



No. VLC-S-S-133008
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

BRIAN BURKE

PLAINTIFF

AND:

**JOHN DOES #1 TO #18, a.k.a. "NOFIXEDADDRESS", "CAMBARKERFAN",
"LAVY16", "MBSKIDMORE", "TULOWD", "LOOB", "NAGGAH",
"MOWERMAN", "AARONP18", "STEVE", "KABOOMIN8",
"THEZBRAD", "SLOBBERFACE", "POONERMAN",
"ISOLATEDCIRCUIT", "KANADA KEV",
"NCOGNITO" AND "SIR PSYCHO SEXY"**

DEFENDANTS

NOTICE OF APPLICATION

Name of applicant: The Plaintiff, Brian Burke

To: This application is brought without notice. It is not intended to be served.

TAKE NOTICE that an application will be made by the applicant to the presiding judge or master at the courthouse at 800 Smithe Street, in the City of Vancouver, in the Province of British Columbia on Tuesday, May 28, 2013 for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

J. at 9:45 am

1. The Plaintiff may serve the Notice of Civil Claim filed April 26, 2013 on the Defendants John Doe #1, #2, #3, #4, #5, #7 and #13, also known as "NoFixedAddress", "CamBarkerFan", "Lavy16", "mbskidmore", "Tulowd", "Loob", "Naggah", and "Slobberface" (the "Message Board Defendants") by sending a private message in the form set out in Schedule "A" to this application to the internet message board accounts maintained by the Message Board Defendants.
2. Such service shall be deemed to be good service upon the Message Board Defendants five days after the day on which the messages are sent in the manner described in paragraph 1 above, and the Message Board Defendants shall have 28 days from the date of effective service within which to file their Responses to the Civil Claim; and

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- The Plaintiff may serve any and all documents in this action on the Message Board Defendants in the manner described in paragraph 1 above, subject to further Order of this Court, agreement of the parties, or the Message Board Defendants' filing Responses to Civil Claim or Notices of Change of Address.

Part 2: FACTUAL BASIS

- Mr. Burke filed the Notice of Civil Claim in this proceeding on April 26, 2013.
- The Notice of Civil Claim concerns a defamatory story which was published originally in January, 2013, was later republished and still exists on the Internet, that accuses Mr. Burke of engaging in an extramarital affair with a sportscaster and of being the father of that sportscaster's child (the "**Defamatory Statements**").
- The Defamatory Statements appear to originate in a single email or letter, which circulated through the internet by email or by some other private means as yet unknown to Mr. Burke.
- The identity and residence of the Message Board Defendants are unknown to the Plaintiff.

Affidavit #1 of Gordon Brandt at para. 10

- Counsel for the Plaintiff has contacted administrators at each of the Message Boards requesting information regarding the identity of the Message Board Defendants. To date, none of the Message Board administrators have provided any information regarding the identities of the Message Board Defendants.

Affidavit #1 of Gordon Brandt at paras 13-14

- The Message Board Defendants have published the Defamatory Statements on internet message boards (the "**Message Boards**") as follows:

Message Board	Message Board Defendant
forums.redflagdeals.com	NoFixedAddress
hockeybroads.com	CamBarkerFan
forums.Proportsdaily.com	Lavy16
Torontogolfnuts.com	mbskidmore
gtamc.com	Tulowd
hfboards.hockeysfuture.com	Naggah
Torontojungle.com	Slobberface

Affidavit #1 of Gordon Brandt at paras. 5-6

7. The Message Boards share the following features:
- (a) The Message Boards are online discussion forums that permit individuals to hold conversations in the form of posted messages;
 - (b) The Message Boards appear to operate in Canada and to be concerned with topics of interest to Canadians, such as hockey;
 - (c) The Message Boards are structured as a number of “threads” or conversations on a particular topic;
 - (d) Members of the public may view the threads without registering with the Message Boards;
 - (e) Messages posted to the Message Boards remain available to be searched and viewed for some time, even if the thread is closed to new messages;
 - (f) In order to post a message to the Message Boards, an individual must register an account with the Message Boards. At registration, the individual must:
 - (i) Provide an email address;
 - (ii) Verify the email address by following a link sent to the email address by the Message Board; and
 - (iii) Select a username that is unique to the Message Board; and
 - (g) Each Message Board has a feature permitting registered users to view information regarding other registered users, and to send private messages to other registered users.

Affidavit #1 of Gordon Brandt at para. 8

8. The Message Boards each provide notification to a user when he or she receives a private message. The type of notification that is put in place automatically when a user registers on a Message Board and remains unless the user takes positive steps to change that type of notification (the “**Default Notification**”) is as follows for each of the Message Boards:
- (a) Gtamc.com: the Default Notification copies the body of the private message, puts it in an email and sends it to the email address the user provided at registration;
 - (b) Torontogolfnuts.com: the Default Notification sends a notification of receipt of private message, with a link to the private message, in an email to the email address the user provided at registration;
 - (c) Redflagdeals.com: the Default Notification is an inbox icon, which is visible in the browser window during the time that a user is logged into his account on the Message Board. The inbox icon indicates the number of unread private messages the user has received; and

- (d) Prosportsdaily.com, hockeybroads.com and torontojungle.com: the Default Notification is a notice of “notification”. Upon the user clicking on the notice of “notification”, the Message Board indicates the type of notification the user has received (i.e. private message).

Affidavit #1 of Gordon Brandt at para. 9

9. The Message Board Defendants each maintain an active account on a Message Board to which private messages may be sent.

Affidavit #1 of Gordon Brandt at para. 11

10. Private messages in the form set out at Schedule “A” to this application (the “**Service Message**”) may be sent to each of the Message Board Defendants from registered Message Board accounts operated by Heenan Blaikie LLP.

Affidavit #1 of Gordon Brandt at para. 16

Part 3: LEGAL BASIS

1. If it is impracticable to serve a person by personal service, or if the person to be served cannot be found after a diligent search or is evading service, the Court may, on an application without notice, make an order for substituted service.

Rule 4-4(1)

2. Rule 4-4 therefore permits substituted service in two distinct circumstances: (a) where it is impracticable to serve the person by personal service; and (b) where the person to be served either cannot be found after a diligent search or is evading service. Accordingly, where an applicant shows that personal service is impracticable, there is no need to also demonstrate that the person cannot be found after a diligent search.

Luu v. Wang, 2011 BCSC 1240

3. “Impracticable”, for the purpose of R. 4-4(1) means incapable of being done usefully, or capable of being done but at too great a cost. What constitutes impracticability will depend on the circumstances of each case including, for example, the type of relief claimed, the amount involved, and the avenues explored to locate the person.

Malkin & Pinton Industrial Supplies v. Anglehart and Anglehart Furniture (1977), 5 B.C.L.R. 285 (Co. Ct.);

Credit Foncier Franco-Canadien v. McGuire (1979), 14 B.C.L.R. 281 (S.C.)

4. In ordering a particular method of substituted service, the Court does not need to be certain that it will provide notice. Rather, the method need only be probably or reasonably likely to bring the process to the attention of the person served.

Leonard Polsky and Stacey Wade, "Status update: service by Facebook" (September 30, 2011) 31:20 *The Lawyer's Weekly* ("Polsky and Wade")
Sun Life Assurance Co. v. Tardiff (1919), 27 B.C.R. 213 (S.C.)

5. The permissible methods of substituted service have been, and should continue to be, responsive to changing technology. In numerous Canadian and Commonwealth cases, courts have permitted substituted service through what are called "social media", or websites which allow communication between individuals.

Knott Estate v. Sutherland, [2009] A.J. No. 1539 (Q.B.);
Byrne v. Howard, [2010] FMCAFAM 509 (Fed. Mag. Ct.);
Mothership Music Pty Ltd v. Darren Ayre (T/As Vip Entertainment & Concepts Pty Ltd),
 [2012] NSWDC 42

6. The unreported 2009 decision of the English High Court in *Blaney v. Persons Unknown* is similar to the facts of this case. There, the plaintiff, a journalist and commentator who operated a website called "Blaney's Blarney", obtained an injunction against an anonymous internet poster who was impersonating him through a Twitter account. The High Court granted the plaintiff leave to serve the poster by sending a message to the Twitter account itself, which message included a link to a website on which the injunction order was displayed.

(1 October 2009) IHQ/12/0653 (Ch.)

7. In *Blaney* the document being served through Twitter was an order whose breach could have resulted in the anonymous poster being found in contempt and committed to jail. In this case, the only consequence of a failure to respond to the message would be the entering of a default judgment. Courts of this province has traditionally taken a more stringent approach to the substituted service of orders whose breach could result in a finding of contempt than to substituted service orders for other types of documents.

Toronto-Dominion Chargex v. Bali, [1976] B.C.J. No. 554 (Co. Ct.);
Telus Communications Inc. v. Telecommunications Workers Union, 2006 BCSC 26

8. Personal service of the Notice of Civil Claim on the Message Board Defendants is impracticable. The Plaintiff does not know who the Message Board Defendants are or where they are located, and there is no cost-effective means of discovering this information. The only readily apparent means of finding out would be to seek production orders against the various internet service providers for or hosts of the Message Boards. Even if such orders were granted and obeyed, they would only yield email addresses, service on which would essentially be no different than that under the proposed order. Further, given the number of the Message Board Defendants, all of whom posted the Defamatory Statements on different Message Board, such a course of action would be lengthy, time-consuming, disproportionate and may ultimately be ineffective, *i.e.* uncertain in its result. Recent academic literature has recognised the so-called "Blaney's Blarney Order" (*i.e.*, an order permitting service on an anonymous internet tortfeasor by

sending a message, including a link to the document served, through social media) as a potential cost-effective alternative to a *Norwich Pharmacal*-type order.

Ann Vamialis, "Online defamation: confronting anonymity"
(Oxford University Press) at 21-22

9. There is no question in this case that the correct people will be served: the Plaintiff is seeking to serve precisely those accounts from which the Defamatory Statements were posted.
10. It is also reasonably likely or probable that the substituted service will come to the attention of the Message Board Defendants. According to the information available on their Profiles on the Message Boards, the Message Board Defendants regularly log into the accounts from which they posted the Defamatory Statements on the Message Boards.
11. For each of the Message Boards, the fact that the user has received a message is immediately apparent on logging into the Account. In the case of two of the Message Boards, receipt of a private message triggers a notifying email to the email account used to register the Message Board Account.

Affidavit #1 of Gordon Brandt at para. 9

12. The Service Message proposed offers a clear statement of the significance of the Notice of Civil Claim and allows it to be accessed with a click of the user's mouse. The Service Message is, in substance, an endorsed writ or summons, and sending it along with a link to a website where the Notice of Civil Claim is posted is a cost-efficient and effective means of serving the anonymous Message Board Defendants.
13. The Message Board Defendants are posting on Message Boards which are of interest to Canadians but their geographical location is ultimately unknown. The Plaintiff therefore asks that the time for filing the Responses to Civil Claim be fixed by the Court at 28 days, which is seven days longer than the time for response to a Notice of Civil Claim served anywhere in Canada.

R. 3-3(3);
R. 22-4(2)

Part 4: MATERIAL TO BE RELIED ON


1. Affidavit #1 of Gordon Brandt, sworn May 24, 2013;
2. The pleadings and proceedings herein; and
3. Such further and other material as this Honourable Court will permit.

The applicant estimates that the application will take 20 minutes.

- This matter is within the jurisdiction of the master.

This matter is not within the jurisdiction of a master.

Date: May 24, 2013



 Signature of Robert W. Grant, Q.C.
 Lawyer for the Applicant

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to receive notice of the time and date of the hearing or respond to the application, you must, within 5 business days after the date of service of this notice of application or, if the application is brought under Rule 9-7 of the Supreme Court Rules, within 8 business days after the date of service of this notice of application,

- (a) File an application response in Form 33,
- (b) File the original of every affidavit, and of every other document, that
 - (i) you intend to refer to at the hearing of this application, and
 - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - (i) a copy of the filed application response;
 - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

To be completed by the court only:

Order made

in the terms requested in paragraphs of Part 1 of this notice of application

with the following variations and additional terms:

.....

Date:

.....

Signature of Judge Master

APPENDIX**THIS APPLICATION INVOLVES THE FOLLOWING:**

- discovery: comply with demand for documents
- discovery: production of additional documents
- other matters concerning document discovery
- extend oral discovery
- other matters concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts

Schedule "A"

The Plaintiff, Brian Burke, has named you as a defendant in a Notice of Civil Claim filed in the British Columbia Supreme Court on April 26, 2013. On _____, 2013, the British Columbia Supreme Court authorized service of the Notice of Civil Claim by private message to you at this message board.

A copy of the Notice of Civil Claim can be access on the website of the law firm Heenan Blaikie LLP at http://www.heenan.ca/_____.

You will be deemed to have been served with the Notice of Civil Claim 5 days after the date this message was sent. A copy of the Order permitting service by this private message can also be accessed on the website of the law firm Heenan Blaikie LLP at http://www.heenan.ca/_____.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file a response to the civil claim within 28 days from the date of service of the Notice of Civil Claim, as ordered by the British Columbia Supreme Court at paragraph ___ of the above-noted Order.