

NOTRE RESEAU DE CORRESPONDANTS ORGANIQUES LEXING VOUS INFORME

Norwich Orders – Quebec Courts Unmask “Anonymous” Online Offenders



- The Quebec Court of Appeal recognized that Norwich orders are indeed within the jurisdiction of Quebec courts. Civil law practitioners have taken notice and what was once a rarely sought remedy has become a powerful tool in information age litigation.
- Victims of anonymous online fraud, hacking or defamation often lack critical information needed to initiate a lawsuit, not the least of which being the identity of the perpetrator.
- Where appropriate, the Norwich order – an extraordinary remedy compelling the pre-action discovery of a third party – allows claimants to obtain such information before seeking further redress.
- These orders are increasingly being sought to force third parties, such as internet service providers and website administrators, to disclose the identities of fraudsters, hackers and cyber-bullies operating under the guise of online anonymity.
- Norwich orders originate from the 1974 U.K. decision in *Norwich Pharmacal Co. v. Commissioners of Customs and Excise* where the House of Lords ordered customs officials to disclose the identity of individuals who had been anonymously importing patent-infringing substances. In Canada, Norwich orders were first recognized in 1998 by the Federal Court of Appeal in a similar patent infringement context.
- The applicable test for the issuance of a Norwich order was first articulated by appellate courts in Alberta and Ontario. Quebec trial courts then followed suit in a handful of reported decisions before the Quebec Court of Appeal ultimately adopted the following iteration of the test in 2013 in *Pollard*.
- A Norwich order's effectiveness and enforceability often depend upon proceedings being confidential so as to prevent anonymous wrongdoers with knowledge of the court application from further concealing their identity or destroying key evidence. Norwich order claimants will generally petition the court to issue a sealing order.
- While the confidential nature of the Norwich order has yielded few reported precedents from Quebec courts, litigants have increasingly turned to this remedy for its overall effectiveness. Indeed, the Superior Court of Quebec has recognized that Norwich orders can favour the principle of proportionality by allowing for simple and cost-effective discovery, which can prevent further complex, costly and potentially futile proceedings.
- In the online context, the Ontario Superior Court of Justice issued a Norwich order in *York University v. Bell Canada Enterprises* to compel certain internet service providers to disclose the identities of anonymous authors of defamatory material.
- Claimants should bear in mind that the Norwich order is a discretionary and equitable remedy. Given that it generally proceeds *ex parte*, an application for such order must always be brought with full and frank disclosure and the relief sought should not exceed its legitimate objective. Ultimately, courts will seek to balance a defendant's right to privacy and freedom of expression with a claimant's right to obtain redress.

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