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Norwich orders recognized by the Court of Appeal of Québec - Financial institutions subject to duty to lend assistance in potential fraud files

December 1, 2013

On June 12, 2013, the Quebec Court of Appeal rendered a decision in the case of *Fers et Métaux Américains S.E.C. et als* v. *Picard et als*[1] ("*Fers et Métaux Américains S.E.C.*") confirming that the courts can issue *Norwich-type* orders in Quebec. This decision is consistent with the judgment rendered by the Quebec Court of Appeal, in 2002, in *Raymond Chabot SST inc.* v. *Groupe AST (1993) inc.*,[2] which recognized that *Anton Piller*-type orders could be validly issued in Quebec.

In the *Fers et Métaux Américains S.E.C.* decision, the Court of Appeal issued *Norwich* orders authorizing several financial institutions to disclose confidential banking information, without the knowledge of the clients concerned, to enable the applicant to find and trace funds alleged to have been fraudulently misappropriated. Both the order and the entire court file remain sealed until December 6, 2013 to ensure the confidentiality of the enforcement of the order.

In this decision, the Court of Appeal of Québec adopted the criteria for the issuance of such orders developed in 2000 by the Court of Queen's Bench of Alberta,[3] which were confirmed by the Court of Appeal of Alberta,[4] and cited with approval by the Court of Appeal for Ontario.[5]

THERE ARE THREE KEY POINTS TO REMEMBER:

1. The criteria developed in the common law jurisdictions to justify the issuance of a Norwich order are applicable in Quebec;
2. The conclusions sought in an application for a *Norwich* order must be carefully drafted and not go beyond what is necessary to achieve the legitimate objective sought by the application;
3. Where the goal of the application for a *Norwich* order is to obtain information and documents from a third party, the conclusions sought should request the appointment of a firm of outside experts to receive and assess the information and documents obtained as a result of the execution of the order, and require the outside firm to prepare and submit a report to the court within a specified time.

OVERVIEW OF THE ORIGIN OF *NORWICH* ORDERS

The *Norwich* order is an order issued by a court authorizing a person who is not a party to an existing or potential litigation to disclose the identity of an unknown party, or to communicate information or documents, in order to enable the applicant to verify the existence of a cause of action or to trace and secure evidence or assets.

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Similarly to the *Anton Piller* order (requiring the defendant to permit the plaintiff to conduct a search of its premises and secure evidence in a private dispute) and the *Mareva* injunction (prohibiting the disposition of assets during a legal proceeding), the *Norwich* order was originally developed in English law for the purpose of promoting the effective conduct of a proceeding that was already instituted or envisaged.

The name comes from a decision rendered by the House of Lords in 1974 in the case of *Norwich Pharmacal Co.* v. *Commissioners of Customs and Excise*.[6] In that case, the House of Lords recognized Norwich's right to obtain the disclosure of the identity of a person - who had imported a chemical compound that was patented by Norwich, without its knowledge - from a third party, i.e. the *Commissioners* of Customs and Excise. The purpose of the disclosure of the importer's identity by the Customs and Excise Commissioners was to allow Norwich to institute legal proceedings against the offending importer.

A *Norwich* order was first issued in Canada, in 1998, by the Federal Court of Appeal in the case of *Glaxo Wellcome PLC* v. *M.N.R.*[7] The facts in that case were similar to those in the *Norwich* case. The Federal Court of Appeal ordered the Minister of National Revenue to disclose the identity of importers who had allegedly infringed Glaxo's patents.

In 2000, in the case of *Alberta (Treasury Branches)* v. *Leahy*,[8] after conducting an extensive review of the English and Canadian decisions dealing with *Norwich* orders, the Court of Queen's Bench of Alberta summarized the situations which can justify the issuance of such an order, and the five criteria which the court must consider (hereinafter the "*Norwich Test*"), as follows:

«[106] The foregoing review demonstrates that:

a. *Norwich*-type relief has been granted in varied situations:

(i) Where the information sought is necessary to identify wrongdoers;
(ii) 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
(iii) To trace and preserve assets.

b. The court will consider the following factors on an application for ***Norwich*** relief:

(i) Whether the applicant has provided evidence sufficient to raise a valid, bona fide or reasonable claim;
(ii) 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;
(iii) Whether the third party is the only practicable source of the information available;
(iv) Whether the third party can be indemnified for costs to which the third party may be exposed because of the disclosure, some refer to associated expenses of complying with the orders, while others speak of damages; and
(v) Whether the interests of justice favour the obtaining of the disclosure. »

These were the same criteria considered by the Court of Appeal for Ontario in 2009 in the case of *GEA Group AG.* v. *Flex-N-Gate Corporation*,[9] and which have now also been adopted by the Court of Appeal of Québec.[10]

NORWICH ORDERS IN QUEBEC

The *Civil Code of Québec* contains no provisions dealing either with applications for *Norwich*-type

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orders, *Anton Piller* orders or *Mareva* injunctions. Instead, one must turn to the provisions of the *Code of Civil Procedure* (particularly articles 20 and 46), which grant general powers to the court, as the basis for incorporating these recourses into our substantive law.[11] The *Norwich* order is an extraordinary recourse that is heard *ex parte* (without notice), and the conditions for the issuance of such an order are therefore strict.[12] It must not be used to circumvent the rules of procedure already provided for in the *Code of Civil* Procedure.[13]

Norwich orders usually contain conclusions requiring the court file to be sealed and providing for the confidentiality of the order itself for a specified time period. Because of the confidentiality surrounding this type of recourse, it is difficult to give an exhaustive review of the orders issued by the Superior Court of Québec in such matters over the past few years.[14]

Since the criteria for the issuance of a *Norwich* order adopted by the Court of Appeal of Québec in *Fers et Métaux Américains S.E.C*[15] are the same as those accepted by the common law provinces, the decisions rendered in those jurisdictions are relevant and useful to us in providing a framework for and defining the scope of the orders which can be issued in Quebec.

For example, the Court of Appeal for Ontario recently heard a case involving an application for a *Norwich* order which sought to obtain the disclosure of the identity of the sources of a journalist for the *Globe and Mail*.[16] In that case, the Court of Appeal for Ontario had to assess the criteria for the issuance of a *Norwich* order in the context of a journalist's privilege with respect to the confidentiality of his sources, as pleaded by the respondent journalist.[17]

Firstly, the Court decided, under the first criterion of the *Norwich* Test, i.e. the existence of a reasonable claim, that it was not necessary to require that there be a " prima facie case" in situations in which the journalist-source privilege is invoked.[18]

Secondly, the Court held that the actual assessment of the journalist-source privilege must take place under the fifth criterion of the *Norwich* Test, i.e. whether the interests of justice favour the disclosure of the information. At this stage, this privilege must be analyzed according to the criteria under the *Wigmore* test, which therefore intersects with the *Norwich* Test. The Court stated that the respondent journalist had the burden of proving that the *Wigmore* test had been met, while the appellant had to show that the interests of justice favour the disclosure of the information under the fifth criterion of the *Norwich* Test. The Court noted that where it is shown that the *Wigmore* test is satisfied, the disclosure of the journalist's sources will probably not be in the interests of justice, on the other hand, if the *Wigmore* test is not satisfied, it probably will be in the interests of justice to order disclosure.[19]

In the event a Quebec court is seized of an application for a *Norwich* order seeking the disclosure of journalistic sources, it will be relevant to consider the decision of the Court of Appeal for Ontario in *1654776 Ontario Limited* in deciding whether a *Norwich-type* order can be issued in Quebec in a similar context.

In addition, since *Norwich* orders are similar in nature to *Anton Piller* orders, one would be well advised to apply the guidelines issued by the Supreme Court of Canada in *Celanese Canada* v. *Murray Demolition*[20] ("*Celanese*") concerning *Anton Piller* orders, with the necessary adjustments, particularly where the *Norwich* order is required to obtain the disclosure of information or documents to enable the applicant to verify the existence of a cause of action, or to trace and secure evidence or assets.

In fact, in the *Fers et Métaux Américains S.E.C.* case,[21] the Court of Appeal of Québec based itself

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on the guidelines laid down by the Supreme Court of Canada in *Celanese*[22] to order the appellants to file either a personal report, or a report prepared by a firm of forensic accountants, in the Superior Court record, within a specified time period, concerning the information obtained from the financial institutions.

Finally, with respect to *Anton Piller* orders, the Court of Appeal of Québec[23] recently noted once again that, at the stage of issuing the order, the judge can only base himself on the allegations and exhibits filed in support of the application. Therefore, the motions judge must necessarily rely on accurate and full disclosure by the deponents as well as the professionalism of the lawyers involved in the order.[24] One would likewise be well advised to follow the same approach in proceedings for a *Norwich* order.

CONCLUSION

The *Norwich* order is a recourse that can be highly effective, particularly in files involving fraud and misappropriation of funds, or when it is necessary to identify an unknown wrongdoer.

In 2002, the Court of Appeal of Québec recognized the application of the principles relating to *Anton Piller* orders under Quebec law.[25] Over the past ten years, there have been significant developments in the case law on these types of orders, which have been subject to strict guidelines since the decision by the Supreme Court of Canada in *Celanese*.[26] Those guidelines served as the basis for the criteria applicable to *Norwich* orders.

Since this is an extraordinary recourse which is brought *ex parte*, and which, furthermore, seeks the issuance of an order against parties who are not involved in the dispute, the applicant must draft the allegations in support of its application with candor. The order sought should:

1. Be carefully drafted and specifically identify the information and documents to be disclosed as well as the time period covered and, where necessary, provide the applicable guarantees, particularly with respect to the treatment of privileged or confidential documents or information;
2. Be clearly defined in duration and, where relevant, order the court record to be sealed as well as the necessary measures to provide for the confidentiality thereof for a defined and sufficient period of time to ensure the effective execution of the order being issued;
3. Provide, where relevant, for the appointment of a firm of outside experts to collect the documents and information received and prepare a report for the court;
4. Specify that the use of the information and documents disclosed is limited to the legitimate objective of the application (for example, locating and tracking the movement of funds) and that they can only be used in legal proceedings instituted to achieve this objective;
5. Provide for adequate compensation to the third parties for the costs incurred by them in gathering and disclosing the information and documents in fulfillment of the order.

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[1] *Fers et Métaux Américains S.E.C. et al* c. *Picard et al*, C.A.Q. 200-09-007991-133, June 12, 2013.

[2] *Raymond Chabot SST inc*. v. *Groupe AST (1993) inc.*, [2002] R.J.Q. 2715 (C.A.).

[3] *Alberta (Treasury Branches)* v. *Leahy*, 2000 ABQB 575 (CanLII).

[4] *Alberta (Treasury Branches)* v. *Leahy*, 2002 ABCA 101 (CanLII), leave to appeal to the Supreme Court of Canada denied.

[5] *GEA Group AG.* v. *Flex-N-Gate Corporation*, 2009 ONCA 619 (CanLII).

[6] *Norwich Pharmacal Co*. v. *Commissioners of Customs and Excise* [1974] A.C. 133.

[7] *Glaxo Wellcome PLC* v. *M.N.R*. [1998] 4 C.F. 439, leave to appeal to the Supreme Court of Canada denied.

[8] *Alberta (Treasury Branches)* v. *Leahy, supra*, note 3, para. [106].

[9] *GEA Group AG.* v. *Flex-N-Gate Corporation, supra*, note 5.

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[10] *Fers et Métaux Américains S.E.C. et al* c. *Picard et al, supra*, note 1.

[11] Daniel Jutras, " *Culture et droit processuel : le cas du Québec* ", in the *McGill Law Journal/Revue de droit de McGill*, 2009, Vol. 54, 2009, page 273, at pages 288 to 292; see also *Lac d'amiante du Québec ltée* v. *2858-0702 Québec inc*. [2001] 2 S.C.R. 743, paras. 35, 37 and 39; *Raymond Chabot SST inc*. c. *Groupe AST (1993) inc., supra*, note 2; articles 20 and 46 of the Code of Civil Procedure.

[12] *Alberta (Treasury Branches)* v. *Leahy, supra*, note 3, para. [106].

[13] *Lac d'amiante du Québec ltée* c. *2858-0702 Québec inc., supra*, note 11.

[14] See, in particular, *Gestion d'hôtel Sherbrooke Ltée (Proposition de)* 2011 QCCS 7232 (CanLII), *Corbeil* c. *Caisse Desjardins De Lorimier*, 2011 QCCS 6867 (CanLII), *GE Canada Equipment Financing G.P.* c. *T.D. Canada Trust*, 2010 QCCS 7128 (CanLII), *PricewaterhouseCoopers Inc.* v. *Bank of Montreal*, S.C. Montreal, no. 500-17-063626-116, *Empire, compagnie d'assurance-vie* v. *Thibault, S.C. Montreal, 500-17-029064-063, 500-17-030305-067 and 500-17-029680-066*.

[15] *Fers et Métaux Américains S.E.C. et al* c. *Picard et al, supra*, note 1.

[16] *1654776 Ontario Limited* v. *Stewart*, 2013 ONCA 184 (CanLII), leave to appeal to the Supreme Court of Canada denied on September 19, 2013.

[17] On the journalistic sources privilege and the Wigmore test, see *R*. v. *National Post*, [2010] 1 S.C.R. 477 and *Globe and Mail* v. *Canada (A.G.)*, [2010] 2 S.C.R. 593.

[18] *1654776 Ontario Limited* v. *Stewart, supra*, note 16, see, in particular, paras. [49] and [75].

[19] *1654776 Ontario Limited* v. *Stewart, supra*, note 16, para. [78].

[20] *Celanese Canada* v. *Murray Demolition*, [2006] 2 S.C.R. 189.

[21] *Fers et Métaux Américains S.E.C. et al* c. *Picard et al, supra*, note 1.

[22] *Celanese Canada* c. *Murray Demolition, supra*, note 20.

[23] *IMS Health Canada Inc*. c. *Th!nk Business Insights Ltd.*, 2013 QCCA 1303 (CanLII), application for leave to appeal to the Supreme Court of Canada pending.

[24] *Celanese Canada* c. *Murray Demolition, supra*, note 20, para. [36].

[25] *Raymond Chabot SST inc*. c. *Groupe AST (1993) inc., supra*, note 2.

[26] *Celanese Canada* c. *Murray Demolition, supra*, note 20.

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