



Common procedural tools for complex litigation

There can be complex litigation about almost anything. This is because complex litigation is not limited to a particular area of substantive law. Despite the variety of topics, parties involved in complex litigation often face similar challenges, and can often use similar procedural tools to deal with such challenges. In this quiz, we review some of these procedural challenges and tools in the context of a claim for corporate espionage by Company X against Company Y.

1 Company X receives some compelling evidence of corporate espionage on the part of Company Y, one of its main competitors, from an anonymous source. The evidence received includes a series of emails that were sent from Hotmail email accounts. The senders' email addresses are composed of random letters and numbers and do not reveal the real identities of the senders. Although Company X is satisfied based on the evidence received that the authors of the emails were acting for the benefit of Company Y, it would like to know their identities in order to sue them personally in addition to suing Company Y. Company X is advised by its information technology manager that in order to identify the authors of the emails, Company X should seek to obtain the Internet protocol addresses associated with the Hotmail addresses in question. What pre-action discovery remedy could assist Company X in obtaining the Internet protocol addresses from Hotmail?

- Mareva injunction.
- Mary Carter Agreement.
- Anton Piller order.
- Norwich order.

2 After completing its investigation, Company X decides to commence an action against Company Y and two of its officers, David Smith and Claire Jones, for \$75 million for breach of confidence, intentional interference with economic relations, conspiracy and other causes of action. However, Company X is concerned that the defendants will destroy evidence of their wrongful conduct once they become aware of Company X's civil action. What should Company X do?

- Seek a Mareva injunction.
- Seek to enter into a Mary Carter Agreement with Company Y.
- Seek an Anton Piller order.
- Seek an interlocutory injunction.

3 In response to Company X's Statement of Claim, Company Y makes very broad allegations in its Statement of Defence regarding the conduct of Company X's business and alleges that any damages incurred by Company X are the result of the mismanagement of its own business. Company X is concerned that, in order to respond to the broad allegations contained in the Statement of Defence, it will have to produce commercially sensitive documents regarding the management of its business.

As a result, Company X brings a motion for a confidentiality order supported by a very short affidavit stating that Company X would be prejudiced if it had to produce commercially sensitive documents to a competitor without any restrictions and/or if such documents were eventually made public in the course of the litigation. What are Company X's chances to obtain a confidentiality order based on this evidence?

- Very good.
- Not very good.

4 In order to prepare its affidavit of documents, Company X collects tens of thousands of potentially relevant documents in both electronic and paper formats. After de-duplication and other culling methodologies are applied to the collection of documents, the remaining documents are reviewed by lawyers for both relevance and privilege. Quality control checks are also performed using keywords and advanced search tools. Despite this review process, Company X is concerned that some of its privileged documents could be inadvertently produced given the volume of documents involved. Although a review of the law on inadvertent production alleviates Company X's concerns to some extent, it still would like to obtain additional protection against waiver of privilege. What could Company X do?

- Negotiate a Mary Carter agreement with the defendants.
- Negotiate a clawback agreement with the defendants.
- Negotiate a tolling agreement with the defendants.
- Negotiate a common interest privilege agreement with the defendants.



1 (D) A Norwich order is an equitable remedy of pre-action discovery against an “involved” third party. The basic principle underlying this type of order was described as follows by the House of Lords in the seminal case *Norwich Pharmacal Co. v Customs and Excise Commissioners*: “[I]f through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers.”

Norwich orders have been granted in various situations, including:

- (a) Where the information sought is necessary to identify wrongdoers (as is the case in this example);
- (b) To find and preserve evidence that may substantiate or support an action against either known or unknown wrongdoers, or even determine whether an action exists; and
- (c) to trace and preserve assets.

The following factors govern the determination of whether an applicant, like Company X, could be granted a Norwich order:

- (a) Whether the applicant has provided evidence sufficient to raise a valid, bona fide or reasonable claim;
- (b) Whether the applicant has established a relationship with the third party from whom the information is sought, such that it establishes that the third party is somehow involved in the acts complained of;
- (c) Whether the third party is the only practicable source of the information available;
- (d) Whether the third party can be indemnified for costs to which the third party may be exposed because of the disclosure; and
- (e) Whether the interests of justice favour obtaining the disclosure.

2 (C) An Anton Piller order authorizes a plaintiff to conduct a “private search” of a defendant’s premises for the purpose of seizing and preserving relevant evidence. Such an order can be obtained *ex parte* after a statement of claim is issued but before it is served on a defendant. This type of order has been described as an exceptional remedy that should only be granted on clear and convincing evidence. In order to obtain an Anton Piller order, Company X would have to adduce convincing evidence that meets the following four essential conditions:

- (1) It has a strong prima facie case;
- (2) The potential or actual damage caused by the alleged misconduct of Company Y, David Smith and Claire Jones is very serious;
- (3) Company Y, David Smith and Claire Jones have in their possession incriminating documents or things; and
- (4) There is a real possibility that Company Y, David Smith and Claire Jones may destroy such material before the discovery process can do its work.

3 (B) The Supreme Court of Canada set out the test for a confidentiality order in *Sierra Club of Canada v Canada (Minister of Finance)*. It stated that a confidentiality order should only be granted when:

- (a) Such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
- (b) The salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its dele-

terious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

The risk referred to in the first branch of the test must be real and substantial and well grounded in the evidence, and must pose a serious threat to the commercial interest in question. The Supreme Court also stated that the important commercial interest in issue must be one which can be expressed in terms of a public interest in confidentiality (i.e. it cannot merely be specific to the party requesting the order) where there is a general principle at stake. In this case, the short and conclusory affidavit filed by Company X falls short of meeting the test set out in the *Sierra Club* case.

4 (B) Principle 9 of the Sedona Canada Principles states that during the discovery process, parties should agree to or, if necessary, seek judicial direction on measures to protect privilege in relation to the production of electronic documents and data. The Commentary to Principle 9 refers to clawback agreements as such a measure. A clawback agreement is a non-waiver agreement under which the parties agree that:

- (a) Production without intent to waive privilege does not constitute a waiver so long as the producing party identifies the documents mistakenly produced in a timely manner after production;
- (b) The mistakenly produced documents as well as any notes or copies will be returned, deleted or destroyed by the receiving party; and
- (c) If there is disagreement between the parties about the privileged nature of the documents or other issues, the documents will be reviewed by the court at an appropriate time.

The Sedona Canada Principles provide that in order to find a clawback agreement enforceable, the court will likely require prior agreement between the parties that the parties’ search methodologies will remove from the production set those documents that are potentially privileged. The thorough review methodology adopted by Company X should elicit such an agreement and, subject to being satisfied with the reasonableness of the review methodology adopted by Company Y, David Smith and Claire Jones, Company X should be able to negotiate a clawback agreement with the defendants in order to protect itself further against waiver of privilege.

YOUR RANKING?

- **One or less correct:** *might be time to brush up*
- **Two correct:** *not bad, but some further work needed*
- **Three correct:** *very well done, but not perfect*
- **four correct:** *excellent*