

The Medium

June 5, 2013

Norwich Orders: You Can't Be Anonymous on the Internet After All



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It's hard to start a lawsuit when you don't know who you're suing. What can potential claimants do when they have been wronged but lack the essential information necessary to start a lawsuit?

The answer to this question came in 1974 when the ancient equitable bill of discovery was resurrected in the form of what is now known as the *Norwich* Order.

When granted, *Norwich* Orders compel innocent third parties to disclose information and/or documents a claimant requires before commencing a lawsuit that could not otherwise be obtained. They can assist claimants to advance meritorious claims by preserving assets, identifying potential defendants and uncovering actionable wrongs.

Norwich Orders are a controversial and exceptional equitable remedy. They can burden innocent third parties by forcing them to disclose information or documents and force disclosure of confidential information. These are effects courts will avoid unless a claimant can show why the disclosure is *just* and *necessary* in the circumstances.

The *Norwich* Order takes its name from the 1974 British case, *Norwich Pharmacal Co. v. Commissioners of Customs and Excise*. The Court granted an Order which compelled the third party customs authority to disclose the identity of the unknown individual who had been smuggling the claimant's patented drug across the border without permission. In granting the Order, the court stated: "*a person who gets mixed up in the tortious acts of others so as to facilitate their wrongdoing 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.*"

Canadian courts first adopted the *Norwich* Order in the 1998 decision, *Glaxo Wellcome PLC v. Minister of National Revenue*.

Two years later, the Alberta Court of Queen's Bench approved *Norwich* Orders in the case *Alberta Treasury Branches v. Leahy*. The Court considered an application by the claimant, ATB, to obtain disclosure of financial documents belonging to a former ATB official whom ATB suspected of corruption.

Before granting the *Norwich* Order, the Court considered the following five factors, which have since been adopted in numerous subsequent decisions:

- Whether the claimant has provided sufficient evidence to raise a valid claim;
- Whether the claimant has shown that the third party was somehow involved in the wrong;
- Whether that third party is the only practicable source of information;
- Whether that third party could be indemnified should any harm come of the order, if granted; and
- Whether the interests of justice favor the disclosure.

Norwich Orders are increasingly being used where a claimant is defamed online by an anonymous author. In such cases, the administrators of the websites or Internet Service Providers are the innocent third parties who have the information the claimant seeks and could not otherwise obtain – the identity of the wrongdoer.

In these situations, courts must strike an appropriate balance between freedom of expression and privacy interests of anonymous defamers on the one hand and the reputational interests of the claimants on the other.

In the 2009 Ontario decision, *York University v. Bell Canada Enterprises*, the claimant sought a *Norwich* Order to compel the Internet Service Providers to disclose the identities of anonymous authors of defamatory emails and web postings.

After considering the *Leahy* test, the Court decided the claimant's equitable right to obtain the information outweighed all other considerations, including the author's right to privacy. The Court reasoned that the author could not have a reasonable expectation to privacy in relation to the use of the Internet for the purpose of publishing defamatory statements.

In August 2012, our firm successfully obtained *Norwich* Orders after our client was anonymously defamed on several websites and blogs, including Facebook. The Orders, among other things, compelled Facebook to disclose the identities of the individuals responsible for administering the defamatory Facebook Pages.

While only rarely invoked in the past, *Norwich* Orders are gaining increased attention in Canada and worldwide, as a tool used for a number of purposes including identifying individuals involved in online defamation or other tortious or fraudulent activity.

Contact one of our professionals in our experienced [Intellectual Property & Technology Group](#) for more information on how *Norwich* Orders may impact you.

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