



## FACSIMILE TRANSMISSION COVER SHEET

**Masters' Chambers**  
**Superior Court of Justice**  
**Toronto Région**

**Chambres des Protonotaires**  
**Cour Supérieure de Justice**  
**Région de Toronto**

**Court House**  
**393 University Avenue**  
**6th Floor**  
**Toronto, Ontario**  
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**Date:** Monday, 22 October 2012  
**From:** Masters Administration Office  
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**Subject:** Morris v. Johnson et al  
**Court File No.:** 10-CV-412021

**Comments: Reasons Released by Master Hawkins**

**Number of pages including cover: 7**

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- ATTENTION -

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**Case Management Master's FAX Number / Nombre de Télécopieur: (416) 326-5416**

**CITATION: Morris v. Johnson, 2012 ONSC 5824**  
**COURT FILE NO.: 10-CV-412021**  
**MOTION HEARD: April 26 and July 17, 2012**

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Phyllis Morris

v.

Richard Johnson, William "Bill" Hogg  
and others

**BEFORE:** Master Thomas Hawkins

**COUNSEL:** Jordan Goldbatt for  
moving defendants Richard Johnson  
and William Hogg  
Fax No. 416-591-7333

Kenneth R. Clark for responding plaintiff  
Fax No.: 416-863-1515

No one for other defendants

**REASONS FOR DECISION**

- [1] This is a motion by the defendants Richard Johnson ("Johnson") and William "Bill" Hogg ("Hogg") for an order that the plaintiff former Mayor Phyllis Morris pay for their costs of defending this action until the plaintiff discontinued this action on October 17, 2011.
- [2] There were two other defendants who defended this action. Elizabeth Bishenden ("Bishenden") has settled this action with the plaintiff and took no part in this motion. Automattic Inc. has not (so far as I am aware) sought costs from the plaintiff and similarly took no part in this motion. Three other anonymous defendants were never served with the notice of action and statement of claim in this action.

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- [3] Johnson and Hogg bring their motion for costs under subrule 23.05(1). This subrule provides as follows.

If all or part of an action is discontinued, any party to the action may, within thirty days after the action is discontinued, make a motion respecting the costs of the action.

- [4] At the outset of argument of this motion, an issue arose as to whether this motion had been brought too late. Subrule 23.05(1) contemplates that a motion for the costs of a discontinued action be brought within thirty days after the action has been discontinued. Here the plaintiff discontinued her action by notice of discontinuance dated October 17, 2011. Johnson and Hogg gave the plaintiff's lawyers notice during that 30 day period that they intended to bring the present motion. However the actual motion record of Johnson and Hogg was not served on the plaintiff's lawyers until December 8, 2011.
- [5] Counsel for Johnson and Hogg served a supplementary notice of motion seeking an extension in time for bringing this motion. However plaintiff's counsel took no position on the issue of whether the motion by Johnson and Hogg was brought on time.
- [6] In light of the fact that plaintiff's counsel does not oppose the motion for a time extension, I granted the time extension requested and declined to dismiss the motion by Johnson and Hogg on the ground that it was not brought on time.

**Background Facts**

- [7] Phyllis Morris was mayor of the Town of Aurora from 2006 to December 1, 2010.
- [8] Johnson was a commentator on Aurora municipal issues. He frequently wrote articles on such issues entitled "Council Watch". These articles were published on the internet at a website called Aurora Citizen.
- [9] Hogg is a two term former member of Aurora town council, serving from 1997 to 2000 and from 2003 to 2006. He has been a moderator of the Aurora Citizen website.
- [10] Both Johnson and Hogg were vocal critics of Mayor Morris during her term in office.
- [11] In 2010 Mayor Morris was running for a second term as mayor. Election day was October 25, 2010.
- [12] On August 20, 2010 Johnson wrote and posted on the Aurora Citizen website an article entitled "Council Watch #13". This article was critical of Mayor Morris.

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The article prompted followers of the Aurora Citizen website to write over 50 comments about Johnson's article which comments were also posted on that website immediately after Johnson's article. Many of these commentators used pseudonyms and did not identify themselves. Some of these comments were even more critical of Mayor Morris than Johnson had been.

- [13] On September 15, 2010 Aurora town council passed a resolution authorizing the town solicitor to retain external legal counsel to take any and all actions to bring resolution to the matter of defamation of Mayor Morris. In practical terms, this resolution authorized Mayor Morris to commence an action for defamation with the Town of Aurora paying her legal fees.
- [14] On October 8, 2010 Mayor Morris commenced the present action.
- [15] Most actions are commenced by having a statement of claim issued. This action was commenced by having a notice of action issued under subrule 14.03 (2). Subrule 14.03(2) provides as follows.

Where there is insufficient time to prepare a statement of claim, an action may be commenced by the issuing of a notice of action (Form 14C) that contains a short statement of the nature of the claim.

- [16] In this notice of action the plaintiff was described in the title of proceeding as "Phyllis Morris in her capacity as Mayor of the Corporation of the Town of Aurora". Johnson, Hogg and five others were named as defendants.
- [17] In the notice of action Mayor Morris claimed injunctive relief and \$6,000,000 in damages from all the defendants.
- [18] Hogg and Bishenden were served with the notice of action alone on Friday October 8, 2010, the same day the action was commenced.
- [19] Johnson was served with the notice of action alone on Thanksgiving Sunday, October 10, 2010 while he was having Thanksgiving dinner with his extended family.
- [20] There is no evidence that Mayor Morris gave instructions that Johnson be served with the notice of action on Thanksgiving Sunday.
- [21] When these three defendants were served with the notice of action they were not served with a statement of claim. This contravened subrule 14.03(4), which provides as follows.

The notice of action shall not be served separately from the statement of claim.

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- [22] In a lengthy affidavit served in support of this motion Johnson has described his emotional reaction to being served with the notice of action, using words such as distraught, traumatic and unimaginable stress.
- [23] Hogg did not swear any affidavit in connection with this motion. I therefore do not know how Hogg reacted emotionally to being served with the notice of action.

**Is This Action SLAPP Litigation?**

- [24] In his affidavit Johnson says that Mayor Morris commenced this action in order to silence him days before the October 25, 2010 elections.
- [25] Mayor Morris did not file any affidavit in response to this motion. She was not examined as a witness on a pending motion. As a result Mayor Morris has not given evidence that her motive in bringing this action was not to silence Johnston, Hogg and Bishenden, three of her critics, as election day approached.
- [26] Defence counsel submits that this action is SLAPP litigation. The term SLAPP is an acronym for Strategic Litigation Against Public Participation. Defence counsel submits that because this is SLAPP litigation, Johnson and Hogg are entitled to an elevated award of costs.
- [27] The following evidence before me is uncontradicted. Mayor Morris brought this action expressly in her capacity as Mayor of the Corporation of the Town of Aurora. Initially and up to December 14, 2010 she had access to Aurora municipal money to fund this litigation. The action was commenced without any prior demand letter to Johnson, Hogg or Bishenden from Mayor Morris or her lawyers. The action was commenced without complying with the prior notice provisions of the Libel and Slander Act, R.S.O. 1990 ch. L-12 respecting broadcasts. (Johnson and Hogg take the position that Aurora Citizen "broadcasts" its content as that term is defined in the Libel and Slander Act). The action was commenced less than three weeks prior to the municipal election in which Mayor Morris was seeking a second term as mayor. The action was commenced by notice of action rather than by statement of claim. In her notice of action Mayor Morris expressly sought damages of \$6,000,000 from the defendants. In an action for damages it is unusual for the plaintiff to claim a specific amount of damages in the notice of action. The notice of action was served on the defendants Johnson, Hogg and Bishenden immediately and without any statement of claim, in contravention of subrule 14.03 (4).
- [28] I infer from these facts that Mayor Morris was not prepared to wait and see if a demand letter would have the desired effect of silencing Johnson, Hogg and Bishenden, and not prepared to wait until her lawyers prepared a statement of

claim. In my view, Mayor Morris wanted to hit Johnson, Hogg and Bishenden quickly and hard, in order to silence them as her critics sooner rather than later in the weeks leading up to the October 25, 2010 municipal elections.

- [29] I have therefore come to the conclusion that this action is indeed SLAPP litigation.
- [30] I recognize that this same issue was raised on a prior motion by Johnson and Hogg which was heard by Spence J., and that Spence J. declined to find that this action was SLAPP litigation. Spence J. did not make an express finding that this action was not SLAPP litigation. He simply concluded that Johnson and Hogg had not shown that this action was indeed SLAPP litigation. I do not know what evidence Spence J. had before him when he declined to make that finding. The evidence before me leads me to a different conclusion.

#### **Costs of Discontinued Action**

- [31] This action effectively came to an end when the plaintiff delivered a notice of discontinuance on October 17, 2011. This made subrule 23.05(1) (quoted in paragraph [ 3] above) relevant. It does not automatically follow that every time a plaintiff discontinues an entire action the defendant or defendants are entitled to costs. Costs are in the discretion of the court.
- [32] Mayor Morris has offered no evidence as to why she discontinued this action. In that situation, I regard Johnson and Hogg as successful defendants entitled to the costs of defending this action. Bishenden has settled this action with Mayor Morris on the basis that she (Bishenden) waived any claim for costs against Mayor Morris. Because I regard this action as SLAPP litigation designed to stifle debate about Mayor Morris' fitness for office, commenced during her re-election campaign, I award Johnson and Hogg special enhanced costs as was done in *Scory v. Krannitz*, 2011 BCSC 1344 per Bruce J. at para. 31 (B.C.S.C.).
- [33] I have carefully reviewed the bill of costs submitted by counsel for Johnson and Hogg. It does not include any time spent on motions where costs have already been awarded or time spent on one motion where the court has yet to make an award of costs.
- [34] Plaintiff's counsel submitted that defence counsel have engaged in overkill. Since Mayor Morris claimed \$6,000,000 in damages, I do not fault defence counsel for mounting a thorough defence and leaving nothing to chance.
- [35] Since I am awarding Johnson and Hogg special enhanced costs but not full indemnity costs, I have not allowed anything for the following items claimed in the bill of costs: responding to inquiries from press; consider insurance

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coverage and review insurance policies of clients and drafting retainer dealing with issues regarding severance of retainer. I have also deducted the \$2,333.42 which Bishenden paid the law firm representing Johnson, Hogg and Bishenden before Bishenden got separate counsel and settled this action as between Bishenden and Mayor Morris on the basis that Bishenden waived her claim for costs.

- [36] In the result, I fix the special enhanced costs of this action I have awarded to Johnson and Hogg at \$21,275 and order the plaintiff Phyllis Morris to pay such costs to Johnson and Hogg within 30 days.

O. R. Hawkins

Master Thomas Hawkins

**DATE:** October 22, 2012