



Fast Relief: Pre-Trial Remedies (Part 1 - Norwich Orders)

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The recent decision of Mr. Justice Spence in *Isofoton S.A. v. The Toronto-Dominion Bank* should be of interest to our institutional, particularly banking, clients and generally any clients who suspect they may have been the victim of fraud. In that case, Justice Spence granted an order in favour of the applicant to obtain the banking records of a party suspected of defrauding the applicant of over \$3 million. The unique nature of the disclosure order was that it was directed not to the alleged fraudster, but to the fraudster's bank, in this case TD. The disclosure order was made to assist the applicant in investigating the fraud and determining what happened to its funds.

The applicant, Isofoton, contracted with AES for the purchase of silicon. As part of the contract, Isofoton paid AES a deposit of approximately \$3.2 million. The deposit was wired to AES's bank account with TD. Subsequent to the payment of the deposit, AES failed to deliver the product as promised and began making excuses for its failure to honour the contract, including blaming its supplier. Repeated communications between Isofoton and AES and AES' alleged efforts to obtain the product led nowhere. Isofoton demanded the return of its money, and AES ceased responding to Isofoton's communications.

Isofoton then hired a private investigator, who determined that AES did not even exist as a legal entity, and that its office was a residential address.

Armed with these facts, Isofoton sought a court order requiring TD to disclose AES's banking records in order to show what happened to Isofoton's \$3.2 million deposit. This would assist Isofoton in its efforts to establish its claim against AES and locate and preserve the funds. The application before the court was brought without notice to either TD or AES.

Justice Spence granted the order requested.

In doing so, he set out the facts a party must establish in order to obtain such court relief. The factors are:

- whether the applicant has provided evidence sufficient to raise a valid and reasonable claim;
- whether the applicant has established a relationship with the third party (TD) from whom the information is sought such that it establishes that the third party is somehow involved in the acts complained of;

- whether the third party is the only practicable source of the information available;
- whether the third party can be indemnified for costs to which the third party may be exposed because of the disclosure; and
- whether the interests of justice favour the obtaining of disclosure.

Justice Spence found that Isofoton met all of these factors. Based on the evidence, it appeared Isofoton had been defrauded, or at the very least, that its funds had been converted. Although TD was not involved in the fraud in the sense of actively and knowingly participating, it was involved in receiving the funds on behalf of AES and to the extent funds left that account, in disbursing them from AES's account. TD was the only practical source of the information (in the circumstances it was not likely AES would comply with a request for the information on a timely basis!). Isofoton agreed to pay TD's reasonable costs of gathering and disclosing the information.

Accordingly, in the interest of justice, Justice Spence granted the order sought, which is called a Norwich order, named after the first case in which such an order was made.

Our institutional clients, particularly banks, ought to be aware of this decision. If and when they are faced with a Norwich order, they should immediately retain counsel to assist them in complying. They are entitled to their costs, and if a provision to that effect is missing from the order or there is a dispute over the amount of costs claimed by the party complying with the order, counsel can assist in resolving this issue with opposing counsel or seeking the court's directions on the issue of costs. As well, counsel can assist the client in determining if there is any possibility that the institution's customer will commence a claim against it for complying with a court order and if such a concern exists, can seek the court's directions prior to compliance.

Others should be aware that a Norwich order can be a powerful and useful tool to assist in information gathering prior to commencing costly and lengthy legal proceedings. Together with Anton Piller orders (civil search and seizure orders) and Mareva injunctions (orders freezing assets prior to trial), a Norwich order is a very useful pre-trial remedy available to parties who believe they have been defrauded. It is important to consult with counsel at the very earliest stages of the discovery of a potential fraud, as counsel can be very useful in assisting in the investigative process, both in terms of getting information and ensuring that such information is properly obtained so that it will be admissible in court.

A second part of this series of articles will focus on Anton Piller orders and their effectiveness as investigative tools and to preserve evidence. The last in the series will deal with Mareva injunctions, which preserve assets pending trial so that a plaintiff can later collect on any judgment obtained. ■