

2019 ABQB 87  
Alberta Court of Queen's Bench

AARC Society v. Sparks, 2019 ABQB 87

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**AARC Society (Alberta Adolescent Recovery Centre) (Applicant) and Amy Sparks, Brian Fish, The CBC, Gillian Findlay Tammi Brown and Greg Elliott (Respondents)**

Nancy F. Dilts J.

Heard: January 17, 2019; January 28, 2019

Judgment: January 28, 2019

Docket: Calgary 1101-06250

Counsel: Grant N. Stapon, Q.C., Cathy Lane-Goodfellow, Q.C., for Plaintiff, AARC Society  
Matthew A. Woodley, for Defendants, CBC and Gillian Findlay  
Michael MacIsaac, for Defendant, Brian Fish  
Dale Ellert, for Defendant, Tammi Brown  
Erika Norheim, for Defendant, Amy Spark  
Greg Elliott, for himself

Subject: Civil Practice and Procedure

*Nancy F. Dilts J.:*

**Introduction**

- 1 The Plaintiff AARC filed an application seeking an order:
  - (a) requiring Brown and Elliott, non-parties to the action, to attend questioning to disclose what AARC records they reviewed, who they received them from and what has been done with those records;
  - (b) prohibiting and restraining Brown and Elliott from using any confidential and proprietary information belonging to AARC;
  - (c) requiring Brown and Elliott to return all property belonging to AARC, including all confidential and/or proprietary information or copies thereof, and any devices upon which such information is copied or stored that is in their possession or control; and
  - (d) requiring Brown and Elliott to permanently remove all online references or postings referencing the confidential and/or proprietary information belonging to AARC.
- 2 In argument before me, counsel for AARC narrowed its request and advised that AARC seeks a Norwich order to require Elliott and Brown to properly inform themselves and attend at questioning by the Plaintiff.

**Position of the Applicant**

- 3 This litigation was commenced in 2011 and is scheduled for 9 days of trial commencing April 2019.

4 AARC alleges that 35,000 — 40,000 pages of its confidential and proprietary information was wrongly accessed, taken and disseminated by the Defendants (the “AARC Confidential Information”).

5 It further alleges that Elliott and Brown are in possession of some of the AARC Confidential Information as evidenced by postings made by them on public online sites and attached as Exhibits to the Affidavit of James Ironside sworn January 3, 2019.

6 AARC argues that as (to the best of its knowledge) the Defendants are the only people outside of AARC that have the AARC Confidential Information, it must follow that Elliott and Brown received the AARC Confidential Information from one or more of the Defendants.

7 AARC says that as part of the Action against the Defendants, it needs to determine from Elliott and Brown how they received the AARC Confidential Information and what they have done with it. Its interest in doing so, it argues, is to trace and preserve its records and to challenge the credibility of the Defendants, each of who deny providing the AARC Confidential Information to Elliott and Brown.

8 AARC argues that the interests of justice favour that the Court grant a Norwich order. As Elliott and Brown are hostile witnesses, it says it is unrealistic to expect that either would voluntarily cooperate with inquiries from it as to how they came to be in possession of the AARC Confidential Information.

9 Counsel for AARC says that while it may have been possible to bring this application earlier in the litigation, the fact that it brings it now should not raise concerns as the Defendants have produced new information as recently as this month and questioning is not yet completed. It argues that it does not lie in the Defendants’ mouths to argue prejudice arising from the late timing of this application.

#### **Position of the Respondents Sparks, Fish, CBC and Findlay**

10 The Respondents Sparks, Fish, CBC and Finlay were effectively of one voice in resisting the application of AARC. They argue that as a Norwich order is an equitable remedy, their interests must also factor into the Court’s consideration.

11 Their argument against the Norwich order is threefold: first, they say that the issue of Brown and Elliott’s access to and use of the AARC Confidential Information is irrelevant to the proceedings against the Defendants.

12 Second, they say AARC is late in making this application. They say AARC had knowledge much earlier than now of Elliott and Brown’s use of the AARC Confidential Information. To raise this issue now puts at risk the parties’ readiness for trial.

13 Third, they say a Norwich order is not intended to boost the trial process. They say that if the Plaintiff wants to challenge the credibility of the Defendants, it can do so at trial by subpoenaing witnesses and through cross examination. Furthermore, they say that as there is no property in a witness, counsel for AARC could try to obtain the information it seeks in other ways.

#### **Position of the Respondents Brown and Elliott**

14 To avoid any contravention of the implied undertaking rule, counsel for AARC did not provide the Ironside Affidavit to the Respondents Brown and Elliott prior to this matter being argued in chambers on January 17, 2019.

15 When the application was heard, all counsel waived any concern that sharing the Ironside Affidavit would breach the implied undertaking rule. Counsel for AARC therefore agreed to provide Brown and Elliott with a copy of the Affidavit.

16 Although invited to make submissions at the hearing on January 17, 2019, as neither Elliott nor counsel for

Brown had the benefit of reviewing the Ironside Affidavit, they were invited to make additional submissions this morning.

## **Evidence**

17 The evidence in the Ironside Affidavit establishes the following:

- AARC has tried to determine how Elliott and Brown came into possession of the AARC Confidential Information since as early as January 2012.
- By September 5, 2018, AARC was asserting that Fish provided certain of the AARC Confidential Information to Elliott.
- Each Fish, Sparks and Finlay stated under oath that he/she did not provide the AARC Confidential Information to Elliott or Brown. The Fish denial is recorded in questioning that took place on November 12, 2015 and November 20, 2018. The Sparks denial is recorded in questioning that took place on January 5, 2012 and November 30, 2018. The Finlay denial is recorded in questioning that took place on July 10, 2017.
- Brown was in contact with the CBC in March 2009.
- In September 2011 and January 2017, Brown appears to have published on public websites a document that forms part of the AARC Confidential Information.
- Elliott published information that appears in the AARC Confidential Information in September 2011 and June and July 2012. Recent online activity involving Elliott in 2018 includes what appears to be the publication of certain of the AARC Confidential Information and online discussions involving the Defendants Fish and Sparks.

18 By a review of the online dialogue included in the Ironside Affidavit, it is reasonable to conclude that Elliott and Brown are highly unlikely to voluntarily cooperate with inquiries from AARC or its counsel. In reaching this conclusion, I refer to the materials at Exhibits 6, 7, 8, 9, 11 and 12 of the Ironside Affidavit.

## **The Issue**

19 The issue then is whether in these circumstances, AARC should be entitled to question Elliott and Brown under a Norwich order.

## **The Law**

20 A Norwich order is a form of pre-trial discovery grounded in equity: [A.B. v C.D., 2008 ABCA 51](#).

21 To obtain a Norwich order, the applicant must demonstrate that there is a legitimate purpose for the discovery: [GEA Group AG v Ventra Group Co., 2009 ONCA 619 para 91](#). A legitimate purpose for the discovery has included i) the identification of a wrongdoer; ii) the evaluation of whether a cause of action exists; iii) to plead a known cause of action; iv) to trace assets; and v) to preserve evidence or property.

22 In its most common form, a Norwich order is available to an aggrieved party who cannot identify its wrongdoer and who seeks to obtain information from third parties that might assist in identifying the wrongdoer so that it can commence litigation against that wrongdoer. Norwich orders are also used to find and preserve evidence and to trace and preserve assets: [ATB v Leahy, 2000 ABQB 575](#).

23 An application for a Norwich order can be brought either prior to litigation being commenced or within existing litigation.

24 In *ATB v. Leahy*, *supra* the Court observed that as an equitable remedy, the application of the Norwich order must continue to evolve.

25 Not surprising, then, litigants have used Norwich orders in the on-line context to obtain the identity of internet users. In a number of recent cases, parties have brought applications against internet service providers to compel the ISP to disclose the identity of internet users in the face of allegations of i) unlawfully sharing music files, ii) publishing anonymous and allegedly defamatory material, iii) anonymously defrauding others, or iv) allegedly infringing a copyright: see *Google Inc. v Equustke Solutions Inc.*, [2017] 1 SCR 824 and *BMG Canada Inc. v John Doe*, 2005 FCA 193; *York University v Bell Canada Enterprises*, 2009 CanLII 46447 (OSC); *Straka v Humber River Regional Hospital*, 2000 CanLII 16979 (OCA).

26 In the evolution of the Norwich order, there appear to be two broad principles underlying its availability in an action: first, that a third party against whom an order is sought has an equitable duty to assist the applicant in pursuing its rights: *Norwich Pharmacal Co. v Commrs. of Customs and Excise*, [1974] AC 133 (HL). And second, that a Norwich order should be available to enable justice to be done.

27 The test to be met to obtain a Norwich order was summarized by the Alberta Court of Queen’s Bench in *ATB v Leahy*, *supra* and was recently articulated by the Supreme Court of *Canada in Rogers Communications Inc. v Voltage Pictures, LLC*, 2018 SCC 38 at para 18:

Originally cast as an equitable bill of discovery (*Norwich; Glaxo Wellcome PLC v M.N.R.*, 1998 CanLII 9071 (FCA), [1998] 4 F.C. 439 (C.A.)), a *Norwich* order is a type of pre-trial discovery which, inter alia, allows a rights holder to identify wrongdoers (*Alberta (Treasury Branches) v Leahy*, 2000 ABQB 575 (CanLII), 270 A.R. 1, at para. 59, aff’d 2002 ABCA 101 (CanLII), 303 A.R. 63). The elements of the test for obtaining a *Norwich* order (although sometimes described as “factors” to be considered (*Leahy* (Q.B.), at para. 106)), are not in dispute before us. A [party seeking the order] must show:

- (a) [a *bona fide* claim] against the unknown alleged wrongdoer;
- (b) the person from whom discovery is sought must be in some way involved in the matter under dispute, he must be more than an innocent bystander;
- (c) the person from whom discovery is sought must be the only practical source of information available to the applicants;
- (d) the person from whom discovery is sought must be reasonably compensated for his expenses arising out of compliance with the discovery order in addition to his legal costs;
- (e) the public interests in favour of disclosure must outweigh the legitimate privacy concerns. [Emphasis added.]

(see *BMG Canada Inc. v John Doe*, 2005 FCA 193 (CanLII), [2005] 4 F.C.R. 81, at paras. 15 and 32, quoting *BMG Canada Inc. v John Doe*, 2004 FC 488 (CanLII), [2004] 3 F.C.R. 241, at para. 13; *Voltage Pictures LLC v John Doe*, 2015 FC 1364, at para. 37 (CanLII); see also *Voltage Pictures LLC v John Doe*, 2014 FC 161 (CanLII), [2015] 2 F.C.R. 540, at para. 45)

28 The use of the Norwich order received relatively recent comment from the Alberta Court of Appeal in the 2008 decision of *A.B. v C.D.*, *supra*. The Court of Appeal stressed that caution must be used in considering an application for a Norwich order:

It must be remembered that the Norwich order — like other forms of pre-trial discovery or execution processes — has been considered somewhat draconian in effect: *Design Group Staffing Inc. v Fierlbeck*, [2006] A.J. No. 538 at para 8 per Slatter J (as he then was). Therefore, the discretion to grant such orders must be exercised cautiously. (para 15)

29 The Alberta Court of Appeal expressly states that a Norwich order is not intended to be used to circumvent the normal discovery process in litigation.

30 In *A.B. v C.D.*, *supra*, amid allegations of **fraud** against the respondent, the appellant sought a Norwich order to require several financial institutions to provide the respondent's banking records. In addition, the appellant sought an order to require those financial institutions to provide the banking records of nine other individuals who were not parties to the action. There was no evidence that the banking records were at risk of destruction or disappearance. The Appellant argued that the information was necessary to confirm the suspected **fraud** and its extent.

31 In denying the appeal, the Alberta Court of Appeal quoted the decision of the Chambers judge with approval:

This application departs considerably from the original Norwich situation: here, the plaintiff has started proceedings against the defendant, whom it clearly considers to be the ultimate wrongdoer, and is entitled to standard discovery of that party. The financial records of the defendant, to which the plaintiff is entitled under standard discovery processes, are likely to supply to the plaintiff any additional fact "crucial to the proper allegation" of the defendant's liability. In other words, here the plaintiff/applicant does not require equitable discovery. (para 16).

32 Based on the decision of the Alberta Court of Appeal in *A.B. v. C.D.*, while a Norwich order as an equitable remedy is to remain flexible, it continues to be regarded an exceptional remedy.

## Decision

33 Turning then to the case at hand, I am satisfied that a Norwich order should not be granted in the circumstances before me because there is not a legitimate purpose for the discovery.

34 AARC does not seek a Norwich order to uncover the identity of its alleged wrongdoers — those alleged wrongdoers are known. AARC chose to commence proceedings against these particular Defendants.

35 Furthermore, AARC does not seek a Norwich order to evaluate a cause of action or to trace and preserve assets. Based on the history of questioning in this litigation, AARC has long been aware of Elliott and Brown's involvement in the on-line dialogue involving certain of the AARC Confidential Information. Had AARC been concerned with the preservation of its information, it would have taken action years ago to protect against the alleged misuse of the AARC Confidential Information by Elliott and Brown.

36 Elliott and Brown are no more than witnesses with potential knowledge of the actions or inactions of the Defendants.

37 While AARC is undoubtedly correct in concluding that Brown and Elliott are unlikely to cooperate with it in its pursuit of answers regarding the Defendants' use of the AARC Confidential Information, frankly, that does not place AARC in a unique position. Litigants often face uncooperative or hostile witnesses and there are accommodations in the rules of evidence to allow for those very circumstances.

38 I am satisfied that the driving force behind this application is to obtain evidence that would discredit the Defendants. AARC has offered no other credible purpose for pursuing a Norwich order at this very late stage of the litigation — in essence on the eve of trial. With respect, I cannot agree that this is a legitimate use of an equitable discovery tool or that the public interest favours granting a Norwich order in this context.

39 A Norwich order is not to be used by a party in an effort to generate different information than what has already been testified to by the Defendants in discovery. A Norwich order is not a tool by which a litigant can test, affirm or disprove the evidence of the Defendants. That is the purpose of a trial.

40 If, however, I am wrong in reaching this conclusion, I am similarly satisfied that AARC fails to meet the test for a Norwich order as expressed in the *ATB v Leahy* case and in *Rogers Communications, supra*. Looking at the

elements of the test, I am not satisfied that the Elliott and Brown are the only sources of the information sought. In fact, the question to which AARC seeks further answer has been asked and answered of the Defendants — whether they are the people who shared the AARC Confidential Information with Elliott and Brown. While AARC is dissatisfied with the answer and doesn't accept it to be true, that does not then entitle them to equitable discovery of Elliott and Brown.

41 The Plaintiff's application is dismissed.