

**ONTARIO SUPERIOR COURT OF JUSTICE DENIES EMPLOYER'S REQUEST FOR CELL
PHONE COMPANY TO RELEASE EMPLOYEE'S CELL PHONE AND TEXT MESSAGE
RECORDS**

Community Living Fort Frances and District v. TBayTel [2011] O.J. No. 2259

Summary

The Ontario Superior Court of Justice recently ruled that an employer could not use the pre-action equitable discovery mechanism commonly referred to as a “*Norwich* order” to compel a cellular phone company to release an employee’s cell phone and text message records. The employer wished to use this information to confirm an inappropriate sexual relationship between its employee and one of the employer’s clients.

What is a Norwich Order?

A *Norwich* order is a pre-action discovery mechanism based in equity whereby a third party, unrelated to the main litigation, is compelled by a Court to provide certain information in its possession.

In a labour and employment context, *Norwich* orders could be used by employers against third parties in order to obtain information about current or former employee for the purposes of disciplining an employee, or initiating action against an employee or former employee.

The Court described the nature of the relief sought by a Norwich order in *Isofoton S.A. v. Toronto Dominion Bank* (2007), 85 O.R. (3d) 780:

[2] A Norwich order essentially compels a third party to provide the applicant with information where the applicant believes it has been wronged and needs the third party’s assistance to determine the circumstances of the wrongdoing and allow the applicant to pursue its legal remedies.

The five-part test that Canadian Courts will apply when considering whether to grant a *Norwich* order was set out in *GEA Group AG v. Ventra Group Co.* (2009), 96 O.R. (3d) 481:

1. **Bona fide Claim:** There should be evidence of a valid, *bona fide* claim or reasonable claim.
2. **Third Party Involvement:** The applicant must establish that the third party from whom the information is sought is somehow involved in the wrongful act, even innocently.

3. **Source:** The third party must be the only practicable source of information.
4. **Indemnity:** The applicant is required to indemnify the third party for any costs associated with complying with the order.
5. **Interests of justice:** The Court will consider all the respective interests and weigh the benefits of revealing the information against the interest of maintaining confidentiality.

The Facts of *Community Living Fort Frances*

In *Community Living Fort Frances*, the employer sought an order compelling TBayTel to release the cellphone and text message records between the cell phones of an employee, JT and a client, NS. The employer wanted this information to confirm that JT, a bargaining unit member, had engaged in an inappropriate sexual relationship with NS. JT was employed as a caseworker. NS was a young man in receipt of care from the company, a registered charity providing services to persons with intellectual disabilities in the community.

NS had admitted to the relationship and given TBayTel his consent to release the information to the company. JT, through her union representative, refused to provide consent to release the information and denied the relationship.

The employer wished to discipline or discharge JT for violation of its Sexuality Policy, which stated that “physical contact is not allowed for the purposes of sexual instruction or for the personal advantages or satisfaction of a staff person.” The employer argued that the text messages would constitute the “best evidence” of a relationship in violation of the employer’s policy. The employer argued that it required this evidence in order to make a disciplinary decision regarding JT. The employer noted that the evidence could be relied upon at a future grievance arbitration hearing in which the employer would have to justify any discipline imposed.

Fregeau J. applied the five-step test and found that the employer failed on both the third and fifth steps. With respect to the third step, it was found that while TBayTel’s records were the only source of the specific evidence sought, the employer already had some evidence of the alleged sexual relationship. The Court thus ruled that TBayTel was not the only practicable source of the information sought.

With respect to the fifth step of the test, the Court found that the information sought by the employer was highly personal. It was found that while ordering the disclosure of the information would be determinative of the issue of whether JT violated the employer’s policy, declining to order it would not deny the employer a remedy. At most, it would mean the employer would have to proceed with their chosen course of discipline without the “best evidence” available.

Overall, the Court found that the *Norwich* order was not necessary for the employer to pursue its claim against JT.

Commentary

In accordance with the above, employers should be aware that *Norwich* orders can be a valuable tool for uncovering information about an employee's activities where the employer requires such information to initiate an action, or discipline an employee. However, *Norwich* orders are not easy to obtain. An employer should ensure that it has no other options before seeking a *Norwich* order. In particular, an employer should ensure it truly requires the information sought to take its desired course of action before seeking a *Norwich* order.

For further information, or to help you determine whether a *Norwich* order is the right course of action for your business, please contact Lauren Chang MacLean at 416-408-5511.

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