

Compelling Production From and Questioning Non-Parties

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COMPELLING PRODUCTION FROM AND QUESTIONING NON-PARTIES

1.0 COMPELLING PRODUCTION FROM NON-PARTIES

Lawyers often think of discovery as being limited to the documents or records possessed by the parties to the action; however, lawyers are not necessarily limited to only those documents in the possession of other parties. The information available to be uncovered during discovery can be significantly broadened when counsel turns his or her mind to the records that may be held by non-parties. The question of course, is how to gain access these records during discovery. This section explores several tools that may be employed to expand the records available during discovery to those held by non-parties:

- Norwich Orders (Rule 5.13);
- Introducing Evidence from Another Action (Rule 6.11(1)(f)); and
- Undertakings to Obtain Records from Third Parties (Rule 5.30(1)(b)).

1.1 Norwich Orders (Rule 5.13)

5.13(1) *On application, and after notice of the application is served on the person affected by it, the Court may order a person who is not a party to produce a record at a specified date, time and place if*

- (a) *the record is under the control of that person,*
- (b) *there is reason to believe that the record is relevant and material, and*
- (c) *the person who has control of the record might be required to produce it at trial.*

Where Granted

Norwich Orders are unique, as they allow parties to an action to seek documentation from non-parties thus expanding the sources of evidence available to litigants. Norwich type relief has been granted in various situations including:

- (i) Where the information sought is necessary to identify wrongdoers (Norwich *Pharmaceutical Co v Comrs of Customs and Excise*, [1974] AC 133, [1973] 2 All ER 943 (HL));

- (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 (*P v T*, [1997] 4 All ER 200, [1997] ICR 887 (Ch D));
- (iii) To trace and preserve assets (*Leahy*).¹

Considerations in Granting Norwich Type Relief

Alberta (Treasury Branches) v Leahy is the foundational case for Norwich type relief in Alberta. In deciding whether to grant a Norwich Order, a Court will consider:

- (iv) Whether the applicant has provided evidence sufficient to raise a valid, bona fide or reasonable claim;
- (v) 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;
- (vi) Whether the third party is the only practicable source of the information available;
- (vii) Whether the third party can be indemnified for costs to which the third party may be exposed because of the disclosure, some refer to the associated expenses of complying with the orders, while others speak of damages; and
- (viii) Whether the interests of justice favour obtaining the disclosure.²
- (ix) The Court will also turn its mind to the privacy interests of the third party and to privacy legislation.³

Underpinning Rule 5.13 is the theory that judicial economy is furthered by not compelling non-parties to come to trial for the sole purpose of producing a few documents. As Master Schlosser commented in *Toronto Dominion Bank v Sawchuck*, “the Foundational Rules require facilitating the quickest means of resolving claims at the least expense. The Rules oblige the Court to provide an effective, efficient and credible system of remedies.”⁴ Used properly, Rule 5.13 can be a powerful tool to

¹ *Alberta (Treasury Branches) v Leahy*, 2000 ABQB 575, 270 AR 1 at para 106 [*Leahy*].

See also *GEA Group AG v Flex-N-Gate Corporation*, 2009 ONCA 619 at para 91.

² *Leahy*, *supra* note 1 at para 106.

³ *1985 Sawridge Trust (Trustee for) v Alberta (Public Trustee)*, 2015 ABQB 799 at para 19 [*Sawridge*].

⁴ *Toronto Dominion Bank v Sawchuck*, 2011 AQBQ 757.