**Civil Procedure**
**Law 225**

**Winter 2014**

**Lecture Notes No. 7**

## Complex Motions

We have already considered some of the more common types of pre-trial motions that can be brought (e.g. a motion to strike pleadings). These are usually straight-forward affairs that are brought with notice and heard on an 'open motions' day - meaning that the lawyers don't have to book a special hearing as the motion can be heard and determined relatively swiftly.

Other motions or applications are more unusual and can be complex. Most build upon the power of the Court to order injunctive relief which arises from the Court's equitable jurisdiction. That is to say that the Court has the power to order a person to do, or refrain from doing, an act – performance is secured by the Court's ability to control its own process. It is an abuse of process in the form of contempt of court not to comply with a lawful order and the Court may punish a person not in compliance. Punishment can take the form of incarceration.

Your assignment no. 3 is one such type of motion – a 'Mareva injunction' that freezes a defendant's assets. These can be very effective and usually brought *ex parte* (that is, without noticed to the party affected). See also Rule 45.

## A. 'Norwich' Orders

A 'Norwich' or 'Norwich Pharmacal' Order is an order of the court which allows a party to obtain pre-action discovery; for example, access to a businesses files held by a third party to obtain the identity and address of the party to be sued, obtain evidence, or identify the location of assets.

The use of such orders can be traced to an English case, *Norwich Pharmacal Co. v. Customs and Excise Commissioners*, [1974] A.C. 133 . The rationale for the rule was set out in that case by Lord Reid:

> On the whole I think they favour the appellants, and I am particularly impressed by the views expressed by Lord Romilly M.R. and Lord Hatherley L.C. in *Upmann v. Elkan* (1871) L.R. 12 Eq. 140; 7 Ch.App. 130. They seem to me to point to a very reasonable principle that **if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers.** I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. **It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should**

> **co-operate in righting the wrong if he unwittingly facilitated its perpetration.**

**Isofoton S.A. v. Toronto Dominion Bank**
**2007 CanLII 14626 (Ont. S.C.J.)**

This was a commercial fraud case. The plaintiff contracted with a defendant in Spain for the delivery of silicon. The contract price was $27 million. The plaintiff wired a deposit of $3,240,000 to the defendant's bank; both the defendant and the money disappeared. Could the plaintiff obtain pre-action discovery from the bank?

**Per Spence J:**

> [2] Requests for Norwich relief are largely unfamiliar to Canadian courts. 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.
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> …
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> **[28] It is convenient here to deal also with this court's authority to make a Norwich order. A Norwich order, also known as an equitable bill of discovery, is a form of equitable relief**: see *Glaxo Wellcome PLC v. Canada (Minister of National Revenue)*, 1998 CanLII 9071 (FCA), [1998] F.C.J. No. 874, [1998] 4 F.C. 439 (C.A.) at p. 458 F.C. **The jurisdiction of the court to grant such relief is grounded in s. 96(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 which provides as follows:**
>
> > **96.(1) Courts shall administer concurrently all rules of equity and the common law.**
>
> [29] Accordingly, the court has the authority to make a Norwich order. There does not appear to be a legal rule or principle precluding the court from exercising this jurisdiction in this instance. Whether this jurisdiction ought to be exercised depends on the test for establishing entitlement to Norwich relief.
>
> **The test for a Norwich order**
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> [30] As Norwich orders are relatively unfamiliar to Canadian courts, a review of the authorities and principles is warranted. The fundamental principle underlying such relief is that the third party against whom the order is sought has an equitable duty to assist the applicant in pursuing its rights.
>
> [31] In *Norwich Pharmacal Co. v. Customs and Excise Commissioners*, [1974] A.C. 133, [1973] 2 All E.R. 943 (H.L.), the case which is said to have revitalized this form of relief in the common law world, the appellant was a pharmaceutical company that owned a patent for a chemical compound. By virtue of information supplied to the public by the Commissioners of Customs and Excise ("CCE"), the appellant Norwich knew that the chemical was being

imported into England in violation of Norwich's patent. However, the CCE did not disclose which specific companies were responsible for the importing, so that Norwich knew its patent was being infringed but did not know by whom and could not find out without the information gathered by the CCE.

[32] Norwich brought an application to compel the CCE to disclose the names of the importing companies. The CCE resisted on several grounds, including that the information was supplied in confidence and that it should remain confidential in order to encourage honest reporting by importers. The House of Lords concluded that Norwich's knowledge of the wrong and need for redress trumped any confidentiality concerns, as the CCE was subject to the equitable duty, which Lord Reid described as follows at p. 175 A.C.:

> They [the authorities] seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers.

[33] Norwich Pharmacal has given its name to what had been called an equitable bill of discovery and renewed interest in this type of relief has developed. An application to a government agency for information collected as part of industry reporting efforts is now a typical situation in which Norwich relief might be sought: see *Glaxo Wellcome*, supra.

**[34] The English authorities also reveal another situation giving rise to requests for Norwich relief that is more directly relevant here. The English courts have granted Norwich relief where the applicant believes it has been defrauded and seeks access to bank records to prove the fraud and recover the wrongfully-obtained property. The courts have been compelled by the possibility that the money or property will be dissipated if the court's equitable jurisdiction is not invoked.**

[35**] One such case is *A. v. C.,* [1980] 2 All E.R. 347 (Q.B.).** In that case, the plaintiffs alleged that they were defrauded and sought, inter alia, an order granting them access to bank records for certain accounts related to the alleged fraud. **Goff J. reviewed several English authorities and concluded that (at p. 351 A.C.):**

> **[I]n an action in which the plaintiff seeks to trace property which in equity belongs to him, the court not only has jurisdiction to grant an injunction restraining the disposal of that property; it may, in addition, at the interlocutory stages of the action, make orders designed to ascertain the whereabouts of that property. In particular, it may order a bank (whether or not a party to the proceedings) to give discovery of documents in relation to the bank account of a defendant who is alleged to have defrauded the plaintiff of his assets.**

**[36] In finding that the victim of a fraud was entitled to the court's full protection, Goff J. adopted the following comment from *Mediterranea Raffineria Siciliana Petroli S.p.A. v. Mabanaft G.m.b.H.* (unreported) at p. 350 A.C.:**

> **A court of equity has never hesitated to use the strongest powers to protect and preserve a trust fund in interlocutory proceedings on the basis that, if the trust fund disappears by the time the action comes to trial, equity will have been invoked in vain. That is why orders of this sort were made long before the recent orders for discovery, and they are at the heart of the Chancery Division's concern, and it is the concern of any court of equity, to see that the stable door is locked before the horse has gone.**

**[37] *A. v. C.* thus demonstrates the applicability of Norwich orders to situations where the applicant seeks access to bank records. That case also makes clear that the court's equitable jurisdiction must be invoked quickly and effectively if a victim of an alleged fraud is to have any recourse.**

…

[40] Mason J. [in ***Alberta (Treasury Branches) v. Leahy*, [2000] A.J. No. 993, 270 A.R. 1 (Q.B.), affd [2002] A.J. No. 524, 51 Alta. L.R. (4th) 94 (C.A.),** application for leave to appeal dismissed [2002] S.C.C.A. No. 235] reviewed the leading English and Canadian authorities dealing with Norwich orders, the principles laid down and the tests that had been proposed. Mason J. then distilled the authorities to identify both the circumstances in which Norwich orders have been granted and the considerations that should guide a court faced with a request for a Norwich order in the exercise of its equitable jurisdiction as follows (at para. 106):

> **The foregoing review demonstrates that:**
>
> **a. Norwich-type relief has been granted in varied situations:**
>
> > **(i) where the information sought is necessary to identify wrongdoers;**
> >
> > **(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; and**
> >
> > **(iii) to trace and preserve assets.**
>
> **b. The court will consider the following factors on an application for Norwich relief:**
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> > **(i) Whether the applicant has provided evidence sufficient to raise a valid, bona fide or reasonable claim;**

**(ii) 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;**

**(iii) Whether the third party is the only practicable source of the information available;**

**(iv) Whether the third party can be indemnified for costs to which the third party may be exposed because of the disclosure, some [authorities] refer to the associated expenses of complying with the orders, while others speak of damages; and**

**(v) Whether the interests of justice favour the obtaining of disclosure.**

[41] The applicant in this case seeks the Norwich order for the purposes of determining what has become of the deposit money and tracing and preserving those funds. These are acceptable purposes according to the authorities as summarized in Leahy, supra. Each of the factors which Mason J. identified must now be considered against the facts of this application.

**1. Evidence of a valid or bona fide claim**

[42] The applicant's claim must not be frivolous or vexatious. In Leahy, supra, for example, the applicant put forward evidence of payments made by the suspected fraudster and of allegedly commercial transactions in which he was involved. The circumstances of these payments suggested that something was not quite right. Counsel for Isofoton argued on this application that similar circumstances prevail here.

…

**2. Third party involvement**

[49] The authorities often speak of a "mere witness" as not being susceptible to a Norwich order. This language clearly does not mean that the third party must therefore have participated in the wrongdoing. An example of an insufficient connection is that of a witness to a car accident: such a third party could not ordinarily be subject to a Norwich order.

[50] In contrast to the eye-witness, a bank in receipt of funds allegedly procured by a fraud on the applicant is a typical "innocently involved" third party against which a Norwich order will be sought: see A. v. C., supra; Leahy, supra. Without the bank's involvement, the wrongful receipt and possible transfer of funds could not have occurred, and it is the confidential information possessed by the bank that will lead the applicant to the information required to determine whether a legal proceeding is appropriate.

[51] Here, the party against whom the order is sought is TD Canada Trust. The affidavit evidence establishes that TD Canada Trust received the US$3,240,000 on September 15, 2006. The money was transferred to

account no. 7303361, which was the account number given to Isofoton by A.E.S. in the Sales Contract. I am satisfied that TD Canada Trust was sufficiently involved in the events that it is a proper third party from which to procure the information required by the applicant.

**3. Third party as the only practicable source**

**[52] The third party must be the only practicable source of the information. This does not mean that the third party is the only source of the information. Where the applicant believes it is the victim of fraud, it is unreasonable to require the applicant to approach the alleged wrongdoer for the information, and the various financial institutions become the only practicable source of the information: see, e.g., Leahy, supra, at para. 157.**

**[53] In this case, Isofoton has adduced evidence that the alleged wrongdoers were in fact approached for information about various issues related to the deposit funds. A.C.H., A.E.S. and their principals have repeatedly refused to provide Isofoton with any information. In this situation, Isofoton has no other viable alternative but to seek access to the bank records.**

**4. Indemnity for costs or damages**

[54] Some of the authorities speak of a requirement that the applicant provide an indemnity for costs, while others speak of an indemnity for damages. The majority of the authorities provided require the former, and Mason J. in Leahy at para. 203 rejected the proposition that only an undertaking as to damages would suffice.

[55] It apparently remains an open question as to whether an undertaking as to damages is required or whether an indemnity for costs will suffice. However, the better view seems to me to be that an indemnity for costs is adequate. It is difficult to envision a situation in which the financial institution or other third [page792] party will be subject to liability and a damages award for disclosing information pursuant to a court order. Should this concern materialize on the facts of a specific case, the third party has the added protection of being able to seek legal advice from professionals and to return to the court for further direction if necessary.

[56] Here the affidavit evidence includes an undertaking to indemnify any party subject to the order for any costs of compliance. Thus, the fourth consideration stated in Leahy, supra, is satisfied.

**5. The interests of justice**

[57] The potential prejudice arising from granting the relief sought is that prejudice which flows to the alleged wrongdoers from the disclosure of confidential information. There are three reasons why this is not sufficient to override the applicant's equitable right to the information that will allow it to pursue its legal remedies.

[58] First, the confidentiality of the bank records is not absolute, as the records are subject to disclosure by court order in a variety of circumstances: Leahy, supra, para. 162. Thus, the privacy interest expected by the alleged wrongdoers is somewhat diminished: Glaxo Wellcome, supra, at paras. 61-62.

[59] Second, the disclosure and use of the information sought is also not absolute, as these issues are limited by the terms of the order. The information can only be used for the purposes for which Norwich orders are typically granted: to trace assets, determine the identity of wrongdoers and discover whether the facts justify the bringing of legal proceedings.

[60] Finally, to the extent that they may have acted fraudulently, A.E.S. and its principals are not entitled to the protection of the confidentiality normally afforded to bank records: see Bankers Trust Co. v. Shapira, [1980] 3 All E.R. 353, [1980] 1 W.L.R. 1274 (C.A.), at p. 358 All E.R.

[61] Each of the considerations stated by Mason J. in Leahy favours granting the Norwich order in this case. The applicant has adduced evidence that strongly suggests that it is the victim of a fraud, or at least that its funds have been converted. Each of these possible claims is itself sufficient to remove any possibility that this is a frivolous or vexatious application. TD Canada Trust was sufficiently involved in the wrongdoing (though this involvement was entirely innocent) and TD Canada Trust is the only reasonable source of the information required. The interests of justice favour granting the relief sought. [page793]

**Sealing the Court File**

[62] The applicant submitted that the court file in respect of this matter ought to be sealed, and that the order should include a confidentiality provision, which would require all persons with knowledge of the application, the resulting order and any conduct undertaken in compliance with the order, to keep such knowledge confidential. The applicant submitted that this was a typical provision in applications for and the granting of Norwich relief, as the relief would be deprived of any effect if the order became known to the alleged wrongdoers.

[63] In Leahy, supra, Mason J. noted that such sealing and confidentiality provisions are "typical and justified" in Norwich orders. As the applicant suggested, the orders would be ineffective for protecting an applicant's rights if the alleged wrongdoer was aware of the order and its consequences, as that party would then be able to dissipate assets and/or take other steps to frustrate the applicant's rights. Accordingly, the confidentiality and sealing provisions were necessary in this instance.

[64] In view of the time that has elapsed since the making of the Norwich order in February, it is not necessary to continue the confidentiality and sealing order any longer so it is now set aside.

**Conclusion**

[65] In the result and for the reasons given herein, I granted an order for Norwich relief substantially in the form of the draft order provided to me by the applicants.

**GEA Group Ag v. Ventra Group Co.**
**2008 CanLII 70043 (Ont. S.C.J.)**

In this case the request for a Norwich order originated from a dispute over a sale by Flex-N-Gate Corporation ('FNG"') of one of its subsidiaries to GEA Group AG ('GEA'). When FNG failed to close the transaction, GEA commenced an arbitration relating to the alleged breach of contract. GEA became concerned that FNG had transferred its assets to an unknown person in an effort to become judgment proof in the event that GEA was successful in the arbitration proceedings. GEA applied for a Norwich order to obtain documents from a company related to FNG ("Ventra") and to examine FNG's lawyer who was also a director, officer and employee of Ventra. GEA insisted that it was necessary to obtain information from Ventra and Graham in order to investigate the alleged fraudulent transfer of assets and determine its legal remedies. GEA's application was successful but Court of Appeal allowed the appeal. Simply, GEA already had enough information at its disposal to start its action (and indeed had started a companion action on the same facts in the United States).

**At first instance per Cumming J.**

**[9] The fundamental principle underlying such an Order is that the third party against whom the order is sought has an equitable duty to assist the applicant in pursuing its rights. *Norwich Pharmacal Co. v. Customs and Excise Commissioners*, (1973), [1974] A.C. 133 at 175 (U.K. H.L.); *Isofoton S.A. v/ Toronto Dominion Ban*k 2007 CanLII 14626 (ON SC), (2007), 85 O.R. (3d) 780 at para. 28 (S.C.J.). The remedy has been extended in Canada such as to allow the Court to grant an order compelling the disclosure of all information vital to the plaintiff's ability to commence an action from any party involved in the wrongful conduct of the defendant or potential defendant...**

**[10] There are five factors that must be considered by the Court in an application for a Norwich Order: (1) is there evidence of a valid and bona fide claim? (2) is there evidence of third party involvement? (3) is the third party the only practicable source of the information sought? (4) is there an undertaking for indemnification for costs or damages for the costs of compliance with the Norwich Order by the third party? and (5) is there a determination that the interests of justice favour granting the Norwich Order requested? *Isoforon S.A. v. Toronto Dominion Bank* 2007 CanLII 14626 (ON SC), (2007), 85 O.R. (3d) 780 (S.C.J.) at paras. 49-50.**

[11] In my view, and I so find, for the reasons which follow, the ex parte Norwich Order should not be set aside. The motions of VGC, Mr. Graham and FNG are properly to be dismissed.

…

[33] GEA's Norwich Order application was based upon the fact that FNG presented one set of facts about its assets (i.e. owning VGC) in inducing GEA to enter into the SPA, and then subsequently and as part of the arbitration proceedings stated through Mr. Khan that it did not in fact own those assets. As well, FNG's lawyers learned January 30, 2008 that FNG did not have significant assets. They say it had been suggested to them by Mr. Graham March 8, 2007 that FNG had been restructured to avoid any seizure of assets and to induce GEA to settle its Arbitration claim for a lesser amount than an award might be.

[34] The moving parties, VGC, Graham, and FNG deny that any such statement was made. They also assert that if made, any such statement was made within the context of settlement discussions. Hence, they assert that settlement privilege adheres in respect of the claimed statement. In my view, the impugned statement is not in itself an admission protected by settlement privilege. It is not a statement relating to admissions or facts relevant to the legal issues as to whether or not there is liability. Rather, it is simply a statement of fact extraneous to the facts relevant to the asserted causes of action, put forward as an inducement to settle. Moreover, there are exceptions to the protection afforded by privilege. If the exclusion of evidence would act as a cloak for a fraud or perversely defeat the interests of justice by amounting to an abuse of privilege, then an exception may be made. See *Meyers v. Dunphy* 2007 CarsellNfld 7 at para. 20 (C.A.). In any event, in my view, not much turns on this alleged statement for the purpose of deciding as to the merits of a Norwich Order. In my view, as set forth above, the evidentiary record indicates that GEA was either misled by intentional misrepresentations as to the ownership of VGC at the time of entering the SPA or VGC was removed from FNG after the SPA was entered into. These alternative fact scenarios are sufficient to support a Norwich Order being granted.

**[35] The information sought through the Norwich Order in the situation at hand is necessary to determine whether an action exists in respect of VGC, to identify wrongdoers, to find and preserve evidence that may substantiate or support an action against wrongdoers and to trace and preserve assets. See *Alberta (Treasury Branches) v. Leahy* [2000] A.J. No. 993 (Q.B.), aff'd 2002 ABCA 101 (CanLII), (2002), 51 Alta. L. R. (4th) 94 (C.A.) application for leave to appeal dismissed [2002] S.C.C. A. No. 235.**

[36] The evidentiary record establishes that GEA has a bona fide and reasonable claim that FNG, Mr. Khan and Mr. Graham engaged in deliberate improper conduct with respect to GEA through fraudulent misrepresentations and/or a fraudulent conveyance. GEA has established a bona fide claim against FNG and Mr. Khan in its ex parte application so that GEA can through the equitable bill of discovery determine whether or not it can commence an action to redress the wrong it has suffered.

[37] Much of the submissions by VGC, Mr. Graham and FNG on the return of the motions were to the effect that the conduct of FNG and Mr. Khan would not give rise to a cause of action in Germany. The expert

evidence of Dr. Harald Rieger establishes that certain causes of action against FNG and Mr. Khan might well be available under German law. Moreover, one should not assume that GEA's causes of action are governed entirely by German law.

[38] The evidentiary record suggests that third parties (i.e. parties beyond FNG and Mr. Khan), being Mr. Graham and VGC may be fraudulently involved in the transfer of assets from FNG or that Mr. Graham was a participant in fraudulent misrepresentations made to GEA.

[39] VGC and Mr. Graham are the only practicable source of information available to GEA in order to investigate and determine its legal remedies. Mr. Graham is an officer and legal counsel of VGC. He has said he is the trustee owner of the shares of the corporation that indirectly controls VGC. The record indicates Mr. Graham has an intimate knowledge of the history of VGC and its relationship to FNG. VGC and Mr. Graham are residents of Canada. The corporate documents of VGC and the financial statements over the period 2003 to 2006 would quite possibly in themselves provide the information sought.

**On appeal, 2009 ONCA 878:**

**Per Cronk J.A.:**

[52] In Ontario, this court has held that the equitable action for discovery lies in this jurisdiction and that it co- exists with the Rules of Civil Procedure: Straka v. Humber River Regional Hospital 2000 CanLII 16979 (ON CA), (2000), 51 O.R. (3d) 1, [2000] O.J. No. 4212 (C.A.), at paras. 27 and 32. In Straka, Morden A.C.J.O. observed, at para. 36: "The real question with respect to an action for discovery is: in what circumstances does it properly lie? We are concerned with an equitable remedy and, accordingly, the exercise of a discretion is involved." Justice Morden went on to accept Stone J.A.'s analysis in Glaxo of the prerequisites to the obtaining of an order for pre- action discovery. [See Note 2 below]

…

**[70] In my view, it is sufficient for the disposition of these appeals to consider only the appellants' claim that the motions judge erred by misapprehending and misapplying the test for a Norwich order. For the reasons that follow, it is my opinion that, in the context of the application as presented to him, the motions judge failed to consider properly whether the disclosure sought was a necessary measure in all the circumstances to permit GEA to pursue its rights against FNG. This was an error in principle, reviewable on the correctness standard.**

[71] The motions judge recognized that a Norwich order is a form of equitable relief that, if granted, requires a third party to a potential action to disclose information that is otherwise confidential. He observed [at para. 8], correctly, that the jurisdiction of the courts in Ontario to grant such relief "is

grounded in s. 96(1) of the Courts of Justice Act, R.S.O. 1990, c. C.43", which states that "[c]ourts shall administer concurrently all rules of equity and common law".

**[72] The motions judge also addressed the rationale for a Norwich order and the approach of Canadian courts to the granting of such relief. Citing Norwich Pharmacal and Isofoton, he stated, at para. 9 of his reasons:**

**The fundamental principle underlying such an Order is that the third party against whom the order is sought has an equitable duty to assist the applicant in pursuing its rights . . . The remedy has been extended in Canada such as to allow the Court to grant an order compelling the disclosure [page501] of all information vital to the plaintiff's ability to commence an action from any party involved in the wrongful conduct of the defendant or potential defendant. (Citations omitted)**

**[73] The motions judge then turned to the test for a Norwich order. He identified and accepted the factors outlined in Isofoton as those that govern the availability of pre-action discovery in Ontario. As I have said, these factors represent the adoption in Ontario of the test for a Norwich order articulated in Leahy (Q.B.). They are also consistent with, although arguably more comprehensive than, the factors set out in Glaxo and Straka.**

**[74] FNG argues that the list of factors identified by the motions judge is incomplete and incorrect since it fails to include the requirement of necessity. This omission, FNG submits, fatally taints the motions judge's analysis of whether Norwich relief is available and appropriate in this case.**

**[75] I agree with FNG that an applicant for a Norwich order is obliged to demonstrate that the requested pre-action discovery is "necessary". However, I do not agree that this is a "stand-alone" prerequisite or that it is restricted to the necessity to plead a cause of action.**

[76] The notion of the requirement of a showing of necessity for a Norwich order is not a novel proposition. It appears to have been a fundamental element of a bill of discovery in equity from the infancy of that remedy. In Norwich Pharmacal, at p. 205 A.C., when discussing the nature of the equitable remedy of pre-action discovery, Lord Kilbrandon cited the following passage in Colonial Government v. Tatham (1902), 23 Natal L.R. 153, at p. 158:

The principle which underlies the jurisdiction which the law gives to the Courts of Equity in cases of this nature, is that where discovery is absolutely necessary in order to enable a party to proceed with a bona fide claim, it is the duty of the Court to assist with the administration of justice by granting an order for discovery, unless some well- founded objection exists against the exercise of such jurisdiction. (Emphasis added)

…

[83] The requirement of necessity also finds some support in the applicable Canadian authorities. In B. (A.), supra, at para. 16, the Alberta Court of Appeal referred to Ashworth as an example of a case in which "[t]he investigative capacity of Norwich orders was applied . . . in circumstances of necessity, sufficiency of grounds and proportionality". In the view of the Alberta Court of Appeal, these were "legitimate concerns" to be taken into account in determining whether to grant Norwich relief. In the result, the applicant's failure in B. (A.) to demonstrate that the information sought would not be available in the normal discovery process was fatal to the application for a Norwich order.

[84] On my reading of the authorities in Canada and England, it is unclear whether the requirement of a showing of necessity for pre-action discovery properly forms part of the court's inquiry as to whether the third party from whom discovery is sought is the only practicable source of the information available (as held in Mitsui, at para. 24) or as to whether the interests of justice favour disclosure or non-disclosure (as argued by FNG before this court). However, there is no suggestion in the established jurisprudence that it is a stand- alone requirement for the granting of a Norwich order. Nor do I regard it as such.

**[85] In my opinion, the precise placement of the necessity requirement in the inventory of factors to be considered on a Norwich application is of little moment. The important point is that a Norwich order is an equitable, discretionary and flexible remedy. It is also an intrusive and extraordinary remedy that must be exercised with caution. It is therefore incumbent on the applicant for a Norwich order to demonstrate that the discovery sought is required to permit a prospective action to proceed, although the firm commitment to commence proceedings is not itself a condition precedent to this form of equitable relief.**

…

[92] Thus, the critical issue in this case is whether the Norwich Order was required for any of these legitimate purposes. In my view, it was not. I say this for the following reasons.

[93] The motions judge concluded that a Norwich order was "necessary" on four grounds. For convenience, I repeat what he said at para. 35 of his reasons:

The information sought through the Norwich Order in the situation at hand is necessary to determine whether an action exists in respect of [Ventra], to identify wrongdoers, to find and preserve evidence that may substantiate or support an action against wrongdoers and to trace and preserve assets. (Citations omitted)

[94] In the first ground cited by him, the motions judge appears to have focused on the issue whether the information sought was required by GEA to

investigate whether it had a cause of action against Ventra. But this suggested objective of a Norwich order went beyond the four corners of the relief sought by GEA and lay outside the objects of the requested Norwich relief advanced by it.

[95] Neither in its original notice of application for the Norwich Order, nor in its November 2008 variation motion did GEA identify a possible cause of action against Ventra as a ground for the equitable relief that it sought. Nor did it suggest that one of the purposes of the requested Norwich order was to permit the investigation of whether it had a potential actionable claim against Ventra or other prospective defendants apart from FNG and its principals or agents.

[96] GEA's notice of application instead focused on alleged fraudulent conveyances by FNG and the investigation of "FNG's fraud". GEA claimed that a Norwich order would allow it "to determine the circumstances of and prosecute FNG's wrongdoing in respect of its assets". Similarly, in its notice of motion for variation of the Norwich Order, GEA maintained that the discovery sought would enable it "to assess its legal remedies against FNG and/or its principals or employees and initiate proceedings as [page506] against them". There was no suggestion of a potential claim as against Ventra or, indeed, as against Graham.

**[97] Yet nowhere in his reasons does the motions judge assess whether a Norwich order was required to permit GEA to pursue its rights against FNG, including to permit GEA to plead its case against FNG, the alleged wrongdoer. By failing to consider this question, the motions judge misdirected himself and failed to undertake a key aspect of the requisite necessity inquiry. With respect, this was reversible error.**

[98] In my opinion, a Norwich order was not needed for GEA to pursue its rights against FNG. On the materials before the motions judge, two potential types of fraud by FNG and/or Khan were identified: fraudulent conveyances and fraudulent misrep- resentations. Many of the critical facts necessary to advance such causes of action were in GEA's possession, at the latest, following the January 30, 2008 telephone call between Heckel and Weimann. By that time, GEA knew of: (i) FNG's statements in the Indicative and Final Offers concerning its assets and financial position; (ii) Khan's admissions under oath regarding the real ownership of Ventra; (iii) Graham's alleged statements about FNG's enterprise value; and (iv) Weimann's alleged statements concerning FNG's worth and asset position.

**Discussion Question:**

***Should a Norwich Order be granted in the facts of the following case?***

**Autopoietic Telemetric Solutions Limited v. Loughlin**
**2012 ONSC 2305 (Ont. S.C.J.)**

[1] The plaintiff Autopoietic Telemetric Solutions Limited ("ATS"), moves ex parte under Rule 37.12.1(1) based on allegations of fraud for a Mareva Injunction and other related orders freezing the bank accounts in Canada held at TD Canada Trust by the defendant Michael Loughlin, trading as Eurologix Security. The related relief sought includes an order preventing the dissipation of assets owned by the defendant in Canada or elsewhere, an order preventing the sale or other disposition of the real estate located at 5 Hesham Dr., Whitby, Ontario, and finally, a Norwich Order requiring the Toronto Dominion Bank, or TD Canada Trust to provide access and information to ATS regarding the bank account to which the it transferred U.S. $1,873,070.28 to or for the credit of the defendants.

[2] ATS is a company registered in the United Kingdom with a registered address at 18 Hartman Lane, South Shields, Tyne & Wear, England, NE34 0EF, and it carries on business as a supplier of telemetric products and counterterrorism consultancy and equipment. It was formed in 2010 with contacts in the Nigerian government. It has websites that can be found on the Internet at www.autopoietic.com and www.ATS – guickby.com.

[3] The individual defendant is a director of a registered company in the United Kingdom by the name of Eurologix Security Limited. In Ontario, however, the defendant does not carry on business through a corporate entity, but rather, as a sole proprietorship with the registered business name of "Eurologix Security." Its business registration number of 190118562 is attributed to that business at a registered place of business, which is reflected in the business registration records as being located at 15 Heaver Dr., Whitby, Ontario L1N 9K4.

[4] In support of the injunctive relief sought by the plaintiff in this motion, an affidavit is filed by one Nkiruka Ochei, an assistant to Mr. Christian Chijindu, the solicitor for the plaintiff, ATS. That affidavit is largely based upon an affidavit filed by Mr. Philip Tann, Director and Chief Technical Officer of ATS, which was filed in the High Court of Justice, Queen's Bench Division in the United Kingdom in support of a Mareva Injunction and similar relief that has been granted there freezing the assets of Mr. Loughlin and Eurologix Security Limited in the similar action commenced by ATS in the United Kingdom. Particulars of that claim, the affidavit of Dr. Tann, and the Order of the Hon. Mr. Justice Eder of the High Court of Justice, Queen's Bench Division issued on December 29, 2011 and filed on December 30, 2011 in the Queen's Bench Listing of the High Court of Justice, were attached as Exhibit 2 to Mr. Ochei's affidavit.

[5] The specific claims of the plaintiff relate to three purchase orders under which the defendant is alleged to have agreed to supply certain detection equipment upon receipt of funds in its Canadian bank account in Whitby, Ontario in the sums of $1,534,995.06, $214,845.12, and $123,230.10, for a total of $1,873,070.28, all in United States dollars. ATS transferred those amounts electronically into a TD Canada Trust account that is under the sole and absolute control of the defendant at the TD Canada Trust branch located at 110 Taunton Rd., Whitby, Ontario. The last transfer of funds is alleged to have taken place on October 17, 2011. Notwithstanding the transfer of funds, however, no goods were ever delivered to the consignment address in Nigeria.

[6] Then, in November of 2011 and after allegedly receiving all of the monies paid for the supply of the contracted goods, Mr. Loughlin advised the plaintiff that Eurologix Security Canada had met its demise, that he had been laid off and that the company had "gone bankrupt." As a result, Mr. Loughlin indicated to the UK purchasers that the equipment would not be supplied. He told them that the money might not be refunded in light of the alleged bankruptcy of Eurologix Security Canada. He told them not to contact him further.

[7] Based on its investigations and these assertions of fact, however, ATS contends that there is no such company as "Eurologix Security Limited" or "Eurologix Canada" registered in any province in Canada. Contrary to John Loughlin's claims as reflected in e-mail exchanges between himself and Dr. Philip Tann and which were included as exhibits in the application record, "Eurologix Security Canada" does not actually exist. It is not a bankrupt company. Eurologix Security Canada is not an incorporated entity reflected in the files of bankrupt corporations. Rather, as noted, that name appears merely to be a trade name used by Mr. Loughlin for the purposes of operating his "business."

[8] Rather, ATS contends that Michael Loughlin, the defendant, is the sole owner and proprietor of Eurologix Security and, accordingly, that he is individually liable and responsible for the defalcation and fraud that is alleged to have been perpetrated by him against ATS as set out in its Statement of Claim dated April 3, 2012, and in the similar claims it has commenced in the United Kingdom. ATS contends that the defendant is singularly responsible for the operation and running of the accounts to which ATS deposited its monies in respect of contracts entered into for the purchase of the goods which were to be supplied to addresses in Nigeria. ATS claims that those contracts have been breached by the defendants by their failure to deliver the goods to the purchaser as agreed. It claims that the failure of these contracts is due to fraudulent conduct and that the defendant is the commanding mind behind the frauds that are alleged to have been perpetrated against it by the individual defendant in his own right, and under Eurologix Security's trade name.

[9] The position of the plaintiff is that the defendant misrepresented these matters as part of a deliberate effort to embezzle funds belonging to ATS with the intention of unjustly enriching himself with the plaintiff's money.

ATS says that its investigations have disclosed that Mr. Loughlin bought a house in Whitby, Ontario for $369,500 in cash and without a mortgage in December 2011. Further, it is claimed that Mr. Loughlin has paid off all of his debt and his mortgage in the United Kingdom, relative to the UK residential addresses reflected in the UK court documentation, and it is believed that he has been embezzling the funds continuously since they have been received.

[10] It is for these reasons that the plaintiff seeks not only a Mareva Injunction and non-dissipation orders relative to the assets of the defendant, but also a Norwich Order requiring the Toronto Dominion Bank to disclose the receipt and disbursement of funds relative to this account in order to assist the plaintiff to trace the allegedly embezzled funds.

## B. Anton Piller Orders

An *Anton Piller* Order is essentially a civil search warrant. It allows for entry onto another person's premises and to take, or take copies, of documents. Sometimes it allows a party to enter onto another's premises and take physical items. The point is to secure evidence that would otherwise be destroyed or become unavailable. One should note that this type of order is extra-ordinary and a Judge will be reluctant to make such an order.

This type of order is normally obtained on an *ex parte* basis. This casts upon the party applying for the order to make 'full and frank disclosure' of all facts, particularly those facts which undermine the application. Failure to do so may result in costs, and possibly costs ordered against a lawyer personally. It will also set the stage for an action for damages for any loss occasioned by the defective order if it was made on the basis of incomplete disclosure.

**Celanese Canada Inc. v. Murray Demolition Corp.**
**2006 SCC 36**

This case dealt with two issues: the propriety of issuing an Anton Piller order, and, privilege. Here one company was able to obtain the confidential information of another through an Anton Piller order; included amongst the e-documents were communications with the company's lawyers. The relief sought, and granted, was an order requiring Celanese Canada to obtain new counsel as its lawyer (i) had learned of the confidential information and (ii) Celanese could not demonstrate there was no real risk such confidential information would be used to the prejudice of the opposing side.

Per Binnie J:

> **A. Requirements for an Anton Piller Order**
>
> **35 There are four essential conditions for the making of an Anton Piller order. First, the plaintiff must demonstrate a strong prima facie case. Second, the damage to the plaintiff of the defendant's alleged misconduct, potential or actual, must be very serious. Third, there must be convincing evidence that the defendant has in its possession incriminating documents or things, and fourthly it must be shown that there is a real possibility that the defendant may destroy such material before the discovery process can do its work**...
>
> 36 Both the strength and the weakness of an Anton Piller order is that it is made ex parte and interlocutory: there is thus no cross-examination on the supporting affidavits. The motions judge necessarily reposes faith in the candour and complete disclosure of the affiants, and as much or more so on the professional responsibility of the lawyers participating in carrying out its terms. We are advised that such orders are not available in the United States (Transcript, at p. 70).
>
> …

38 At this stage, the challenge to the decision of Nordheimer J. to grant the Anton Piller order is not before the Court.

**B. Terms of the Anton Piller Order**

…

40 Anton Piller orders are often conceived of, obtained and implemented in circumstances of urgency. They are generally time-limited (e.g., 10 days in Ontario under Rule 40.02 (Rules of Civil Procedure, R.R.O. 1990, Reg. 194) and 14 days in the Federal Court, under Rule 374(1) (Federal Courts Rules, SOR/98-106)). Despite the urgency, the more detailed and standardized the terms of the order the less opportunity there will be for misunderstandings or mischief. As noted by Lamer J. in Descôteaux v. Mierzwinski, 1982 CanLII 22 (SCC), [1982] 1 S.C.R. 860, at p. 889:

Searches are an exception to the oldest and most fundamental principles of the common law, and as such the power to search should be strictly controlled.

Unless and until model orders are developed by legislation or recommended by law societies pursuant to their responsibility for professional conduct, the following guidelines for preparation and execution of an Anton Piller order may be helpful, depending on the circumstances:

**(1) Basic Protection for the Rights of the Parties**

(i) The order should appoint a supervising solicitor who is independent of the plaintiff or its solicitors and is to be present at the search to ensure its integrity. The key role of the independent supervising solicitor was noted by the motions judge in this case "to ensure that the execution of the Anton Piller order, and everything that flowed from it, was undertaken as carefully as possible and with due consideration for the rights and interests of all involved" (para. 20). He or she is "an officer of the court charged with a very important responsibility regarding this extraordinary remedy" (para. 20)…

(ii) Absent unusual circumstances the plaintiff should be required to provide an undertaking and/or security to pay damages in the event that the order turns out to be unwarranted or wrongfully executed…

(iii) The scope of the order should be no wider than necessary and no material shall be removed from the site unless clearly covered by the terms of the order..

(iv) A term setting out the procedure for dealing with solicitor-client privilege or other confidential material should be included with a view to enabling defendants to advance claims of confidentiality over documents before they come into the possession of the plaintiff or its counsel, or to deal

with disputes that arise… The U.K. practice direction on this point provides as follows:

> Before permitting entry to the premises by any person other than the Supervising Solicitor, the Respondent may, for a short time (not to exceed two hours, unless the Supervising Solicitor agrees to a longer period) — (a) gather together any documents he [or she] believes may be . . . privileged; and (b) hand them to the Supervising Solicitor for [an assessment of] whether they are . . . privileged as claimed.
>
> If the Supervising Solicitor decides that . . . any of the documents [may be] privileged or [is in any doubt as to their status, he or she] will exclude them from the search . . . and retain [them] . . . pending further order of the court [(if in doubt as to whether they are privileged), or return them to the Respondent and retain a list of the documents (if the documents are privileged)].
>
> [A] Respondent [wishing] to take legal advice and gather documents as permitted . . . must first inform the Supervising Solicitor and keep him [or her] informed of the steps being taken…
>
> Experience has shown that in general this is a workable procedure. Counsel supporting the appellants suggested the basic "two-hour" collection period permitted in the U.K. is too short. This is a matter to be determined by the judge making the order, but it must be kept in mind that unnecessary delay may open the door to mischief. In general, the search should proceed as expeditiously as circumstances permit.

(v) The order should contain a limited use clause (i.e., items seized may only be used for the purposes of the pending litigation)…

(vi) The order should state explicitly that the defendant is entitled to return to court on short notice to (a) discharge the order; or (b) vary the amount of security…

(vii) The order should provide that the materials seized be returned to the defendants or their counsel as soon as practicable.

**(2) The Conduct of the Search**

(i) In general the order should provide that the search should be commenced during normal business hours when counsel for the party about to be searched is more likely to be available for consultation…

(ii) The premises should not be searched or items removed except in the presence of the defendant or a person who appears to be a responsible employee of the defendant.

(iii) The persons who may conduct the search and seize evidence should be specified in the order or should specifically be limited in number. ..

(iv) On attending at the site of the authorized search, plaintiff's counsel (or the supervising solicitor), acting as officers of the court should serve a copy of the statement of claim and the order and supporting affidavits and explain to the defendant or responsible corporate officer or employee in plain language the nature and effect of the order…

(v) The defendant or its representatives should be given a reasonable time to consult with counsel prior to permitting entry to the premises..

(vi) A detailed list of all evidence seized should be made and the supervising solicitor should provide this list to the defendant for inspection and verification at the end of the search and before materials are removed from the site..

(vii) Where this is not practicable, documents seized should be placed in the custody of the independent supervising solicitor, and defendant's counsel should be given a reasonable opportunity to review them to advance solicitor-client privilege claims prior to release of the documents to the plaintiff.

(viii) Where ownership of material is disputed, it should be provided for safekeeping to the supervising solicitor or to the defendant's solicitors.

**(3) Procedure Following the Search**

(i) The order should make it clear that the responsibilities of the supervising solicitor continue beyond the search itself to deal with matters arising out of the search, subject of course to any party wishing to take a matter back to the court for resolution.

(ii) The supervising solicitor should be required to file a report with the court within a set time limit describing the execution, who was present and what was seized...

(iii) The court may wish to require the plaintiff to file and serve a motion for review of the execution of the search returnable within a set time limit such as 14 days to ensure that the court automatically reviews the supervising solicitor's report and the implementation of its order even if the defendant does not request such a review…

41 It is evident that the draft order placed before the motions judge in this case was deficient in many respects. At issue here is the absence of any provision to deal with solicitor-client confidences. The absence of specific terms in the Anton Piller order does not relieve the searching solicitors from the consequences of gaining inappropriate access. Such consequences may include removal. A precisely drawn and clearly thought out order therefore will not only protect the defendant's right to

solicitor-client privilege, but also protect the plaintiff's right to continue to be represented by counsel of choice by helping to ensure that such counsel do not stumble into possession of privileged information.

**Dish Network LCC v. Ramkissoon**
**2010 ONSC 773 (Ont. S.C.J.)**

This case concerns the consequences of refusing to cooperate with the searching party seeking to enforce the Order.

**Per Cummins J.**

**The Execution of the Second Anton Piller Orders and the Motions for Findings of Contempt**

[36] Injunctions such as Anton Piller orders are "readily enforceable through the court's contempt power", and when one party alleges that another has failed to comply with such a court order, a motion for contempt may be made: see Robert J. Sharpe, Injunctions and Specific Performance, looseleaf (Aurora: Canada Law Book, 1992) at para. 2.10.

[37] As stated above, Anton Piller orders find their legitimacy in the court's inherent power to prevent the frustration of its process through destruction of evidence. This inherent power extends to finding parties who so frustrate court orders to be in contempt.

[38] A contempt motion is quasi-criminal in nature, as there is a potential for imprisonment. Therefore, proof beyond a reasonable doubt is required.

[39] The plaintiffs are not required to prove that a defendant intended to act contemptuously. Instead, the plaintiffs are required to prove that a defendant must have intentionally committed an act prohibited by the Order.

[40] The test for a finding of contempt was considered recently by the Court of Appeal in Bell ExpreesVu Ltd. Partnership v. Torroni, 2009 ONCA 85 (CanLII), 2009 ONCA 85, 94 O.R. (3d) 614 [Torroni]. In Torroni, the court overruled a contempt finding on the basis that the motion judge failed to consider each element in the three-part test for contempt. At para. 21 of the decision, these elements are set forth as follows:

- the order that was breached must state clearly and unequivocally what should and should not be done;

- the party who disobeys the order must do so deliberately and wilfully; and

- the evidence must show contempt beyond a reasonable doubt.

[41] The first prong of the test can be determined by looking at the contents of the Orders. Are they clear? Do they make sense? Are they "clear to a party exactly what must be done to be in compliance with the terms of an order"?: Torroni at para. 22.

[42] In the second prong of the test, one must consider the conduct of the alleged contemnors. What do their actions demonstrate? Evidence on the conduct of the Ramkissoons included an audio recording, affidavits from the ISS and representatives of legal counsel for the Plaintiffs and viva voce evidence from the Ramkissoons themselves.

[43] If there is legitimate confusion about the nature and scope of the contents of the Orders, contempt cannot be made out. In this instance, Orders were issued which allow for a search of the home and business of the Defendants and their cars. The items subject to the Orders are listed at para. 1 of the Orders. The rights and responsibilities of the Ramkissoons are laid out in the Orders, as well as the permissible method of execution. As stated above, the terms are clear and unequivocal.

[44] The rights and responsibilities of the Ramkissoons are clearly spelled out in the Orders, which are to, inter alia, allow the ISS to exercise their rights and discharge their duties and require the Defendants to "render any necessary assistance" to the ISS.

…

[49] On December 16, 2009, the Plaintiffs' representatives attended at the Digital Store premises at 34 Futurity Gate and the Jane Street residence to execute the Second Anton Piller Orders. The representatives included Mark Abradjian ("Abradjian"), Brad Wiseman ("Wiseman") and Renata Kis ("Kis"), the ISS appointed pursuant to the Second Anton Piller Orders, Steve Rogers ("Rogers") from the computer forensic firm Digital Evidence International Inc. ("DEI"), and Ira Nishisato ("Nishisato") and Isabella Massimi ("Massimi") from the Plaintiffs' law firm.

[50] Mr. Abradjian, the senior person of the ISS group, was not cross-examined on his affidavit dated December 29, 2009. Nor did counsel for Mr. and Ms. Ramkissoon ask that Mr. Abradjian or Mr. Nishisato be cross-examined at the hearing on the return of the motion for contempt. I accept the affidavit evidence of Mr. Abradjian and Mr. Nishisato and I prefer their evidence where there is conflict with the evidence of Mr. and Ms. Ramkissoon.

[51] I do not find either Mr. Ramkissoon nor Ms. Ramkissoon to be credible witnesses in their testimony, including their recounting of, and explanations for, their actions and behaviour during the execution of the Second Anton Piller Orders by the ISS and Plaintiffs' counsel. I accept the evidence of Mr. Abradjian and Mr. Nishisato in preference to that of the Ramkissoons where their evidence is in conflict. I add that the detailed notes of Mr. Abradjian, affixed to his affidavit, as to the events of December 16, 2009, together with the audio recording (and transcription thereof) for part of the time in the course of the events upon the execution of the Orders,

support and confirm the affidavit testimony of Messrs. Abradjian and Nishisato and contradict the claims of the Ramkissoons. The audio recording confirms that Messrs. Abradjian and Nishisato calmly and patiently tried to explain why they were on the premises, the efforts at service of the Second Anton Piller Orders, the efforts at explaining the contents and nature of the Orders, and that they were seeking to preserve and protect the Evidence.

[52] Mr. Abradjian states that the execution of the Second Anton Piller Orders commenced at about 5:23 p.m. December 16, 2009 when Mr. and Ms. Ramkissoon arrived by car outside the Digital Store. Mr. Ramkissoon entered the Digital Store. Ms. Ramkissoon waited in the car. The Digital Store has a carpeted store area with a doorway leading to a hallway and outer office area with a back office which is entered by a doorway from the outer office area.

[53] Mr. Abradjian, followed by Mr. Nishisato within about 30 seconds, entered the premises following upon Mr. Ramkissoon's entrance. Mr. Abradjian states that Mr. Ramkissoon and another man, later determined to be Mr. Krishna Ramkissoon ("Krishna"), met him just inside the doorway leading from the carpeted store area into the outer office area. Mr. Abradjian says he identified himself as the ISS appointed officer pursuant to a Court Order and observed Mr. Nishisato identify himself and attempt to serve the Orders on both of them, together with a box containing the court materials to be served, although the Orders were not taken by Mr. Ramkissoon.

[54] Mr. Abradjian says he explained that the Second Anton Piller Orders required them to permit entry to the premises and that he wished to explain the Orders. Mr. Ramkissoon said he wanted to call his lawyer and took out his cell phone whereupon Mr. Abradjian says he said that Mr. Ramkissoon would have an opportunity to call his lawyer but was asked to put down his cell phone until Mr. Abradjian had a chance to explain the Orders and that nothing would happen while he explained it.

[55] Mr. Abradjian states that he was "…trying to ease a tense situation and was continuing to try to explain that they would have an opportunity to refuse entry to certain people for up to two hours and speak to their lawyers and that we could all go into the store area where I could explain the Order in an orderly way….".

[56] Mr. Nishisato confirms the account by Mr. Abradjian in Mr. Nishisato's own affidavit. Mr. Nishisato says he attempted to serve the Orders but that Mr. Ramkissoon refused to accept them. Mr. Nishisato says that Mr. Ramkissoon:

refused to permit Abradjian to explain the Orders at this time and walked back towards the Office, and out of our view, with his phone to his ear….Krishna emerged from the Outer Office Area into the Hallway where Abradjian and I were standing …[and] would not permit Abradjian to move towards the Office to observe Ravin and physically blocked Abradjian's way.

[57] Ms. Ramkissoon had entered the premises by this point and was served by Mr. Nishisato. Mr. Abradjian states that Ms. Ramkissoon "took up the cause of demanding we leave and was insisting that we leave into the front store area and was edging us out of the back area".

[58] Ms. Ramkissoon prevented the passage of Messrs. Abradjian and Nishisato beyond the doorway from the store area into the outer office area while Mr. Ramkissoon went to the back office where he called his lawyer but could not be seen.
…

[62] Following upon further discussions between counsel, Mr. Moldaver and Mr. Nishisato agreed on a process to facilitate the execution of the Orders. Mr. Abradjian then explained the Orders to the Ramkissoons and, at approximately 7:55 p.m., the implementation of the search began with the ISS, Nishisato and Rogers, a computer forensic expert from DEI, walking through the premises to identify the Evidence.

[63] Mr. Abradjian states that, for the better part of the first hour following his initial entry, the Ramkissoons and Krishna "refused to allow me into the back office area and refused to come out the front store area for an explanation of the Order…":

I explained to both Mr. Ramkissoon and Mrs. Ramkissoon that I was concerned with the possibility that evidence could be deleted while Mr. Ramkissoon was in the back and Mrs. Ramkissoon refused entry thereto and my requests to attend in the backroom were repeatedly refused.

[64] While it is understandable that the Ramkissoons would be surprised and angry about the fact of the Orders, they knew the purpose of those Orders and the importance of being cooperative. They had experienced the execution of the First Anton Piller Orders and their aftermath. The Ramkissoons knew the Plaintiffs' accusations that they had deliberately prevented timely access to the execution of the First Anton Piller Orders. They were aware of the Plaintiffs' accusations that Mr. Ramkissoon had deliberately destroyed evidence while delaying access.

[65] Moreover, the Ramkissoons knew there was no objection to their calling their counsel, with privacy, for advice. Indeed, Mr. Nishisato told them he wanted them to speak with their counsel. But they also knew that the ISS wanted to keep Mr. Ramkissoon away from the Evidence while the ISS explained the nature of the Orders and while counsel was being contacted. The Ramkissoons knew that the predominant concern of the ISS and Plaintiffs' counsel from the point of their entry to the premises was to ensure that the Evidence was preserved and protected. The Ramkissoons knew and understood that Messrs. Abradjian and Nishisato had real and serious concerns that the Orders might be compromised and rendered ineffective if they could not ensure that the premises and Evidence therein were secure while they explained the Orders and the Ramkissoons spoke with their counsel. Indeed, from 5:27 p.m. to 5:37 p.m., Mr. Ramkissoon spoke with his counsel but Mr. and Ms. Ramkissoon denied the ISS and Mr. Nishisato

access beyond the doorway of the store area into the outer office area and the back office until about 6:55 p.m.

[66] Diagrams or sketches of the premises were put into evidence by both sides to the dispute. I find on the evidence that Mr. Ramkissoon and Krishna could not be observed by the ISS and Mr. Nishisato for much of the time between 5:23 p.m. and 6:55 p.m. such that the objective of preserving the Evidence was compromised and jeopardized by their actions and the actions of Ms. Ramkissoon.

[67] Computers that are the subject of the Second Anton Piller Orders were determined to be in the outer office area and the back office beyond the view of the ISS and Mr. Nishisato but were not delivered up to the ISS prior to 7:55 p.m.

[68] Mr. Ramkissoon and Ms. Ramkissoon refused to permit the ISS to fully explain the Second Anton Piller Orders between 5:20 p.m. and 6:55 p.m. despite repeated requests by the ISS to be able to do so. Telephone discussions between Messrs. Nishisato and Abradjian with Mr. Moldaver ultimately resulted in the ISS gaining access about 7:55 p.m. to the outer office area and the back office for the purpose of effectively executing the Second Anton Piller Orders.

[69] I find beyond any reasonable doubt on the evidence that Mr. and Ms. Ramkissoon intentionally did not disclose, deliver up and grant access to the outer office area and back office in a timely manner during the execution of the Second Anton Piller Orders. They wilfully and deliberately blocked and prevented entry and access to these areas of the premises to frustrate the purpose of the Orders in preserving the Evidence. They intentionally prevented the ISS upon their entry to the premises from being able to observe Mr. Ramkissoon and Krishna who had access to the Evidence in the outer office area and back office. They were intentionally in breach of ss. 2 , 4, 5, 17, 18 and 19 of the Orders by not allowing the ISS to keep the Evidence under observation until access would be granted. They did not render the necessary assistance to the ISS to effectively carry out their responsibilities under the Orders.

[70] I find beyond a reasonable doubt that the Ramkissoons deliberately and wilfully disobeyed the Second Anton Piller Orders. I find that Mr. and Ms. Ramkissoon are in contempt of the Second Anton Piller Orders. I turn now to a consideration of the specific components of the Evidence sought through the Second Anton Piller Orders.

**On appeal, 2011 ONCA 478:**

**[1] We view the actions of the appellants in refusing to comply with the Second Anton Pillar order as quite serious. Their conduct was both prejudicial to the respondents and an affront to the court. In our view, the sentences of four months' imprisonment for Mr. Ramkissoon, two months' imprisonment for Mrs. Ramkissoon and the order**

**requiring that they pay the respondents' costs were fit sentences when imposed.**

[2] That said, the appellants have filed fresh evidence indicating they have now purged their contempt to the extent that they are able to do so, setting out their circumstances and expressing their remorse to the court. Importantly, the respondents do not oppose the motion to introduce fresh evidence or the appeal.

[3] In the circumstances, the appeal is allowed and the sentence of imprisonment imposed on Mr. Ramkissoon is varied to time served (64 days); and the sentence of imprisonment imposed on Mrs. Ramkissoon is vacated. The order that the appellants pay the respondents costs shall remain in full force and effect.

**Bergmanis v. Diamond & Diamond**
**2012 ONSC 5762 (Ont. S.C.J.)**

Rather than the usual kind of case that gives rise to an Anton Piller order (breach of confidence, infringement of an intellectual property right, breach of contract by an employee or distributor, etc), this was a case involving two law firms who had a referral agreement. One law firm employed a family member of the other; the other law firm agreed to provide a 30% payment of its fees charged to client referred to it on personal injury clients provided it was to be the only law firm such clients were referred to in such matters.

Per Perrell J.:

[44] **I accept that evidence of dishonesty, suspicious circumstances or misappropriation of property, etc. can justify the inference that there is a risk that evidence will be destroyed, but the onus remains on the plaintiff or applicant for an Anton Piller Order to prove that there is a real possibility that the defendant may destroy evidence before the discovery process can do its work: Celanese Canada Inc. v. Murray Demolition Corp., supra, at para. 35, but it is not enough that an inference of dishonesty can be drawn from the evidence; rather, the inference of dishonesty must be compelling: Catalyst Partners Inc. v. Meridian Packaging Ltd., 2007 ABCA 201 (CanLII), [2007] 10 W.W.R. 436, at para. 34 (Alta. C.A.).**

[45] To obtain an Anton Piller order, opinion, supposition or the plaintiff's fear or paranoia that documents will be destroyed will not suffice: PricewaterhouseCoopers LLP v. Phelps, 2010, 2010 ONSC 1061, at para. 30 (S.C.J.); Agracity Ltd. v. Skinner, [2009] S.J. No. 555 (Sask. Q.B.), 52, 97-102, at paras. 52 and 53.

[46] In my opinion, no dishonesty or suspicious circumstances or misappropriation of property has been shown in the case at bar. There is no evidence of wrongdoing by Jeremy Diamond or Alex Ragozzino, nor does

the evidence establish any grounds for believing that there is any risk that Jeremy Diamond or Alex Ragozzino would destroy any evidence in their possession.

**[47] At best, the evidence on this motion establishes that there has been a breach of contract by the Respondents for which the normal remedy is damages. An interlocutory injunction is an extraordinary remedy and an Anton Piller order is an extraordinary-extraordinary remedy and it is not shelled out simply because the target of the order has relevant information that it has the ability to destroy**.

[48] In his text, R.J. Sharpe, Injunctions and Specific Performance, (Canada Law Book: Aurora, ON, looseleaf, 2009) at ¶ 2.1240, Justice Sharpe writes:

It is one thing to justify a significant invasion of the defendant's privacy where there is strong evidence of an intent to flout the ordinary process and effectively deprive the plaintiff of rights but quite another to grant such drastic relief where there is no more than a possibility that the defendant might destroy evidence which might assist the plaintiff in making out his or her case.

**[49] It is not and cannot be the case that courts grant intrusive orders akin to a criminal search warrant with nothing more than evidence that there has been a breach of contract, and it is not and cannot be the case that courts grant intrusive orders akin to a criminal search warrant against a non-party, even a non-party who may be the means by which a contract has been breached, with nothing more than evidence that there has been a breach of contract.**

**[50] Anton Pillar orders and Norwich orders are not a dime a dozen remedies; they are rare and precious remedies. With the light of a contested fully argued motion, in my opinion, the Anton Piller Order granted in this case should not be continued, and it should rather be set aside.**

**[51] I do not know why the Respondents did not move to have the order set aside, since it besmirches their reputation, and it may be that they have a grievance against Jeremy Diamond and are content to have the order go against him and Mr. Ragozzino. But, be that as it may, an Anton Pillar order or a Norwich order is not justified in the case at bar and the order should be set aside in its entirety.**

[52] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Messrs. Diamond and Ragozzino within 20 days of the release of these reasons followed by the Applicants' submissions within a further 20 days.

[53] Order accordingly.