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## 2010 GUIDE TO THE LEADING US/CANADA CROSS-BORDER LITIGATION LAWYERS IN CANADA

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# NORWICH ORDERS ACROSS BORDERS

## Obtaining third-party discovery in Canada

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There are known knowns. There are things we know that we know. There are known unknowns. That is to say, there are things that we now know we don't know. But there are also unknown unknowns. There are things we do not know we don't know.

- Donald Rumsfeld

### Introduction

Any time an appellate court judge describes a remedy as “equitable, discretionary and flexible” as well as “intrusive and extraordinary ... [to] be exercised with caution” (*GEA Group AG v. Ventra Group Co.*, 2009 ONCA 619 at para. 85, per Cronk J.A. (*GEA Group*)), litigation lawyers' ears should perk up. Less well known than other equally extraordinary remedies, such as *Mareva* injunctions and *Anton Piller* orders, the *Norwich* order, which is the subject of this piece and of the statement above, is a tool that is gaining increased attention in Canada for use both in domestic and transnational litigation.

The *Norwich* remedy is a form of equitable order that permits discovery of third parties even in the absence of a pending lawsuit. Effectively, this order can turn an otherwise innocent bystander into the key actor who may determine whether a cause of action will be litigated or, indeed, whether a cause of action even exists. Once only rarely used, these types of orders are gaining traction in Canada and worldwide.

In an era where individuals and businesses know no borders, and where funds can be instantaneously hidden or shuttled around the world, a tool that allows for third-party discovery is a useful tool indeed. Here, we take a close look at the remedy's origins, trace its expansion and development, and examine the latest appellate treatment of the remedy in the 2009 Ontario Court of Appeal decision in *GEA Group*.

### Origins and Development of the Order in the UK

The *Norwich* order – or *Norwich Pharmacal* order

– is the contemporary incarnation of the equitable bill of discovery. Discovery as a remedy was developed by England's Court of Chancery to assist a party in an existing litigation because there was no provision in the common law for the discovery of witnesses and the gathering of evidence. Pre-action discovery was allowed in limited situations, including where the object of the discovery was to determine the appropriate party against whom an action should be brought. (For an account of the equitable bill of discovery's historical development, see *Norwich Pharmacal Co. v. Customs and Excise Commissioners*, [1974] A.C. 133 (H.L.), and *Kenney v. Loewen* (1999), 28 C.P.C. (4th) 179 (B.C. S.C.).)

The now-eponymous *Norwich* order draws its name from the 1974 House of Lords decision in *Norwich Pharmacal Co. v. Customs and Excise Commissioners*, [1974] A.C. 133 (*Norwich*), a case of suspected patent infringement. The Customs and Excise Commissioners refused to disclose the identity of importers of a compound for which the claimant, *Norwich Pharmacal*, owned a patent. Roskill L.J. summarized the facts of the case as follows:

The plaintiffs wish to sue those by whom the goods allegedly infringing their patents have been and are being imported into this country. They do not know the names of these alleged infringers. The commissioners know the names. The plaintiffs cannot sue without the information which they say they cannot otherwise obtain. The commissioners have that information but refuse to supply it. Therefore the plaintiffs seek to extract this information from them by legal process. The question is whether the law allows them to do so (*Norwich* at page 147).

The Law Lords held that in certain circumstances, an action for discovery may be allowed against an “involved” third party who has information that the claimant alleges would allow it to identify a wrongdoer, so as to enable the claimant to bring an action against the wrongdoer where the claimant would otherwise not be able to do so.

In his seminal speech in this case, Lord Reid concluded that equity demanded that discovery be available to find the identity of a wrongdoer from not only people against whom there was a cause of action, but also from those who were “mixed up” in the tortious acts of others:

[I]f through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing 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. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration (*Norwich* at page 175).

Of course, it is not in every instance that pre-action discovery will be ordered from an otherwise disinterested third party. The test applied in *Norwich* required a court to conduct a balancing exercise. As set out by Lord Cross in his concurring speech, the following factors were seen as relevant to the determination of whether a court should exercise its discretion in ordering pre-action discovery of a third party:

[S]uch matters as the strength of the applicant's case against the unknown alleged wrongdoer, the relation subsisting between the alleged wrongdoer and the respondent, whether the information could be obtained from another source, and whether the giving of the information would put the respondent to trouble which could not be compensated by the payment of all expenses by the applicant. The full costs of the respondent of the application and any expense incurred in providing the information would have to be borne by the applicant (*Norwich* at page 199).

In *Norwich*, pre-action discovery was sought for a narrow purpose: to identify suspected wrongdoers where it was known that a wrong had occurred in order to permit the injured parties to sue for redress. However, the principle has not remained static. It has since expanded and been adapted by courts to respond to new fact situations that demand equitable remedies.

In *British Steel Corp. v. Granada Television Ltd.*, [1981] A.C. 1096 (*British Steel*), the defendant had received confidential documents belonging to the plaintiff, who wished to learn who had provided the documents so as to avoid future information leaks. There was no indication that the claimant intended to sue the party that had provided the documents. Nonetheless, the House of Lords found no reason to limit the *Norwich* principle to cases where the information was sought for the purpose of commencing an action. Equity, it was held by Lord Denning, should allow for third-party disclosure in circumstances where the plaintiff simply wished to protect itself against future wrongdoing (*British Steel* at page

1127; also see the reasons of Lord Templeman L.J. at page 1132).

Further, since it was “a possibility” that British Steel could bring an action against the wrongdoer, conditions existed for the granting of the order, requiring disclosure of the identities of those who had supplied the confidential documents to the defendant. The principle from *Norwich* was therefore expanded to include situations in which redress *might* be sought against those whose identity the plaintiff was seeking. (This principle was reinforced by the House of Lords in *Ashworth Hospital Authority v. MGN Ltd.*, [2002] 4 All E.R. 193, where it was held that the absence of a settled intention to sue the alleged wrongdoer or the person from whom discovery is sought did not bar the claimant from obtaining *Norwich* relief.)

In *P. v. T. Ltd.*, [1997] 1 W.L.R. 1309, the principle was expanded even further. There, to determine if he had an action for defamation, a senior employee sought *Norwich* relief to learn who made the allegations, and the content of the allegations, that caused him to be terminated by his employer. Now, therefore, instead of being restricted to learning the identity of a tortfeasor, the principle could be invoked to determine whether there had been any tortious conduct at all.

In *Bankers Trust Co. v. Shapira*, [1980] U.K.W.L.R. 1274 (C.A.) (*Bankers Trust*), the plaintiff bank, situated in New York, alleged that two individuals, Shapira and Frei, had defrauded it of \$1 million and that the money had been deposited in a bank in London. The plaintiff bank sought not only to freeze the assets of Shapira and Frei, but also sought disclosure from the London bank of the defendants’ account balances, as well as all documents relating to any accounts in the defendants’ names. The London bank fought the order based on the importance of the confidential relationship between a bank and its customers.

The plaintiff bank prevailed. In a significant expansion of the original *Norwich* principle, Lord Denning, writing for the Court of Appeal, held that the application of a *Norwich* order is not limited to situations where a plaintiff needs a third party to reveal an individual’s identity. Rather, it can be deployed to obtain from third parties extensive information about that individual (*Bankers Trust* at page 357). While the principles of equity cannot run roughshod over legal duties of confidentiality, even a duty of confidentiality will not automatically shield an innocent party from becoming the subject of a *Norwich* order.

Lord Denning held, however, that ordering a bank

to disclose information about its customers should only be done when there are sufficient grounds for thinking that the money in the bank belongs to the plaintiff, and that the plaintiff has a right in equity to follow this money. If the plaintiff’s equity is to be of any avail, the plaintiff must be given access to the bank’s books and documents, for that is the only way of tracing the money or of knowing what has happened to it. In order to give effect to equity, the court will be prepared in a proper case to make an order on the bank for discovery of its books and documents (*Bankers Trust* at pages 357–358).

## Norwich in Canada

On this side of the Atlantic, acceptance of the doctrine has proceeded along a similar trajectory as in the United Kingdom. Although relatively uncommon, *Norwich* relief has been ordered in an increasing number of cases. This type of equitable discovery was first adopted in Canada in *Glaxo Wellcome PLC v. M.N.R.* (1998), 162 D.L.R. (4th) 433 (F.C.A.) (*Glaxo Wellcome*). The facts of the case were in fact very similar to those in *Norwich*.

In granting the relief sought, the Federal Court of Appeal outlined the four requirements to be met before a court would order relief under the *Norwich* principle (*Glaxo Wellcome* at paras. 24–26):

1. The person seeking discovery must have a *bona fide* claim against the alleged wrongdoer.
2. The person seeking discovery must share some sort of relationship with the person from whom discovery is sought.
3. The person from whom discovery is sought must be the only practical source of information available to the person seeking discovery.
4. The court must take into account the public interests both in favor of and against disclosure.

Over time, these requirements have been liberally interpreted to meet the exigencies of various situations. For example, the requirement that there be a *bona fide* claim against the alleged wrongdoer was downplayed by the Ontario Court of Appeal in *Straka v. Humber River Regional Hospital* (2000), 51 O.R. (3d) 1 (C.A.) (*Straka*). In that case, much like in *P. v. T. Ltd.*, the plaintiff was seeking the production of reference letters that had been delivered to the defendant in order to determine whether an action for defamation or for interference with economic relations could be made out.

With regard to the requirement of a *bona fide* claim, Justice Morden, former Associate Chief Justice of Ontario, held that although the appellant did not know whether he had a cause of action against the reference-givers, he was not merely fishing, since he did know that the letters damaged his opportunity for appointment for a new position. He was unaware of what facts could have given rise to these letters, and needed to find out what the letters contained in order to clear his name, possibly through legal proceedings.

Justice Morden further held:

On these facts, I do not think that the appellant should be “non-suited” because his claim is not a *bona fide* one, i.e., that his claim should fail because the threshold requirement of a *bona fide* claim has not been shown. As I have said, we are concerned with an equitable remedy the granting of which involves the exercise of a discretion. The general object is to do justice. Accordingly, I do not think that a rigid view should be taken of the elements of the claim. With this approach in mind, I think that it is reasonable to accept that sufficient *bona fides* has been shown to justify consideration of the case as a whole. The nature and apparent strength of the appellant’s case is a factor to be weighed together with the other relevant factors in arriving at the final determination of the claim (*Straka* at paras. 52–53).

A few months before *Straka* was decided, in *Alberta (Treasury Branches) v. Leahy* (2000), 270 A.R. 1 (Q.B.), aff’d (2002), 303 A.R. 63 (C.A.) (leave to appeal denied [2002] S.C.C.A. No. 235 (QL)) (*Leahy*), Mason J. of the Alberta Court of Queen’s Bench summarized the variety of instances in which *Norwich* relief will be ordered (*Leahy* at para. 106):

- where the information sought is necessary to identify wrongdoers;
- 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
- to trace and preserve assets.

After an extensive review of the authorities, Mason J. set out as follows the factors that the court will consider on an application for *Norwich* relief (*Leahy* at para. 106):

- whether the applicant has provided evidence sufficient to raise a valid, *bona fide* or reasonable claim;
- 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;

- whether the third party is the only practicable source of the information available;
- whether the third party can be indemnified for costs to which the third party may be exposed because of the disclosure, some (authorities) refer to the associated expenses of complying with the orders, while others speak of damages; and
- whether the interests of justice favor the obtaining of the disclosure.

While the test adopted in *Leahy* is similar to the four requirements set out in *Glaxo Wellcome* (with the additional requirement that the person from whom disclosure is sought should be indemnified for costs or damages), the *Leahy* test is more comprehensive and has generally been applied in subsequent cases (see, e.g., *Isofoton S.A. v. Toronto Dominion Bank* (2007), 85 O.R. (3d) 780 at paras. 40–41 (S.C.J.) (*Isofoton*); *Enbridge Gas Distribution Inc. v. Toronto Dominion Bank (c.o.b. TD Canada Trust)*, [2008] O.J. No. 1182 at paras. 5, 7 (S.C.J.) (QL). See also *GEA Group* at para. 73).

Among others, it was adopted in Ontario in *Isofoton*, where the applicant sought and obtained a *Norwich* order compelling TD Canada Trust to provide it with banking records relating to the alleged fraudster for the purposes of: 1) determining what had happened to certain deposit funds, and 2) tracing and preserving those funds (*Isofoton* at para. 23).

The most recent Canadian appellate treatment of the *Norwich* remedy came in *GEA Group*. GEA Group AG (GEA), a German company, was seeking discovery from a Canadian company, Ventra Group Co. (Ventra) in relation to an alleged fraud perpetrated by Flex-N-Gate Corporation (FNG), a corporation incorporated under the laws of Illinois.

GEA and FNG were involved in an arbitration in Germany during which GEA began an application for *Norwich* relief after concluding, based on certain disputed evidence, that FNG was transferring its assets, including FNG’s interest in Ventra, in an effort to become judgment proof and to prevent GEA from collecting its anticipated damages award in the arbitration. (After the respondents filed material to set aside the *Norwich* order granted *ex parte*, GEA alleged another, alternative fraud: see *GEA Group* at para. 31.)

Before the Court of Appeal, the main issue was whether the disclosure sought by GEA was a neces-



sary measure in all the circumstances to permit GEA to pursue its rights against FNG. The Court of Appeal affirmed the tests from *Leahy* and *Glaxo Wellcome*, but focused on the requirement of necessity. It stated that an applicant for a *Norwich* order must show that pre-action discovery is “necessary.”

However, the court did not characterize necessity as constituting a stand-alone prerequisite for the issuance of a *Norwich* order. After reviewing case law on the issue of necessity, the court noted that it was unclear whether the requirement of a showing of necessity formed part of the inquiry as to whether the third party was the only practicable source of information available, or the inquiry as to whether the interests of justice favored disclosure (*GEA Group* at para. 84).

It concluded as follows on this issue:

In my opinion, the precise placement of the necessity requirement in the inventory of factors to be considered on a *Norwich* application is of little moment. The important point is that a *Norwich* order is an equitable, discretionary and flexible remedy. It is also an intrusive and extraordinary remedy that must be exercised with caution. It is therefore incumbent on the applicant for a *Norwich* order to demonstrate that the discovery sought is required to permit a prospective action to proceed, although the firm commitment to commence proceedings is not itself a condition precedent to this form of equitable relief (*GEA Group* at para. 85).

The court also stopped short of casting necessity in narrow terms, whereby an applicant would have to demonstrate that the information being sought was necessary in order to be able to plead his or her case. Rather, the court took a very flexible view of necessity, stating as follows:

While the applicant for *Norwich* relief must establish that the discovery sought is needed for a legitimate objective, this requirement may be satisfied in various ways. The information sought may be needed to obtain the identity of a wrongdoer (as in *Norwich*), to evaluate whether a cause of action exists (as in *P. v. T.*), to plead a known cause of action, to trace assets (as in *Bankers Trust* and *Leahy*), or to preserve evidence or property (as in *Leahy*) (*GEA Group* at para. 91).

Ultimately, the court found that GEA had not met the test for necessity, as it had sufficient information upon which to formulate and plead its case against

FNG. The court emphasized that *Norwich* relief is not made available simply to assist a litigant to perfect its prospective pleading or to obtain further evidence. Nor is it intended as a device to circumvent the normal discovery process. Underlining the exceptional nature of this form of relief, the court held that, in the circumstances of the case, the *Norwich* order could not stand.

There are a number of decisions in the United Kingdom dealing with requests for *Norwich* relief, which, like *GEA Group*, have cross-border aspects or seek information in one jurisdiction for use in another jurisdiction (see, e.g., *Mitsui & Co. Ltd. v. Nexen Petroleum UK Ltd.*, [2005] 3 All E.R. 511 (Ch.), where a Japanese company sought a *Norwich* order against a corporation incorporated in England and Wales with respect to information relating to negotiations between two Canadian companies. See also *Arab Monetary Fund v. Hashim*, [1992] 2 All E.R. 911 (Ch.)).

A recent example is the 2008 decision of the Divisional Court in *R. (on the application of Mohammed) v. Secretary of State for Foreign and Commonwealth Affairs* [2008] E.W.H.C. 2048 (Admin.) (Div. Ct.). There, the court ordered the foreign secretary to provide certain information to the claimant – who was held by the United States government at Guantanamo Bay after having been arrested in Pakistan – to assist in his defense against the charges against him in the United States.

Exhortations for judicial restraint aside, it is clear that the *Norwich* order is a powerful tool that will likely increase in use as decisions such as the one in *GEA Group* help raise the profile of, and give shape to, this remedy. Indeed, within a month of the *GEA Group* decision, another *Norwich* order was issued in Ontario, this time compelling Internet service providers to disclose information necessary to obtain the identity of the sources of allegedly defamatory e-mails and a website posting.

In *York University v. Bell Canada Enterprises*, 2009 CanLII 46447 (Ont. S.C.J.) (*York University*), Justice Strathy of the Ontario Superior Court of Justice granted an order to a Canadian university whose president had been the subject of Internet postings alleging that he had perpetrated “an outrageous fraud” in making academic appointments. The university had earlier obtained an order compelling Google Inc. to disclose the Internet protocol (IP) address associated with the e-mail that was used to make the online posting. The second order was against the Internet service providers in order to identify the individuals associated with the IP

address that Google had provided.

The court applied the test as set out in *Leahy* and *GEA Group*. In addition, the court also considered, under the rubric of balancing the interests of justice, questions of privacy and anonymity in the arena of online publishing. Ultimately, the court granted the order, satisfied that (*York University* at para. 39):

- the plaintiff had established a *prima facie* case of defamation and the claim appeared to be reasonable and made in good faith;
- the defendants, Bell and Rogers, although innocent of any wrongdoing, were implicated in the alleged defamation because their services were used for publication;
- reasonable efforts had been made, with no success, to obtain the information from the only known potential source;
- the costs of compliance were nominal and had been met;
- without the information sought, the plaintiff would be without a remedy;
- the Internet service customer(s) who

published the communications could not have a reasonable expectation of privacy in relation to the use of the Internet for the purpose of publishing defamatory statements; and

- the disclosure of the information was for the limited purpose of enabling the plaintiff to commence litigation, if so advised.

## Conclusion

Given the situations in which it has been deployed to date, the *Norwich* order has proven to be a useful litigation tool to tackle the “known and unknown unknowns” that litigants may face. There will be instances where clients need to locate money or individuals, or need to identify who the individuals are in order to get their lawsuit off the ground. Indeed, there will even be instances where lawyers or clients are unsure of whether a cause of action exists. *Norwich*-style relief is one tool to consider in order to gain clarity in a world where wrongdoers – or potential wrongdoers – could otherwise hide in obscurity.

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