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

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

PROCEEDING UNDER the *Class Proceedings Act, 1992*

DEFENDANT WHATCOTT'S FRESH AS AMENDED FACTUM

[ORIGINAL FACTUM WITH ADDENDUM OPPOSING MOTION TO DISCLOSE IDENTITIES OF FELLOW ZOMBIES AND FINANCIAL BACKERS AND IN SUPPORT OF CROSS- MOTIONS TO DISMISS ALL CLAIMS AS AN ABUSE OF PROCESS, TO DISMISS ALL CLAIMS UNDER S. 137.1 OF THE *COURTS OF JUSTICE ACT,* AND TO STRIKING OUT IN WHOLE OR IN PART THE PLAINTIFFS' PLEADINGS]

PART I INTRODUCTION

1. On November 15, 2016 Mr. Justice Paul Perell scheduled time for the Plaintiffs to bring on an application for pre-trial disclosure of the identities of the anonymous defendants assumed to be known by the Defendant William Whatcott (Whatcott).

2. In response, Whatcott has filed a motion to strike out all of the Plaintiffs' claims as an abuse of process and alternatively to strike as much of the Plaintiffs' claims as possible, including substantial portions of the Statement of Claim (Claim), in reliance upon Rules 2.1.01(1)(a),

21.01(1)(b), 21.01(3)(d) and 25.11 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, under the *Courts of Justice Act* R.S.O. 1990, c. C. 43.

3. By agreement of counsel for the Plaintiffs and Whatcott, a statement of defence is not to be filed at this time.

4. Out of respect for the court process, Whatcott voluntarily removed from his website the content of the leaflet that is objected to by the plaintiffs in their Claim, pending the outcome of this litigation.

PART II FACTS

The Toronto Gay Pride Parade is a Political Event

5. The Toronto Gay Pride parade (the Parade) is a public political event held on the streets of Toronto and is paid for in part by public taxpayer funds in the amount $140,200 from the Government of Canada, $270,000 from the Province of Ontario, and $160,500 from the City of Toronto. In addition, Toronto taxpayers paid $729,364.40 for city services provided to the Parade and another $260,000 was given to the Parade as a cultural grant by the City of Toronto.

Claim, Whatcott Motion Record, Tab 2, paras. 31 to 49
Toronto Sun Stories, Whatcott Motion Record, Tabs A and B

6. Participants in the 2016 Parade included the Liberal Prime Minister of Canada, Justin Trudeau (Trudeau) and the Liberal Premier of Ontario, Kathleen Wynne (Wynne), who is an openly gay woman. By participating in an official capacity, these politicians and the Liberal parties of Canada and Ontario made implied and express public political statements to approve of the purpose of the parade, the gay lifestyle of the marchers, the public conduct of the marchers, and their partnership and solidarity with marchers and the gay community generally. The 2016-2021 Strategic Plan of Pride Toronto reveals the goal to "stay true to our political roots" and proclaimed this objective with the T-shirt slogan "Pride is Political".

Claim, Whatcott Motion Record, Tab 2, paras. 49 and 60
Pride Toronto Strategic Plan 2016-2021, Whatcott Motion Record, Tab C

7. Paragraph 49 of the Claim notes that Trudeau "enthusiastically marched" in the Toronto Pride Parade, even before being elected to the Office of Prime Minister of Canada, as a "proud" ally of the LGBTQ2SI (Gay) community. Paragraph 60 notes that prior to marching in the July 3, 2016 Parade, as the first sitting Prime Minister to do so, Trudeau honoured a newly extended Pride Day to Pride Month by raising the Rainbow Flag on Parliament Hill for the first time. Braeden Caley, Senior Director, Communications for the Liberal Party of Canada, months before the Parade, sponsored a prize to celebrate Trudeau's planned participation, entitled "Win a Trip to Toronto Pride to March with the Liberal Team." Promotional material included photos of Trudeau and Wynne.

Liberal Party Contest Notice, Whatcott Motion Record, Tab D
Promotional Material advertising Trudeau and Wynne, Whatcott Motion Record, Tab E

The Filing of the Class Action was a Political Event

8. On August 12, 2016 the Plaintiff George Smitherman (Smitherman), a former MPP and an openly gay Liberal Party Member, Plaintiff Christopher Hudspeth (Hudspeth), an openly gay man, and lawyer Douglas Elliott (Elliott), a prominent Toronto lawyer who ably represents members of the gay community, and recipient of Pride Toronto's lifetime achievement award, held a press conference hosted by the Canadian Parliamentary Press Gallery (the Gallery) in the Charles Lynch Room, located in the Centre Block on Parliament Hill, in the federal Parliament building complex, that houses the Senate and the Parliament of Canada, in Ottawa, the national capital of Canada, to announce the filing of a 104 million dollar class action lawsuit against the Defendant Bill Whatcott (Whatcott) and his unknown financial supporters. This press conference and news of the commencement of this class action, was a political event, for the Gallery permits only politically related press conferences.

9. The entire press conference was recorded, and is attached as Exhibit "E" to the affidavit of Carol Swick, John Findlay's legal assistant in the law firm of Findlay McCarthy

PC. An unofficial transcript of what was said is attached as Exhibit "F" to the affidavit of Carol Swick.

Recording of Press Conference, Whatcott Motion Record, Tab F (memory stick).
Transcript of Press Conference, Whatcott Motion Record, Tab G

10. Plaintiff Smitherman spoke at the Gallery and gave a clear explanation that the Parade was a political event and that Whatcott was targeting people in their roles as politicians and civil servants:

"I have been a life-long Liberal from 1998 on. I was the catalyst for organizing **a very, very strong Liberal presence, especially in the Toronto Gay Pride Parade** and it disgusts me further that this individual [Whatcott] takes aim at people **based on their roles, their government responsibilities, and their partisan identification**…. We want to do all we can to stamp this hateful individual out." [**Bolding** my emphasis]

Recording of Press Conference, Whatcott Motion Record, Tab F, (memory stick) at 11:02 mins.
Transcript of Press Conference, Whatcott Motion Record, Tab G, at p. 5.

11. Plaintiff Hudspeth told the press that that he wanted to "smoke out" anybody who financially supported Whatcott in any way and to punish them with a 100 million dollar judgement, for enabling Whatcott to attend the Parade and distribute literature.

Recording of Press Conference, Whatcott Motion Record, Tab F, at 9:36 mins.
Transcript of Press Conference, Whatcott Motion Record, Tab G, at p. 4

12. Elliott, counsel for the plaintiffs, spoke at the Gallery and said that Whatcott was a "wicked man" who "promotes his hatred." Elliott later added, "I look forward to see God testify in Mr. Whatcott's defence."

Recording of Press Conference, Whatcott Motion Record, Tab F, (memory stick) at 21:00 mins.
Transcript of Press Conference, Whatcott Motion Record, Tab G, at pp. 9 and 11

13. Elliott also confirmed that the Parade was a political event with the lead attraction being Canada's Prime Minister Justin Trudeau:

"**Given that this was the first time a sitting prime minister was marching in a pride parade in Canada, Whatcott also took aim at the Liberals** and defamed Justin Trudeau, Kathleen Wynne and the other Liberals who marched in the Parade." [**Bolding** my emphasis]

Recording of Press Conference, Whatcott Motion Record, Tab F, (memory stick) at 5:32 mins.
Transcript of Press Conference, Whatcott Motion Record, Tab G, at p. 3

The Defendant Whatcott went "Undercover" to Gain Admission to the Parade

14. The Defendant Bill Whatcott assumed the false identity of Robert Clinton so that he could officially join in the Parade in disguise as a member of the Gay Zombies Cannabis Consumers Association, along with a handful of other "Zombies" who purposely disguised their identities in order to remain anonymous. Whatcott believed that had he disclosed his true identity, he anticipated that would have been barred from participating in the Parade, in violation of his constitutional right to freedom of association protected by s. 2(d) of the *Charter*. This suspicion is confirmed by paragraph 64 of the Claim, "Whatcott falsely posed as "Robert Clinton" in his application to Pride Toronto, knowing if he used his real name he would be barred from participating." This is the one thing both parties do agree upon.

15. Whatcott is the same Whatcott in *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] S.C.J. No. 11 (SCC), a case where the facts did not involve public participation in a political event and political opposition to the political agendas of the ruling Liberal provincial and federal governments.

Saskatchewan (Human Rights Commission) v. Whatcott, [2013] S.C.J. No. 11, Book of Authorities, Tab 9

16. The Pride Participation Agreement (PPA) is a license agreement that governed the participation of the Zombies in the Parade, as Whatcott filled out an application on behalf of all the Zombies, which was approved by Pride Toronto.

Pride Participation Agreement, Whatcott Motion Record, Tab H

The Core Political Message

17. The Zombies engaged in the distribution of leaflets packaged as a Zombie Safe Sex Package, headlined with the phrase, "Gay Zombies want you to practice safe sex." These leaflets were offered to and accepted by many people in the Parade and along the parade route, and the recipients are identified in the Claim as Class 2, "the Recipients." The messages in the leaflets warned of the health risks and descending moral depravity of sexual conduct engaged in by gay men and encouraged repentance and acceptance of the Christian faith. Paragraph 70 of the Claim estimates that about 3,000 leaflets were distributed.

18. The message distributed by the Zombies was at its core, political statements that represent an opposing viewpoint to the views publicly held by others who participated in the Parade. The message offering Christ as the answer is consistent with efforts by gay members of the Anglican and United churches to become Christians and to fully participate in the religious rites, sacraments and offices in those and other Christian denominations.

19. The informational content of those same leaflets is also consistent with the information provided by members of the gay community when it lobbies for increased health care funding, and documents authored by the Canadian Aids Society, the City of Toronto Department of Public Health and the Centers for Disease Control and Prevention, to combat rampant diseases affiliated with gay sexual practices and rampant in the gay community.

Canadian Aids Society Letter to Minister of Health, Whatcott Motion Record, Tab I
Toronto Public Health Public Statement, Whatcott Motion Record, Tab J
Centers for Disease Control Press Release and Report, Whatcott Motion Record, Tab K

20. No statements in the leaflets were false or defamatory of any one individual, and particularly, it is not defamatory of either of the plaintiffs.

21. The following *Charter* provisions constitutionally protected the Zombies in their leaflet distributions and accompanying informational content:

1 Freedom of conscience and religion s. 2(a)
2 Freedom of thought, belief, opinion and expression s. 2(b)
3 Freedom of peaceful assembly s. 2(c)
4 Freedom of association s. 2(d)
5 The right to life, liberty and security of the person s. 7

Canadian Charter of Rights and Freedoms, ss. 2 and 7, Book of Authorities, Tabs 5 and 6.

The Liberal Party of Canada and the Liberal Party of Ontario and the Liberal Subclass are Political and Governmental Actors That Seek to Suppress Constitutional Freedoms of Dissenters

22. While not specifically pleaded, it is assumed that some of the Recipients, were members of Class 1, the Marchers, who include Pride Toronto, all persons who personally or by association, contracted with Pride Toronto to participate in the 2016 Toronto Pride Parade, but specifically excludes the Defendants and public authorities present to ensure security of the Marchers and the Liberal Subclass.

23. While not specifically pleaded, it is further assumed that the Liberal Subclass is a member of Class 1, the Marchers, and Class 2, the Recipients.

24. The Liberal Subclass, estimated by the Plaintiffs to be about 500 people, consists of Trudeau and Wynne, past and present members of the Liberal Parties of Canada and Ontario, the Marchers who are Liberal party members and currently hold elected public office as a Member of Parliament or the Ontario Legislative Assembly, who currently hold power as the governments of Canada and Ontario, and at the time of the Parade, and those individuals self-identified as Liberals by marching with the Liberal Party contingent are employed in the Parade. Presumably these self-identifiers includes past and present civil servants employed by the governments of Canada and Ontario, whose responsibilities may

have included or do include, fulfilling the gay community's political agenda through the political vehicles of the Liberal parties of Canada and Ontario, and the respective administrative branches of the Canada and Ontario governments.

Claim, Whatcott Motion Record, Tab 2, at para. 14(c)

25. According to paragraph 61 of the Claim, the Liberal Subclass encouraged self-identification by asking supporters to wear red, a colour associated with that political party, and to march in close proximity to the Liberal float in the Parade.

26. The Claim also notes in paragraph 61 that a "significant number of Liberal cabinet ministers at the federal and provincial level, including the Attorney General of Canada" participated as the Marchers. In addition, there were "several Liberal Members of Parliament and Members of the Legislative Assembly, including an openly gay Member of Parliament, Randy Boissonault."

27. The Parade was a significant political event, for leading members of the Liberal governments of Canada and Ontario marched as a very large group to show solidarity with the political goals and agenda of the gay community. It was a "golden opportunity" not just for Whatcott to voice his political views, but also for Liberal party members to publicly strengthen their positive alliance with the gay community. Paragraph 62 of the Claim recognized this combined gathering in its phrase, "The Toronto Parade with its million plus attendees presented a golden opportunity..." This "golden opportunity" was there for both the Zombies and the Liberals to make either supporting or opposing political statements about political issues, as each saw fit. In fact, some honoured guests, Black Lives Matters, "hijacked" the same Parade and remarkably was not sued, even though they successfully used this "golden opportunity" to "blackmail" the Pride executives for the police marchers to be expelled from the Parade to accomplish their political goals. Elliott said in a radio interview on July 4, 2016 that even "homophobes treat us better" and that those members of the gay community who hijacked Parade would be subject to his personal complaint with the Parade's internal complaint resolution process.

Audio of Elliott Radio Interview, Whatcott Motion Record, Tab F
Transcript of Elliott Radio Interview, Whatcott Motion Record, Tab L

28. The partnership between the gay community and the Liberal parties of Canada and Ontario is evident not just from the enthusiastic welcoming and love shown to both Trudeau and Wynne at the Parade, and the honour bestowed upon Smitherman, a former Liberal Deputy Premier of Ontario, to march in the Parade as part of the Grand Marshall's party. The governments of Canada and Ontario, through the Liberal subclass, indirectly join in as partners with the plaintiffs Smitherman and Hudspeth in this class action. As explained *infra*, this is constitutionally unsound and legally impermissible.

The Legal Attack

29. Even though the Parade is a public political event of notoriety of a massive scale, held on the public streets of Toronto, Pride Toronto denies in paragraph 46 of the Claim that the Parade is a public event held in the public forum. Pride Toronto censors messages delivered by participants so that they are in harmony with the overall mission, vision and values of Pride Toronto, set out in Appendix A of the Pride Participation Agreement (PPA). Appendix A purportedly welcomes "everyone" and celebrates the "uniqueness of all voices" unless those voices are dissenting ones. Pride Toronto seeks to "unite and empower" people "with diverse sexual orientations, gender identities, and gender expressions", in concert with the power and influence of the governing Liberal parties of Canada and Ontario, unless those diverse perspectives are coming from Christians with an opposing viewpoint.

Pride Participation Agreement, Whatcott Motion Record, Tab H

30. Pride Toronto grants only unto itself the constitutional right to freedom of expression, and suppresses any opposing or dissenting viewpoints (see Claim paragraph 46). Ostensibly, Pride Toronto "welcomes people with widely diverging political and religious views" but that ends when true freedom of expression for all individuals begins, with the distribution of leaflets with allegedly offensive content. This is because the PPA requires all

participants to "tailor their messaging to be in accordance with … solidarity with the [gay] communities."

Paragraph 6 (c) of the Pride Participation Agreement, Whatcott Motion Record, Tab H

31. Pride Toronto seeks a constitutional exemption by claiming that the Parade, a public political event on the streets of Toronto, funded in part by taxpayers in partnership with the ruling governments of Canada and Ontario, is not a legitimate public forum for political expression and rejects the idea that the exercise of constitutional freedoms belong to everyone, not just to those who express harmonious viewpoints that are deemed politically correct by Pride Toronto and the Plaintiffs.

The Personal Attack

32. At page 18 of the Claim the Plaintiffs hide behind qualified privilege and personally attack Whatcott by the false and defamatory headline, "Whatcott and his Homophobic "Jihad", and then launch into a condensed narrative of Whatcott's biography. The headline insinuates that Whatcott is a hateful person who is a religiously motivated terrorist who is at war with the gay community at large. None of these implied allegations are true.

33. No facts are pleaded to establish that Whatcott is a "homophobe", who is defined by the Merriam-Webster dictionary as: "A person who hates or is afraid of homosexuals or treats them badly." That same dictionary defines "Jihad" as "a war fought by Muslims to defend or spread their beliefs."

34. Whatcott is simply an individual who utilizes his constitutional freedoms and uses his freedom of expression at political events by distributing written leaflets. His leaflets warn others of the dangers of a gay lifestyle that jeopardizes health and strains the healthcare system of Canada. He expresses his political opposition to moral debauchery by exposing the private immoral behaviour of those individuals that have been entrusted with public office and who were scandalized by deviant sexual behaviour that resulted in criminal convictions. His goal is to speak the truth.

35. No facts are pleaded that Whatcott is violent or promotes violence. No facts are pleaded that he is a Muslim, when in fact, he is described in the Claim as a Christian. The only 'jihad" or crusade Whatcott takes part in is his Christian ministry to boldly speak the truth in love, inviting those individuals suffering from a gay lifestyle to repent of their choice and to make a better choice and become a Christian who is no longer gay. No facts are pleaded that show Whatcott incited hatred contrary to the *Criminal Code of Canada*. To simply allege "jihad" without qualification implies malicious intent to misrepresent the message of Whatcott.

36. In summary, this heading is false and libellous *per se*, but for the fact that the cloak of qualified privilege may protect these statements.

37. At paragraph 73, the Claim is further defamatory of the Whatcott by falsely asserting that he conflates paedophilia with homosexuality, and thereby wrongly accuses Trudeau, Wynne, and "other members of the Liberal subclass" of "supporting and actively participating in child abuse." This allegation is scandalous, vexatious, malicious and false. This is an offensive inappropriate pleading without any supporting evidence. But for the shield of qualified privilege, these statements would ordinarily be actionable.

38. Even though the Plaintiffs allege in paragraph 72 of the Claim that the content of the leaflets were offensive and exposed gay people to hatred, there is no evidence that criminal charges for hate speech, or any for other matter, were laid by the Toronto police service or by anyone else, nor are there any proceedings undertaken pursuant to the City of Toronto anti-discrimination policy, nor were any steps taken by Pride Toronto pursuant to paragraph 8 of the PPA, to enforce any number of available enumerated remedies. Neither is there any evidence that Whatcott, or any other Zombie, been sued by any individual for alleged defamation.

39. Instead, this punitive class action proceeding was launched, claiming over 104 million dollars, plus costs, against the Whatcott and his fellow Zombies, alleging class defamation, civil conspiracy to injure and the intentional infliction of emotional distress.

PART III ISSUES

Issues

40. The issues for resolution are as follows:

1. Is there a constitutional right to be anonymous with respect to core political speech that is protected by the constitution?

2. May a defendant in a class action be legally compelled to disclose the identity of anonymous individuals who, in the public forum, distributed leaflets in the constitutional exercise of their rights to free speech, in order to assist plaintiffs in a class action that may be meritless and brought for the purpose of chilling freedom of expression?

3. May a class action be used as a weapon to silence political opponents who lawfully exercise their constitutional rights and to financially ruin their anonymous supporters, or is this an abuse of process that will not be tolerated by the courts?

4. Does the Claim disclose a reasonable cause of action?

5. If the Claim is not struck out, do paragraphs 16, 20, 22, 24, 25, 27, 28, 29 30 and 52 violate the rules of pleadings and should be struck?

PART IV THE LAW

Overview

41. This action fits within the kind of case the Divisional Court cautioned might occur in the context of civil litigation where *Charter* values are at stake. At paragraph 33 of *Warman v. Wilkins-Fournier*, the Ontario Divisional Court (Kent, Heeney, Wilton-Siegal JJ.) identified the potential for the misuse of the *Rules of Civil Procedure*, in circumstances where a plaintiff might file a meritless action for the tactical purpose of identifying anonymous defendants "**with a view to stifling the commentators and deterring others from speaking out on controversial issues**." [**Bolding** my emphasis] It is the responsibility of this Court to be the guardian of this abuse, "for the commencement of a defamation claim does not trump freedom of expression or the right to privacy." *Ibid.* When a plaintiff commences a

defamation claim in a class action, which is prohibited by law in Ontario, as in this proceeding, the abusive nature of meritless action blatantly exposed. For this reason, a Superior Court Judge has inherent jurisdiction to take *Charter* values into consideration, which in the instant case, outweighs traditional concerns of relevance and privilege.

Warman v. Wilkins-Fourier, [2010] O.J. No. 1846 Book of Authorities, Tab 10

42. Whatcott invites this court, to follow *Warman v. Wilkins-Fournier* and summarily or after written submissions, stay or dismiss this proceeding as an abuse of process, pursuant to Rules 21.01(1)(a) and (b), 21.01(3)(d), 25.11(c) and this Court's inherent jurisdiction.

43. The following discussion outlines why this is the legally correct result.

The Defamation Action In this Proceeding Cannot Succeed as a Matter of Law

44. The defamation action must be dismissed, as Ontario is a common law jurisdiction and does not permit defamation claims in class actions. The *per curium* endorsement written by the Divisional Court (McRae, Kurisko JJ., Smith A.C.J.O.C.) in *Kenora (Town) Police Services Board v. Savino* succinctly summarizes the law:

"1 The sole issue on this appeal is the correctness of the decision of Platana J. refusing Certification of this defamation action as a Class Action pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, and to appoint Donald J. Munro as the representative plaintiff of all members of the Kenora Police Service.

2 The Claim as styled was commenced by Kenora Police Services Board and Donald John Munro on his behalf and on behalf of all members of the Kenora Police Service against Victor P. Savino, a lawyer, who alleged racist practices by members of the Kenora Police Services.

3 **Defamation is a personal tort.** A cause of action will only lie if each member of the Kenora Police Service is able to maintain a personal action for defamation. **The *Class Proceedings Act* does not create any new substantive rights.** To comment that "members of the Kenora Police Service" have performed racist acts does not, of itself, justify certification as a Class Action by *all* members of the Service. Each member of the Kenora Police Service is required to disclose a cause of action in the pleadings as condition precedent to Certification.

See:
Knupffer v. London Express Newspaper Ltd., [1944] A.C. 116 (U.K. H.L.)
Booth v. British Columbia Television Broadcasting Systems (1982), 139 D.L.R. (3d) 88 (B.C. C.A.)
Elliott v. Canadian Broadcasting Corp. (1993), 16 O.R. (3d) 677 (Ont. Gen. Div.) affirmed (1995), 25 O.R. (3d) 302 (Ont. C.A.)

4 Section 2 of the *Charter of Rights* guarantees as a fundamental freedom the "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication". **This freedom requires that criticism of unspecified members of a public body in a general way not be proscribed by use of a class action defamation suit.**

5 This is not to say that an individual member of the Kenora Police Service who has been singled out may not be able to maintain such an action.

6 Appeal dismissed."

[**Bolding** my emphasis]

Kenora (Town) Police Service Board v. Savino, [1997] O.J. No. 2768 (Ont.Div.Ct.), Book of Authorities, Tab 11

45. Leave to appeal was dismissed by the Ontario Court of Appeal.

Kenora (Town) Police Service Board v. Savino, [1997} O.J. No. 5067 (Ont.C.A.)
Book of Authorities, Tab 11

<u>The Remaining Actions</u>

46. This leaves the two remaining actions: conspiracy to surreptitiously enter the Parade in order to exercise legitimate constitutional rights at the Parade, and the alleged intentional infliction of mental distress, presumably caused when a Recipient read the content of the constitutionally protected free speech. Both of these claims depend upon whether constitutional freedoms expressed in the public forum at a political event may be suppressed or must be tolerated, even if the content of the information communicated is hurtful, controversial or unwanted.

<u>Civil Conspiracy to Injure</u>

47. Since the Plaintiffs' cause of action in defamation cannot be sustained as a matter of law the tort of civil conspiracy also fails because there was no unlawful means. The prior agreement by the Zombies to sneak into the Parade under false pretences and to march in the Parade and to distribute leaflets merged with the failed tort of defamation. The Plaintiffs cannot gain a legal advantage by adding the tort of civil conspiracy to buttress a failed non-actionable tort. The claim for civil conspiracy becomes redundant and fails when the infirm defamation claim fails.

48. This result follows from the reasoning of Lord Denning in *Ward v. Lewis*::

"It is important to remember that when a tort has been committed by two or more persons **an allegation of a prior conspiracy to commit the tort adds nothing**….

The prior agreement merges in the tort. A party is not allowed to gain an added advantage by charging conspiracy when the agreement has become merged in the tort. It is sometimes sought, by charging conspiracy, to get an added advantage, for instance in proceedings for discovery, or by getting in evidence which would not be admissible in a straight action in tort, or to overcome substantive rules of law, such as here, the rules concerning re-publication of slanders. **When the court sees attempts of that kind being made, it will discourage them by striking out the allegation of conspiracy on the simple ground that the conspiracy adds nothing when the tort has in fact been committed."**

[**Bolding** my emphasis]

Ward v. Lewis, [1955] 1 All. E.R. 55 (C.A.), Book of Authorities, Tab 12

49. In Ontario, Justice Gray applied with approval the law from *Ward v. Lewis* in *Apple Bee Shirts Ltd. v. Lax et al.*

Apple Bee Shirts Ltd. v. Lax, [1988] O.J. No. 658 (Ont. S.C), Book of Authorities, Tab 13

50. The civil conspiracy claim in this proceeding is distinguishable from the situation where the predominant purpose of a defendant's actions is to cause injury to the plaintiffs, by either lawful or unlawful means. The means used to distribute and communicate information at the Parade were lawful.

51. There was no evidence of any intent to injure, either express or constructive, as is contemplated by the two-pronged test for civil conspiracy, set out by Estey J. in *Canada Cement LeFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*:

"Although the law concerning the scope of the tort of conspiracy is far from clear, I am of the opinion that whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy if:

(1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff;

or,

(2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.

In situation (2) it is not necessary that the predominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff."

Canada Cement LeFarge Ltd. v. British Columbia Lightweight Aggregate Ltd. [1983] 1 S.C.J. No. 33 (SCC), Book of Authorities, Tab 6, per Estey, J. at p. 14

Intentional Infliction of Mental Distress

52. Whatcott says that public debate at political events ought to be encouraged in a healthy constitutional democracy and that open, vigorous and robust discussion is the paramount constitutional value that is protected, and trumps any civil claim to hurt feelings caused by factual honest debate of controversial topics that may offend or disgust others.

53. Whatcott relies upon all the constitutional freedoms set out *supra*. The Parade raises issues of great public importance and is more than just a local community event, for it is primarily a political event that presents and celebrates the public political partnership of the gay agenda with the pro-gay agenda of the governments of Canada, Ontario and Toronto.

As well, without funding by taxpayer dollars, the Parade could not be held in its current place, extravagant style, scope or manner.

54. The informational content of the leaflets distributed by the Zombies enjoy absolute privilege as guaranteed constitutional freedoms. There is no evidence that informational content of the leaflets is seditious, or constitutes hate speech.

55. It is an abuse of process and contrary to public policy to claim for hurt feelings that in turn trigger mental distress, by simply being exposed learn about an opposing viewpoint at a political event. There is no safe zone at a public political event, which by its very nature in a free and democratic society invites opposing viewpoints. To allow such a claim in this context is to open the floodgates for all members of society to litigate when exposed to offensive ideas that upset intolerant close-minded people.

The Misconduct of the Liberal Parties of Canada and Ontario

56. The silent plaintiffs in this class action are the Liberal Parties of Canada and Ontario, which are currently in power and constitute the governments of Canada and Ontario. They are unable to do indirectly as a subclass plaintiff in a class action what they cannot do directly. It is constitutionally unsound for governments to enter as plaintiffs in a civil class action through the back door to ban freedom of expression critical of public policy and public laws. This limit on government power in a democracy is sound public policy in accordance with *Charter* values and freedoms, according to Corbett, J. in *Halton Hills (Town) v. Kerouac* :

"The Constitutional Argument

Overview

25 Without free speech, there is no free press. Without a free press, there is no free political debate. Without free political debate, there cannot be true democracy. Freedom of speech, writ large, is a pillar of democracy.

26 Must free speech be entirely unfettered to be truly free? No: freedom of speech, like all other freedoms, is constrained to recognize other important rights. Laws against hate speech limit free speech to protect people from persecution on the basis of a group affiliation.[13] The

law of defamation limits free speech to protect people from untrue and damaging statements made about them. Laws against sedition may limit free speech that advocates the violent overthrow of the state: to the extent that this speech is fettered, it is on the basis that society as a whole may guard against its own continued existence.[14]

27 A law that restricts free speech, even slightly and for noble purposes, has some chilling effect. The chill is greater than the metes and bounds of the restriction itself, since the risk of prosecution or litigation will surely discourage speech near the boundaries of what is permitted."

Halton Hills (Town) v. Kerouac [2006] O.J. No. 1473 (Ont.S.C.), Book of Authorities, Tab 16, at pp. 5 and 6

57. The Defendant Whatcott and his fellow Zombies enjoy absolute privilege regarding their constitutional freedoms and governments may not respond to offensive criticism in the courts:

"58 *Speech About Government Is Absolutely Privileged:* The reason for the prohibition of defamation suits by government lies not with the use of taxes, or with some abstruse theory about the indivisibility of the state and the people who make up the state. Rather, it lies in the nature of democracy itself. **Governments are accountable to the people through the ballot box, and not to judges or juries in courts of law. When a government is criticized, its recourse is in the public domain, not the courts. The government may not imprison, or fine, or sue, those who criticize it.** The government may respond. This is fundamental. Litigation is a form of force, and the government must not silence its critics by force.

59 Section 2(b) of the *Charter* guarantees freedom of expression. **Statements made about public affairs generally, and about government in particular, lie at the very core of this democratic value.**
60 None of this would preclude the state from enacting laws that could restrict the freedom to criticize government, and the laws against sedition are an example.[34] In such a case, there would be a law, enacted by the government, which would have to pass constitutional muster. **But the starting position, at common law, is that statements made about government are absolutely privileged.**

61 Statements made about public servants, be they employees of government or elected officials, are not subject to the same absolute privilege because the individuals have private reputations which they are entitled to protect. The underlying principles are the same: no doubt according public servants the right to sue in defamation chills criticism of those public servants. However, it is in the public interest that the state be able to attract and retain competent persons of good repute as public servants. It is not likely to be able to do so if these persons may be subject to false personal attacks without recourse. **The same cannot be said of the government itself.**

62 I conclude as follows:

1) Section 2(b) of the *Charter* guarantees freedom of expression;

2) expression about public affairs in general, and government in particular, lies at the core of freedom of expression;

3) **any legal restriction on freedom of expression about public affairs has a chilling effect on freedom of expression generally, and infringes the Section 2(b) guarantee**;

4) infringements of the Section 2(b) guarantee may be justified pursuant to Section 1 of the *Charter*. Laws against sedition, for example, may be justified, since society may guard against its own violent overthrow. Laws against hate speech may be justified to protect the victims of hate speech. The common law tort of defamation may be justified on the basis that private persons (including public servants) are entitled to protect their personal reputations;

5) **there is no counterveiling justification to permit governments to sue in defamation. Governments have other, better ways to protect their reputations**;

6) any restriction on the freedom of expression about government must be in the form of laws or regulations enacted or authorized by the legislature; the common law position, **in the absence of such legislation, is that absolute privilege attaches to statements made about government;**

7) 'Government' includes democratically elected local governments."

[**Bolding** my emphasis]

Halton Hills (Town) v. Kerouac [2006] O.J. No. 1473 (Ont. S.C.), Book of Authorities, Tab 16, at pp. 11 and 12

58. Coming to the same conclusion was Pedlar J. in *Montague (Township) v. Page*, 2006 CarswellOnt 451 (Ont. S.C.):

"29 **In a free and democratic system, every citizen must be guaranteed the right to freedom of expression about issues relating to government as an absolute privilege, without threat of a civil action for defamation being initiated against them by that government. It is the very essence of a democracy to engage many voices in the process, not just those who are positive and supportive**. By its very nature, the democratic process is complex, cumbersome, difficult, messy and at times frustrating, but always worthwhile, with a broad based participation absolutely essential. **A democracy cannot exist without freedom of expression, within the law, permeating all of its institutions. If governments were entitled to sue citizens who are critical, only those**

with the means to defend civil actions would be able to criticize government entities. As noted above, governments also have other means of protecting their reputations through the political process to respond to criticisms."

[**Bolding** my emphasis]

Montague (Township) v. Page [2006] O.J. No. 331 (Ont. S.C.), Book of Authorities, Tab 17, at p. 11.

The Plaintiffs' Motion to Disclose Identities of all the Zombies and Financial Supporters

59. The Plaintiffs now bring a motion to compel Whatcott to identify the anonymous zombies who participated in the parade and who distributed leaflets, and those anonymous people who give money or other support. Whatcott says this application is without merit, given that this proceeding is an abuse of process, does not have any viable causes of action, and is brought prior to certification application in this class action.

The Right to Remain Anonymous with respect to Core Political Speech

60. The distribution of leaflets that may communicate an opposing viewpoint to the political views of the majority in the Parade constitute at its core political expression protected by s. 2(b) of the *Charter*. This is legal activity protected by law.

61. In a constitutional democracy, identity of the author of the leaflet and identity of the individual who distributes the literature may remain anonymous, as identification and fear of reprisal might deter peaceful discussion of opposing viewpoints to politically correct viewpoints that are currently in vogue by a majority of the populace. The dissemination of ideas is vital to have a robust uninhibited public debate in the pursuit of truth.

The Canadian Authorities

Introduction

62. Whatcott was forced to resort to creativity to accomplish his goal to participate in the Parade and to make known his political views at this political event. Had he disclosed his true identity, he would have been barred. By agreeing to the terms of the license agreement he had to accept conditions that violated his constitutional freedoms and obliged him to only express politically correct views in accordance with the Liberal Party line. Whatcott is not a member of Liberal Party, nor does he identify with the agenda and views of the Liberal Party, as those views violate his conscience and religious beliefs.

63. Individuals who wish to participate at political events in a public forum should not have to be constrained by rules to adhere to politically correct thought in line with the political partner of the Parade or the political goals of the Parade. These limitations are unacceptable in a free and democratic society. Whatcott's ability to exercise his freedom of expression at the right time and place to make an impact on the target audience must not be conditional upon forcing him to either resort to subterfuge or to ally himself with a political opponent. Whatcott contends that he has the freedom to disassociate himself from the political views of the Parade, while marching in the Parade. Whatcott contends that his anonymous financial supporters and his anonymous fellow Zombies have the constitutional right to be anonymous in the exercise of their constitutional freedoms and their right to privacy.

64. The third parties who wish to remain anonymous have a reasonable expectation of privacy to shield their identity, under the protection of s. 7 of the *Charter*.

General Principles Regarding Constitutional Right to Privacy

65. Even the most odious and offensive ideas may find refuge in s. 2 and 7 of the Charter, even in the context of a criminal charge for the making and possession of child pornography. In *R. v. Sharpe*, McLaughlin CJC stated:

"A. The Values at Stake

21 Among the most fundamental rights possessed by Canadians is freedom of expression. It makes possible our liberty, our creativity and our democracy. It does this by protecting not

only "good" and popular expression, but also unpopular or even offensive expression. **The right to freedom of expression rests on the conviction that the best route to truth, individual flourishing and peaceful coexistence in a heterogeneous society in which people hold divergent and conflicting beliefs lies in the free flow of ideas and images. If we do not like an idea or an image, we are free to argue against it or simply turn away. But, absent some constitutionally adequate justification, we cannot forbid a person from expressing it.**

22 Nevertheless, freedom of expression is not absolute. Our constitution recognizes that Parliament or a provincial legislature can sometimes limit some forms of expression. Overarching considerations, like the prevention of hate that divides society as in *Keegstra*, *supra*, or the prevention of harm that threatens vulnerable members of our society as in *Butler*, *supra*, may justify prohibitions on some kinds of expression in some circumstances. Because of the importance of the guarantee of free expression, however, **any attempt to restrict the right must be subjected to the most careful scrutiny.**

23 **The values underlying the right to free expression include individual self-fulfilment, finding the truth through the open exchange of ideas, and the political discourse fundamental to democracy**: *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), at p. 976; *Ford c. Québec (Procureur général)*, [1988] 2 S.C.R. 712 (S.C.C.), at p. 765. While **some types of expression, like political expression, lie closer to the core of the guarantee than others**, all are vital to a free and democratic society. As stated in *Irwin Toy Ltd.*, *supra*, at p. 968, the guarantee "ensure[s] 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", the Court continued, "is ... ' 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". As stated by Cardozo J. in *Palko v. Connecticut*, 302 U.S. 319 (1937), free expression is " the matrix, the indispensable condition of nearly every other form of freedom"

[**Bolding** my emphasis]

R. v. Sharpe, [2001] S.C.J. No. 3, Book of Authorities, Tab 18, p. 17

<u>Laws that Restrict Freedom of Expression and Coerce Disclosure of Identity</u>

66. In *Libman v. Quebec (Attorney General)*, a unanimous Supreme Court of Canada considered the situation when rules of participating limit the exercise constitutional freedoms:

"A. Constitutional Infringements

27 The appellant submits that the impugned legislation infringes the freedom of political expression and the freedom of association guaranteed by the *Canadian Charter*. He argues that if he wishes to conduct a referendum campaign independently of the national committees, his freedom of political expression will be limited to unregulated expenses. Conversely, if he wishes to be able to incur regulated expenses, he will have to join or affiliate himself with one of the national committees.

28 The Court has consistently and frequently held that freedom of expression is of crucial importance in a democratic society (e.g. *Reference re Alberta Legislation*, [1938] S.C.R. 100 (S.C.C.); *R. v. Boucher* (1950), [1951] S.C.R. 265 (S.C.C.); *Switzman v. Elbling*, [1957] S.C.R. 285 (S.C.C.); *Ford c. Québec (Procureur général)*, [1988] 2 S.C.R. 712 (S.C.C.); *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.); *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.); *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.); *Comité pour la République du Canada - Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139 (S.C.C.); *R. v. Butler*, [1992] 1 S.C.R. 452 (S.C.C.); *R. v. Zundel*, [1992] 2 S.C.R. 731 (S.C.C.)). In *Edmonton Journal*, *supra*, at p. 1336, Cory J. wrote eloquently about how fundamental this freedom is in any democracy:

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.* No doubt that was the reason why **the framers of the *Charter* set forth s. 2(*b*) in absolute terms** which distinguishes it, for example, from s. 8 of the *Charter* which guarantees the qualified right to be secure from unreasonable search. *It seems that the rights enshrined in s.* 2(*b*) *should therefore only be restricted in the clearest of circumstances* [Emphasis added.]

Freedom of expression was not created by the *Canadian Charter* but rather was entrenched in the Constitution in 1982 as one of the most fundamental values of our society (see, for example. *Switzman v. Elbling, supra*, at pp. 306-7).

29 In *Keegstra*, *supra*, at pp. 763-64, Dickson C.J. stressed the paramount importance for Canadian democracy of freedom of expression in the political realm:

Moving on to a third strain of thought said to justify the protection of free expression, one's attention is brought specifically to the political realm. ***The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2 (b) guarantee****, and the nature of this connection is largely derived from the Canadian commitment to democracy.* Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that **participation in the political process is open to all persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity**. *The state therefore cannot act to hinder or condemn a political view without to some extent harming the openness of Canadian democracy and its associated tenet of equality for all.* [Emphasis added.]

Political expression is at the very heart of the values sought to be protected by the freedom of expression guaranteed by s. 2 (*b*) of the *Canadian Charter*. (See also *Edmonton Journal*, *supra*, at pp. 1355-56; *Zundel*, *supra*, at pp. 752-53.)

30 *Irwin Toy, supra*, laid down the tests for infringement of freedom of expression. The Court must ask, first, whether the form of expression at issue is protected by s. 2(*b*) and, second, whether the purpose or effect of the impugned legislation is to restrict that form of expression.

31 The appellant claims the right to conduct a referendum campaign independently of the national committees and with the same type of regulated expenses. Is this form of expression protected by s. 2(*b*)? The Court favours a very broad interpretation of freedom of expression in order to extend the guarantee under the *Canadian Charter* to as many expressive activities as possible. Unless the expression is communicated in a manner that excludes the protection, such as violence, the Court recognizes that any activity or communication that conveys or attempts to convey meaning is covered by the guarantee of s. 2(*b*) of the *Canadian Charter* (*Irwin Toy, supra*, at p. 970; *Zundel*, *supra*, at p. 753)."

[**Bolding** my emphasis]

Libman v. Quebec (Attorney General), [1997] S.C.J. No. 85 (SCC), Book of Authorities, Tab 19, pp. 15 and 16.

67. A requirement of political affiliation should never be imposed as a pre-condition to participate at a political event, especially one that is on a massive scale of an estimated one million attendees. As noted in *Libman*, freedom of expression and freedom of association may be closely linked and must be considered together. In *Libman,* a key issue was the "incurring of regulated expenses"; here, the analogous issue is "participating in the Parade":

"32 There is no doubt that the appellant is attempting to convey meaning through the form of communication at issue; he wishes to express his opinions on the referendum question independently of the national committees by means of expenses that are included in the definition of "regulated expenses". This is a form of political expression that is clearly protected by s. 2(*b*) of the *Canadian Charter*.

33 It remains to be determined whether the provisions challenged by the appellant restrict freedom of expression. …

34 Thus, to be able to incur regulated expenses **[participate in the Parade],** the Act **[the license]** requires that a person belong either to one of the national committees **[Pride Toronto]** or to a group affiliated with one of the committees **[the Liberal Party of Canada or Ontario]**. Since the definition of regulated expenses is very broad, most of the expenses incurred to campaign during a referendum period fall into this category reserved exclusively for the national committees or affiliated groups. Certain categories of persons **[Christian**

activists] therefore do not have access to regulated expenses **[participate in the Parade]** during a referendum campaign **[political event],** in particular:

(1) persons who, either individually or as a group, would like to support one of the options submitted to the referendum but who do not *wish* to join or affiliate themselves with the national committee supporting the same option as they do -- for a variety of reasons -- are limited to the unregulated expenses set out in s. 404 *Special Version*;

(2) individuals who, while supporting one of the options submitted to the referendum, cannot join the national committee campaigning for that option directly -- because they do not wish to identify their political ideas with those promoted by that committee or because they disagree with that committee's referendum strategy, for example -- *cannot* even affiliate themselves because the possibility of affiliation provided for in s. 24 of the *Referendum Act* is restricted to "groups". They are thus limited to the unregulated expenses provided for in s. 404 *Special Version*;

(3) persons who, either individually or as a group, wish to participate in the referendum campaign without supporting either of the options -- if they advocate abstention or are against the referendum question as worded, for example -- *cannot* directly join or affiliate themselves with one of the national committees. They are thus limited to the forms of communication set out in s. 404 *Special Version*, that is, to unregulated expenses.

35 The Act **[Parade license]** accordingly places restrictions on such persons who, unlike the national committees, cannot incur regulated expenses during the referendum period in order to express their opinions and points of view. **This clearly infringes their freedom of political expression. There is no doubt that freedom of expression includes the right to employ any methods, other than violence, necessary for communication.** [**Bolding** my emphasis]

Libman v. Quebec (Attorney General), [1997] S.C.J. No. 85 (SCC), Book of Authorities, Tab 19, pp. 16 and 17.

68. Applying *Libman*, Bentley J. in *Canada (Commissioner of Canada Elections) v. National Citizen's Coalition Inc.* held in a prosecution, that the advertising restrictions and spending limits placed upon a political lobby group that was not officially registered as a political party unconstitutionally violated that group's freedom of expression to express a political opinion under s. 2(b) of the *Charter*.

Canada (Commissioner of Canada Elections) v. National Citizen's Coalition Inc. [2003] O.J. No. 3420, Book of Authorities, Tab 20

69. A key component of this decision is the recognition by Bentley J. that forced registration as a political party removes the anonymity of financial donors to the donors to

the National Citizen's Coalition (NCC). This, in turn, would negatively impact on the NCC's freedom of expression:

"**Effects**

18 The burden at this stage is on the Applicant to demonstrate that the effect of the impugned legislation has restricted their free expression. The N.C.C. has relied upon and led evidence of Gerry Nicholls, and of Mariam Alford, who are employees of the Applicant organization. The viva voce evidence of Gerry Nicholls the vice president of the N.C.C. was to the effect that the legislation imposes a burden on their activities. He testified that the registration requirements of the Act acted as an impediment to his organization buying election advertising. **N.C.C. believed that if it registered, it would have to disclose the names of its contributors. Mr. Nichols stated that supporters of N.C.C. did not wish their names disclosed and that to be obligated to do so was an unreasonable burden on freedom of expression.** Mr. Nicholls argues there is a difference between a political party and the N.C.C., because the latter discusses issues and ideas and does not run for election. Consequently, **their financial supporters should be permitted to remain anonymous**.

19 In addition to the viva voce evidence of Gerry Nicholls, the affidavit and annexed exhibits of Mr. Nicholls was filed with the court and was relied on by the Applicants to provide a factual basis for their charter challenge.. This material inter alia highlights the role and duties of the C.E.O. in relation to the third party regime. If the Commissioner receives information that there has been a violation of Part 17 he may decide to launch a prosecution. Also filed by the Applicant in these proceedings was the Election Handbook for third parties, their financial agents and auditors and the Third Party Election Advertising Report. The latter details the requirements outlined in s.359 of the Act.

20 **The reporting requirements of this Act has removed the right of financial contributors to third parties to support political causes anonymously because financial contributions made during the election will be published by Elections Canada. Complying with Part 17 would strip away this confidentiality. In my view the requirement of disclosure is a prima facie breach of a third party's charter rights to freedom of expression. It places limits on their right to communicate with the voter during the crucial period after an election writ has been dropped.** Although the inconvenience with complying with the disclosure provisions of Part 17 may not be significant, that is not determinative of the issue. **The disclosure requirements by themselves are a significant intrusion on the Applicant's freedom of expression by imposing a burden or restriction on that freedom.** As the Supreme Court of Canada stated in *Big M Drug Mart Ltd.* supra at p .417:

"Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free.... Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, **coercion includes indirect forms of control which determine or limit alternative courses of**

conduct available to others. … Freedom means that, subject to such limitations are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

21 In essence **the Applicant argues that the effect of the legislation has forced the N.C.C. to make a choice. Either it registers and risks losing its financial backers, or it doesn't register and runs afoul of the legislation. This is a no win situation which directly affects free speech.** The effect of the government's action restricts the free expression of the Applicant. The right to express political views, particularly during an election campaign, was conceded by the Respondent to be a protected form of expression. **The effect of restricting such a form of expression by requiring registration,** before advertising can be purchased and by making registration subject to the decision of the C.E.O., **has the effect of restricting free expression and engaging s.2 (b) of the Charter**."

[**Bolding** my emphasis]

Canada (Commissioner of Canada Elections) v. National Citizen's Coalition Inc., [2003] O.J. No. 3420 (Ont. S.C.), Book of Authorities, Tab 20, at. p. 6 to 8.

<u>The Legal Test For Whatcott to Use a Public Space</u>

70. In *Committee for the Commonwealth of Canada v. Canada*, Lamer CJC discussed the American concept of the public forum and the proper adaption of this concept into Canadian law in the context of the *Charter:*

"1. The Concept of "Public Forum" and its Incorporation in Rules and Burdens Imposed by the Charter

3 As developed by the American courts in a series of decisions, the concept of "public forum" refers first and foremost to a social reality, namely, that certain places owned by the government constitute a favourable platform for the dissemination of ideas. In an article titled "The Concept of the Public Forum: Cox v. Louisiana", [1965] *Sup. Ct. Rev.* 1, at pp. 11-12, Prof. Harry Kalven, Jr. summarized the definition of the term "public forum" as follows:

... in an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom.

4 The "public forum" concept thus appears as a "label" used by the American courts to describe certain places which are by their very nature suited to free expression. In thus characterizing certain places as "public forums", the American courts have in fact made an

exception to the absolute nature of the government's right of ownership in order to conclude that the First Amendment to the American Constitution gives a person wishing to exercise his or her freedom of expression the right to use a parcel of the public domain so identified for purposes of expression (see *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939), at pp. 515-16, *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983), at p. 45).

5 In *Perry Education Association*, the United States Supreme Court divided government properties into three distinct categories: (1) "traditional public forums", (2) "public forums by designation" and (3) forums which are not public. According to this nomenclature, the category within which a government property falls will determine the scope of the limitations which may be imposed on expression taking place on the property:

The first, traditional public forum, comprises streets and parks. Restrictions on access to these properties come under strict judicial scrutiny. If the restrictions are not narrowly tailored to serve a compelling state interest, they are unconstitutional. The second, public forum by designation, encompasses those public properties that the state has dedicated primarily as sites for communicative activity. These **include** auditoriums, meeting facilities and **theaters**. **Second category properties enjoy the same strict scrutiny protection as properties in the first category**. The third category is defined as "property which is not by tradition or designation a forum for public communication."
(P. Jakab, "Public Forum Analysis After *Perry Education Association v. Perry Local Educators' Association* — A Conceptual Approach to Claims of First Amendment Access to Publicly Owned Property" (1986), 54 *Fordham L. Rev.* 545, at p. 549).
…

9 … in the Canadian legal context, it would be preferable to disregard the nominalistic approach developed by the American courts and instead to balance the interests underlying the public forum doctrine. The American experience shows that the "public forum" concept actually results from an attempt to strike a balance between the interests of the individual and the interests of the government. As there is no provision similar to s. 1 of our *Charter*, the American "public forum" doctrine is the result of the reconciliation of the individual's interest in expressing himself in a place which is itself highly propitious to such expression and of the government's interest in being able to manage effectively the premises that it owns. For example, parks and public roads which have earned the "public forum" classification are in fact places whose functions will generally not be interfered with by the exercise of freedom of expression.

In an article titled "Access to Public and Private Property Under Freedom of Expression" (1988), 20 *Ottawa L. Rev.* 339, at p. 341, Prof. Richard Moon says the following in this regard:

While the courts purport to attach the categorical labels, public forum and non-public forum, as a formal threshold matter, it *appears that, beneath it all, the determination that a particular state-owned property is a public forum involves a judgment that public access for communication is reasonably consistent with the state use of the property*. Access is required if it can be reasonably accommodated by the state. The focus of judicial analysis shifts from the categories of public and non-public forum to a balancing of the state's interest in excluding communication from

its property against the importance of communicative access to a particular individual or group. [Emphasis added.]

10 I agree completely with this assessment of the principles underlying the "public forum" doctrine. For this reason, I am of the view that **when a person claims that his freedom of expression was infringed while he was trying to express himself in a place owned by the government, the legal analysis must involve examining the interests at issue, namely the interest of the individual wishing to express himself in a place suitable for such expression and that of the government in effective operation of the place owned by it.** I will examine these interests in turn.

a. Interest of the Individual Wishing to Express Himself

11 The interest an individual wishing to express himself has in using a parcel of the public domain can quite easily be explained. **Unquestionably, the dissemination of an idea is most effective when there are a large number of listeners; the economic and social structure of our society is such that the largest number of individuals, or potential listeners, is often to be found in places that are state property. One thinks immediately of parks or public roads which, by their very nature, are suitable locations for a person wishing to communicate an idea.**

12 Accordingly, it must be understood that the individual has an interest in communicating his ideas in a place which, because of the presence of listeners, will favour the effective dissemination of what he has to say. Certain places owned by the state are well suited for such purposes; it has to be borne in mind, however, that all government property is used for specific purposes which must be respected by any person seeking to communicate. This is the essence of the government interest.

b. Government Interest

13 In considering the government interest, I would note at the outset that this should not be confused, strictly speaking, with the ownership held by the government. An analysis of the public status of a place cannot be based on the premise suggested by the appellant that the owner has unlimited rights over his property. Pratte J., dissenting on appeal, articulated this position in the following way ([1987] 2 F.C. 68, at p. 74):

The government has the same rights as any owner with respect to its property. Its ownership right, therefore, is exclusive like that of any individual.

14 In my opinion, this analytical approach contains inherent dangers. First, it ignores the special nature of government property. The very nature of the relationship existing between citizens and the elected government provides that the latter will own places for the citizens' benefit and use, unlike a private owner who benefits personally from the places he owns. The "quasi-fiduciary" nature of the government's right of ownership was indeed clearly set out by the U.S. Supreme Court in *Hague v. Committee for Industrial Organization, supra*, at pp. 515-16:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

I note that in the case at bar Hugessen J.A. eloquently summarized this position, at p. 77:

As regards the government's right of ownership of the airport terminal, in my opinion it can never be made the sole justification for an infringement of the fundamental freedom of a subject. **The government** is not in the same position as a private owner in this respect, as it **owns its property not for its own benefit but for that of the citizen**. Clearly the government has a right, even an obligation, to devote certain property for certain purposes and to manage "its" property for the public good. The exercise of this right and the performance of this obligation may, depending on the circumstances, legitimize the imposition of certain limitations on fundamental freedoms. Of course the government may limit public access to certain places; of course it may also act to maintain law and order; but it cannot make its ownership right a justification for action the only purpose and effect of which is to impede the exercise of a fundamental freedom.

15 Second, an absolutist approach to the right of ownership fails to take into account that the freedom of expression cannot be exercised in a vacuum and that it necessarily implies the use of physical space in order to meet its underlying objectives. No one could agree that the exercise of the freedom of expression can be limited solely to places owned by the person wishing to communicate: such an approach would certainly deny the very foundation of the freedom of expression. I therefore conclude that, as a consequence of its special nature, the government's right of ownership cannot of itself authorize an infringement of the freedom guaranteed by s. 2(*b*) of the *Charter*.

16 This having been said, it must be understood, since the government administers its properties for the benefit of the citizens as a whole, that it is the citizens above all who have an interest in seeing that the properties are administered and operated in a manner consistent with their intended purpose. In this regard reference may be made to the passages already cited from *Hague v. Committee for Industrial Organization, supra*, and the reasons of Hugessen J.A., on appeal in the case at bar. In practical terms, it is easy to see that the citizens as a whole benefit from the services offered by Canada Post or by employment centres managed by the state. The state is accordingly responsible for ensuring that such places serve the specific purposes and functions for which they were intended. The fundamental government interest, and by the same token that of the citizens as a whole, is thus to ensure that the services or undertakings offered by various levels of government are operated effectively and in accordance with their intended purpose.

c. Balancing These Poles of Interest Under s. 2(b) of the Charter

17 Having reviewed the interests at issue, I come to the conclusion that s. 2(*b*) of the *Charter* cannot be interpreted so as to consider only the interests of the person wishing to communicate. As the Attorney General for Ontario properly points out, s. 2(*b*) of the *Charter* does not protect "expression" itself, but *freedom* of expression. In my opinion, the "freedom" which an individual may have to communicate in a place owned by the government must necessarily be circumscribed by the interests of the latter and of the citizens as a whole: the individual will only be free to communicate in a place owned by the state if the form of expression he uses is compatible with the principal function or intended purpose of that place.

18 The interest which any person may have in communicating in a place suited for the purpose cannot have the effect of depriving the citizens as a whole of the effective operation of government services and undertakings. Even before any attempt was made to use them for purposes of expression, such places were intended by the state to perform specific social functions. A person who is in a public place for the purpose of expressing himself must respect the functions of the place and cannot in any way invoke his or her freedom of expression so as to interfere with those functions. **For example, no one would suggest that an individual could, under the aegis of freedom of expression, shout a political message of some kind in the Library of Parliament or any other library. This form of expression in such a context would be incompatible with the fundamental purpose of the place, which essentially requires silence.** When an individual undertakes to communicate in a public place, he or she must consider the function which that place must fulfil and adjust his or her means of communicating so that the expression is not an impediment to that function. To refer again to the example of a library, it is likely that wearing a T-shirt bearing a political message would be a form of expression consistent with the intended purpose of such a place.

19 The fact that one's freedom of expression is intrinsically limited by the function of a public place is an application of the general rule that one's rights are always circumscribed by the rights of others**. In the context of expressing oneself in places owned by the state, it can be said that, under s. 2(*b*), the freedom of expression is circumscribed at least by the very function of the place.**

…

22 Accordingly, it is only after the complainant has proved that his form of expression is compatible with the function of the place that the justifications which may be put forward under s. 1 of the *Charter* can be analysed. …

…

d. Application of the Foregoing Principles to the Facts of This Case

23 It will be recalled that, in the case at bar, the respondents went to the Montréal airport in Dorval to discuss the Committee's aims and objectives with members of the public. As my colleague properly noted, there seems to be no doubt that by their actions the respondents conveyed or tried to convey an idea or message of an expressive nature. In short, the primary purpose of the respondents' visit to Dorval airport was to inform people on the premises of the existence of the Committee for the Commonwealth of Canada, and the ideology promoted by it. It thus only remains to determine whether the form of expression

used by the respondents is compatible with the performance of the airport's essential function.

24 **In my view, the distribution of pamphlets and discussion with certain members of the public are in no way incompatible with the airport's primary function, that of accommodating the needs of the travelling public.** An airport is in many ways a thoroughfare, which in its open areas or waiting areas can accommodate expression without the effectiveness or function of the place being in any way threatened. **Thus, the very nature of the premises, the presence of a large and varied audience, meant that the respondents' freedom of expression could be exercised without interfering with the operation of the airport.** For this reason, I am of the view that there was a limitation on the freedom of expression enjoyed by the respondents when the airport manager ordered them to cease their activities. I therefore conclude that the respondents were "free" to express themselves in this manner at the Dorval airport."

[**Bolding** my emphasis]

Committee for the Commonwealth of Canada v. Canada, [1991] S.C.J. No. 3 (SCC), Book of Authorities, Tab 21, at pp. 8 to 14.

71. The limitation sought by the plaintiffs upon the freedom of expression of Whatcott on the public streets of Toronto is founded upon the rules of Pride Toronto that are found in the PPA. These elements of the license agreement do not constitute a "law" and because of this, there is no application of s. 1 of the *Charter*. This is made clear from the observations of Lamer CJC from the above case:

40 In my opinion, the limitation imposed on the respondents' freedom of expression arose from the action taken by the airport manager, a government official, when he ordered the respondents to cease their activities. **Although this action was based on an established policy or internal directive, I do not think it can be concluded from this that there was in fact a "law" which could be justified *under s. 1 of the Charter*.** The government's internal directives or policies differ essentially from statutes and regulations in that they are generally not published and so are not known to the public. Moreover, they are binding only on government officials and may be amended or cancelled at will. For these reasons, the established policy of the government [**in this case Pride**] cannot be the subject of the test under s. 1 of the *Charter*.

[**Bolding** my emphasis]

Committee for the Commonwealth of Canada v. Canada, [1991] S.C.J. No. 3 (SCC), Book of Authorities, Tab 21, at p 17.

72. In *Montréal (City) v. 2952-1366 Québec Inc.*, the Supreme Court of Canada revisited C*ommittee for the Commonwealth of Canada v. Canada* to formulate a single test to resolve divided opinions from that case as to the proper test to use for a public space. McLachlin C.J.C. and Deschamps J. (Bastarache, LeBel, Abella, and Charron JJ. concurring) agreed to the following test:

"71 We agree with the view of the majority in *Committee for the Commonwealth of Canada* that the application of s. 2(*b*) is not attracted by the mere fact of government ownership of the place in question. There must be a further enquiry to determine if this is the *type* of public property which attracts s. 2(*b*) protection.

72 Expressive activity should be excluded from the protective scope of s. 2(*b*) only if its method or location clearly undermines the values that underlie the guarantee. Violent expression, which falls outside the scope of s. 2(*b*) by reason of its method, provides a useful analogy. Violent expression may be a means of political expression and may serve to enhance the self-fulfillment of the perpetrator. However, it is not protected by s. 2(*b*) because violent means and methods undermine the values that s. 2(*b*) seeks to protect. Violence prevents dialogue rather than fostering it. Violence prevents the self-fulfillment of the victim rather than enhancing it. And violence stands in the way of finding the truth rather than furthering it. Similarly, in determining what public spaces fall outside s. 2(*b*) protection, we must ask whether free expression in a given place undermines the values underlying s. 2(*b*).

73 We therefore propose the following test for the application of s. 2(*b*) to public property; it adopts a principled basis for method or location-based exclusion from s. 2(*b*) and combines elements of the tests of Lamer C.J. and McLachlin J. in *Committee for the Commonwealth of Canada*. The onus of satisfying this test rests on the claimant.

74 **The basic question with respect to expression on government-owned property is whether the place is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s. 2(*b*) is intended to serve, namely (1) democratic discourse, (2) truth finding and (3) self-fulfillment. To answer this question, the following factors should be considered**:

(a) **the historical or actual function of the place**; and

(b) **whether other aspects of the place suggest that expression within it would undermine the values underlying free expression**

…

81 Applying the approach we propose to the case at bar confirms the conclusion reached earlier under the three *Committee for the Commonwealth of Canada* tests that the expression at issue in this case falls within the protected sphere of s. 2(*b*) of the *Canadian Charter*. The

content, as already noted, is expressive. Viewed from the perspective of locus, the expression falls within the public domain. **Streets are clearly areas of public**, as opposed to private, concourse, **where expression of many varieties has long been accepted**. There is nothing to suggest that to permit this medium of expression would subvert the values of s. 2(*b*)."

Montréal (City) v. 2952-1366 Québec Inc., [2005] S.C.J. No. 63, (SCC) Book of Authorities, Tab 22, at pp. 20 to 22

73. The issue of policy and rules did not arise in the s. 1 *Charter* discussion in *Montreal* since the "law" under consideration as a reasonable limit was a valid by-law enacted by the City of Montreal and was thus subject to the *Charter*.

<u>There is a Constitutional Right To Privacy, Including Anonymity, Protected By Section 7 of the *Charter*.</u>

74. Third parties have a reasonable expectation of privacy within the scope of s. 7 of the *Charte*r.

75. In *R. v. O'Connor*, Lamer CJC and Sopinka J. were in general agreement with Justices L'Heureux-Dubé, La Forest and Gonthier on the issues of privacy and privilege. The following passage from the judgment of L'Heureaux-Dubé J. declared that s. 7 of the *Charter* includes a right to privacy:

"(b) The Right to Privacy

110 This Court has on many occasions recognized the great value of privacy in our society. It has expressed sympathy for the proposition that **s. 7 of the *Charter* includes a right to privacy**: *R. v. Beare*, supra, at p. 412; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at 369, per La Forest J. On numerous other occasions, it has spoken of privacy in terms of s. 8 of the *Charter*: see, e.g., *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, *(*sub nom. *Hunter v. Southam Inc.)* [1984] 2 S.C.R. 145 [[1984] 6 W.W.R. 577]; *R. v. Pohoretsky*, [1987] 1 S.C.R. 945 [[1987] 4 W.W.R. 590]; *R. v. Dyment*, [1988] 2 S.C.R. 417. On still other occasions, it has underlined the importance of privacy in the common law: *McInerney v. MacDonald*, [1992] 2 S.C.R. 138 at 148-49; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130. [**Bolding** my emphasis]"

R. v. O'Connor, [1995] S.C.J. No. 98 (SCC), Book of Authorities, Tab 23, at p. 40.

76. In considering a third party who wishes to remain anonymous at a political event, that decision is constitutionally protected, falling within the scope of personal autonomy found in the liberty component of s. 7 of the *Charter*, over important decisions intimately affecting their private lives. Coerced disclosure of identity not only restricts the liberty of personal autonomy but also violates the security of the person component of s. 7, and the consequent psychological trauma that may result from an invasion of privacy. This reasoning is compatible with the analysis of L'Heureux-Dubé, J. who stated:

111 On no occasion has the relationship between "liberty", "security of the person", and essential human dignity been more carefully canvassed by this Court than in the reasons of Wilson J. in *R. v. Morgentaler*, [1988] 1 S.C.R. 30. In her judgment, she notes that the *Charter* and the right to individual liberty guaranteed therein are tied inextricably to the concept of human dignity. She urges that both "liberty" and "security of the person" are capable of a broad range of meaning and that a purposive interpretation of the *Charter* requires that **the right to liberty contained in s. 7 be read to "guarantee to every individual a degree of personal autonomy over important decisions intimately affecting their private lives"** (p. 171). Concurring on this point with the majority, she notes, as well, that **"security of the person" is sufficiently broad to include protection for the psychological integrity of the individual.**

112 Equally relevant, for our purposes, is Lamer J.'s (as he then was) recognition in *R. v. Mills*, supra, at p. 920, that **the right to security of the person encompasses the right to be protected against psychological trauma**. In the context of his discussion of the effects on an individual of unreasonable delay contrary to s. 11(*b*) of the *Charter*, he noted that such **trauma could take the form of**

... stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to outcome and sanction."

R. v. O'Connor, [1995] S.C.J. No. 98 (SCC), Book of Authorities, Tab 23, at pp. 40 and 41.

77. To bolster her analysis, L'Heureux-Dubé referred to Cory J.'s decision is *Hill v. Church of Scientology*:

"115 **Privacy has traditionally also been protected by the common law, through causes of action such as trespass and defamation**. In *Hill*, supra, which dealt with a

Charter challenge to the common law tort of defamation, Cory J. reiterates the constitutional significance of the right to privacy (at para. 121):

... reputation is intimately related to the right to privacy which has been accorded constitutional protection. As La Forest J. wrote in *R. v. Dyment*, [1988] 2 S.C.R. 417, at p. 427, *privacy, including informational privacy, is "[g]rounded in man's physical and moral autonomy" and "is essential for the well-being of the individual"*. The publication of defamatory comments constitutes an invasion of the individual's personal privacy and is an affront to that person's dignity. The protection of a person's reputation is indeed worthy of protection in our democratic society and must be carefully balanced against the equally important right of freedom of expression. [Emphasis added.]"

[**Bolding** my emphasis]

R. v. O'Connor, [1995] S.C.J. No. 98 (SCC), Book of Authorities, Tab 23, at pp. 41 and 42.

78. Privacy must be protected at the point where it is most at risk of disclosure, which in this case is a pre-trial application of a third party's identity by forcing disclosure from a party litigant. Again, the reasoning of L'Heureux-Dubé J. is helpful:

"119 **The essence of privacy, however, is that once invaded, it can seldom be regained. For this reason, it is all the more important for reasonable expectations of privacy to be protected at the point of disclosure.** As La Forest J. observed in *Dyment*, supra, at p. 430:

... if the privacy of the individual is to be protected, we cannot afford to wait to vindicate it only after it has been violated. This is inherent in the notion of being *secure* against unreasonable searches and seizures. ***Invasions of privacy must be prevented, and where privacy is outweighed by other societal claims, there must be clear rules setting forth the conditions in which it can be violated.*** [Emphasis in last sentence added.]

…

… I underline that when a private document or record is revealed and the reasonable expectation of privacy therein is thereby displaced, the invasion is not with respect to the particular document or record in question. Rather, **it is an invasion of the dignity and self-worth of the individual, who enjoys the right to privacy as an essential aspect of his or her liberty in a free and democratic society**"

[**Bolding** my emphasis]

R. v. O'Connor, [1995] S.C.J. No. 98 (SCC), Book of Authorities, Tab 23, at p. 43

<u>The American Authorities</u>

79. In *Talley v. California* Justice Hugo Black of the U.S. Supreme Court noted:

"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.** The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that **exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government.** The old seditious libel cases in England show the lengths **539 to which government had to go to find out who was responsible for books that were obnoxious *65 to the rulers. John Lilburne was whipped, pilloried and fined for refusing to answer questions designed to get evidence to convict him or someone else for the secret distribution of books in England. Two Puritan Ministers, John Penry and John Udal, were sentenced to death on charges that they were responsible for writing, printing or publishing books.[6] Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day.[7] Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that **anonymity has sometimes been assumed for the most constructive purposes.**

We have recently had occasion to hold in two cases that there are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified. Bates v. City of Little Rock, 361 U.S. 516, 80 S.Ct. 412; N.A.A.C.P. v. State of Alabama, 357 U.S. 449, 462, 78 S.Ct. 1163, 1171, 2 L.Ed.2d 1488. The reason for those holdings was that **identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance**. This broad Los Angeles ordinance is subject to the same infirmity. We hold that it, like the Griffin, Georgia, ordinance, is void on its face."
[**Bolding** my emphasis]

Talley v. California, 362 U.S. 60 (1960), Book of Authorities, Tab 24, at p. 2.

80. Freedom of expression is constitutionally protected even when done anonymously. The disclosure of identity is the choice of the individual who has chosen to remain anonymous. The freedom to remain anonymous is an integral part of the right to freedom of expression, according to Justice Stevens:

"Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind." *Talley v. California,* 362 U.S., at 64, 80 S.Ct., at 538. Great works of literature have frequently been produced by authors writing under assumed names.[4]

Despite readers' curiosity and the public's interest in identifying the creator of a work of art, an author generally is free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, *342 by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry.[5] Accordingly, an author's **decision to remain anonymous**, like other decisions concerning omissions or additions to the content of a publication, **is an aspect of the freedom of speech protected by the First Amendment."**

[**Bolding** my emphasis]

McIntyre v. Ohio Elections Comm'n 514 U.S. 334 (1995), Book of Authorities, Tab 25 at p. 5.

81. Core political expression permits opposition to laws that legalize gay rights and to the social, monetary, and health costs of gay sexual practices. Debate of public issues of importance is effective and appropriate in the context of the Parade, to maximize the peaceful dissemination of ideas to a hostile audience that holds opposing viewpoints. Debate on public issues of political importance means more than the expression of a timid, tame and vapid floating of an idea, but extends to and includes strong emotional impact in a potential Recipient stimulated by a robust vigorous uninhibited exposition of controversial ideas communicated without shame or fear of repercussions. Freedom of speech matters most in the heat of battle in the face of opposition, when courage rises to the occasion.

82. The leaflets handed out by the Zombies is analogous to the actions of Mrs. McIntyre:

"Indeed, the speech in which Mrs. McIntyre engaged—**handing out leaflets in the advocacy of a politically controversial viewpoint—is the essence of First Amendment expression**. See *International Soc. for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672, 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992); *Lovell v. City of Griffin,* 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938). That this advocacy occurred in the heat of a controversial referendum vote only strengthens the protection afforded to Mrs. McIntyre's expression: **Urgent, important, and effective speech can be no less protected than impotent speech, lest the right to speak be relegated to those instances when it is least needed.** See *Terminiello v. Chicago,* 337 U.S. 1, 4, 69 S.Ct. 894, 895, 93 L.Ed. 1131 (1949). No form of speech is entitled to greater constitutional protection than Mrs. McIntyre's."

[**Bolding** my emphasis]

McIntyre v. Ohio Elections Comm'n 514 U.S. 334 (1995), Book of Authorities, Tab 25 at p. 5.

83. Justice Stevens correctly recognized the paramount constitutional value at stake is that anonymity in free speech is a shield from the tyranny of the majority:

"Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. **Anonymity is a shield from the tyranny of the majority.** See generally J. Mill, On Liberty and Considerations on Representative Government 1, 3–4 (R. McCallum ed. 1947). It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. **But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.** See *Abrams v. United States,* 250 U.S. 616, 630–631, 40 S.Ct. 17, 22, 63 L.Ed. 1173 (1919) (Holmes, J., dissenting). Ohio has not shown that its interest in preventing the misuse of anonymous election-related speech justifies a prohibition of all uses of that speech. The State may, and does, punish fraud directly. But it cannot seek to punish fraud indirectly by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented. One would be hard pressed to think of a better example of the pitfalls of Ohio's blunderbuss approach than the facts of the case before us."

[**Bolding** my emphasis]

McIntyre v. Ohio Elections Comm'n 514 U.S. 334 (1995), Book of Authorities, Tab 24 at pp. 9 and 10.

Application of the Law

84. The tyranny here is the intentional misuse of the instrument of class action litigation to intimate, chill and crush legitimate political freedom of expression by not only silencing opposing viewpoints, but also to force disclosure of the identities of those who support and assist Whatcott, so they can then be financially destroyed.

85. This class action is thus an abuse of process, for it is used as a weapon of mass destruction against a small and brave vocal minority who oppose the viewpoints of the politically powerful who hold the politically correct majority view that succeeded in legally enshrining gay rights in the courts of this country, and by winning over and influencing the

political agendas of the governing Liberal Party of Canada and the governing Liberal Party of Ontario.

86. The bedrock principle underlying the right to freedom of expression is the right to hold opposing viewpoints that are disagreeable or offensive to others, even if those opposing viewpoints cause emotional distress or harm to the psyche of the recipient of the communication. Instituting a class action for the intentional infliction of mental distress in this case overlooks the constitutional right to engage in mature debate in a public forum where the search for the truth in the pursuit of the public good may hurt feelings of individuals. This is the price that Canadians must pay to live in a constitutional democracy where dissent and freedom of political expression is not just tolerated but encouraged, as vital to the strength, health and survival of a just and responsible society.

Is Whatcott legally required to disclose Identities of his fellow Zombies and Financial Supporters?

Introduction

87. There is no automatic right of disclosure. Where constitutional values are in play, a court must strike an appropriate balance between competing interests, and apply strict scrutiny to meet the legal tests involved.

The Canadian Authorities

88. On the facts of this case, *Warman v. Wilkins-Fournier,* as modified by *1654776 Ontario Ltd. v. Stewart*, [2013] O.J. (Ont. C.A.), is the leading authority for this Court to consider. The Divisional Court, carefully considered all the applicable law pertaining to the *Norwich* principle, the *Charter*, and the variety of legal tests that have developed:

"Role of the Court of Where Charter Values are Engaged

22 While the *Charter* does not apply to strictly private litigation between litigants not invoking state action, the Divisional Court has held that, because **the *Rules of Civil Procedure* have the force of a statute, they must be interpreted in a manner**

consistent with *Charter* rights and values: see *P. (D.) v. Wagg*, [2002] O.J. No. 3808 (Ont. Div. Ct.) at paras. 65-66. In that case, the court held that whenever one party to a civil suit invokes or relies upon government action (in that case, the *Rules of Civil Procedure*, as enforced by the machinery of the administration of justice) to produce what amounts to the infringement of another party's Charter rights, Charter values are invoked.

23 On appeal, Rosenberg J.A., speaking for the Court**, was prepared to assume**, for purposes of that case, that **Charter values should inform the discovery process**: *P. (D.) v. Wagg* (2004), 71 O.R. (3d) 229 (Ont. C.A.) at para. 61. However, the appeal was ultimately decided on the principle that the Superior Court has **inherent jurisdiction** to control the discovery and production process under the *Rules of Civil Procedure* to ensure that important state and other third party interests, including *Charter* interests, are protected, even if the particular documents do not, strictly speaking, fall within a recognized category of privilege: see para. 28.

Manner in Which Courts Address the Need to Take Charter Rights into Consideration in Relation to a Request for Disclosure

24 In circumstances where *Charter* rights are engaged and therefore courts are required to take such interests into consideration in determining whether to order disclosure, the case law indicates that the ***Charter* protected interests are balanced against the public interest in disclosure in the context of the administration of justice** by a combination of (1) a requirement of **an evidentiary threshold**, (2) fulfillment of **conditions establishing the necessity** of the disclosure sought, and (3) an **express weighing of the competing interests in the particular circumstances of the litigation.** In order **to prevent the abusive use of the litigation process, disclosure cannot be automatic where *Charter* interests are engaged.** On the other hand, to prevent the abusive use of the internet, disclosure also cannot be unreasonably withheld even if *Charter* interests are engaged.

25 There is no case law that specifically addresses the relevant considerations to be taken into account by a Court on a motion for an order that a defendant make disclosure under Rule 30.06 in an on-going action. However, there is ample authority in the analogous circumstances of proceedings taken against third parties to obtain the identities of prospective defendants.

26 In civil litigation, the courts have developed the **equitable remedy** of "pre-action discovery" to permit a plaintiff to discover the identity of a proposed defendant. The remedy has most recently been upheld by the Ontario Court of Appeal in *GEA Group AG v. Ventra Group Co.* (2009), 96 O.R. (3d) 481 (Ont. C.A.) at paras. 40-54, which confirmed the principles originally set out in *Norwich Pharmacal Co. v. Customs & Excise Commissioners* (1973), [1974] A.C. 133 (U.K. H.L.).

27 The fundamental premise of *Norwich Pharmacal* is that, where privacy interests are involved, **disclosure is not automatic** even if the plaintiff establishes relevance and the absence of any of the traditional categories of privilege. ***Norwich Pharmacal* requires the court to go on to consider five factor**s including: (1) whether the plaintiff has provided **evidence sufficient to raise a valid, *bona fide* or reasonable claim**; (2) **whether the**

third party is the only practicable source of the information available; and (3) **whether the interests of justice favour obtaining the disclosure**: see *Glaxo Wellcome plc v. Minister of National Revenue*, [1998] 4 F.C. 439 (Fed. C.A.).

28 An important point, reaffirmed by the Ontario Court of Appeal in *GEA*, is that, being an equitable remedy, **the principles in *Norwich Pharmacal* are to be applied flexibly and will vary as the particular circumstances of each case require.** In this connection, we note that, while there may be some uncertainty as to whether the House of Lords required the plaintiff to satisfy **a *bona fide* standard or a *prima facie* standard in *Norwich Pharmacal*, that issue is now resolved on a case-by-case basis.** We will return to this issue later.

29 The principle in *Norwich Pharmacal* was applied by the Federal Court of Appeal in *BMG Canada Inc. v. John Doe*, [2005] 4 F.C.R. 81 (F.C.A.) at paras. 39-41 ("BMG"), aff'g [2004] 3 F.C.R. 241 (F.C.) in the context of an application for disclosure by ISPs of customer information in order to identify anonymous internet users who were sharing music files on the internet. *BMG* illustrates that **a court must have regard to the privacy interests of anonymous users of the internet before granting a *Norwich Pharmacal* order, even where the issue involved pertains to property rights and does not engage the interest of freedom of expression.** In that decision, disclosure was sought under Rule 238(1) of the *Federal Court Rules*, 1998, SOR/98-106, which contemplate leave of the Court to examine for discovery a non-party to an action having relevant information. The Federal Court of Appeal upheld the order of the motions judge denying such disclosure.

30 In doing so, the Federal Court of Appeal expressly stated that the proceeding could have been brought either under Rule 238 or by invoking the common law principles in *Norwich Pharmacal* and that, in either case, the same principles — the principles in *Norwich Pharmacal* — would be applicable because the same issues were at stake. The Federal Court of Appeal held that the following factors governed determination of whether to grant the order:

(1) the applicant must establish a ***bona fide* claim** against the unknown alleged wrongdoer;

(2) the third party against whom discovery is sought must be in some way connected to or **involved in the misconduct**;

(3) the third party must be the **only practical source** of the information available to the applicant;

(4) the third party must be **reasonably compensated** for expenses and legal costs arising out of compliance with the discovery order; and

(5) **the public interest in favour of disclosure must outweigh the legitimate privacy interests**.

31 The earlier decision in *Irwin Toy* also involved a motion for disclosure from ISPs, but in the context of a defamation action. Wilkins J. held that Rule 30.10 and Rule 31.10 of the *Rules of Civil Procedure*, which in the case of Rule 31.10 is similar to Federal Rule 238, could be used to compel production from an ISP of the identity of a subscriber for whom the

plaintiffs had obtained the IP address. While Wilkins J. did not expressly adopt the principles in *Norwich Pharmacal*, he did, in substance, consider the factors enumerated in that decision and addressed in *BMG*. In particular, Wilkins J. expressly considered whether the applicant had demonstrated on the affidavit evidence a *prima facie* case of defamation against the John Doe defendant in that action."

[**Bolding** my emphasis]

Warman v. Wilkins-Fourier, [2010] O.J. No. 1846 Book of Authorities, Tab 11, at pp. 6 to 8

89. *Stewart* was decided in the context of a journalist protecting a confidential source. The Ontario Court of Appeal, composed of Laskin, Jurianz, and Tulloch, JJ., held that the Divisional Court in *Warman* erred by imposing a "more robust standard" at stage one of the Norwich analysis and by requiring the demonstration by the applicant of a *prima facie* case. The value of freedom of expression must instead be required to be considered at the fifth stage of the *Norwich* test, in balancing the interests of justice, on a case-by-case basis:

"47 The application judge did not consider whether the appellant satisfied the first step of the Norwich test. He simply assumed it had and proceeded on with the analysis. Although he assumed it was satisfied, his statement of the standard to be met is not correct. He said that at the first step the appellant was required to show a stronger case than an applicant in an ordinary *Norwich* application because freedom of expression was involved. In imposing an elevated standard he followed *Warman v. Fournier*, 2010 ONSC 2126, 100 O.R. (3d) 648, a decision of the Divisional Court, and *Morris v. Johnson*, 2011 ONSC 3996, 107 O.R. (3d) 311, a decision of the Superior Court that followed *Warman*. In my view, these cases do not state the law correctly. I review the relevant jurisprudence to indicate the proper standard.

48 In *Warman*, the applicant sought disclosure of the identities and email addresses of persons who, using pseudonyms, posted allegedly defamatory material on an Internet message board. At para. 42 the Divisional Court reasoned that since the case "engage[d] 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." The court went on to explain 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."

49 In my view this approach is inconsistent with the proper application of both the *Norwich* and Wigmore tests. Generally, values like freedom of expression are to be considered at step five of the *Norwich* test. In this case the Wigmore test is the proper

framework for considering the "chilling effect on freedom of expression" and attempting to strike the "appropriate balance" of the competing interests involved. Adopting a "more robust standard" at step one of the *Norwich* test overlooks the function of step five, which is to consider whether the interests of justice favour disclosure. At step five of the *Norwich* analysis the Wigmore test can be applied to determine whether the interests of justice favour disclosure. Automatically applying a more robust standard at step one of all *Norwich* applications involving freedom of expression loses sight of the case-by-case approach required by *National Post* and *Groupe Polygone*, and of the fact that the onus is on the media to satisfy the Wigmore test."

1654776 Ontario Ltd. v. Stewart, [2013] O.J. (Ont. C.A.), Book of Authorities, Tab 27, p. 9 and 10.

Disclosure in the Absence of *Charter* Rights and Values

"Norwich" Order

90. Any right to compel Whatcott to reveal co-defendants would derive from the ancient bill of discovery in equity. Contemporary consideration of this equitable form of relief has been developed in the 1974 House of Lords case of *Norwich Pharmacal & Others v. Customs and Excise Commissioners*.

Norwich Pharmacal & Others v. Customs and Excise Commissioners, [1974] A.C. 133 (H.L.), Book of Authorities, Tab 27

91. Section 96 of the *Courts of Justice Act* provides that the court shall administer concurrently all rules of equity and the common law. The equitable jurisdiction employed in the *Norwich* case has been adopted and approved in Ontario.

Courts of Justice Act, s. 96, Book of Authorities Tab 7

92. A *Norwich* order can be granted to identify wrongdoers. But is Whatcott a "wrongdoer"? The Plaintiffs assert he is. But if the Claim is struck as a matter of law, there is no remaining basis to assume that he is.

93. Certain requirements to obtain such an order have been established by both Federal and Ontario courts. These requirements are set out in the Justice Stone of the Federal Court of Appeal in *Glaxo Wellcome PLC v. M.N.R.*,, and adopted by the Ontario Court of Appeal., As quoted in *GEA Group AG*, they are as follows:

> "49. Following a detailed review of the decision in *Norwich Pharmacal*, Stone J.A. held at p. 461 that there are two threshold requirements for obtaining the discretionary remedy of an equitable bill of discovery: (i) the applicant must have a *bona fide* claim against the alleged wrongdoers; and (ii) the applicant must share some sort of relationship with the respondents. Justice Stone explained that the first requirement is intended to ensure "that actions for a bill of discovery are not brought frivolously or without any justification", while the second requirement reflects the principle that "a bill of discovery may not be issued against a mere witness or disinterested bystander to the alleged misconduct". Justice Stone then identified two additional requirements for granting a bill of discovery: (iii) the person from whom discovery is sought must be the only practicable source of information available to the applicant; and (iv) the public interests both in favour and against disclosure must be taken into account."
>
> *Glaxo Wellcome PLC v. M.N.R.,* [1998] F.C.J. No. 874 (F.C.A.);
> *Straka v. Humber River Regional Hospital,* [2000] O.J. No. 4212 (Ont.C.A.);
> *GEA Group AG v. Ventra Group Co*., [2009] O.J. No. 3457 (Ont.C.A)

GEA Group AG v. Ventra Group Co., [2009] O.J. No. 3457 (Ont. C.A.), Book of Authorities, Tab 28, pp. 13 and 14.

94. As previously discussed, the plaintiffs do not satisfy the first threshold requirement, lacking a *bona fide* claim against Whatcott.

95. Whatcott's motion to strike the plaintiffs' Claim takes priority as a matter of judicial economy, for if the Claim is struck as an abuse of process and for lack of disclosing a *bona fide* reasonable cause of action, there is no need to proceed to evaluating the Plaintiff's motion for a *Norwich* order.

The American Approach

96. The reasoning from the Appellate Division of the New Jersey Superior Court in *Dendrite International Inc. v. Doe No. 3* is applicable. In that case, Yahoo was asked to disclose to the plaintiff the identities of the anonymous poster of information on a bulletin board. Fall, J.A.D. declined to make that order, on the basis that the plaintiff failed to meet their legal burdens. He stated:

"We offer the following guidelines to trial courts when faced with an application by a plaintiff for expedited discovery seeking an order compelling an ISP to honor a subpoena and disclose the identity of anonymous Internet posters who are sued for allegedly violating the rights of individuals, corporations or businesses. The trial court must consider and decide those applications by striking a balance between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation through the assertion of recognizable claims based on the actionable conduct of the anonymous, fictitiously-named defendants.

[2] We hold that when such an application is made, **the trial court should first require the plaintiff to undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, and withhold action to afford the fictitiously named defendants a reasonable opportunity to file and serve opposition to the application. These notification efforts should include posting a message of notification of the identity discovery request to the anonymous user on the ISP's pertinent message board.**

[3] The court shall also require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech.

[4] [5] **The complaint and all information provided to the court should be carefully reviewed to determine whether plaintiff has set forth a prima facie cause of action against the fictitiously-named anonymous defendants. In addition to establishing that its action can withstand a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to R. 4:6–2(f), the plaintiff must produce sufficient evidence supporting each element of its cause of action, on a prima facie basis, prior to a court ordering the disclosure of the identity of the unnamed defendant.**

*142 [6] Finally, assuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the **761 anonymous defendant's identity to allow the plaintiff to properly proceed.

[7] The application of these procedures and standards must be undertaken and analyzed on a case-by-case basis. The guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue."

[**Bolding** my emphasis]

Dendrite Intern., Inc. v. Doe No. 3, 342 N.J. Super. 134 (2001), (Sup.Ct.N.J.App.Ct.), Book of Authorities, Tab 29, at p. 5.

Application of the Law

97. The Court could ask that Whatcott post on his website notice to all the anonymous Zombies of their right to participate in this proceeding, and failure to do so will result in the loss of legal rights and remedies in the motion to disclose identities.

98. The Court could proceed to a certification hearing to determine which causes of action, if any, are viable. Alternatively, the Court could proceed with the cross-motion filed by Whatcott.

99. Whatcott contends that there is no actionable conduct whatsoever. There is no viable claim for defamation in a class action. Whatcott, the anonymous Zombies, and the anonymous financial supporters lawfully exercised their constitutional freedoms. Disclosure of the identities sought in these circumstances is not permitted.

100. The class action lacks *bona fides*. It is not brought in good faith. It is a political tool designed to "smoke out" political opponents. It is designed to punish political opponents and to suppress constitutional freedoms. It is designed to intimidate, bully Whatcott, chill free speech, and financially ruin his supporters. Its stated purpose is to crush and "stamp out" anyone opposed to the gay agenda. It is a politically motivated action done in concert with the Liberal federal and provincial governments of Canada and Ontario and supported by the Liberal subclass.

101. Entitlement to pre-action discovery is an equitable remedy that does not reward undeserving conduct. This is a legal pre-requisite that the Plaintiffs cannot meet because they have "unclean hands."

The Plaintiffs Have "Unclean Hands" and Are Legally Disqualified from Equitable Remedies

102. The Parade was a theatrical exposition of immoral indecent public nudity, uninhibited obscene lewd erotic behaviour, blasphemous costumes, which were obscene and insulted Christians and other people of faith, and biased free speech extolling the hedonistic gay lifestyle and celebrating the achievement of securing full constitutional legal equality. Visual recordings of the Parade taken by the Defendants and others reveal there were numerous *prima facie* violations of the *Criminal Code* by male and female participants in the parade, who deliberately exposed their sexual organs to children attending and viewing the Parade. The Toronto Police Services inexplicably ignored these apparent criminal activities, presumably because this Parade was a theatrical and political event funded by governments of Toronto, Ontario and Canada, and the conduct of the participants appeared to be sanctioned and approved by Pride Toronto, the ruling Liberal parties and Liberal governments of Canada and Ontario. Section 167(2) of the *Criminal Code* states:

"**Every one commits an offence** who **takes part** or appears as an actor, a performer or an assistant **in any capacity**, in an **immoral, indecent or obscene** performance, entertainment or **representation in a theatre**."

[**bolding** my emphasis]

Criminal Code, s 167, Book of Authorities, Tab 9
Federation of Canadian Naturalist Notice, Whatcott Motion Record, Tab M
Picture of Naked Marchers in 2016 Parade, Whatcott Motion Record, Tab N.

103. Assuming a theatrical style parade constitutes outdoor theatre, and that erotic lewd behaviour by some participants and full frontal nudity by naked men and women did occur in the Parade, criminal liability may extend not only to those who were actors or performers, but also to all the Marchers, the Recipients, and the Liberal Subclass who took part "in any capacity" in this Parade, including the representative plaintiffs in this class action, the Prime

Minister of Canada, the Attorney General of Canada and the Premier of Ontario, who marched and participated in the Parade, in company with those who were nude in front of children, and others who engaged in lewd and immoral conduct.

104. Assuming without deciding that the criminal law was violated by some Parade participants, the plaintiffs would thereby be disqualified from obtaining any equitable remedies in this court, by not meeting the "clean hands" doctrine, nor the related doctrine, *ex turpi causa non oritur actio*, which means that a person may not found a claim or cause of action based upon immoral or illegal conduct. There is a direct causal link between the immoral, indecent and obscene Parade and the unwelcome participation of Whatcott and the Zombies, who would not have been there to dissent, but for the existence of the Parade and the governmental presence and its political messages of approval and solidarity. Equity in these circumstances does not entitled the Plaintiffs to equitable remedies in the courts.

PART V CONCLUSION

105. There is no legal requirement to self-identify in a public parade when engaged in the distribution of leaflets at a public political event.

106. Peaceful and non-criminal freedom of expression and other constitutional freedoms are absolute and not limited to harmonious politically correct viewpoints from diverse members and political allies of the gay community, but extend to everyone, including Whatcott. While the Pride Participation Agreement may be policy in the form of a license agreement to participate in the Parade, the PPA is not authorized or prescribed by any law within the scope of section 1 of the *Charter*.

Canadian Charter of Rights and Freedoms, s 1, Book of Authorities, Tab 4

107. There are no material facts pleaded, assumed to be true, that constitute sufficient particulars to demonstrate that the plaintiffs or any members of the classes, have any viable causes of action to sustain this proceeding.

108. There is no legal bar to the Defendants observing and recording illegal conduct, in their "undercover" Zombie capacity, so that criminal charges may be laid in the public interest against Parade participants.

109. The entire class action is an abuse of process and ought to be dismissed with solicitor and client (substantial indemnity) costs payable to Whatcott.

110. The entire class action is an abuse of process and ought to be dismissed with full indemnity costs and damages payable to Whatcott, in accordance with the public policy expressed in s. 137.1(7) and s. 137.1(9) of *The Courts of Justice Act*, R.S.O. 1990, c. C43, as amended.

Courts of Justice Act, s. 137.1, Book of Authorities, Tab 8

Answers to Questions

111. Here are the answers to the foregoing questions of law set out as issues:

1. Is there a constitutional right to be anonymous with respect to core political speech that is protected by the constitution?

   Yes.

2. May a defendant in a class action be legally compelled to disclose the identity of anonymous individuals who, in the public forum, distributed leaflets in the constitutional exercise of their rights to free speech, in order to assist plaintiffs in a class action that may be meritless and brought for the purpose of chilling freedom of expression?

   No.

3. May a class action be used as a weapon to silence political opponents who lawfully exercise their constitutional rights and to financially ruin their anonymous supporters, or is this an abuse of process that will not be tolerated by the courts?

   No.

4. Does the Claim disclose a reasonable cause of action?

No.

5. If the Claim is not struck out, do paragraphs 16, 20, 22, 24, 25, 27, 28, 29 30 and 52 violate the rules of pleadings and should be struck?

Yes.

Dated this 1st day of November, 2016

PART VI ADDENDUM

PART ONE

Motion to Strike Under s. 137.1 of the Courts of Justice Act

112. Whatcott moves that the claims by the Plaintiffs must be struck out and the action dismissed before certification under s. 137.1(3) as a proceeding that arises from the exercise of Whatcott's freedom of expression made by distributing a pamphlet, the content of which relates to a matter of public interest, while marching as a Zombie in a public political event, the 2016 Toronto Pride Parade.

Section 137.1 of the *Courts of Justice Act*, Book of Authorities of the Defendant Whatcott, Vol I, Tab 8

113. Subsection 137.1(3) of the *Courts of Justice Act* provides:

> "(3). On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from the expression made by the person that relates to a matter of public interest."

Section 137.1(3) of the *Courts of Justice Act*, Book of Authorities of the Defendant Whatcott, Vol I, Tab 8

114. "Expression" is defined in subsection 137.1(2) as:

" … any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity."

Rule 137.1(2) of the *Courts of Justice Act*, Book of Authorities of the Defendant Whatcott, Vol I, Tab 8

115. The legislative purpose of s. 137.1 is expressly set out in subsection 137.1(1) as follows:

"The purposes of this section and sections 137.2 to 137.5 are,

(a) to encourage individuals to express themselves on matters of public interest;

(b) to promote broad participation in debates on matters of public interest;

(c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and

(d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action."

Subsection 137.1(1) of the *Courts of Justice Act*, Book of Authorities of the Defendant, Vol I, Tab 8

116. This application raises the following issues:

(a) Was the communication in respect of a matter of public interest?

(b) Have the Plaintiffs discharged their onus of proving there are "grounds to believe that … the proceeding has substantial merit"?

(c) Have the Plaintiffs discharged their onus of proving that there are "grounds to believe that … the moving party has no defence in the proceeding."?

(d) Have the Plaintiffs discharged their onus of showing that the public interest in allowing the proceeding to continue outweighs the public interest in communicating?

(e) If successful, is Whatcott presumptively entitled to full indemnity costs both for this motion and for the proceeding itself unless the Court orders otherwise?

A WAS THE COMMUNICATION IN RESPECT OF A MATTER OF PUBLIC INTEREST?

117. The fact that the communication by Whatcott took place in the context of political event in a public place while misrepresenting himself as a supporter of the objectives of the gay community in order to gain entry to march as a participant in the Pride Parade does not preclude the subject matter from being considered to be one involving the public interest. This is because "it is the su*bject matter* of the communication that must be scrutinized and not the *medium* of communication, " according to Dunphy, J. in the leading case of *Platnick v. Bent*. The focus of judicial scrutiny upon *content* is mandated by the plain, clear, and unambiguous language of s. 137.1(3) [an expression made by a person that relates to a public interest] and s. 137.1(2) [the broad definition of expression].

> *Platnick v. Bent*, [2016] O.J. No. 6223 (Ont. S.C.J.) para. 64, Book of Authorities of the Defendant Whatcott, Vol. III, Tab 33

The Meaning of Public Interest

118. The guiding principles regarding the definition of "public interest" were drawn by Dunphy J. from the decision of the Supreme Court of Canada in *Grant v. Tostar Corp.* include:

> "a. '...the judge must consider the subject matter of the publication as a whole. The defamatory statement is not to be scrutinized in isolation' (*Grant* at para. 101);
>
> b. 'The authorities offer no single "test for public interest, nor a static list of topics falling within the public interest' (*Grant* at para. 103);
>
> c. '...the fact that much of the public would be less than riveted by a given subject matter does not remove the subject from the public interest. It is enough that some segment of the community would have a genuine interest in receiving information on the subject' (*Grant* at para. 102); and
>
> d. 'Public interest is not confined to publications on government and political matters, as it is in Australia and New Zealand. Nor is it necessary that the plaintiff be a 'public figure', as in the American jurisprudence since *Sullivan*. Both qualifications cast the public interest too narrowly. The public has a genuine stake in knowing about many matters, ranging from science and

> the arts to the environment, religion and morality. The democratic interest in such wide-ranging public debate must be reflected in the jurisprudence.' (*Grant* at para. 106)."

Grant v. Torstar Corp. [2009] 3 S.C.R. 640, Book of Authorities of the Defendant Whatcott, Vol. III, Tab 35
Platnick v. Bent, [2016] O.J. No. 6223 (Ont. S.C.J.) para. 65, Book of Authorities of the Defendant Whatcott, Vol. III, Tab 33
Able Translations Ltd. and Express International Translations Inc. [2016] O.J. No. 5740 (Ont. S.C.J.) Book of Authorities of the Defendant, Vol. III, Tab 34

119. In the case of *10704604 Ontario Ltd. v. Points Protection Assn.* Mr. Justice Garreau also invoked *Grant v. Torstar Corp.* stating:

> "31. As I indicated above, the phrase "relates to a matter of public interest" is not defined in Section 137.1 of the *Courts of Justice Act*. In the context of defences available in a defamation action, and whether the publication is a matter of public interest, the Supreme Court of Canada considered the phrase "matters of public interest" in the case of *Grant v. Torstar Corp.,* [2009] 3 S.C.R. 640. At paragraphs 103, 104 and 105 of that case, McLachlin, C.J. speaking for the court states:
>
> > [103] The authorities offer no single "test" for public interest, nor a static list of topics falling within the public interest (see, e.g. *Gatley on Libel and Slander* (11th ed. 2008), at p. 530). Guidance, however, may be found in the case on fair comment and s. 2(b) of the *Charter*.
> >
> > [104] In *London Artists, Ltd. V. Littler,* [1969] 2 AII E.R. 193 (C.A.), speaking of the defence of fair comment, Lord Denning, M.R., described public interest broadly in terms of matters that may legitimately concern or interest people:
> >
> > There is no definition in the books as to what is a matter of public interest. All we are given is a list of examples, coupled with the statement that it is for the judge and not for the jury. I would not myself confine it within narrow limits. Whenever a matter is such as to affect [page 686] people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make fair comment. [p. 198]
> >
> > [105] To be of public interest, the subject matter 'must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached'; Brown, vol. 2, at pp. 15-137 and 15-138. The case law on fair comment 'is replete with successful fair comment defences on matters ranging from politics to

> restaurant and book reviews': *Simpson v. Mair,* 2004 BCSC 754, 31 B.C.L.R. (4th) 285, at para. 63, *per* Koenigsberg J. Public interest may be a function of the prominence of the person referred to in the communication, but mere curiosity or prurient interest is not enough. Some segment of the public must have a genuine stake in knowing about the matter published."

10704604 Ontario Ltd. v. Points Protection Assn. [2016] No. 2395 (Ont.S.C.J.), Book of Authorities of the Defendant, Vol. III, Tab 36

120. The objective of the pamphlets distributed by Whatcott was to provide an opposing viewpoint to the celebration of the gay community by providing a "fact check" to show that the gay lifestyle can lead to moral depravity and criminal conduct as well as serious health risks that jeopardize the health of welfare of gay people and that the costs to taxpayers is enormous to save the lives and health of those who participate in a promiscuous and hedonistic gay lifestyle. Nothing communicated by Whatcott was untrue, although the truth was uncomfortable and unwelcome, as well as politically incorrect and disturbing. It was not hateful, but factual. The intended audience of the communications were observers and participants in the Pride Parade. The content of the communication would not have survived censorship by organizers of the Pride Parade, given the fact that Whatcott was *persona non grata* and would have been barred from participating in the Pride Parade had his identity been known.

121. Whatcott adopts and incorporates by reference his earlier arguments in this factum that *Charter* values are implicated in his actions, and that his communications were legally made in accordance with his constitutional rights to free expression under the *Charter*.

122. Advancing the gay community's legislative agenda into law remains a matter of great public interest that generates controversy and emotional reaction in society at large. There is ongoing public debate that involves political parties, including the Liberal parties of Ontario and Canada, which have assumed the position of advocates on behalf of the gay community, as demonstrated by their public participation in the 2016 Toronto Pride Parade.

123. The Supreme Court of Canada recognized that Mr. Whatcott had a right to express his disapproval of homosexual conduct in *Saskatchewan Human Rights Commission v. Whatcott.* Rothstein J. stated:

> "[123] The polemicist may still participate on controversial topics that may be characterized as "moral" or "political". However, words matter. In the context of this case, Mr. Whatcott can express disapproval of homosexual conduct and advocate that it should not be discussed in public schools or at university conferences. Section 14(1)(b) only prohibits his use of hate-inspiring representations against homosexuals in the course of expressing those views. As stated by Alito J. in dissent in *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), at p. 1227:

Saskatchewan Human Rights Commission v. Whatcott [2013] 1 S.C.R. 467, Book of Authorities of the Defendant, Vol. I, Tab 10

124. In this case, as opposed to the situation in *Saskatchewan Human Rights Commission v. Whatcott* there is no "limit proscribed by law", such as s. 14(1)(b) of the *Saskatchewan Human Rights Code*, that would invoke s. 1 of the *Charter* and impose a limitation to Whatcott's right to freedom of expression. To the contrary, two of the express purposes of ss. 137.1 to 137.5 of the *Courts of Justice Act* are "to encourage individuals to express themselves on matters of public interest" and "to promote broad participation in debates on matters of public interest". Sections 137.1 to 137.5 state:

> 137.1(1) The purposes of this section and sections 137.2 to 137.5 are,
>
> (a) to encourage individuals to express themselves on matters of public interest;
> (b) to promote broad participation in debates on matters of public interest;
> (c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and
> (d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.

Saskatchewan Human Rights Commission v. Whatcott [2013] 1 S.C.R. 467, Book of Authorities of the Defendant, Vol. I, Tab 10
Subsection 137.1(1) of the *Courts of Justice Act*, Book of Authorities of the Defendant, Vol I, Tab 8

125. Even though Whatcott and his supporters were granted entry into the Pride Parade under false identities and that the message communication was offensive to the Plaintiffs, the content of his message is constitutionally protected and protected as an expression on a matter of public interest.

126. Section 64(1) of the *Legislation Act* S.O. 2006 c. 21, Sched. F. requires this Court to interpret s. 137.1 of the *Courts of Justice Act* as "remedial" and requires that it be given "such fair, large and liberal interpretation as best ensures the attainment of its objects." This Court's task is to breathe life into s. 137.1, requiring this Court to dismiss this action against the Defendant Whatcott.

> *Platnick v. Bent*, [2016] O.J. No. 6223 (Ont. S.C.J.) para. 78-79, Book of Authorities of the Defendant Whatcott, Vol. III, Tab 33

B. HAVE THE PLAINTIFFS DISCHARGED THEIR ONUS OF PROVING THERE ARE "GROUNDS TO BELIEVE THAT … THE PROCEEDING HAS SUBSTANTIAL MERIT"?

The Onus Shift to Plaintiffs

127. Subsection 137.1(4) provides that a judge shall not dismiss an action under s. 137.1(3) "if the responding party [the Plaintiffs] satisfied the judge that:

(a) There are grounds to believe that:
   i. The proceeding has substantial merit; and
   ii. The moving party has no valid defence in the proceeding; and

(b) The harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

> Subsection 137.1(4) of the *Courts of Justice Act,* Book of Authorities of the Defendant Whatcott, Vol I, Tab 8

128. The Plaintiffs must meet the following standard established in *Platnick v. Bent*:

> "87. In my view, the responding party under s 137.1(4)(a) bears the burden of establishing on objective evidence that shows beyond mere suspicion and based on 'compelling and credible information' *both that the claim has 'substantial merit' and that there is 'no valid defence'*. How high a probability of success in establishing the claim or

the affirmative defence must be made out is something that will have to be worked out on a case-by-case basis." [emphasis added]

Platnick v. Bent, [2016] O.J. No. 6223 (Ont. S.C.J.), Book of Authorities of the Defendant, Vol. III, Tab 33

129. What is "compelling and credible" evidence? Dunphy J. in *Platnick v. Bent* adopts the language set out in the Supreme Court of Canada case of *Mugesera v. Canada (Minister of Citizenship and Immigration)* to determine whether or not there is compelling and credible information to establish whether or not a plaintiff's claim has substantial merit:

> "**84**. The formulation of the "reasonable grounds to believe" test adopted by the Supreme Court of Canada in *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 SCR 100, 2005 SCC 40 (CanLII) at para. 114 appears to me to offer a very useful and practical approach to accomplish the intentions of the Legislature faithfully here. That test requires that "there is an objective basis for the belief which is based on compelling and credible information": *Mugesera* at para. 114.
>
> **85** The "compelling and credible information" test must of course be adapted to the circumstances in which it is being used. The court is not a ministerial officer acting on information generated from a variety of sources. "Information" is provided to a judge on a motion by way of evidence. Further, the motion in which the evidence is presented is a relatively summary motion that can be brought at any stage in the proceeding - including potentially before pleadings have been closed. As such, applying too readily the expectations of "best foot forward" and the "full toolbox" of our evolving summary judgment practice would expect more than can reasonably be demanded of parties called upon to respond within the strictures of the time limits and procedures prescribed by s. 137.1 and s. 137.2 of the *CJA*. Among other considerations, the *PPPA* did not intend that the parties would be expected to front-end load most of the costs of litigation into a summary motion of this sort.
>
> **86** The examination of the evidence undertaken by the judge must be approached with a sensible and reasonable degree of appreciation for the summary nature of the motion and the quality of evidence that can reasonably be expected or demanded. That being said, the court ought not to be satisfied with mere speculation since that will never provide "compelling and credible" grounds to believe. What is called for is a "Goldilocks" approach that neither sets the bar neither too high as to filter out meritorious claims unduly nor so low as to filter out few if any. In my view, a sensitive and reasonable application of *Mugesera* accomplishes this goal."

Platnick v. Bent, [2016] O.J. No. 6223 (Ont. S.C.J.) para. 84-86, Book of Authorities of the Defendant Whatcott, Vol. III, Tab 33

Mugesera v. Canada (Minister of Citizenship and Immigration), [2005] 2 SCR 100, Book of Authorities of the Defendant, Vol. III, Tab 36

The Plaintiffs's Class Action Claim in Defamation Has No Basis in Law

130. According to the *AssessMed* case, in an ordinary defamation proceeding a plaintiff bears the burden to establish that the words complained of were published, that the words complained of refer to the plaintiff, and that the words complained of, in their natural and ordinary meaning, or in some pleaded extended meaning, are defamatory of the plaintiff. However, as previously discussed in this factum, this is a class action proceeding, wherein a claim for defamation is currently not legally permitted in the Province of Ontario. Experienced counsel represents the Plaintiffs and may be presumed to know this legal prohibition. Unless the law changes, there is no merit whatsoever to the defamatory cause of action in this class action.

Platnick v. Bent, [2016] O.J. No. 6223 (Ont. S.C.J.) para. 88, Book of Authorities of the Defendant Whatcott, Vol. III, Tab 33
AssessMed Inc. v. Canadian Broadcast Corp. 2004 CarswellOnt 843(Ont. S.C.J.) para. 100, Book of Auhorities of the Defendant Whatcott, Vol. III, Tab
Kenora (Town) Police Service Board v. Savino, [1997] O.J. No. 2768 (Ont.Div.Ct.), Book of Authorities, Tab 11
Kenora (Town) Police Service Board v. Savino, [1997} O.J. No. 5067 (Ont.C.A.)
Book of Authorities, Tab 11

131. Even assuming there is no substantive legal bar to bringing a claim for defamation in a class action in Ontario, the communication distribution and published by Whatcott do not refer to the plaintiffs Hudspeth or Smitherman. On this basis too, the test in *AssessMed* required to prove defamation is not satisfied.

Evidence of Hudspeth's Alleged Defamation

132. Hudspeth purports to represent two classes of claimants, The Marcher Class and The Recipient Class. The Marcher class is defined as "all persons who contracted with Pride Toronto to participate in the 2016 Toronto Pride Parade and all persons who marched as part of groups that contracted to participate in the 2016 Toronto Pride Parade, save and

except the defendants and any other person who are members of groups who contracted to march, but were participating in some other capacity such as security guards and police officers." The Recipient Class is defined as "all persons present, whether as participants or spectators at the Toronto Pride Parade 2016 that took place on July 3, 2016, who received or otherwise observed a pamphlet described by Whatcott as a "Zombie Safe Sex package" with the phrase "Gay Zombies want you to practice safe sex!" a pamphlet distributed by the Gay Zombies during the 2016 Toronto Pride Parade"

Statement of Claim, Plaintiffs' Motion Record (for Certification), Tab 5, p. 8
Statement of Claim, Plaintiffs' Motion Record (for Certification), Tab 5, p. 8

133. The "communication" or "offensive material" is the pamphlet that is attached as Exhibit "G" to the affidavit of Hudspeth sworn on November 11, 2016 (the "Pamphlet").

Pamphlet, Plaintiff's Motion Record (for Certification), Tab 2

134. Hudspeth admits that he did not receive the pamphlet while he was marching in the Toronto Pride Parade.

Transcript of Cross-Examination of Christopher Hudspeth, Q. 24, p. 7

135. Hudspeth admits that he did not see the pamphlet until he went on Whatcott's website a few days after the Pride Parade.

Transcript of Cross-Examination of Christopher Hudspeth, Q. 25, p. 7

Evidence of Smitherman's Alleged Defamation

136. Smitherman purports to represent the "Liberal Class", which is defined as a subclass of the Marcher Class or the Recipient Class, and consisting of the following class members:

(a) Justin Trudeau and marchers who were at the time of the 2016 Toronto Pride Parade members of the Liberal Party of Ontario and/or the Liberal Party of Canada;
(b) Marchers who previously held elected office as Liberals; and

(c) Persons such as those who marched in the 2016 Toronto Pride Parade who self-identified as Liberals by marching with the Liberal contingent at the 2016 Toronto Pride Parade.

Statement of Claim, Plaintiffs' Motion Record (for Certification), Tab 5, p. 8-9

137. Smitherman admits that he did not receive the pamphlet at the Pride Parade, either as a marcher or as a recipient. He only viewed the pamphlet sometime later.

Transcript of Cross-examination of George Smitherman, Qs. 75 and 76, p. 25

138. The Statement of Claim sets out the exact words in the pamphlet that are alleged to be defamatory:

> "Justin Trudeau (picture left) is the Prime Minister of Canada and leader of the Liberal Party. Justin is a chronic attendee of homosexual pride parades and is the leader of a party with a long and sordid history of homosexual activism and both enabling and actively participating in child sexual abuse".
> "Former Liberal Defense Minister Bill Graham sodomized a 15 year old male prostitute by the name of Lawrence Metherel."
> "Lesbian Liberal Premier Kathleen and her buddy (who sat beside her at the Toronto homosexual pride parade) former Deputy Education Minister, now convicted child pornographer with an incest fetish, Benjamin Levin. Notwithstanding Liberal denials, Benjamin's paw prints are all over Ontario's perverted sex education curriculum telling impressionable 6 year olds they can switch their gender and 13 year olds they can make decisions when to have anal sex. Wynne is ramming this perverted propaganda down parent's and children's throats even though thousands have taken to the streets protesting it."

Statement of Claim, Plaintiffs' Motion Record (for Certification), Tab 5, p. 37

139. When asked on cross-examination how these statements were defamatory of him personally Smitherman stated:

> "A. Yes. I mean, this brochure is targeted at the two office holders who happen to be the leaders of the Liberal Party provincially and federally, but by no means is the comment … would any Liberal reading the comment take this as something simply defamatory to Mr. Trudeau. This speaks to my history and motivation in a political party."

Transcript of Cross-examination of George Smitherman, Q. 94, pp. 31-32

140. Smitherman admitted that the only connection between himself and the alleged defamatory statements is that it refers to Liberals and that he self-identifies as a Liberal:

> "Q. Well, again, how is that defamatory of you?
> A. I'm a Liberal, he's a Liberal.
> . . .
> Q. So there's no reference to you, except the only …
> A. None, sir.
> Q. The only connection to possibly being defamatory of you is the fact that Mr. Graham is a Liberal and you're a Liberal. Is that correct?
> A. Yes.
> Q. Again, with respect to the mentions to Mr. Trudeau and Mr. Graham, Premier Wynn, Mr. Levin, as far as asserting defamation of members of the subclass other than those individuals, what's the defamation? Is it again their connection to being self-identified Liberals? Is that what the …
> A. Yes, and more, in particular suggesting that associated with that Liberal designation is that this party has a long and sordid history of homosexual activism and both enabling and actively participating in child sexual abuse. This is defamatory. It's associated with the Liberal Party, in this case the context is the leader of the Liberal Party, but it says that's the history. That's defamatory. That to me is deeply troubling."
>
> Transcript of Cross-examination of George Smitherman, Qs. 118-120, pp. 40-42

141. This is the "best foot" that Smitherman has put forward to assert a personal claim for defamation and it does not establish a claim in defamation that is personal to Smitherman. Even assuming these communications were held to be defamatory of Prime Minister Trudeau, Premier Wynne, Mr. Graham or Mr. Levin, that finding will not give rise to a valid claim in defamation by Smitherman by the mere fact that he is a member of or self-identifies with the same political party.

> *Kenora (Town) Police Services v. Savino* [1997] O.J. No. 2768 (Ont. Div.Ct.), leave to appeal denied by the Ontario Court of Appeal, Book of Authorities of the Defendant Whatcott, Vol. I, Tab 12;
> *Halton Hills (Town) v. Kerouac* [2006] O.J. No. 1473 (Ont. S.C.) Book of Authorities of the Defendant Whatcott, Vol. I, Tab 16.

Summary of Defamation Evidence

142. None of the allegedly defamatory statements makes any reference to Smitherman or Hudspeth personally. Neither Hudspeth nor Smitherman are mentioned anywhere in the pamphlet. Defamation is a personal tort. Even if the Plaintiffs sued Whatcott in their individual capacities, their individual claims for defamation would be dismissed as being without merit.

Pamphlet, Plaintiff's Motion Record (for Certification), Tab 2, Exhibit G

The Remaining Actions

143. Assuming the defamation claim has no merit, the Plaintiffs' remaining claims rest upon on two torts:

(a) Unlawful conspiracy to injure on behalf of the Marcher Class; and

(b) Intentional infliction of mental distress on behalf of the Recipient Class.

Civil Conspiracy

144. Whatcott repeats and incorporates by reference his foregoing arguments pertaining to civil conspiracy from paragraphs 47-51 in this factum. Since the Plaintiffs' cause of action in defamation cannot be sustained as a matter of law the tort of civil conspiracy also fails because there was no unlawful means. The prior agreement by the Zombies to sneak into the Parade under false pretences and to march in the Parade and to distribute leaflets merged with the failed tort of defamation. The Plaintiffs cannot gain a legal advantage by adding the tort of civil conspiracy to buttress a failed non-actionable tort. The claim for civil conspiracy becomes redundant and fails when the infirm defamation claim fails.

145. In *Apple Bee Shirts Ltd. v. Lax,* Gray J. held that the fact of injury must occur in order to succeed in an action for civil conspiracy:

> "There are still two forms of civil conspiracy in the law of Ontario, namely (a) conspiracy to injure where there is agreement between two or more parties, the

> predominant purpose of which is to cause injury to the plaintiffs and acts are done in execution of that agreement which caused damage to the plaintiffs; and (b) conspiracy by unlawful means where there is an agreement between two or more parties to use unlawful means to achieve an object not otherwise lawful, and illegal acts are done in execution of that agreement, which acts are directed towards the plaintiffs and the defendants should know in the circumstances that injury to the plaintiffs is likely to result and injury does in fact result.
>
> Injury has to result for the tort of civil conspiracy to succeed and special damages must be pleaded and proved in civil conspiracy cases."

Apple Bee Shirts Ltd. v. Lax [1988] O.J. No. 658 (Ont.S.C.) Book of Authorities of the Defendant Whatcott, Vol. I, Tab 14

There is No Injury

146. No damages are claimed or pleaded in the Statement of Claim on behalf of Hudspeth or Smitherman. No damages are pleaded on behalf of any member of the Marcher class, Recipient class, or Liberal Sub-Class.

Statement of Claim, Plaintiffs' Motion Record (for Certification), Tab 5

147. Hudspeth states that the content of Whatcott's pamphlet was to make him feel "upset and somewhat fearful".

Transcript of Cross-examination of Christopher Hudspeth, Q. 127 to 133, p. 36-37

148. Hudspeth admits that he did not seek any medical treatment for the psychological effects.

. Transcript of Cross-examination of Christopher Hudspeth, Q. 134, p. 37

149. Hudspeth did not seek any medical advice or any counselling.

Transcript of Cross-examination of Christopher Hudspeth, Q. 135, p. 37

150. No evidence was given by Smitherman regarding any injury that he may have sustained from reading Whatcott's literature.

No evidence of an Unlawful Conspiracy

151. There is no "compelling and credible information" of unlawfulness.

152. There is no evidence adduced by the Plaintiffs that the Toronto Pride executive took any steps against Mr. Whatcott under the provisions of the Toronto Pride Participation Agreement Rules.

153. There is no evidence adduced by the Plaintiffs that Whatcott had violated the Ontario *Human Rights Code*. Hudspeth admits that he did not make a complaint to the Ontario Human Rights Tribunal.

Transcript of Cross-examination of Christopher Hudspeth, Q. 113, p. 33

154. There is no evidence adduced by the Plaintiffs that the City of Toronto has taken any steps against Whatcott alleging that he had violated Toronto's Anti-Discrimination By-law.

155. Hudspeth stated on cross-examination that he made a criminal complaint to the Toronto Police Services, but was unable to provide any evidence of investigatory steps were taken by the police.

Transcript of Cross-examination of Christopher Hudspeth, Q. 111 to 116, p. 33-34

156. There is no evidence that Whatcott has been charged for any offence under the *Criminal Code*.

Summary Regarding Claim for Unlawful Conspiracy

157. As a matter of law, there is no sustainable claim for unlawful civil conspiracy.

There is No Proof there was the Intentional Infliction of Mental Suffering

158. Laskin J. in *Boucher v. Wal-Mart Canada Corp.,* set out the legal test to establish the intentional infliction of mental suffering:

> "41. The tort of intentional infliction of mental suffering has three elements. The plaintiff must prove:
>
> (a) The defendant's conduct was flagrant and outrageous;
> (b) The defendant's conduct was calculated to harm the plaintiff;
> (c) The defendant's conduct caused the plaintiff to suffer a visible and provable illness."
>
> *Boucher v. Wal-Mart Canada Corp.* [2014] O.J. No. 2452 (Ont. C.A.) at para. 41, Book of Authorities of the Defendant Whatcott, Vol. III, Tab 37

159. In *Prinzo v. Baycrest Centre for Geriatric Care*, a decision of the Ontario Court of Appeal referred to in the *Boucher* case, Weiler J. discussed the nature of what is required to prove visible and provable illness:

> Lastly, there must be evidence of a visible and provable illness caused by the defendant's actions. In addition to the evidence from Prinzo herself as to the emotional distress caused by the appellant's actions, the trial judge had before him the evidence of Dr. McNabb that the conduct of the Baycrest employees caused her emotional upset, increased her blood pressure, resulted in significant weight gain, and increased her diabetes symptoms. The conduct here did not merely result in temporary and transient upset of mere injury to feelings. Rather, the emotional distress was such that it was manifested in physical illness documented by a physician. …"
>
> *Prinzo v. Baycrest Centre for Geriatric Care* [2002] O.J. No. 2712 (Ont. C.A.) Book of Authorities of the Defendant Whatcott, Vol. III, Tab 38

160. Neither the pleadings, nor the evidence adduced by Mr. Hudspeth meet the threshold of sufficient "compelling and credible information" to establish that he has a *bona fide* cause of action for mental suffering, let alone a "substantial" cause of action, as required by s. 137.1(4).

C. HAVE THE PLAINTIFFS ESTABLISHED THAT THERE ARE GROUNDS TO BELIEVE THAT … THE MOVING PARTY HAS NO VALID DEFENSE IN THE PROCEEDING?

161. Whatcott has several defences that are likely to succeed:

(a) The entire proceeding is an abuse of process intended to chill the constitutional freedom of expression of Whatcott and his supporters, even at a public political event;

(b) The class defamation action cannot succeed as a matter of law;

(c) The civil conspiracy to injure action cannot succeed as a matter of law;

(d) The claim for intentional infliction of mental suffering cannot succeed as a matter of law;

(e) The informational content of the leaflets distributed by the Zombies enjoy absolute privilege as guaranteed constitutional freedoms. There is no evidence that informational content of the leaflets is seditious, or constitutes hate speech;

(f) It is contrary to public policy to claim for hurt feelings by simply being exposed to opposing viewpoints at a political event. There is no safe zone at a public political event, which by its very nature in a free and democratic society invites public debate on controversial matters. To allow this action to proceed is to open the floodgates to allow upset intolerant close-minded people, who seek to oppress minority beliefs and chill freedom of expression, and is contrary to the express legislative purposes of s. 137.1 of the *Courts of Justice Act*; and

(g) The silent plaintiffs in this class action are the Liberal Parties of Canada and Ontario, which are currently in power and constitute the governments of Canada and Ontario. They are not permitted by law to do indirectly as a subclass plaintiff in a class action what they cannot do directly as a Plaintiff in a civil action. It is constitutionally unsound for the governments of Ontario and Canada to enter as sub-class plaintiffs in this civil class action through the back door, in order to ban freedom of expression critical of public policy and public laws, and to silence and financially ruin their political opponents.

162. The particulars of these defences are set out earlier in this Revised Factum.

D. HAVE THE PLAINTIFFS DISCHARGED THEIR ONUS OF SHOWING THAT THE PUBLIC INTEREST IN ALLOWING THE PROCEEDING TO CONTINUE OUTWEIGHS THE PUBLIC INTEREST IN COMMUNICATING?

163. The Court must weigh the competing values of the harm likely to have been suffered by the Plaintiffs relative to the public interest in allowing the proceeding to continue, and the public interest in protecting the expression. Each competing value is to be examined separately by the Court.

> *Platnick v. Bent*, [2016] O.J. No. 6223 (Ont. S.C.J.) para. 120, Book of Authorities of the Defendant Whatcott, Vol. III, Tab 33

164. The foregoing discussion establishes that the harm allegedly suffered by the Plaintiffs is *de minimus*, if any. The outrage felt by the representative Plaintiffs focuses on the deceitful manner in which Whatcott infiltrated their Pride Parade, and distributed without prior permission or censorship his opposing viewpoint, which they regard as vile expressions of hate. While Whatcott's manner of communicating and the content of his message are vilified, his freedom of expression is constitutionally protected and must be tolerated in a free and democratic society. If Whatcott's expression was illegal, the public interest is already safeguarded by legislation, such as the *Criminal Code*, and a civil action would be redundant.

165. Beyond their emotional reactions, the Plaintiffs are unable to demonstrate the suffering of any harm, as the Pride Parade accomplished its objectives, and was unimpeded by the Zombies, who kept the peace and participated as a diverse minority, unlike the Black Lives Matter activists, who held the Pride Parade hostage until their demands were met. To prevent any recurrence of the presence of Whatcott at future Pride Parades, the Plaintiffs launched this class action to identify, intimidate, and to financially crush any opponent of

their political agenda and their public networking with politicians engaged in cultivating the vote of the gay community, by making an example of Whatcott and his unknown supporters.

166. The very political manner in which this action was commenced exposes the clear political intent of the Plaintiffs to deter and destroy political opponents who dare attend their public political events to communicate unwelcome expression:

(a) They conducted a televised public press conference at the Ottawa Press Gallery announcing this action;

(b) counsel for the Plaintiffs at the press conference suggested that "anyone who assisted Mr. Whatcott, who paid for his air-fare, or donated Aeroplan points to get him to Toronto, the people who put him up in Toronto, the people who paid to print the pamphlets, anyone who helped him in any way could be on the hook for 100 million dollars", clearly intending to invoke a "libel chill" (p. 3);

(c) Smitherman, stated at the press conference that his express intention was to "stamp this hateful individual out" (p. 5);

(d) counsel for the Plaintiffs at the press conference suggested that the Defendant was "in fear of arrest" suggesting that he was a fugitive and possibly facing criminal charges when counsel knew at the time that this was not the case (p. 6); and

(e) counsel for the Plaintiff stated at the press conference that both the Prime Minister of Canada and the Premier of the Ontario have been made aware of the proceedings and that they had no objections to it (p. 10).

Transcript of Press Conference, Defendant's Motion Record, Tab G

167. On the other hand, the public interest in protecting Whatcott's freedom of expression is very strong. Dunphy J. recognized:

> "Freedom of expression to engage in robust discussions of matters of public both represent strong values in our system. This latter value has been recognized by the evolving common law of defamation in cases such as *Grant v. Torstar Corp*. It is also a value that has found expression – both for and against – in the public consultation process leading to the enactment of the *PPPA*."
>
> *Platnick v. Bent*, [2016] O.J. No. 6223 (Ont. S.C.J.) para. 131, Book of Authorities of the Defendant Whatcott, Vol. III, Tab 33

168. This lawsuit claims 104 million dollars from Whatcott and any supporter who the Plaintiffs may be identify that even bought Whatcott a cup of coffee at the Pride Parade. This proceeding is intended to have a chilling effect on the ability of Whatcott and others with similar views, in order to scare them from participating in the public debate on the gay agenda to promote social and legislative change.

169. Whatcott adopts and incorporates *mutatis mutandis*, his foregoing submissions in this Revised Factum made at paragraphs 41, 56-58, 66-73, 80-86, and 88-89.

170. The public interest in protecting Whatcott's expression outweighs the Plaintiffs' goal to silence him.

Summary Regarding s. 137.1

171. This Court may conclude that the Plaintiffs have failed to satisfy their onus under s. 137.1(4) of the *Courts of Justice Act.* If this Court further finds that the Plaintiffs' claims in this proceeding against Whatcott arise from the exercise of his expression that relates to a matter of public interest, the Court is compelled by s. 137.1(3) to dismiss the Plaintiffs' claim in its entirety.

E. IF SUCCESSFUL, IS WHATCOTT PRESUMPTIVELY ENTITLED TO FULL INDEMNITY COSTS BOTH FOR THIS MOTION AND FOR THE PROCEEDING ITSELF UNLESS THE COURT ORDERS OTHERWISE?

Full Indemnity

172. If this class action is struck out under s. 137.1(3) then Whatcott must be awarded his full indemnity costs. Section 137.1(7) of the *Courts of Justice Act* provides that if an action is struck out under s. 137.1(3) then "the moving party is entitled to costs on the motion and in the proceeding on a full indemnity basis, unless the judge determines that such an award in not appropriate in the circumstances."

137.1(7) of the *Courts of Justice Act*, Book of Authorities of the Defendant Whatcott, Vol I, Tab 8

173. Whatcott submits that there are no circumstances that would justify a deviation from the application of s. 137.1(7). In *Platnick v. Bent*, Dunphy J. awarded full indemnity costs to the defendant that carried the burden of advancing the ultimately successful motion to strike the action. In that case, as here, the defendant had objectively very strong defenses and that fact was either known or ought to have been known by the Plaintiffs since November 1, 2016, when Whatcott served and filed his initial factum, and perhaps since September 9, 2016 when counsel for Whatcott provided counsel for the Plaintiffs with the citation for *Kenora (Town) Police Services Board v. Savino*, the authority that bars a claim for defamation in a class action in the Province of Ontario. In the absence of any convincing reason to exercise the Court's discretion in the Plaintiff's favor, Whatcott submits that he is entitled to an award of full indemnity costs for both the motion and for the entire proceedings.

Platnick v. Bent, [2016] O.J. No. 6223 (Ont. S.C.J.) para. 175, Book of Authorities of the Defendant Whatcott, Vol. III, Tab 33

CONCLUSION

Answers to Questions

174. Here are the answers to the foregoing questions of law set out as issues in Part One of the Addendum:

(a) Was the communication in respect of a matter of public interest?

Yes.

(b) Have the Plaintiffs discharged their onus of proving there are "grounds to believe that … the proceeding has substantial merit"?

No.

(c) Have the Plaintiffs discharged their onus of proving that there are "grounds to believe that … the moving party has no defense in the proceeding."?

No.

(d) Have the Plaintiffs discharged their onus of showing that the public interest in allowing the proceeding to continue outweighs the public interest in communicating?

No.

(e) If successful, is Whatcott presumptively entitled to full indemnity costs both for this motion and for the proceeding itself unless the Court orders otherwise?

Yes.

PART TWO

Striking the Entire Pleadings

175. For the reasons previously submitted in paragraphs 99-104, this action should be struck under Rule 21.01(1)(b) as disclosing no reasonable cause of action or under Rule 21.01(1)(d) as being frivolous or vexatious or otherwise an abuse of the court.

176. In addition, Section 35 of the *Class Proceedings Act, 1992,* provides that "the rules of court apply to class proceedings". We have already established, under the principles set out by the Federal Court of Appeal in *Glaxo Wellcome PLC v. M.N.R.*. and the Ontario Court of Appeal. in *GEA Group AG,* that the first threshold requirement to obtain a Norwich order is that the plaintiffs establish that they have a *bona fide* claim against the alleged wrongdoers.

> *GEA Group AG v. Ventra Group Co.* [2009] O.J. No. 3457 (Ont. C.A.) Book of Authorities of the Defendant Whatcott, Vol I, Tab 28

177. Even before certification, a defendant may bring a motion to strike a representative plaintiff's claim on the ground that it discloses no reasonable cause of action.

> *Stone v. Wellington County Board of Education* (1999), 29 C.P.C. (4th) 320 (Ont. C.A.) Book of Authorities of the Defendant Whatcott, Vol III, Tab 30

178. As each of the representative plaintiffs do not have a valid cause of action against Whatcott, their claims against him must be struck out. Nordheimer J. said in *Boulanger v. Johnson & Johnson*: "for each defendant who is named in a class action there must be a representative plaintiff who has a valid cause of action against that defendant." In this class action, there is the absence of a representative plaintiff with a claim against Whatcott.

> *Boulanger v. Johnson & Johnson*, [2002] O.J. No. 1075 (Ont. S.C.J.) Book of Authorities of the Defendant, Vol III, Tab 31
> *Hughes v. Sunbeam Corp. (Canada)* [2002] O.J. No. 3457 (Ont.C.A.) Book of Authorities of the Defendant, Vol III, Tab 32

PART THREE

Striking Portions of the Pleadings

179. In the alternative, if this proceeding is not struck in its entirety either as an abuse of process or in accordance with s. 137.1 of the *Courts of Justice Act*, Whatcott submits that even if the pleadings are not struck out as a whole, it is the Defendant's position that many paragraphs in the Statement of Claim violate the rules application to pleadings under Rule 25.11 of the Rules of Civil Procedure.

180. In *Quizno's Canada Restaurant Corp. v. Kileel Developments Ltd.*, Blair J. articulated the principles with respect to striking pleadings:

> **"13.** Rule 25.11 states:
>
> The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,

a) may prejudice or delay the fair trial of the action;
b) is scandalous, frivolous or vexatious; or
c) is an abuse of the process of the court.

14 A pleading cannot be "scandalous" if it is relevant, and given her findings noted above, the motion judge must have based her decision on the ground that the impugned portions of the statement of defence "may prejudice or delay the fair trial of the action." Before analysing the portions of the pleading by category, she stated her general conclusion as follows (para. 28):

I do not agree with Quizno's position that the impugned paragraphs ... are irrelevant, frivolous, vexatious or an abuse of process. However, I do accept those paragraphs should be struck as being of limited probative value in relation to allegations in the Action and because the prejudice of maintaining these paragraphs outweighs their probative value.

15 A court may strike out portions of a pleading, even where the allegations are relevant, if the applicant can establish that they are of marginal probative value and their probative value is outweighed by their prejudicial effect. Before doing so, a judge must balance the rights of the parties on the particular facts of the case and must consider carefully the extent to which the particulars attacked are necessary to enable the defendant to prove its case and their probative value in establishing that case: see *Clement v. McGuinty* (2001), 18 C.P.C. (5th) 267 (Ont. C.A.), at paras. 21-24; *Asper v. Lantos* (2000), 51 O.R. (3d) 215 (Div. Ct.), at paras. 18-20; *Lee v. Globe and Mail* (2001), 52 O.R. (3d) 652 (S.C.), at paras. 11 and 14. Where the allegations in question are relevant and material, however, the court should exercise this power with considerable caution, in my view."

Quizno's Canada Restaurant Corp. v. Kileel Developments Ltd. [2008] O.J. No. 3674 Book of Authorities of the Defendant, Vol. III, Tab 39

181. Whatcott submits that paragraphs 16, 20, 22, 24, 25, 27, 28, 29, 30 and 52 of the Statement of Claim violate these principles in that they are not statements of material facts, are of little relevance to the allegations set out in the Statement of Claim and are either opinions or statements of highly prejudicial effect with very low probative value and therefore should be struck.

Statement of Claim, Plaintiff's Motion Record (for Certification), Tab 5

PART VII ORDER REQUESTED

182. That the Plaintiffs' Statement of Claim be struck out without leave to amend.

183. That the Plaintiffs' motion for disclosure be dismissed.

184. That the Defendant, William Whatcott be awarded his full indemnity costs on the motion and in defence of the action throughout, payable by the Plainitffs forthwith.

Dated this 9th day of January, 2017

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Charles I. M. Lugosi, 20691L
Counsel for the Defendant, William Whatcott

John Findlay, 19502C
Co-Counsel for the Defendant, Bill Whatcott