

FINANCIAL SERVICES LITIGATION BULLETIN

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NORWICH ORDERS ARRIVE IN ONTARIO

FINANCIAL INSTITUTIONS CALLED UPON TO ASSIST IN FIGHTING ALLEGED CLIENT FRAUD

When a bank's customer is suspected of defrauding someone, a court may compel the bank to disclose the customer's confidential financial records to the victim. In most circumstances, the suspected wrongdoer will not be informed that its financial information has been revealed. This type of order is known as a "Norwich order". The Superior Court in *Isofoton S.A. v. Toronto Dominion Bank* recently approved the use of such orders against financial institutions in Ontario.

Norwich orders are third party pre-action discovery mechanisms. They allow victims of alleged fraud to access potentially relevant information from third parties, such as financial institutions. Norwich orders have been granted to identify the wrongdoer, locate and preserve evidence, or trace and preserve assets. The underlying fundamental principal behind such orders is that an innocent third party who unknowingly assisted the wrongful action (i.e. a financial institution involved in the processing of an allegedly fraudulent transaction) has an equitable duty to assist the applicant in attaining his or her legal rights. Courts have granted Norwich relief where the applicant believes it has been defrauded and seeks access to bank records to prove the fraud and recover the wrongfully-obtained property.

Applications for Norwich orders can be made *ex parte* (without notice) and are often granted in conjunction with confidentiality orders, Mareva injunctions (to identify and locate assets), Anton Pillar orders (to identify and locate evidence for preservation) and Bankers' Trust orders (to trace and preserve assets in which the wronged party has a proprietary interest). In cases where Norwich orders are granted in order to locate misappropriated funds in a bank account, it is likely that the order will be granted in closed court, with sealed records. Such secrecy is essential in order to preserve the assets because if the wrongdoer finds out about the Norwich order, it can easily cause the money to disappear, rendering the order useless.

The Court in *Isofoton S.A. v. Toronto Dominion Bank*, outlined five elements that a court should consider before granting a Norwich order.

- First, there should be evidence of a valid, *bona fide* claim or reasonable claim. The standard required is that the claim is not frivolous or vexatious.
- Second, the applicant must establish that the third party from whom the information is sought is somehow involved in the wrongful act, even innocently. The Court confirmed that a bank in receipt of allegedly fraudulent funds will be considered an innocently-involved third party.
- Third, the third party must be the only practicable source of information. The victim is not required to approach the alleged wrongdoer for the information. Often, financial institutions are the only real source of the information required to prove a claim and locate fraudulently transferred assets.
- Fourth, the victim is required to indemnify the third party for any costs associated with complying with the order. Notably, the Court in *Isofoton* rejected the argument that an undertaking as to damages was required, stating that it was difficult to envision a situation in which a financial institution that is subject to a Norwich order would be subject to liability and a damages award for disclosing financial information. The Court further advised that should a concern materialize on the facts of a specific case, the financial institution has the added protection of being able to seek legal advice and return to court for further direction, if necessary.

- Fifth, the court will consider all the respective interests and weigh the benefits of revealing the information against the interest in maintaining confidentiality. There is serious prejudice to the alleged wrongdoer in releasing their confidential financial records without their knowledge or consent. Further, once the information has been released it is difficult to undo any harm that occurred. However, courts are reluctant to protect the rights of wrongdoers if maintaining confidentiality in essence protects fraudulent acts.

In *Isofoton*, the Court found that the alleged wrongdoer's right to privacy did not outweigh the victim's right to access the information required to pursue its legal remedies. The Court based its decision on the following three reasons:

- Confidentiality in bank records is not absolute, as the records are subject to disclosure by court order in a variety of circumstances.
- The use that could be made of the information ordered disclosed was restricted by the terms of the order.
- The wrongdoer, to the extent that it acted fraudulently, did not have a right to the protection of confidentiality normally afforded to bank records.

Norwich orders offer financial institutions a means of meeting their obligations to clients to protect confidential information in circumstances in which substantiated suspicions have been raised regarding their client's complicity in fraud. In the past, financial institutions have been held liable for breaching obligations owed to their clients in assisting other financial institutions or wronged parties in instances of alleged fraud. The availability of Norwich orders removes the burden from financial institutions of determining whether, or how, to respond to allegations of fraud made against one of their clients. Upon being alerted of allegations of fraud involving one of its clients, a financial institution may reasonably take the position that it will not disclose confidential information or take other steps in response to such allegations absent a Norwich order compelling it to do so. It will be up to the alleged victim of fraud to establish that a Norwich order is required and for the court to determine whether such an order ought to be granted.

Norwich orders allow financial institutions to assist in the fight against fraud while protecting their clients' legitimate expectations regarding confidential information. As such, they are a welcome addition to Ontario's legal landscape.

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