



Norwich orders: Recent developments in the right to pre-action discovery in Ontario

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Two recent Ontario decisions, *GEA Group AG v. Ventura Group Co.*¹ and *York University v. Bell Canada Enterprises and Rogers Communications Inc.*² have clarified the circumstances under which courts should grant the extraordinary equitable remedy of pre-action discovery, commonly known as a Norwich order.

At issue before the Ontario Court of Appeal in *GEA Group* was the availability of a Norwich order compelling the disclosure and production of documents related to the transfer of interests in a specific corporation, which GEA alleged had been fraudulently conveyed in an attempt to render the appellant, FNG, judgment proof. The lower court found that pre-action discovery was necessary for GEA to plead its case and granted the order.

FNG appealed and sought to have the Norwich order set aside, claiming that it was not necessary and that GEA was perfectly capable of pleading its case against FNG and any other alleged wrongdoers without first examining FNG and its documents. The Court of Appeal agreed, and in doing so, set out the factors to be considered in whether to grant a Norwich Order:

- 1) Whether the applicant has provided evidence sufficient to raise a valid, *bona fide* or reasonable claim;
- 2) 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;
- 3) Whether the third party is the only practicable source of the information available;

4) Whether the third party can be indemnified for costs to which the third party may be exposed because of the disclosure; and

5) Whether the interests of justice favour obtaining the disclosure.

In holding that GEA had failed to satisfy this test, the Court of Appeal explained that a Norwich order is "...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."

Soon after the decision in *GEA*, the Ontario Superior Court had occasion to further interpret the Norwich order test as laid out in *GEA* – this time in a case of internet defamation. In *York University v. Bell Canada Enterprises and Rogers Communications*, York University successfully applied for an order compelling two Internet service providers to disclose information it needed to identify the anonymous author(s) of a series of emails impugning the integrity of York's President.

Mr. Justice Strathy concluded that the *GEA* test was met and ordered the identities of the persons holding the relevant email accounts to be disclosed by the relevant email service providers. In doing so, he provided further guidance when the interests of justice will warrant such an order being granted:

"The Court is required to balance the benefit to the applicant of revealing the desired information against the prejudice to the alleged wrongdoer in releasing the information. At this stage, the Court may consider the nature of the information sought,

the degree of confidentiality accorded to the information by the party against whom the order is sought, and the degree to which the requested order curtails the use to which the information can be put.”

may end up becoming much more common as victims of defamatory emails or internet postings seek to pursue authors who would otherwise remain anonymous.

When viewed in conjunction, the decisions in *GEA* and *York University* not only provide instruction as to when Norwich orders can be issued, but they also demonstrate the circumstances in which such orders may be valuable to a wronged party otherwise lacking the information needed to commence litigation. In particular, Norwich orders



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¹ *GEA Group AG v. Ventura Group Co.*, 2009 ONCA 619.

² *York University v. Bell Canada Enterprises and Rogers Communications Inc.*, 2009 CanLII 46447 (Ont. S.C.).