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## Who was that masked man? Online defamation, freedom of expression, and the right to speak anonymously

Jonathon T. Feasby\*

### Introduction

As the internet continues to reach into the lives of people around the world, it facilitates interaction and the exchange of ideas between far-flung individuals and groups to an extent unprecedented in communications history. However, with this positive effect, the potential of the internet as a forum for defamation and other malfeasance has increased as well. Words online can be heard or read in places conventional forms of speech might never reach. As the United States Supreme Court put it, with the aid of the internet ". . . any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox."<sup>1</sup> The internet's capacity to carry words afar greatly increases the damage possible from a single incident of defamatory speech.

An additional factor contributes to the potential of the internet as both a socially constructive "marketplace of ideas" and an ideal medium for the transmission of defamatory speech: the internet is a world of anonymity.<sup>2</sup> Users are often identified only by an email address or chat room pseudonym of their own choosing. These identities are simple to obtain under false pretences and without identification.<sup>3</sup>

Anonymity can be an aid to nefarious enterprise, as it was for Jesse James and other masked bandits. It is attractive to those who wish to utter defamatory statements because it removes accountability. However, anonymity can also be a positive social force. The Lone Ranger wore a mask as well. Anonymity can allow advocacy in favour of unpopular causes, or advocacy by unpopular people. It can allow participation in public debate by those who would otherwise remain quiet out of fear of persecution, loss of status or social ostracism.<sup>4</sup>

True historical figures have also used anonymity in the service of constructive ends. James Madison, Alexander Hamilton and John Jay, who lobbied for the ratification of the *United States Constitution*, published their essays under a shared pseudonym.<sup>5</sup> Joseph Howe's 1835 publication of an anonymous letter critical of the corrupt magistrates of Halifax and his subsequent libel trial provide a Canadian example.<sup>6</sup>

While obviously subject to abuses, anonymity is a potentially positive social force, and there appears to be no reason why it should be attributed a different value in the online context. The law governing the internet must therefore balance the protection of anonymity as a means of facilitating expression, debate and political participation with its negative potential as a cloak for shielding bad behaviour from view.

Canadian jurisprudence on the subject of anonymity is scarce, and scarcer still in the context of the internet. While the issue is now regularly making headlines in the United States,<sup>7</sup> and is being litigated there with increasing frequency,<sup>8</sup> it has yet to make the same impact in Canada. However,

the factors that make the internet a potential hotbed of defamatory speech, or "cyberlibel" (ie., anonymity and access to large numbers of people) are not unique to the United States. The internet is by definition an international medium, so what is now the norm in the United States cannot be long in heading north.

One particular scenario is common in the U.S. cases: A person believes he or she has been the subject of defamatory speech online by someone using a pseudonym. The aggrieved party is unsure of whom to sue, so he or she files suit against the anonymous party and requests discovery of the internet service provider (I.S.P.) to disclose who uttered the speech.

While I.S.P.s in the past have often simply turned over the information when they received a subpoena, some major providers have begun giving notice to the client whose identity is being sought.<sup>9</sup> This gives defendants an opportunity to apply to have the subpoena quashed, and has resulted in more frequent litigation of whether there is a right to speak anonymously online.

The issues of whether and how it is appropriate to divulge the identities of those who choose to speak anonymously raise essential questions about democratic participation and freedom of expression. Unfortunately, Canadian law has not considered these issues in much depth. Courts must decide where to place the threshold for divulging the identity of anonymous defamation defendants. The answer to this question will require a careful balance between the interests of plaintiffs in having their grievances heard and reputations preserved and the value of anonymity as an aspect of freedom of expression. American case law on the subject considers these issues and provides some useful first principles that arguably apply with equal force outside of the American constitutional context.

Despite this, and the fact that the American constitutional law includes a right to speak anonymously,<sup>10</sup> American and Canadian courts have not decided the cases in a way that fully acknowledges the value of anonymous speech on the internet. However, a procedure that fully balances the value of anonymous speech with the need to give injured parties redress can be extrapolated from consideration of the available American and Canadian case law. I will argue that such a procedure should be employed in applications to divulge the identities of anonymous defendants in Canada. Further, in considering such applications, Canadian courts should find that the guarantee of freedom of expression in s. 2(b) of the *Canadian Charter of Rights and Freedoms*<sup>11</sup> includes a right to speak anonymously.

## **Anonymous Defendants in Canada**

Two recent cases indicate that anonymity on the internet is becoming a live issue in Canadian law. *Philip Services Corp. v. John Does*<sup>12</sup> and *Irwin Toy Ltd. v. Joe Doe*<sup>13</sup> both consider requests by plaintiffs for court orders compelling Internet Service Providers to identify internet users.

Unfortunately, *Philip Services Corp.* provides no reasons for the decision and is merely an order to the I.S.P. to answer interrogatories identifying the anonymous defendants. However, in *Irwin Toy* Justice Wilkins acknowledges that the case is one of the first on an issue that will become increasingly common,<sup>14</sup> and provides reasons that briefly address some of the procedural and policy concerns surrounding the issue of online anonymity.

### ***Irwin Toy v. Joe Doe***

As an unpublished decision of a lower court, *Irwin Toy* has limited weight as precedent. However, it represents the totality of Canadian law on the procedure for identifying anonymous online defendants, so it is definitive by default.

In *Irwin Toy*, the plaintiff corporation and its president alleged that the anonymous defendant had sent a defamatory email message containing confidential files that had been wrongfully removed from the corporation. The defendant was known only by an email address, which was traced to an Internet Service Provider. The plaintiffs sought production of material identifying the defendant and discovery of the I.S.P.

The decision in *Irwin Toy* applies the normal tests in *Rules 30.10* and *31.10* of the *Ontario Rules of Civil Procedure*,<sup>15</sup> which deal with production from and discovery of non-parties. However, to prevent the abuse of the procedure through frivolous suits brought only to disclose the identity of anonymous internet users, the court also required that the plaintiffs show a *prima facie* case against the defendant on the allegations made.<sup>16</sup>

Under *Rule 31.10*, the moving party must satisfy the court that it has been unable to obtain the information from other persons it is entitled to examine for discovery. It must further show that it would be unfair to require the moving party to proceed to trial without having the opportunity of examining the person. *Rule 30.10* allows for production of a document to the court if it is satisfied that the document is relevant to a material issue, and also repeats the fairness criterion of *Rule 31.10*.

The moving party in *Irwin Toy* passed the tests under *Rules 31.10* and *30.10*. With respect to the first element of *Rule 31.10*, Justice Wilkins noted that in cases with similar facts it would be difficult to imagine a scenario where the information could be obtained from a source other than the I.S.P.<sup>17</sup> He further stated that the identity of the defendant would always be of sufficient importance to require disclosure.<sup>18</sup> However, he continued,

Such disclosure, . . . in my view, should not be automatic upon the issuance of a Statement of Claim. If such were to be the case, the fact of the anonymity of the internet could be shattered for the price of the issuance of a spurious Statement of Claim, and the benefits obtained by the anonymity lost in inappropriate circumstances.<sup>19</sup>

For this reason, where defendants have chosen to remain anonymous, the moving party should have to show that it has a *prima facie* case against the John Doe defendant before his or her identity will be divulged.<sup>20</sup>

## **Is There a *Charter* Right to Speak Anonymously in Canada?**

The decision in *Irwin Toy* takes some steps to protect anonymity on the internet. As Justice Wilkins indicated,

. . . some degree of privacy or confidentiality with respect to the identity of the internet protocol address of the originator of a message has significant safety value and is in keeping with... good public policy.<sup>21</sup>

However, since the case was undefended, the question of the application of the *Charter* to the issue of anonymity was not raised, and so could not be considered by the court.<sup>22</sup> The basis of the constitutional right to speak anonymously in the United States will be addressed in depth below. However, before proceeding with the discussion in the Canadian context, it is first necessary to address the question of whether the *Charter* would apply in a scenario such as that in *Irwin Toy*. It is submitted that the *Charter* would apply to a review of the *Civil Procedure Rules* under which the order for production was made.

### ***The Application of the Charter***

Section 32 of the *Charter* indicates that the *Charter* applies to the federal parliament and government, as well as the provincial legislatures in respect of all matters within their competence.<sup>23</sup>

In *R.W.D.S.U. v. Dolphin Delivery Ltd.*,<sup>24</sup> the Supreme Court held that the word "government" in s. 32 did not apply to the courts, and that an order of a court was thus not subject to review under s. 2(b).<sup>25</sup> This appears to leave no room for *Charter* review of an order for production in a case like *Irwin Toy*. However, *Dolphin Delivery* may be distinguished from the situation at issue in such cases. Peter Hogg explains *Dolphin Delivery* in this way:

No government was involved in the dispute, and no statute applied to the dispute. Therefore there was no governmental action that could make the *Charter* applicable.<sup>26</sup>

Despite this, he writes,

Where . . . a court order is issued . . . in a purely private proceeding that is governed by statute law, then the *Charter* will apply to the court order.<sup>27</sup>

An order for production and discovery from a non-party in a civil proceeding must be made pursuant to the *Rules of Civil Procedure*, which in Ontario, are regulations of the *Courts of Justice Act*.<sup>28</sup> Such an order is not made under common law authority. As a result, the aspect of the proceeding relating to the order is properly described as "governed by statute law" and is therefore arguably subject to *Charter* review.

However, even barring a finding that such a court order is "governed by statute law," *Charter* values may apply nonetheless. The Supreme Court of Canada has found that although the *Charter* does not directly apply to the common law, the principles of the common law ". . . ought to develop in a manner consistent with the fundamental values enshrined in the Constitution."<sup>29</sup> It is thus clear that *Charter* values should be taken into account by courts considering orders for the production or discovery of the names of anonymous defendants.

### ***The Right to Speak Anonymously***

Canada does not have a highly developed *Charter* jurisprudence on the issue of anonymity. While the constitutionality of *plaintiffs* bringing actions under pseudonyms for the purpose of maintaining their own privacy has been considered,<sup>30</sup> no Canadian court has engaged the constitutional issues involved in unmasking *defendants* whose identities are unknown.

American case law on the right to speak anonymously, as will be shown, is an outgrowth of the guarantee of freedom of speech in the First Amendment of the *U.S. Bill of Rights*.<sup>31</sup> In Canada, s. 2(b) of the *Charter* grants the fundamental freedom of,

. . . thought, belief, opinion and expression, including freedom of the press and other media of communication; . . .

This provision formally protects a very broad range of activity, particularly in the use of the word "expression," rather than "speech."<sup>32</sup> However, unlike its American counterpart, and despite its more general wording, it has never been said that s. 2(b) includes a right to speak anonymously.

Perhaps the closest the Supreme Court of Canada has come to finding such a right was in *R.J.R. - MacDonald v. Canada*, where it found that, ". . . freedom of expression necessarily entails the right to say nothing or the right not to say certain things."<sup>33</sup> This statement is similar to one of the American arguments for a right to speak anonymously, which holds that a person's name is like any other element of a text, and may be omitted or included at the discretion of the author.<sup>34</sup> However, somewhat ironically, this statement was made in the context of the Supreme Court striking down a law requiring tobacco manufacturers to include health warnings on cigarette packages on the basis that the warnings were not attributed and might be taken as the speech of the cigarette company.

Although s. 2(b) has not explicitly been interpreted as protecting the anonymity of expression, there is jurisprudence that considers the existence of a right to privacy in an overall sense, not limited to the context of the internet. Decisions of the Supreme Court of Canada, such as *R. v. O'Connor*<sup>35</sup> and *Canada (Combines Investigation Acts, Director of Investigation and Research) v. Southam Inc.*,<sup>36</sup> indicate that Canadians may have such a right under s. 7 or s. 8 of the *Charter*. However, much of the law of privacy under the *Charter* has evolved in the context of balancing state and individual interests. Such a scenario provides a poor analogy to the interests at stake in the unmasking of a defendant through discovery in a civil action between private parties. Consequently, the *Charter* arguments for a right to privacy do not translate well to the context of anonymity in civil proceedings.

The Alberta Queen's Bench case of *R. v. Weir*,<sup>37</sup> a child pornography decision, provides a brief example. The case is topical in that it considers the expectation of privacy in email messages. The Court found that email messages carry a "reasonable expectation of privacy" as they pass through the computer system at the I.S.P.<sup>38</sup> While the expectation of privacy was found to be somewhat lower than that of first class conventional mail,<sup>39</sup> the court indicated that searches will not usually be allowed without judicial authorization.<sup>40</sup> It seems logical that a similar expectation would apply to other information that the I.S.P. holds as a result of its relationship with the client, such as billing information and the client's name and address. Despite this, and the fact that the I.S.P. divulged the client's identity in response to a police request before any warrant was issued, there is no discussion of the *Charter* issues surrounding the defendant's right to remain anonymous.

However, the issues in *Weir* are considered in the context of illegal search and seizure in the investigation of a criminal charge under s. 8 of the *Charter*. The case does not relate to freedom of expression, which grounds the more direct arguments in favour of a right to anonymity. Still, *Weir*<sup>41</sup> arguably bestows some protection on information held by I.S.P.s on behalf of their clients.

Privacy cases involving *Charter* protections of physical liberty and security of the person or freedom from unreasonable search and seizure are a forced fit to the context of a civil dispute over the identity of a party in a defamation case. Freedom of expression and basic democratic principles allow for much stronger arguments in favour of a right to speak anonymously.

## **The First Amendment and the Right to Speak Anonymously in the United States**

The decision in *Irwin Toy*, discussed above, addresses some of the unique legal issues with the problem of identifying anonymous defendants in cases involving the internet. American case law, considered in the context of a well-defined constitutional right to speak anonymously, provides some additional procedural protections to the anonymous internet defendant, as well as addressing the essential democratic issues involved with anonymity online.

The American jurisprudence creating a right to speak anonymously is rooted in the guarantee of freedom of speech provided in the First Amendment to the *United States Constitution*. The First Amendment provides,



Congress shall make no law respecting an establishment of religion, or prohibiting free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of their grievances.[42](#)

The right to anonymity is a function of freedom of association,[43](#) which is a right implied from the explicit guarantees of free expression in the First Amendment.[44](#) Anonymity reduces the possibility of identification and fear of reprisal for those engaging in legitimate, but unpopular speech.[45](#)

The most frequently quoted decisions on the right to anonymity as an aspect of the First Amendment guarantee of freedom of speech are those of the United States Supreme Court in *Talley, supra*, and *McIntyre v. Ohio Elections Commission*.[46](#)

In *Talley*, the earlier of the two cases, the Court cited the First Amendment in overruling a statute banning the distribution of anonymous handbills. In reaching its conclusion, the Court reviewed the historic basis of the right to anonymity:

Anonymous pamphlets, leaflets, brochures, and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.[47](#)

In *McIntyre*, the Court approvingly quoted the above passage, and added,

Anonymity . . . provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent. . . . The specific holding in *Talley* related to advocacy of an economic boycott, but the Court's reasoning embraced a respected tradition of anonymity in the advocacy of political causes. This tradition is perhaps best exemplified by the secret ballot, the hard-won right to vote one's conscience without fear of retaliation.[48](#)

While these words indicate that the Court felt that the right to anonymous speech is a value that should be jealously guarded, it should also be noted that both *Talley* and *McIntyre* created specific exceptions within the broad constitutional protections they afforded. In *McIntyre* the Court reviewed the intended scope of its ruling in *Talley*:

California had defended the Los Angeles ordinance at issue in *Talley* as a law "aimed at providing a way to identify those responsible for fraud, false advertising and libel." We rejected that argument because nothing in the text or legislative history of the ordinance limited its application to those evils... We then made clear that we did "not pass on the validity of an ordinance to prevent these or any other supposed evils."[49](#)

Although the law challenged in *McIntyre* raised additional constitutional issues not present in *Talley*, the Court found that,

. . . to the extent. . . that Ohio seeks to justify [the impugned statute] as a means to prevent the dissemination of untruths, its defense must fail for the same reason given in *Talley*.[50](#)

Though pointedly not ruling on the issue, the decisions of the United States Supreme Court in *Talley* and *McIntyre* demonstrate the clear reluctance of the Court to grant the same First Amendment

protection to anonymity in the context of an action concerning libel, fraud or false advertising as in the context of speech generally, and political and social activism specifically. It is clear that while the Court often sees anonymity as a constructive position, deserving of protection, it did not intend to create a precedent that facilitated the abuse of anonymity.

The remaining question, then, is whether the existing constitutional protections of anonymous speech will translate into cyberspace.

## First Amendment Anonymity on the Internet

In *A.C.L.U. v. Reno*,<sup>51</sup> the United States Supreme Court invoked the First Amendment in overruling provisions of the *Communications Decency Act* that limited the transmission of "indecent"<sup>52</sup> and "patently offensive"<sup>53</sup> material to people over the age of 18. In reaching its decision, the court famously gushed about the value and political potential of the online medium, referring to the ". . . vast democratic fora of the Internet."<sup>54</sup> The court stated that the internet,

. . . provides relatively unlimited, low-cost capacity for communication of all kinds. . . . This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, "the content of the Internet is as diverse as human thought."<sup>55</sup>

The Court also indicated that the internet was legally unique as compared to the major regulated media that had gone before. After briefly discussing a number of significant decisions dealing with the particular aspects of telephony, radio and television that justified the regulation of the content of those media, the Court stated that those cases ". . . provide no basis for qualifying the level of First Amendment scrutiny that should be applied to the Internet."<sup>56</sup>

These unequivocal statements make it clear that the United States Supreme Court expected freedom of expression to be taken very seriously on the internet. The Court would not tolerate content-regulation that interfered with the potential of the medium to foster the development of the values enshrined in the First Amendment.

*A.C.L.U. of Georgia v. Miller*<sup>57</sup> is one of the first cases to directly consider the issue of anonymity on the internet. It was decided in 1997, the same year as *Reno*, but without the benefit of the decision of the United States Supreme Court in that case. *Miller* seems to indicate that lower courts were reasoning in the direction of a right to anonymity online, even without the strong words of the Supreme Court.

The United States District Court found that a Georgia statute attaching criminal consequences to the act of anonymous or pseudonymous communication over the internet violated the First Amendment guarantee of free speech. In reaching its decision, the Court found that the statute was presumptively invalid on the basis that the identity of the speaker is no different from other aspects of a document's content that the author is free to include or exclude.<sup>58</sup>

While few decisions on the point are currently available, lower courts after *Miller* have not consistently shared the Supreme Court's reverence for the First Amendment protection of anonymity in cyberspace.



## The Conflicting American Cases on Online Anonymity

### *Columbia Insurance v. SeesCandy.com*<sup>59</sup>

In 1999, the United States District Court considered a plaintiff's request for discovery of an I.S.P. so that the several John Doe defendants in the case could be identified. The anonymous defendants were accused of trademark infringement and dilution, unfair competition and trade practices, and unjust enrichment in relation to an alleged incident of "cybersquatting."<sup>60</sup> The scenario placed the right to have one's day in court in direct conflict with the right to anonymity.

The Court first acknowledged that anonymous defendants can be a serious impediment to actually getting one's grievance heard. Judge Jensen stated,

With the rise of the Internet has come the ability to commit certain tortious acts, such as defamation, copyright infringement, and trademark infringement, entirely online. The tortfeasor can act pseudonymously or anonymously and may give fictitious or incomplete identifying information. Parties who have been injured by these acts are likely to find themselves chasing the tortfeasor from Internet Service Provider (ISP) to ISP, with little or no hope of actually discovering the identity of the tortfeasor.

In such cases the traditional reluctance for permitting filings against John Doe defendants or fictitious names and the traditional enforcement of strict compliance with service requirements should be tempered by the need to provide injured parties with a forum in which they may seek redress for grievances.<sup>61</sup>

Although First Amendment arguments were not explicitly raised,<sup>62</sup> the Court anticipated the potential impact of its ruling on the right to anonymity on the internet:

. . . this need [to seek redress] must be balanced against the legitimate and valuable right to participate in online forums anonymously or pseudonymously. People are permitted to interact pseudonymously and anonymously with one another so long as those acts are not in violation of the law. This ability to speak one's mind without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate. . . . People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identity.<sup>63</sup>

These are the same basic concerns for free speech and democratic participation that underlie the First Amendment arguments for a right to anonymity in *Talley* and *McIntyre*, discussed above.

In an effort to balance the competing interests at stake in the case, the Court outlined a set of four procedural safeguards to ensure that discovery of the identity of defendants,

. . . will only be employed in cases where the plaintiff has in good faith exhausted traditional avenues for identifying a civil defendant pre-service, and will prevent use of this method to harass or intimidate.<sup>64</sup>

First, the Court held, the plaintiff must identify the defendant with sufficient specificity to permit the court to determine whether the defendant is a real person or entity over whom the Court has jurisdiction.<sup>65</sup>

Second, the plaintiff must identify all previous steps taken to locate the elusive defendant.<sup>66</sup> The court stated that,

This element is aimed at ensuring that plaintiffs make a good faith effort to comply with the requirements of service of process and specifically identifying defendants.<sup>67</sup>

Third, the plaintiff is required to satisfy the Court that the plaintiff's suit against the defendant could withstand a motion to dismiss. "A conclusory pleading will never be sufficient to satisfy this element."<sup>68</sup> To prevent abuse of this procedure, the plaintiff,

. . . must make some showing that an act giving rise to civil liability actually occurred and that the discovery is aimed at revealing specific identifying features of the person or entity who committed that act.<sup>69</sup>

Finally, the plaintiff must file a discovery request with the court, as well as a statement of reasons justifying the specific discovery requested. The request must include the names of a limited number of persons or entities on whom the discovery process might be served and for which there is a reasonable likelihood that the discovery process will lead to identifying information about the defendant that would make the service of process possible.<sup>70</sup>

These procedural safeguards offer anonymous internet users significant protection, while also allowing courts to prevent the abuse of anonymity to perpetrate libel, fraud, and false advertising. This system balances the concerns for the protection of anonymity and protection from the abuse of anonymity articulated by the United States Supreme Court in *Talley* and *McIntyre*.

### ***Hvide v. John Does 1-8***<sup>71</sup>

In May of 2000, a Miami-Dade Circuit Court judge considered the case of *Hvide v. John Does 1-8*.<sup>72</sup> The facts were similar to those in *SeesCandy.com*, but the court reached the opposite conclusion. The plaintiff, the former C.E.O. of Hvide Marine, alleged that he had been the subject of defamatory statements in online chat rooms.<sup>73</sup> The chat rooms were dedicated to discussion of his company and were hosted by America Online and Yahoo!. Mr. Hvide had been granted subpoenas requiring A.O.L. and Yahoo! to divulge the identities of the online critics. The anonymous defendants brought a motion to quash the subpoenas, and their request was resoundingly denied.<sup>74</sup> The court did not require the plaintiff to pass through the filter of the *SeesCandy.com* safeguards. Judge Shockett said in her oral decision,

It sends the message, "You can have your say if it's responsible." . . . Give them anonymity and nothing holds them back. That's why the Ku Klux Klan wears hoods.<sup>75</sup>

While applications for subpoenas to identify defendants must often be considered *ex parte*, due to the nature of the issue of anonymity, this case was not. The decision was made in the face of extensive First Amendment arguments by both the anonymous defendants<sup>76</sup> and the American Civil Liberties Union, acting as a friend of the court.<sup>77</sup> While *Hvide's* precedential weight is limited by the fact that it was not subsequently published, it was upheld by the Court of Appeal of Florida, Third District,<sup>78</sup> and represents a significant rebuke to proponents of a First Amendment right to anonymity on the internet. Further, it is a step back from the balance the *SeesCandy.com* safeguards struck between the right to online anonymity and the prevention of the abuse of anonymity. In *Hvide*, the scale weighs significantly in favour of unmasking defendants, whether or not the complaints against them have passed the barest test of their merits.

The decision in *Hvide* also indicates that until a higher court rules on the point it will be difficult to predict what protections will be granted to the identities of anonymous defendants on the internet generally, and in defamation cases specifically.

### ***Dendrite International v. John Does 1-14***<sup>79</sup>

One additional American case considers an aspect of the procedure for divulging the identities of defendants that is not addressed in either *SeesCandy.com* or *Hvide*.

*Dendrite International v. John Does 1-14*<sup>80</sup> is typical of the cyberlibel scenario discussed above. A corporation filed a suit alleging that it had been the subject of defamatory statements by 14 anonymous parties online, and that those parties had misappropriated trade secrets. The company sought to identify four of the defendants by serving the I.S.P. with a subpoena.

*Dendrite* is unique in the case law in that the court recognized that anonymous defendants were not always aware that a John Doe suit had been launched against them and often did not send counsel to appear in their defence when the application to grant the subpoena was heard. By the very nature of an application to identify a defendant, it is clear that serving notice on the same defendant is a potentially difficult problem. The Court made an order to the defendants to appear and show cause why disclosure of their identities should not be granted. The I.S.P. was then ordered to post the order on the same message board where the allegedly defamatory statements had initially appeared.<sup>81</sup>

Ordering the I.S.P. to post a message to its client in the forum in which the original statement appeared is an effective way to provide notice to the defendant to send counsel to defend his or her anonymous status without compromising that status in the process. In *Dendrite*, two of the four defendants appeared to defend their right to remain anonymous. The court applied the test from *SeesCandy.com* and found that the plaintiff did not pass the threshold of withstanding a motion to dismiss.

## **Discussion**

### ***American versus Canadian protections of speech***

Canada and the United States have bestowed constitutional protection on freedom of expression and free speech, respectively. The existence of section 2(b) of the *Charter* and the First Amendment is a recognition of the value of public debate and expression. These similar protections are products of the strong democratic and pluralistic traditions of the two countries. While the Canadian and American political systems differ in many obvious ways, they share the core values of public debate and political participation that are at the root of the protection of free speech and freedom of expression.

In *Irwin Toy v. Québec (A.G.)*,<sup>82</sup> Justice Dickson wrote,

Freedom of expression was entrenched in our Constitution and is guaranteed in the Quebec *Charter* so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters, "fundamental" because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual.<sup>83</sup>

In *Palko v. State of Connecticut*,<sup>84</sup> Justice Cardozo wrote for the United States Supreme Court,

. . . neither liberty nor justice would exist if [the freedoms protected in the *Bill of Rights*] were sacrificed. This is true . . . of freedom of thought and speech. Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom.<sup>85</sup>

These words were quoted by the Supreme Court of Canada in its discussion of s. 2(b) in *Irwin Toy v. Québec*<sup>86</sup> and in the Court's judgment in *R. v. Sharpe*.<sup>87</sup> Justice Cory wrote for the Supreme Court of Canada in *Edmonton Journal v. Alberta (A.G.)*,<sup>88</sup>

It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized.<sup>89</sup>

These examples show that the basic principles underlying the constitutional protection of freedom of expression in the United States and Canada are similar. Free speech or expression, which voices both popular and unpopular views on a diversity of subjects, is seen in both countries as part of the essential framework of the other constitutionally protected freedoms and of democracy itself.

Despite this, it is clear that the two countries differ in the degree to which they protect this freedom. In *Hill v. Church of Scientology*,<sup>90</sup> the Supreme Court of Canada rejected the higher, American standard of "actual malice" in defamation cases involving public officials.<sup>91</sup> The Court found that freedom of expression must be balanced with the importance of individual reputation. Justice Cory wrote,

I simply cannot see that the law of defamation is unduly restrictive or inhibiting. Surely it is not requiring too much of individuals that they ascertain the truth of the allegations they publish. The law of defamation provides for the defences of fair comment and of qualified privilege in appropriate cases. Those who publish statements should assume a reasonable level of responsibility.<sup>92</sup>

This practical view of the law of defamation is typical of the Supreme Court's approach to s. 2(b).

Section 1 of the *Charter*<sup>93</sup> has allowed courts to limit the extent of the right to free speech granted by section 2(b). A Court may consider the value of the particular speech at issue in a given case as it relates to the principles underlying s. 2(b). In *Hill*, Justice Cory discusses examples of cases involving hate speech and obscenity where the impugned legislation was found to be a reasonable limit on freedom of expression, despite violating s. 2(b). In those cases, he writes, the type of speech limited did not engage the core values underlying freedom of expression.<sup>94</sup> The constitutionally protected freedoms in the *U.S. Bill of Rights* are not mitigated by a provision like s. 1 of the *Charter* that allows the court to take the nature of the speech at issue into account.

For these reasons, it may be correctly stated that s. 1 of the *Charter* fosters a more relativistic approach to the protection of fundamental freedoms in Canada than is the norm in the United States.<sup>95</sup>

***Section 2(b) should include a right to speak anonymously.***

The American jurisprudence discussed above indicates that the protection of a right to speak anonymously serves the same principles and is an inherent part of the right to free speech. These cases show that anonymity facilitates speech by people who might otherwise be silenced by fear of persecution for their unpopular views. Since the essential principles underlying American and Canadian speech protections are the same, there appears to be no reason why Canadian courts should not interpret s. 2(b) of the *Charter* as including a right to speak anonymously.

In deference to this right, the merits of plaintiffs' defamation claims should be evaluated *before* courts are free to order discovery of a defendant's identity under provincial *Civil Procedure Rules*. Rules that do not impose such a hurdle risk divulging a defendant's identity as a result of non-defamatory speech. If it is accepted that s. 2(b) includes a right to speak anonymously, a law allowing the unmasking of non-defaming speakers would clearly infringe the *Charter* right to freedom of expression.

The issue of justifying the infringement under s. 1 is a separate matter.<sup>96</sup> It is acknowledged that rights under s. 2(b) are by no means absolute and are subject to contextual interpretation and balancing with competing rights and interests.<sup>97</sup> However, since an application for discovery of a defendant's identity is necessarily made pre-trial, when the nature of the speech has not yet been determined, issues such as the degree to which defamatory speech advances the core values underlying the *Charter* protection of speech<sup>98</sup> should not be taken into account. At the pre-trial stage, the court has determined no basis on which to mitigate the application of the *Charter* right.

The American cases always turn to the history of anonymous speech in their arguments in favour of the right to speak anonymously. A number of writers who published under assumed names are mentioned in *McIntyre, supra*, including Samuel Clemens, better known as Mark Twain, Francois Marie Arouet, better known as Voltaire, and Benjamin Franklin who wrote under numerous pseudonyms.<sup>99</sup> However, the writings of James Madison, Alexander Hamilton and John Jay, under the collective pseudonym, "Publius," are the most often cited example.<sup>100</sup> Their series of essays, known as "The Federalist Papers",<sup>101</sup> published in several New York newspapers in 1787 and 1788, successfully campaigned for the ratification of the *American Constitution*. Madison went on to become president of the United States and is acknowledged as the Father of the Constitution, Hamilton was an important cabinet member and economist, and Jay was governor of New York and became the first Chief Justice of the United States Supreme Court.<sup>102</sup> This compelling example makes the right to speak anonymously something of a sacred principle in American constitutional law.

It is perhaps because Canada lacks such a touchstone that the arguments in favour of anonymity have not crossed the border. However, it is trite to say that persecution for unpopular or politically dangerous speech is not just an American phenomenon. Though they may be less numerous, Canada is not without its own examples.

Joseph Howe, a Nova Scotia newspaper publisher, was charged with criminal libel in 1835 for printing an anonymous letter, written by someone else, which alleged corruption among the magistrates and police of Halifax.<sup>103</sup> Despite the truth of what Howe had published, he had no legal defence, since he was charged with ". . . wickedly, maliciously and seditiously desiring and intending to stir up discontent among His Majesty's subjects."<sup>104</sup> The issue was intent, not truth, and the judge informed the jury that even *he* believed Howe was guilty.<sup>105</sup> Luckily for Howe, he escaped conviction as a result of his own rousing six-hour jury address full of rhetoric about freedom of the press. A lesser orator may well have been convicted.

Numerous magistrates resigned following the Howe case.<sup>106</sup> The acquitted publisher was elected to the provincial legislature the next year on a platform of reform and soon became Premier. Howe was charged for printing what many undoubtedly knew but were afraid to voice themselves.

While Howe's story is perhaps earthier than that of the "Federalist Papers", it shows that Canada has its own history of silencing constructive speech. Further, although anonymity is not as central to the Howe case as to the American story, it shows that writers in Canada have also had to remove their names from their work in order to escape persecution.

The suggestion that Canada should follow the American example and interpret s. 2(b) of the *Charter* as including a right to speak anonymously is not a suggestion that Canada should raise its protection of speech or expression to the same level as the United States. On the contrary, Canadian courts should simply recognize that anonymity often facilitates valuable speech.

In the context of a request for production of the identity of an anonymous defendant, the adoption of a test like the one in *Irwin Toy* would help to complete these protections, while also allowing Canadian defamation law and the balanced *Charter* approach to apply. The *prima facie* case requirement simply asks: Is a case likely to be made out on the relevant standard? The test is value free, and acknowledges the speaker's right to remain anonymous until it has been shown that he or she probably did something wrong.

It is obvious that anonymity can be used to evade responsibility as well as to facilitate socially constructive speech. Justice Scalia, in his dissenting judgment in *McIntyre*, wrote that anonymity,

. . . facilitates wrong by eliminating accountability, which is ordinarily the very purpose of the anonymity. . . . [T]o strike down the Ohio law in its general application . . . on the ground that all anonymous communication is in our society traditionally sacrosanct, seems to me a distortion of the past that will lead to a coarsening of the future.<sup>107</sup>

Justice Scalia's comments inject a dose of contemporary realism and compromise into what is often a discussion based purely on principle and America's revolutionary history.

However, it must be recognized that an application to divulge the identity of a defendant in a defamation case for the purpose of service is always made before the primary issue is resolved. The Supreme Court of Canada has held that defamatory speech does not advance the core values underlying s. 2(b) of the *Charter*,<sup>108</sup> but in the context of a pre-trial motion, the words at issue have not yet been proven defamatory. Thus, the speaker's right to anonymity should still be recognized. Since the type of speech remains unknown, the level of protection that different types of speech should receive must be seen as irrelevant to this kind of pre-trial issue. Such issues are properly considered only after the speech has been found to be defamatory.

The above point goes to the heart of the argument for a right to remain anonymous in an online defamation case. As Justice Wilkins noted,

. . . the fact of the anonymity of the internet could be shattered for the price of the issuance of a spurious Statement of Claim, and the benefits obtained by the anonymity lost in inappropriate circumstances.<sup>109</sup>

Therefore, to prevent the abuse of the civil discovery process as a way to unmask critics who may be speaking the truth, or within the bounds of opinion or fair comment, there is a need to evaluate whether the speech at issue is defamatory before naming any names. The *prima facie* case requirement, discussed above, ensures that plaintiffs must have a real case before discovery is granted, while also preventing a right to anonymity from becoming a license to defame. Under this test, the right to speak anonymously does not facilitate wrong because it does not eliminate accountability. Since it is the actual words, and not who spoke them, that is at issue in making out a *prima facie* case of defamation, the continuing anonymity of the defendant does not present a significant hurdle to the plaintiff at this stage of the action. If the speech appears to be defamatory, the plaintiff will succeed on the application for discovery, and will not be denied redress by reason of



the defendant's anonymity. The adoption of the *prima facie* case requirement from *Irwin Toy* would avoid the "coarsening of the future" that Justice Scalia predicts.<sup>110</sup>

### ***Additional Procedural Protections of the Right to Speak Anonymously***

While a *prima facie* case requirement is necessary to the protection of anonymity in defamation cases, it is not, in and of itself, sufficient. The tests applied in *SeesCandy.com* and *Dendrite* each supply additional, equally important elements.

*SeesCandy.com* includes several elements similar to the procedure the Court applied in *Irwin Toy*. The requirement of surviving a motion to dismiss<sup>111</sup> is analogous to the *prima facie* case requirement in *Irwin Toy*.<sup>112</sup> The element of listing all steps taken to discover the identity of the defendant before requesting discovery mirrors the requirement in *Ontario Civil Procedure Rules* 30.10 and 31.10, applied in *Irwin Toy*, of showing that the plaintiff was unable to obtain the information another way. Finally, the requirement that the plaintiff submit reasons justifying the discovery requested is similar to the element in *Rules 30.10* and *31.10*, applied in *Irwin Toy*, that the plaintiff show that it would be unfair to bring the matter to trial without first allowing discovery.

In addition to these shared requirements, *SeesCandy.com* creates a unique burden on the plaintiff to identify the defendant with sufficient specificity to determine whether the court has jurisdiction to try the issue. The international nature of the internet means that jurisdiction is often the determinative issue in online defamation cases.<sup>113</sup> Therefore, to avoid abuse of the discovery process, plaintiffs must also be required to prove jurisdiction before discovery of the defendant's name is granted. Jurisdiction is essential to the trial of any issue in the sense that it determines what law applies. For instance, a defamation case tried in Canada would certainly be subject to differently nuanced case law than one in the United States, and might be subject to completely different standards if the plaintiff was a public figure.<sup>114</sup> Without first showing jurisdiction, it cannot be known whether the correct defamation standard is even being applied, or even whether the court has any power to compel the parties involved.

Using the powers of the court to divulge the name of a defendant in a case where the court ultimately has no jurisdiction would be as unjust as allowing discovery where the plaintiff has no case on the facts. Requiring the plaintiff to prove jurisdiction before allowing discovery ensures that such an injustice would be avoided.

*Dendrite* adds another useful element to the procedure. In that case, the court ordered the I.S.P. to give the defendants notice of the hearing on the discovery issue in the forum in which the alleged defamation occurred. Although, as noted above, several major I.S.P.s have chosen to give notice to their clients when they receive subpoenas requesting information on the clients' identities, it is submitted that this should be a requirement, not simply a voluntarily offered benefit. Further, notice after the subpoena is granted is not enough. Notice of the hearing to grant the subpoena would allow defendants to send counsel to defend their anonymity when the issue first arises, rather than shouldering them with the added burden of convincing the court to quash a decision already made.

A posting in the online forum in which the alleged defamation occurred is not an infallible method of serving the defendant with notice of a hearing. The defendant may no longer use the chat room or bulletin board where the posting was made, and may thereby fail to receive notice of the hearing. In some cases the forum may no longer exist. On the other hand, since internet users operating under pseudonyms have knowingly made themselves difficult to find, it is reasonable to expect anonymous speakers to accept some of the burden of their nameless status. Such an approach would be in harmony with Canadian courts' balancing approach to competing rights under the *Charter*. Notice in the same forum in which the impugned speech appeared adequately accounts for both the right of the defendant to remain anonymous and the plaintiff's need to proceed with the action.

### ***The Full Set of Procedural Protections***

Drawing from *Irwin Toy*, *SeesCandy.com* and *Dendrite*, a full set of procedural protections can be suggested for the right to speak anonymously in defamation actions on the internet. It is submitted that the following procedure would be in harmony with the protection of freedom of expression set out in s. 2(b) of the *Charter*, and would not present unjustifiable or insurmountable impediments to the hearing of the plaintiff's defamation complaint.

Before granting a plaintiff's request for discovery of an I.S.P. to determine the identity of the defendant, the Court must be satisfied that:

- (1) the plaintiff has been unable to find the information through other legal means at its disposal or from other parties it is entitled to discover;
- (2) it would be unfair to require the plaintiff to proceed to trial without the information requested;
- (3) the plaintiff has made out a *prima facie* case against the defendant on the allegation before the Court;
- (4) the plaintiff has identified the defendant with sufficient specificity for the Court to determine whether it has jurisdiction to hear the complaint; and
- (5) the plaintiff has attempted to give the defendant notice of the hearing by posting a message in the forum where the allegedly defamatory speech originally appeared.

## Conclusion

Although to date Canadian courts have not found that s. 2(b) of the *Charter* includes a right to speak anonymously, it is submitted that without such a finding the constitutional protection of freedom of speech remains incomplete. Basic democratic principles articulated in the decisions of the United States Supreme court, as well as compelling historical examples, indicate that the right to speak anonymously is an inherent part of a right to free speech or freedom of expression. While the question of whether s. 2(b) includes such a right has not yet been raised in a Canadian case, developments in the United States and Canada indicate that the issue will not be long in arising in the context of a defamation suit concerning speech on the internet. In online defamation cases where the defendant remains anonymous, a request for production of the defendant's identity from the I.S.P. is inevitable.

The procedure described above accounts for the value of anonymous speech by ensuring that the civil discovery process cannot be abused to ascertain the identity of people engaging in legal and non-tortious speech.

The first two parts of the test duplicate the requirements of Ontario *Rules 30.10* and *31.10*. They are essentially preliminary and merely ensure that discovery is not being used as a shortcut to obtain information otherwise available and that the information requested is necessary to the case.

The *prima facie* case requirement, which is the central component of the procedure, requires that applicants must have a real case before they will be granted discovery. As well as acting as a brake on unjustifiable uses of discovery, this part of the test acknowledges the potential abuses of anonymity. Those who are legitimately subject to defamatory speech will be able to show a *prima facie* case and thereby discover the identity of the speaker and proceed with their action. The jurisdiction requirement is similar to the *prima facie* case step in that it also ensures that the discovery process cannot be used to elicit a name by launching what will ultimately prove to be a frivolous case.

The final requirement addresses the problem of notifying anonymous defendants of the request for discovery so that they may send counsel to appear at the hearing and defend their anonymous status. Posting notice in the forum where the allegedly defamatory speech originally appeared divides the burden of this problem between the plaintiff and defendant. While an imperfect method of giving notice, it acknowledges that by using an assumed name the defendant has knowingly made him or herself difficult to find, while also requiring that the plaintiff attempt to inform the defendant that a proceeding potentially affecting his or her rights is underway.

These procedural steps balance the value of anonymity with the need for aggrieved parties to defend their reputations. They permit those who are engaging in legitimate speech to do so without fear of reprisal or persecution. The steps also allow plaintiffs to proceed with defamation actions when they have been subject to defamatory speech.

Such a procedure is essential to adequately balance the interests at stake in an action for defamation against an anonymous online speaker. In the context of a request for discovery, a court order that divulged the identity of an anonymous speaker without first applying the procedural protections enumerated above would risk unmasking a speaker who had done nothing wrong. If such a court order were found to be made "pursuant to statute" it is submitted that it would violate the rights of the anonymous speaker under s. 2(b) of the *Charter*. However, regardless of whether the order was made "pursuant to statute," it would be out of step with an interpretation of *Charter* values that acknowledged the place of anonymity as an aspect of freedom of expression.

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\* [Back](#) Student-at-law with Morris Manning, Q.C.; LL.B. Dalhousie, 2001.

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<sup>1</sup> [Back](#) *A.C.L.U. v. Reno*, 521 U.S. 844 (1997) [hereinafter *Reno*].

<sup>2</sup> [Back](#) M. Geist, *Internet Law in Canada* (North York: Captus, 2000) at 295, referring to anonymity as a "defining characteristic" of the internet.

<sup>3</sup> [Back](#) For example, an email address from the popular email provider www.hotmail.com can be obtained free of charge after the applicant has supplied only a name and street address and chosen an email box name. There is no verification process for any of the information.

<sup>4</sup> [Back](#) *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) at 341-2 [hereinafter *McIntyre*].

<sup>5</sup> [Back](#) University of Oklahoma College of Law "Chronology of U.S. Historical Documents", online: *The Federalist Papers* <http://www.law.ou.edu/hist/federalist/> (last modified: 3 February 1997).

<sup>6</sup> [Back](#) W.H. Kesterton, *A History of Journalism in Canada* (Toronto: McClelland and Stewart, 1967) at 21-23.

<sup>7</sup> [Back](#) Bibliographies at the following sites list dozens of news articles: online: Enforcenet.com [http://www.enforcenet.com/EnforceNet/news\\_archive.htm](http://www.enforcenet.com/EnforceNet/news_archive.htm) (date accessed: 10 September 2001); "Corporate Cybersmear Lawsuits", online: *Cybersecurities Law Case Digest* [http://www.cybersecuritieslaw.com/lawsuits/cases\\_corporate\\_cybersmears.htm](http://www.cybersecuritieslaw.com/lawsuits/cases_corporate_cybersmears.htm) (date accessed: 10

September 2001).

<sup>8</sup> [Back](#) *Ibid.* The bibliographies also refer to over 70 different American cases involving defamation on the internet, almost all of which date from 1998 or later. In over 40 the defendant is named John or Jane Doe.

<sup>9</sup> [Back](#) C. Gaither, "Judge orders AOL, Yahoo! to identify online writer" *The Miami Herald* (26 May 2000), online: *Fischman, Harvey and Dutton homepage* <http://fhdlaw.com/html/aol.htm> (last modified: no date provided).

<sup>10</sup> [Back](#) *Talley v. California*, 362 U.S. 60 (1960) [hereinafter *Talley*]; *McIntyre*, *supra* note 4; see also, *infra*, under the heading, *The First Amendment and the Right to Speak Anonymously in the United States*.

<sup>11</sup> [Back](#) Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

<sup>12</sup> [Back](#) (24 June 1998), Hamilton 4592/98 (Ont. Gen.Div.) (Order), online: *Canadian Internet Law Resource homepage* <http://www.cc.uottawa.ca/~geist/Philip.v.JohnDoe.24jun98.html> (last modified: 15 March 2001) [hereinafter *Philip Services Corp.*].

<sup>13</sup> [Back](#) [2000] O.J. No. 3318 (Sup. Ct.), online: QL (OJ) [hereinafter *Irwin Toy*].

<sup>14</sup> [Back](#) *Ibid.* at para 8.

<sup>15</sup> [Back](#) R.R.O. 1990, Reg. 194, am. to O.R. 654/00.

<sup>16</sup> [Back](#) *Supra* note 13 at para 18.

<sup>17</sup> [Back](#) *Supra* note 13 at para 16.

<sup>18</sup> [Back](#) *Supra* note 13 at para 17.

<sup>19</sup> [Back](#) *Supra* note 13.

<sup>20</sup> [Back](#) *Supra* note 13 at para 18.

<sup>21</sup> [Back](#) *Supra* note 13 at para 11.

<sup>22</sup> [Back](#) Although, as noted above, some I.S.P.s have begun notifying their clients when they receive subpoenas, *ex parte* applications for discovery and production have necessarily been the norm in cases where the issue arises from the fact that the defendant's identity is unknown.

<sup>23</sup> [Back](#) *Supra* note 11.

<sup>24</sup> [Back](#) [1986] 2 S.C.R. 573, online: QL (SCC) [hereinafter *Dolphin Delivery*].

<sup>25</sup> [Back](#) *Ibid.* at para 34.

<sup>26</sup> [Back](#) *Constitutional Law of Canada*, looseleaf edition (Scarborough, Ont.: Carswell, 2000) at 34-18 [hereinafter *Hogg*].

<sup>27</sup> [Back](#) *Ibid.* at 34-19.

<sup>28</sup> [Back](#) R.S.O. 1990, c. C-43.

<sup>29</sup> [Back](#) *Dolphin Delivery*, *Supra* note 24 at para 37.

<sup>30</sup> [Back](#) *John Doe v. Roe*, [1999] A.J. No. 411 (Q.B.), online: QL (AJ).

<sup>31</sup> [Back](#) *U.S. Const.* amend. I. See *infra* under heading, *The First Amendment and the Right to Speak Anonymously in the United States*.

<sup>32</sup> [Back](#) The word "expression", used in s. 2(b) encompasses expressive activity not covered by the word "speech" in the First Amendment: *Hogg*, *supra* note 26 at 40-7.

<sup>33</sup> [Back](#) [1995] 3 S.C.R. 199 at para 124 citing *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1080.

<sup>34</sup> [Back](#) *McIntyre*, *supra* note 4 at 342.

<sup>35</sup> [Back](#) [1995] 4 S.C.R. 411 at 482.

<sup>36</sup> [Back](#) [1984] 2 S.C.R. 145.

<sup>37</sup> [Back](#) [1998] A.J. No. 155 (Q.B.), online: QL (AJ).

<sup>38</sup> [Back](#) *Ibid.* at para 70.

<sup>39</sup> [Back](#) *Ibid.* at para 74.

<sup>40</sup> [Back](#) *Ibid.* at para 70.

<sup>41</sup> [Back](#) *Ibid.*

<sup>42</sup> [Back](#) *Supra* note 31.

<sup>43</sup> [Back](#) Nowak, John E. and Rotunda, Ronald D., *Constitutional Law (5th ed.)* (St. Paul, Minn.: West, 1995) at 1160.

44 [Back](#) *Ibid.* at 1189. See also *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958) which found finding that allowing the state of Alabama to force the N.A.A.C.P. to disclose the names of its members would violate the members' right to free speech by exposing them to danger for their political associations.

45 [Back](#) *Ibid.* at 1160.

46 [Back](#) *Supra* note 4. These two decisions are very frequently cited. See also, *N.A.A.C.P. v. Alabama*, *supra* note 44; *Bates v. City of Little Rock*, 361 U.S. 516 (1960).

47 [Back](#) *Supra* note 10 at 64.

48 [Back](#) *Supra* note 4 at 342-343.

49 [Back](#) *Supra* note 4 at 343-344, citing *Talley*, *supra* note 10 at 64 [emphasis added].

50 [Back](#) *Supra* note 4 at 344.

51 [Back](#) *Supra* note 1.

52 [Back](#) *Communications Decency Act*, 47 U.S.C. 223(a)(1)(B)(ii) (2000).

53 [Back](#) *Ibid.* s. 223(d).

54 [Back](#) *Supra* note 1 at 868.

55 [Back](#) *Supra* note 1 at 870, citing *A.C.L.U. v. Reno*, 929 F. Supp. 824 (E.D.La. 1996) at 842.

56 [Back](#) *Ibid.* at 845.

57 [Back](#) 977 F. Supp. 1228 (N.D.Ga. 1997) [hereinafter *Miller*].

58 [Back](#) *Ibid.* at 1232, quoting *McIntyre*, *supra* note 4 at 340.

59 [Back](#) 185 F.R.D. 573 (N.D. Ca. 1999).

60 [Back](#) The practice of registering internet domain names that refer to a trademark or known entity, with the intention of later selling them to the entity to which they refer or owner of the mark. In this case, the defendant had registered the domain names *seescandy.com* and *seescandys.com* and had allegedly communicated a desire to sell them to the plaintiff, who owned the registered trademarks, "See's" and "See's Candies," among others: *Ibid.* at 574, 576.

61 [Back](#) *Supra* note 59 at 578.

62 [Back](#) Undoubtedly because *SeesCandy.com*, like *Irwin Toy*, was an *ex parte* application.



63 [Back](#) *Supra* note 59 at 578.

64 [Back](#) *Supra* note 59.

65 [Back](#) *Supra* note 59.

66 [Back](#) *Supra* note 59 at 579.

67 [Back](#) *Supra* note 59.

68 [Back](#) *Supra* note 59.

69 [Back](#) *Supra* note 59 at 580.

70 [Back](#) *Supra* note 59.

71 [Back](#) (8 June 2000), Miami-Dade 99-22831 CA 01 (11th Cir.) [hereinafter *Hvide*].

72 [Back](#) *Ibid.*

73 [Back](#) C. Kaplan, "Judge Says Online Critic Has No Right To Hide", *The New York Times* (9 June 2000), online: *The New York Times on the Web*  
<http://www.nytimes.com/library/tech/00/06/cyber/cyberlaw/09law.html> (site modified daily).

74 [Back](#) *Ibid.*

75 [Back](#) R. Trigaux, "The fight to speak their mind, anonymously", *The St. Petersburg Times* (28 May 2000), online: *The St Petersburg Times*  
[http://www.stpetersburgtimes.com/News/052800/Business/The\\_fight\\_to\\_speak\\_th.shtml](http://www.stpetersburgtimes.com/News/052800/Business/The_fight_to_speak_th.shtml) (site modified daily).

76 [Back](#) *Supra* note 73.

77 [Back](#) *Hvide v. John Does 1-8* (11th Cir. 2000) (Brief of Amicus Curiae American Civil Liberties Union and American Civil Liberties Union of Florida), online: American Civil Liberties Union  
[http://www.aclu.org/court/hvide\\_v\\_doe.html](http://www.aclu.org/court/hvide_v_doe.html) (last modified: no date provided).

78 [Back](#) *Hvide v. John Does 1-8*, 770 So. 2d 1237 (Fla. App. 2000).

79 [Back](#) (20 June 2000), Docket no. MRSC-129-00 (S.C.N.J., Chan. Div.) (Order), online: *Yahoo! Dendrite (DRTE) messageboard* (msg. 867, posted 23 June 2000)  
<http://messages.yahoo.com/bbs?.mm=FN&board=4688055&action=m&mid=867> (site modified daily) [hereinafter *Dendrite*].

80 [Back](#) *Ibid.*

- 81 [Back](#) M. Samson, "Subpoena" (summary of unpublished *Dendrite* decision), online: *Phillips Nizer Benjamin Krim & Ballon LLP internet library* <http://www.phillipsnizer.com/int-art221.htm> (last modified: 29 March 2001).
- 82 [Back](#) [1989] 1 S.C.R. 927, online: QL (SCC) [hereinafter *Irwin Toy v. Quebec*].
- 83 [Back](#) *Ibid.* at para 41.
- 84 [Back](#) 302 U.S. 319 (1937).
- 85 [Back](#) *Ibid.* at 326-327.
- 86 [Back](#) *Supra* note 82 at para 41.
- 87 [Back](#) [2001] S.C.J. no. 3, online: QL (SCC) at para 23.
- 88 [Back](#) [1989] 2 S.C.R. 1326.
- 89 [Back](#) *Ibid.* at para 3.
- 90 [Back](#) [1995] 2 S.C.R. 1130, online: QL (SCC) [hereinafter *Hill*].
- 91 [Back](#) *New York Times v. Sullivan*, 376 U.S. 254 (1964).
- 92 [Back](#) *Supra* note 90 at para 137.
- 93 [Back](#) *Supra* note 11.
- 94 [Back](#) *Supra* note 90 at paras. 103-105.
- 95 [Back](#) The Supreme Court of Canada has discussed the relationship between United States First Amendment protection and Canadian s. 2(b) freedom of expression in a variety of cases. See for example: *R. v. Keegstra*, [1990] 3 S.C.R. 697 (in the context of hate propaganda and s. 1), *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, *Ford v. Quebec (AG)*, [1988] 2 S.C.R. 712. These cases have adopted the view that the differing historical, social, and legislative contexts between the two countries mean that principles of First Amendment protection must not be adopted wholesale by Canadian courts. Principles of the protection of freedom of speech in the U.S. must be carefully scrutinized as to their appropriateness to the Canadian constitutional context.
- 96 [Back](#) Since this discussion is taking place in the abstract, rather than in the context of a real challenge to a statute or rule under which a discovery order could be made, and it is unclear whether the *Charter* would apply directly to the statute, or merely indirectly to the common law, the strict procedure for a s. 1 justification will not be discussed. However, the general concepts at work in the s. 1 process will be referred to.

97 [Back](#) *Supra* note 87 at para 102-103.

98 [Back](#) *Supra* note 87 at para 106.

99 [Back](#) *Supra* note 4 at 341.

100 [Back](#) *Talley supra* note 10 at 65; *McIntyre supra* note 4 at 343 (at note 6 therein).

101 [Back](#) Online: *Thomas, Library of Congress database of legislative information on the internet* <http://lcweb2.loc.gov/const/fed/fedpapers.html> (last modified: 25 December 1996).

102 [Back](#) *Supra* note 5; F. Monaghan, *John Jay: Defender of Liberty Against Kings & Peoples, Author of the Constitution & Governor of New York, President of the Continental Congress, Co-author of the Federalist, Negotiator of the Peace of 1783 & the Jay Treaty of 1794, First Chief Justice of the United States* (New York: Bobbs-Merrill, 1935).

103 [Back](#) *Supra* note 6; D. Jobb, "Howe's 1835 Libel Trial", *The Halifax Herald* (25 May 1985), online: *The Halifax Herald home page* <http://www.herald.ns.ca/aboutus/howe1.html> (site modified daily) [hereinafter *Jobb*].

104 [Back](#) *Jobb, Ibid.*

105 [Back](#) Kesterton, *supra* note 6 at 22.

106 [Back](#) *Jobb, supra* note 102.

107 [Back](#) *Supra* note 4 at 385, citing *N.A.A.C.P. v. Alabama, supra* note 44.

108 [Back](#) *Hill, supra* note 90 at para 106.

109 [Back](#) *Supra* note 13 at para 17.

110 [Back](#) *Supra* note 4 at 385.

111 [Back](#) The following procedural elements from *SeesCandy.com* are discussed above in the text following note 64.

112 [Back](#) The following procedural elements from *Irwin Toy* are discussed above in the text following note 15.

113 [Back](#) See, for example, *Braintech v. Kostiuk* (1999), 171 D.L.R. (4th) 46 at para 66, online: QL (BCJ), where the British Columbia Court of Appeal determined that a default defamation judgment against a Canadian defendant in a Texas court was of no effect because British Columbia was the natural forum to resolve the dispute.

114 [Back](#) See *Hill, supra* note 90 at para 122, where Cory J. explains the American "actual malice"

standard for public officials suing for defamation, articulated in *New York Times v. Sullivan*, *supra* note 91. The actual malice standard does not apply in Canada: paras. 137-141.