatcott to reveal their identities.
- (e) The Plaintiffs further contend that they cannot be more specific in their statement of claim in outlining their cause of action and seeking remedies against the defendants unless they are aware of the exact number, contribution and identities of the other co-defendants.
- (f) The Plaintiffs also respectfully argue that as a principle of natural justice, all defendants must be served with a statement of claim and be notified of the hearing which may well have an adverse impact on them, so that they have the opportunity to prepare a defence and be heard.

PART V - STATEMENT OF LAW & AUTHORITIES

The Court has the discretion to grant the Order to compel

18. Section 12 of the Class Proceeding Act states that:

Court may determine conduct of proceeding

12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate. 1992, c. 6, s. 12.

19. Section 35 of the Class Proceedings Act

Rules of court

35. The rules of court apply to class proceedings. 1992, c. 6, s. 35

20. In *Moyes v. Fortune Financial Corp. (2001)*¹¹, it was held that a case management judge could "... manage the proceedings to avoid delays and complications after certification due to steps taken before certification", making it clear that the case management judge has the s. 12 jurisdiction from the date of commencement of the proceeding.

21. In *Jeffery v. London Life Insurance Co. (2008)*¹², it was held that "...pursuant to s. 12 of the Class Proceedings Act, parties may bring motions before the court at any stage of the proceeding respecting the conduct of the proceeding to ensure its fair and expeditious determination. ... To decide otherwise could deny parties access to the court to fulfill the functions contemplated by s. 12 of the Class Proceedings Act."

¹¹ *Moyes v. Fortune Financial Corp.* 2001 CarswellOnt 6397, para 4

¹² *Jeffery v. London Life Insurance Co.* 2008 CarswellOnt 8057, 173 A.C.W.S. (3d) 1038, 69 C.C.L.I. (4th) 231, para 13

22. In *Scott v. TD Waterhouse Investor Services (Canada) Inc. (2000)*¹³, it was held that, “There is nothing in the Act that is inconsistent with the conclusion that the Rules apply before certification”.

23. The Plaintiffs respectfully submit that this Court has the discretion to grant the Order to compel the defendant Mr. Whatcott to reveal the identities of the other unknown co-defendants. Since the Plaintiffs are likely to succeed in seeking the identification of the co-defendants at the discovery stage, it is in the best interests of administration of justice and to ensure expeditious determination of the proceeding that all defendants are duly identified and notified of the hearing at this stage.

24. The Plaintiffs further respectfully submit that compelling the defendant Whatcott to reveal the identities of the co-defendants at the present stage is more cost-effective. It will be far more expensive to repeat the discovery process for each John Doe/Jane Doe as they are individually identified throughout the discovery process.

25. Rule 30.06 of the Rules of Civil Procedure states that:

Where the court is satisfied by any evidence that a relevant document in party's possession, control or power may have been omitted from the party's affidavit of documents, or that a claim of privilege may have been improperly made, the court may,

- a. Order cross-examination on the affidavit of documents;
- b. Order service of a further and better affidavit of documents;

¹³ *Scott v. TD Waterhouse Investor Services (Canada) Inc.* 2000 CarswellBC 2551, 2000 BCSC 1786, [2000] B.C.J. No. 2524, para 27

- c. Order the disclosure or production for inspection of the document, or a part of the document, if it is not privileged; and
- d. Inspect the document for the purpose of determining its relevance or the validity of a claim of privilege.

26. IP addresses and email addresses of John Doe defendants constitute “documents” for the purpose of Rule 30.06 (*Warman v. Wilkins-Fournier (2010)*¹⁴).

27. The Plaintiffs respectfully submit that if IP addresses and email addresses are documents for the purpose of Rule 30.06, then the identities and addresses of the other co-defendants should also constitute documents under Rule 30.06. If, as such, this information can be compelled from the defendants at the time of discovery, it is a more prudent and time-saving step to compel the defendants to reveal the identities of the co-defendants now.

Principle of natural justice

28. The Plaintiffs also respectfully contend that it is a matter of natural justice to notify all the defendants of the certification hearing that is likely to impact them adversely, so that they are given a chance to prepare a defence and be heard.

29. As Mr. Jetchick has stated that while he was present at the distribution of the offensive materials, he did not distribute the same materials as Mr. Whatcott, other defendants may also want an opportunity to defend themselves. It is a principle of natural justice that this opportunity is provided to them by duly identifying and notifying these co-defendants.

¹⁴ Warman v. Wilkins-Fournier 2010 CarswellOnt 2737, 2010 ONSC 2126, [2010] O.J. No. 1846, para 6

30. In *Beals v. Saldanha* (2003)¹⁵, the court held that “the denial of natural justice can be the basis of a challenge to a foreign judgment and, if proven, will allow the domestic court to refuse enforcement.”

31. Further, the court defined the principle of natural justice “to include, but is not limited to, the necessity that a defendant be given adequate notice of the claim made against him and that he be granted an opportunity to defend”.¹⁶

32. In the same case, the court stated that “adequate notice must include alerting the defendant to the consequences of any procedural steps taken or not taken, to the extent that those consequences would not be reasonably apparent to someone in the defendant’s position”¹⁷.

33. Similarly, in *Morguard Investments Ltd. v. De Savoye* (1990)¹⁸, the court addressed the issues of fairness to the defendant. The court stated that according to the principles of order and fairness, a person suing in another jurisdiction must consider the subject matter of the suit and the contacts the defendant may have in that jurisdiction. “Thus, fairness to the defendant requires that the judgment be issued by a court acting through fair process and with properly-restrained jurisdiction.”

34. While the above two judgments pertained to enforcement of foreign judgments, the Plaintiffs respectfully submit that the principles applied in these cases should also be applied in the present case and, accordingly, the defendant be compelled to reveal

¹⁵ *Beals v. Saldanha* 2003 CarswellOnt 5101, 2003 CarswellOnt 5102, 2003 SCC 72, para 59

¹⁶ *Beals v. Saldanha* 2003 CarswellOnt 5101, 2003 CarswellOnt 5102, 2003 SCC 72, para 65

¹⁷ *Beals v. Saldanha* 2003 CarswellOnt 5101, 2003 CarswellOnt 5102, 2003 SCC 72, para 239

¹⁸ *Morguard Investments Ltd. v. De Savoye* 1990 CarswellBC 283, Para 42

identities of the co-defendants so that they may be served with a statement of claim and are given the opportunity to defend.

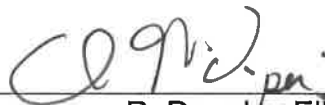
35. Finally, the Plaintiffs respectfully submit that they cannot be more specific in their statement of claim in outlining their cause of action and seeking remedies against the defendants, unless they are aware of the exact number, identity and role of each defendant.

PART VI - ORDER REQUESTED

36. An Order compelling the defendant Mr. Whatcott to reveal the identities of his co-defendants be granted.

37. Costs of this motion be granted on a substantial indemnity basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this ^{4th} day of November, 2016.



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SCHEDULE "A"
LIST OF AUTHORITIES

1. *Beals v. Saldanha* (2003) 2003 CarswellOnt 5102, 2003 SCC 72
2. *Jeffery v. London Life Insurance Co.* 2008 CarswellOnt 8057
3. *Morguard Investments Ltd. v. De Savoye* 1990 CarswellBC 283
4. *Moyes v. Fortune Financial Corp.* 2001 CarswellOnt 6397
5. *Scott v. TD Waterhouse Investor Services (Canada) Inc.* 2000 CarswellBC 2551
6. *Warman v. Wilkins-Fournier* 2010 CarswellOnt 2737, 2010 ONSC 2126, [2010] O.J. No. 1846

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY – LAWS

1. Section 12 of Class Proceedings Act

Court may determine conduct of proceeding

12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate. 1992, c. 6, s. 12.

2. Section 35 of Class Proceedings Act

Rules of court

35. The rules of court apply to class proceedings. 1992, c. 6, s. 35.

CHRISTOPHER HUDSPETH et al.
Plaintiffs

-and- WILLIAM WHATCOTT et al.
Defendants

Court File No. CV-16-558424-00-CP

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