Court File No. CV-17-578681-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

BRUNO-MANSER-FONDS, Association for the Peoples of the Rainforest and MUTANG URUD

Applicants

- and -

ROYAL BANK OF CANADA, TORONTO-DOMINION BANK, MANULIFE FINANCIAL CORPORATION and DELOITTE & TOUCHE

Respondents

FACTUM OF THE RESPONDING PARTY DELOITTE & TOUCHE

January 31, 2018

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PART I - INTRODUCTION

1. The applicants seek a *Norwich Pharmacal* disclosure order ("***Norwich* Order**") to obtain from the respondents production of records relating to 33 non-parties against whom no civil action has been commenced. The applicants' stated intention is to use this information to determine whether or not to pursue criminal proceedings against the non-parties through private prosecution (in either Canada or the United Kingdom). The applicants' requested relief is unprecedented, and the proposed dramatic expansion of the use of a *Norwich* Order raises serious privacy and public policy concerns.

2. This case does not warrant the extraordinary and intrusive expansion in the law sought. The long and contentious history between the applicants and the non-parties is well-documented. However, the evidence put forward by the applicants, while lengthy, is ultimately speculative.

3. Further, the applicants have failed to demonstrate that a *Norwich* Order is necessary. The applicants have failed to pursue existing and more appropriate processes available to them: for example, they have failed to commence a civil proceeding against the non-parties, which would permit access to much greater information than the disclosure currently sought. Prior to asking this Honourable Court to expand the use of a *Norwich* Order in the unprecedented manner sought, the applicants must satisfy the Court that they have exhausted all other avenues. They have failed to do so.

4. Finally, the interests of justice, and in particular, the privacy rights of parties in respect of records held by their accountants and auditors, weigh heavily against granting the relief sought. The allegations are based on information that is 25 years old and the

applicants have failed to explain their excessive delay in commencing this proceeding. Further, the scope of the order is unjustifiably broad, and the applicants have failed to provide an appropriate indemnity regarding the costs of compliance by the respondent Deloitte & Touche ("**Deloitte**") and the other respondents.

5. For all of these reasons, Deloitte respectfully submits that the application should be dismissed with costs.

PART II - SUMMARY OF FACTS

6. The applicant, Bruno-Manser-Fonds ("**BMF**"), is a charitable organization based in Switzerland. [1] The applicant, Mutang Urud ("**Urud**", and together with BMF, the "**Applicants**"), is an individual residing in Canada.[2] The Applicants allege that certain individuals and entities may have engaged in money laundering in relation to funds obtained through an allegedly corrupt Malaysian state official, Abdul Mahmud Taib ("**Taib**"). The Applicants seek wide-ranging documentary disclosure regarding the "**Taib Entities**" as defined in their draft order.[3] The Taib Entities consist of 33 individuals and corporate entities in seven jurisdictions around the world and include Taib, members of his family, and various corporate entities allegedly under their control.[4]

7. The respondents are various financial and accounting institutions who are alleged to have professional relationships with one or more of the Taib Entities. The respondent Deloitte is an accredited accounting firm; the respondent Manulife Financial Corporation

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[1] Affidavit of Lukas Straumann, sworn June 27, 2017 ("**Straumann Affidavit**") at para. 1, Application Record of the Applicants ("**Application Record**"), Tab B.
[2] Straumann Affidavit at para. 12, Application Record, Tab B.
[3] Draft order of the Applicants ("**Draft Order**"), Factum of the Applicants ("**Applicants' Factum**"), Tab E.
[4] Draft Order at subpara. 1(b) and Schedule "A", Applicants' Factum, Tab E.

is an insurance and financial institution; and the respondents The Toronto-Dominion Bank and Royal Bank of Canada are chartered banks (together, the "**Respondents**").

8. The non-party respondents consist of certain of the Taib Entities who were served with the Applicants' application materials following Justice Myers' decision dated August 22, 2017, that the application could not proceed on an *ex parte* basis ("**Myers Decision**").[5]

9. The Applicants seek a broad-ranging *Norwich* Order requiring Deloitte to provide copies of "any documents in Deloitte's possession relating to the accounting, auditing, or any other services provided to [any of the 33 Taib Entities] from the commencement of any relationship to present".[6] The Applicants also request that Deloitte be required to produce "financial statements and any related financial documents" and to identify any shareholders of any of the corporate Taib Entities.[7]

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

10. This application raises the following issues:

(a) Should the remedy of a Norwich Order be expanded to facilitate potential private criminal prosecutions?

(b) Have the Applicants established that a Norwich Order is necessary, and/or are there more appropriate existing processes available to them?

(c) Do the interests of justice favour granting the Applicants the extraordinary relief sought?

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[5] *Bruno-Manser-Fonds v. Royal Bank of Canada*, 2017 ONSC 5517, Book of Authorities of the Applicants ("**Applicants' Authorities**"), Tab 5.
[6] Draft Order at subparas. 1(b) and 4(a), Applicants' Factum, Tab E.
[7] Draft Order at subparas. 4(b)-(c), Applicants' Factum, Tab E.

(d) Is it appropriate to override accountants' duties of confidentiality and loyalty in these circumstances?

(e) Is the *Norwich* Order sought appropriately focused and would its issuance cause prejudice to Deloitte or its clients?

(A) NORWICH ORDERS SHOULD NOT BE EXPANDED TO FACILITATE PRIVATE CRIMINAL PROSECUTIONS

(i) A Norwich Order is an Intrusive and Extraordinary Remedy

11. The law is clear that, in the limited circumstances in which it is available, a *Norwich* Order is a remedy in aid of a party seeking to commence a civil action. Most provinces in Canada make no provision for equitable relief in the nature of a *Norwich* Order.[8] On the rare occasions in which they have been granted, the Courts have held that *Norwich* Orders are available as a form of pre-action discovery, and the Ontario Court of Appeal has said that they "co-exist with the *Rules of Civil Procedure*".[9]

12. The Applicants' request for a *Norwich* Order to commence a private criminal prosecution is unprecedented. The Applicants are attempting to convert a civil law remedy into a criminal law remedy which, if permitted by the Court, would have far-reaching consequences for the manner in which criminal offences are investigated in Canada, and for any individuals or entities who may have information about the ultimate target of a potential private prosecution that is investigated in this manner.

13. As held by the Court of Appeal in *GEA*, a *Norwich* Order is "an intrusive and extraordinary remedy that must be exercised with caution".[10] Pre-action discovery (such

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[8] *GEA Group AG v. Ventra Group Co.*, 2009 ONCA 619 at para. 47 [***GEA***], Applicants' Authorities, Tab 8.
[9] *GEA* at para. 52, Applicants' Authorities, Tab 8.
[10] *GEA* at para. 85, Applicants' Authorities, Tab 8; *Ontario (Attorney General) v Two Financial Institutions*, 2010 ONSC 47 at para. 17 [***Two Financial Institutions***], Applicants' Authorities, Tab 19.

as a *Norwich* Order) is "rare and extraordinary discretionary relief and is not intended as a devices to circumvent the normal discovery process".[11]

14. Outside of the civil proceeding context in which private parties have broad discovery rights, private parties do not inherently have any right to disclosure of the private confidential financial records of others. In other words, it not merely a matter of the timing of disclosure (i.e. pre- vs. post-action) that is at issue, but rather whether the Court should grant a free-standing and broad disclosure right to private parties where none already exists. The Applicants' proposed dramatic expansion of the use of *Norwich* Orders to facilitate a private prosecution should therefore be approached by the Court with an even greater degree of caution.

(ii) The Authorities Relied Upon By the Applicants Suggest a Norwich Order Should Not Be Granted

15. The Applicants admit that there is no Canadian precedent regarding the relief sought but assert that English authorities suggest this relief should be granted. The Applicants overstate the case law on both points.

16. First, recent Canadian case law clearly indicates that a *Norwich* Order should not be granted for the purposes sought. Specifically, in *Two Financial Institutions*, Justice Brown (as he was then) held as follows:

> **Norwich orders should not be used for purposes of criminal investigation.** The *Criminal Code* and *Provincial Offences Act*, R.S.O. 1990, c. P. 33 both contain tools, available in specified circumstances, to assist in the investigation of crime. **The equitable jurisdiction of the**

[11] *GEA* at para. 104, Applicants' Authorities, Tab 8; *Two Financial Institutions* at para. 16, Applicants' Authorities, Tab 19.

> **courts on which rests the power to issue Norwich orders should not be used to assist in criminal investigations.** In my view, courts must be vigilant in ensuring that requests for Norwich orders by the AGO, or any other government department or agency, are limited to the purpose of assisting in initiating civil proceedings, and not subtly converted into a device to investigate crime. Requests by government actors to compel disclosure of personal information from third parties, such as financial institutions, engage the consideration of privacy interests which are protected by s. 8 of the *Canadian Charter of Rights and Freedoms*. To ensure the continued protection of such interests in the context of civil proceedings initiated by the government, the courts should screen and measure carefully requests by government parties for the issuance of the "rare and extraordinary" device of the Norwich order.[12]

17. The Applicants suggest *Two Financial Institutions* should be distinguished on the basis that the applicant was the Attorney General. This distinction is untenable. While Justice Brown's comments were directed at the Attorney General and other government entities as they are responsible for the vast majority of criminal investigations, these comments equally apply in the rare cases where private parties intend to pursue a private prosecution.

18. Further, the Applicants' assertion that they "cannot utilize the *Criminal Code*'s search warrant provisions and are therefore not similarly situated to the Attorney General", may be incorrect. While search warrants issued upon application by private parties are very rare (as are private prosecutions in general), they have been granted by Canadian Courts in exceptional cases,[13] although they cannot be executed by private

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[12] *Two Financial Institutions* at para. 37, Applicants' Authorities, Tab 19.

[13] See e.g. *Carino Co. v. Casey*, (1997) 157 Nfld. & P.E.I.R. 266 (Sup. Ct. (T.D.)) [*Carino*] and *Saint John (City) Commissioners of Police v. Stanton*, [1991] N.B.J. No. 1033 (Q.B.), Book of Authorities of the Respondent Deloitte ("**Deloitte Authorities**"), Tabs 1 and 2, which involve cases where search warrants were issued upon the application of private parties (albeit ultimately quashed on other grounds). In *Carino* at para. 15, the Court held that "there are good policy reasons for ensuring the issuance of search warrant authorizations to private individuals be done only in exceptional circumstances, where those circumstances

parties.[14] In any event, the Applicants would not meet the criminal search warrant test and *Charter* protections would also be engaged. The Applicants cannot simply step into the "shoes" of the Attorney General as they seek to do,[15] while avoiding the important safeguards the law imposes on public authorities.

19. The Applicants also overstate the findings of the English authorities they urge this Court to instead rely upon. In *Financial Times v. Interbrew*, the English Court of Appeal merely expressed a desire to "leave open" the situation where there is a need for help "in identifying the wrongdoer".[16] The Court did not state that a Norwich Order "should" be granted for use of a private criminal prosecution as the Applicants incorrectly assert,[17] but merely did not foreclose such an order being granted in another case. Further, the only relief contemplated was a disclosure order that would identify a wrongdoer (i.e. where the existence of a crime was not in doubt). The English Court of Appeal did not suggest that a *Norwich* Order might be used to determine whether or not a crime has even occurred, which is in fact what the Applicants seek in this application.[18]

20. Similarly, in *Ashworth Security Hospital v. MGN Limited*, the House of Lords discussed *Interbrew* and found that it might be appropriate to grant a Norwich Order to

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have been clearly submitted to the issuing justice and the issuing justice has addressed them in the exercise of his discretion". Neither of these authorities were included in the Applicants' motion materials when they attended before Justice Myers on an *ex parte* basis.

[14] *Criminal Code*, R.S.C., 1985, c. C-46, section 487. See also the Law Reform Commission of Canada, *Police Powers – Search and Seizure in Criminal Law Enforcement*, Working Paper 30 (Ottawa: Law Reform Commission of Canada 1983), at pp. 206-208, Deloitte Authorities, Tab 3, which suggests private individuals could apply for search warrants (at least at that time), but recommends that only peace officers be authorized to execute such search warrants. This recommendation appears to have ultimately been followed as the current section 487 (previously section 443) of the *Criminal Code* now limits enforcement of search warrants to peace officers or public officers appointed to enforce federal or provincial laws.

[15] Applicants' Factum at paras. 47 – 49.

[16] *Financial Times v. Interbrew* SA, [2002] EWCA Civ 274 at para. 22 ["***Interbrew***"], Applicants' Authorities, Tab 11.

[17] Applicants' Factum at para. 41.

[18] Applicants' Factum at paras. 34 – 36.

allow "the victim of a crime to obtain the identity of the wrongdoer".[19] No suggestion is made that a Norwich Order could be made to determine whether or not a crime had occurred.

21. At their highest, these English authorities can be said to stand for the proposition that where a crime has occurred, the victim may apply for a *Norwich* Order to ascertain the criminal's identity. Here, the Applicants have not established that the crime of money laundering has occurred, nor that they are the victims of such a crime, both of which would be prerequisites under even the English authorities upon which the Applicants seek to rely. As such, these cases are of limited utility to the present application.

(B) THE APPLICANTS HAVE FAILED TO ESTABLISH NECESSITY

22. As observed by Justice Brown in *Two Financial Institutions*, when determining whether or not to grant a *Norwich* Order, an "over-arching criterion is whether the disclosure sought is a necessary measure in all the circumstances".[20] The Court of Appeal in *GEA* held that "the necessity for a *Norwich* order must be established on the facts of the given case to justify the invocation of what is intended to be an exceptional, though flexible, equitable remedy".[21]

23. The Applicants have failed to establish that a *Norwich* Order is necessary in the particular circumstances of this case. The Applicants admit that they may already have sufficient evidence to pursue a private prosecution, and they also have failed to pursue more appropriate existing processes available to them. Even if the Court were to

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[19] *Ashworth Security Hospital v MGN Limited*, [2002] UKHL 29 at paras.53 - 54, Applicants' Authorities, Tab 12.
[20] *Two Financial Institutions* at para. 17, Applicants' Authorities, Tab 19.
[21] *GEA* at para. 91, Applicants' Authorities, Tab 8.

contemplate expanding the use of *Norwich* Orders to potential private criminal prosecutions, this cannot be justified on the basis of necessity in this case.

(i) The Applicants Admit They May Already Have Sufficient Evidence

24. In their original factum on the *ex parte* motion before Justice Myers, the Applicants acknowledged that they may already have sufficient evidence to proceed with a private prosecution, and if so, they would have an opportunity to obtain the documentary disclosure they are seeking through that process:

> It is possible that a justice of the peace could decide to issue process if the [Applicants] laid an information for the private prosecution and commenced the pre-enquete with the information currently in their possession. To the extent that further information is required if process was issued, [the Applicants] could request that the justice of the peace issue a subpoena requiring the defendants to give evidence and bring to the proceedings the documents that [the Applicants] are seeking.[22]

25. The Applicants have not provided any explanation as to why they have not attempted to pursue a private prosecution already. Regardless, by their own admission, a *Norwich* Order may not be necessary for them to proceed.

(ii) The Applicants Have Failed to Commence a Civil Action

26. The Applicants claim the Respondents are the "only practicable source of information. Here, Jamilah, Murray, and the Sakto Group will not disclose the information required to assess whether there are reasonable grounds for a private prosecution".[23] It is not surprising that a private party will not voluntarily provide disclosure to a third party that wishes to commence a private prosecution against it. However, this is no different than

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[22] Original Factum of the Applicants dated August 11, 2017 ("**Applicants' *Ex Parte* Factum**") at para. 105.
[23] Applicants' Factum at para. 65.

any adversarial legal proceeding.

27. The Applicants acknowledge that they "may have sufficient information to commence a civil action (and would obtain the information sought through discovery in such action".[24] In light of this admission, the extraordinary relief sought by the Applicants in this application is unnecessary. The Applicants have failed to explain why they have not pursued this course of action available to them.

28. Having failed to avail themselves of existing (and more appropriate) processes for obtaining the documentary disclosure they seek, and having failed to provide an explanation for declining to do so, the Applicants should not be granted an unprecedented expansion to what is already a rare and extraordinary equitable remedy.

(C) THE INTERESTS OF JUSTICE DO NOT FAVOUR GRANTING A NORWICH ORDER

(i) The Applicants May Not Pursue a Private Prosecution in Canada

29. The Applicants have not committed to pursuing a private prosecution in Canada (or at all). They have indicated that they may (or may not) use the documents ordered by a Canadian court to pursue a private prosecution in the U.K.[25]

30. While a commitment to pursuing a legal proceeding is not a mandatory requirement for a *Norwich* Order, it is relevant to the issue of whether the interests of justice favour the order being sought. Where a foreign party commences a proceeding to obtain access to private details about a resident or corporation who does business in

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[24] Applicants' Factum at para. 34.
[25] Straumann Affidavit at paras. 9-10, Application Record, Tab B.

Canada for the purpose of a potential proceeding in the U.K., Deloitte respectfully submits that the interests of justice do not favour a *Norwich* Order being granted.

(ii) The Applicants Delayed Commencing this Proceeding for 25 Years

31. The Applicants admit that they "have only limited information about the Sakto Group since 1994 since [the Applicants] only have access to Sakto's financial statements from 1983 to 1993".[26] In short, the only alleged crimes that the Applicants purport to have any evidence of took place at least 25 years ago. The Applicants have failed to provide any explanation for this inordinate delay in commencing this proceeding.

32. The Court of Appeal has repeatedly held that inordinate delay creates a presumption of prejudice owing to the fading of memories, unavailability of witnesses, and loss of documents. The burden of displacing this presumption lies with the party pursuing the claim.[27]

33. A delay of 25 years is clearly inordinate and the Applicants have not rebutted the presumption of prejudice inherent in such lengthy delay. A party seeking extraordinary equitable relief must act promptly. The Applicants have failed to do so.

(iii) The Applicants Have Demonstrated a Willingness to Breach Undertakings of Confidentiality

34. The clean hands doctrine requires that parties seeking equitable relief must come to the Court with clean hands and that misconduct of the applicant in a directly related

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[26] Original Factum at para. 91.
[27] *Ticchiarelli v. Ticchiarelli*, 2017 ONCA 1 at paras. 28-32, Deloitte Authorities, Tab 4.

matter will disentitle the applicant to the equitable relief sought.[28]

35. In this case, the Applicants seek wide-ranging disclosure of the confidential financial records of the 33 Taib Entities. As such, the Applicants' past conduct regarding their use of confidential information regarding the Taib Entities must be assessed.

36. Regrettably, the Applicants[29] have demonstrated a lack of clean hands and a willingness to breach undertakings of confidentiality as well as publish private personal information of individuals in connection with their allegations against the Taib Entities (as further detailed below). In these circumstances, the Applicants do not come to Court with clean hands and their request for extraordinary equitable relief should be denied.

37. For example, in the context of a complaint made by the Applicant BMF against certain of the Taib Entities to the Canadian National Contact Point ("**NCP**") for the OECD Guidelines for Multinational Enterprises, BMF sought similar disclosure as it now seeks in the current application.[30] As part of the NCP's process, BMF voluntarily provided an undertaking of confidentiality including in respect of the NCP's initial draft reports.[31]

38. Notwithstanding this commitment, when the NCP advised it would not extend an offer of dialogue facilitation to the parties and would instead close its file, BMF proceeded to breach its undertaking of confidentiality by posting NCP's initial draft report on its

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[28] *Toronto (City) v. Polai*, [1970] 1 O.R. 483 (C.A.), at 46, Deloitte Authorities, Tab 5; *BMO Nesbitt Burns Inc. v. Wellington West Capital Inc.*, [2005] O.J. No. 3566 (C.A.) at para. 27, Deloitte Authorities, Tab 6.
[29] This comment applies to the Applicant BMF. While the Applicant Urud apparently works closely and shares a common objective with BMF, it is unclear whether he was involved in the actions of BMF subsequently described.
[30] Straumann Affidavit, Exhibit 130, Application Record, Tab B.
[31] Transcript of Cross-Examination of Lukas Straumann ("**Straumann Transcript**") at qq. 723-724, 729, 751-753, Supplementary Responding Application Record of Sakto Development Corporation, et al. ("**Sakto Supplementary Record**"), Tab A.

website (where it remains), issuing a press release, and holding a press conference. This was not an inadvertent breach of confidentiality; rather, BMF willfully decided to breach its undertaking of confidentiality because it did not agree with the NCP's final decision, and it made this decision to breach its undertaking after receiving legal advice (BMF's lawyers advised the NCP that BMF was taking this course of action due to perceived bias in the NCP's process).[32] The NCP's final report confirmed that it had decided not to assist the parties in part due to BMF's decision to breach its undertaking of confidentiality.[33]

39. BMF has also repeatedly published personal information regarding individuals it believes are related to the Taib Entities, including the names, dates of birth, passport/citizenship numbers, and home address of Jamilah Hamidah Taib Murray (Taib's daughter), her husband Sean Murray, and their children.[34]

40. BMF's admitted willful breach of its undertaking of confidentiality in respect of the NCP complaint against the Taib Entities, as well as its pattern of publishing and disseminating confidential and/or personal information regarding the Taib Entities and their family members demonstrates a lack of clean hands disentitling the Applicants to equitable relief. In light of this prior conduct, there is a real risk of misuse and inappropriate disclosure of confidential information if the Applicants are granted a *Norwich* Order, especially if the Applicants do not agree with the outcome of any related proceeding (e.g. if a justice of the peace were to refuse to issue process to permit a

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[32] Straumann Transcript at qq. 723-724, 733, 738, 751-763, Sakto Supplementary Record, Tab A.
[33] Supplementary Affidavit of Lukas Straumann sworn August 21, 2017, Exhibit "A" at paras. 25-28.
[34] Straumann Transcript at qq.796-815, Sakto Supplementary Record, Tab A. and Straumann Affidavit, Exhibits 4 and 35, Application Record, Tab B.

private prosecution). In these circumstances, the interests of justice favour a dismissal of the application.

(D) THE DUTIES OWED BY ACCOUNTANTS AND AUDITORS TO THEIR CLIENTS SHOULD NOT BE OVERRIDDEN LIGHTLY

(i) Accountants and Auditors Owe Important Duties of Confidentiality to Their Clients

41. The Supreme Court of Canada has emphasized the duties of confidentiality and loyalty owed by professional advisors such as accountants and auditors to their clients, which can, depending on the circumstances, amount to a fiduciary duty.[35]

42. The Supreme Court has also held that "the rules set by the relevant professional body are of guiding importance in determining the nature of the duties flowing from a particular professional relationship".[36] In the auditing context, the Court of Appeal has held that the CICA Handbook (now the CPA Canada Handbook) is "'of great assistance' to courts in determining the requisite standard and 'a persuasive guide to the applicable standard of care'".[37]

43. The CPA Code of Professional Conduct ("**CPA Code**") sets out various duties of accountants to their clients, including in respect of confidentiality. This obligation of confidentiality is highlighted in the preamble of the CPA Code as one of its "fundamental principles governing conduct":

> **Confidentiality**

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[35] *Hodgkinson v. Simms*, [1994] S.C.J. No. 84 at para. 44 [*Hodgkinson*], Deloitte Authorities, Tab 7.
[36] *Hodgkinson* at para. 52, Deloitte Authorities, Tab 7; *Livent Inc. (Receiver of) v. Deloitte & Touche*, 2016 ONCA 11 at para. 199 [*Livent*], rev'd on other grounds, *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, Deloitte Authorities, Tabs 8 – 9.
[37] *Livent* at para. 200, Deloitte Authorities, Tab 8.

> *Chartered Professional Accountants protect confidential information acquired as a result of professional, employment and business relationships and do not disclose it without proper and specific authority, nor do they exploit such information for their personal advantage or the advantage of a third party.*
>
> The principle of confidentiality obliges members to protect and maintain the confidentiality of information both outside of and within a member's firm or employing organization and to properly address a situation that may arise when confidentiality is breached.
>
> The disclosure of confidential information by a member or firm may be required or appropriate where such disclosure is:
>
> - Permitted or authorized by the client or employer;
> - Required by law; or
> - Permitted or required by a professional right or duty, when not prohibited by law.[38] (emphasis in original)

44. Indeed, the duty of confidentiality and loyalty owed by accountants/auditors was specifically recognized by Justice Myers:

> I have no doubt that the Sakto Group has an interest in the privacy of the information that is held by its bankers, accountants, and others. **The banks and accountants owe statutory or other duties of loyalty and confidentiality to Sakto Group.... Sakto Group's privacy will be compromised if the Norwich Pharmacal order is granted.**[39]

45. These duties of loyalty and confidentiality are owed to all of Deloitte's clients. The precedent that would be set if this application were granted has implications for all persons who retain accountants or auditors: any individual's private financial details could

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[38] Chartered Professional Accountants of Ontario, *CPA Code of Professional Conduct*, last amended August 26, 2006, Preamble p. 4 and Rule 208 Confidentiality of information and related guidance, Deloitte Authorities, Tab 10.

[39] Myers Decision at para. 19, Applicants' Authorities, Tab 5. See also *Drabinsky v. KPMG*, 41 O.R. (3d) 565 (G.D.) at para. 3, aff'd [1999] O.J. No. 1416 (Div. Ct.), Deloitte Authorities, Tabs 11 – 12.

be compromised by disclosure to a third party on the basis that it might wish to commence a private criminal prosecution. The potential for abuse of such a remedy is manifest.

(ii) The Duties of Accountants/Auditors Should Not be Overridden in these Circumstances

46. The duties owed by accountants and auditors to their clients should not be overridden lightly. Clients should be encouraged to be frank and open with their accountants and auditors similar to other professional advisors. If *Norwich* Orders were to be expanded to facilitate private criminal prosecutions, this could discourage clients from providing full disclosure to their financial professionals and negatively impact the accuracy and transparency of clients' financial records. This would greatly undermine the important role served by accountants and auditors.

47. Granting the relief sought by the Applicants would represent an unprecedented intrusion into the privacy of private parties in respect of their financial records and would undermine the importance of confidentiality in the auditor/client relationship. In order to justify this privacy violation, evidence of necessity would have to be overwhelming. There is simply no such evidence in this case.

(E) THE NORWICH ORDER SOUGHT IS OVERLY BROAD AND WOULD BE PREJUDICIAL TO DELOITTE AND ITS CLIENTS

(i) The Evidence Does Not Support the Broad Disclosure Sought

48. The Applicants do not assert that Deloitte has advanced funds to any of the Taib Entities, and Deloitte is not referred to in any of the schedules to the Draft Order. The Applicants do not assert that Deloitte was party to any of the subject transactions. Rather, the sole reference in the Straumann Affidavit with respect to Deloitte's involvement is that

its predecessor "provided accounting services to the main Sakto Group entity, Sakto, from at least 1987 to 1993".[40] On that basis the Applicants seek to have broad-ranging disclosure of the personal financial documents of 33 individuals and corporations located in seven jurisdictions worldwide without any time restrictions whatsoever. This is clearly a fishing expedition which the Court should not permit.

49. In *Two Financial Institutions*, Justice Brown declined to grant a *Norwich* Order on the basis *inter alia* that the applicant had failed to provide sufficient evidence establishing that the disclosure sought was a necessary measure in all the circumstances. In particular, Justice Brown noted that the affidavit evidence filed failed to link the disclosure sought to the stated purpose of the order.[41]

50. Similarly, in this application the Applicants have failed to establish that the broad disclosure sought is necessary and the evidence put forward by the Applicants is clearly insufficient to justify such extraordinary relief.

(ii) The Applicants Have Failed to Indemnify the Respondents for their Costs of Compliance

51. The Applicants have also failed to provide an appropriate undertaking indemnifying the Respondents for any costs of compliance as required.[42] On the contrary, the Applicants have only undertaken to indemnify the Respondents for their "reasonably incurred photocopying costs".[43]

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[40] Straumann Affidavit at para. 101, Application Record, Tab B.
[41] *Two Financial Institutions* at paras. 27-33, Applicants' Authorities, Tab 19.
[42] *Isofoton S.A. v. Toronto Dominion Bank*, [2007] O.J. No. 1701 (Sup. Ct.) at paras. 40(b)(iv) and 54-56, Applicants' Authorities, Tab 23.
[43] Straumann Affidavit at para. 205, Application Record, Tab B.

52. Photocopying costs will be a small fraction of the total costs required to search for, review, and produce any responsive records for the 33 Taib Entities over an unrestricted period of time. Given that the categories of documents sought from Deloitte are very broadly defined and include "any documents in Deloitte's possession relating to the accounting, auditing, or any other services" provided to the Taib Entities, the internal resources required will be significant. It is also possible that Deloitte's files may contain privileged documents and legal counsel will need to be engaged to review documents for privilege and ensure compliance with the terms of any order granted.

53. Deloitte would be financially prejudiced if a *Norwich* Order were granted without the required indemnification for all costs of compliance. Deloitte requests that, in the event any such order is made, that it be subject to the requirement that the Applicants provide a full indemnity in respect of all costs (including legal costs) incurred in relation to compliance with said order.

(iii) The Scope of Any Order and Permitted Use of Productions Would Need to be Restricted

54. As noted above, the Applicants have failed to provide establish that the broad-ranging categories of documents sought are necessary. As such, any *Norwich* Order granted by this Court should be narrowly restricted to specific categories of documents that the Applicants can satisfy this Court are necessary to be produced in the interests of justice.

55. Further, given the unprecedented nature of the relief sought, there are no currently existing restrictions on the use of such disclosure should the relief be granted. If a *Norwich* Order were granted, appropriated protections and limitations on the use of the

documents would need to be put in place. The Applicants have not proposed any restriction on the use of the productions sought apart from the undertaking of Dr. Straumann "not to utilize them for any purpose other than for the Canadian private prosecution or the U.K. private prosecution without first obtaining leave of the court".[44]

56. Dr. Straumann's undertaking clearly fails to protect the privacy interests at stake.

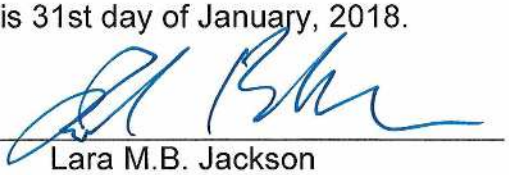
57. First, a personal undertaking of Dr. Straumann is insufficient. No undertaking has been given on behalf of BMF generally nor by the personal Applicant Urud. At a minimum, appropriate undertakings from, and restrictions upon, both Applicants are required.

58. Second, as discussed at paragraphs 34 - 40 above, BMF's prior conduct means that BMF cannot provide the required assurance that it will deal with confidential information appropriately. Further, as BMF is based in Switzerland, the ability of this Court to sanction it for any non-compliance is limited.

PART IV - ORDER REQUESTED

59. In light of the foregoing, Deloitte requests that this application be dismissed with costs, plus all applicable taxes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of January, 2018.



Lara M.B. Jackson
Jed Blackburn

[44] Straumann Affidavit at para. 10, Application Record, Tab B.

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TAB A

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Bruno-Manser-Fonds v. Royal Bank of Canada*, 2017 ONSC 5517
2. *GEA Group AG v. Ventra Group Co.*, 2009 ONCA 619
3. *Ontario (Attorney General) v Two Financial Institutions*, 2010 ONSC 47
4. *Carino Co. v. Casey*, (1997) 157 Nfld. & P.E.I.R. 266 (Sup. Ct. (T.D.))
5. *Saint John (City) Commissioners of Police v. Stanton*, [1991] N.B.J. No. 1033 (Q.B.)
6. Law Reform Commission of Canada, *Police Powers – Search and Seizure in Criminal Law Enforcement*, Working Paper 30 (Ottawa: Law Reform Commission of Canada 1983)
7. *Financial Times v. Interbrew* SA, [2002] EWCA Civ 274
8. *Ashworth Security Hospital v MGN Limited*, [2002] UKHL 29
9. *Ticchiarelli v. Ticchiarelli*, 2017 ONCA 1
10. *Toronto (City) v. Polai*, [1970] 1 O.R. 483 (C.A.)
11. *BMO Nesbitt Burns Inc. v. Wellington West Capital Inc.*, [2005] O.J. No. 3566 (C.A.)
12. *Hodgkinson v. Simms*, [1994] S.C.J. No. 84
13. *Livent Inc. (Receiver of) v. Deloitte & Touche*, 2016 ONCA 11
14. *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63
15. Chartered Professional Accountants of Ontario, *CPA Code of Professional Conduct*, last amended August 26, 2006
16. *Drabinsky v. KPMG*, 41 O.R. (3d) 565 (G.D.)
17. *Drabinsky v. KPMG*, [1999] O.J. No. 1416 (Div. Ct.)
18. *Isofoton S.A. v. Toronto Dominion Bank*, [2007] O.J. No. 1701 (Sup. Ct.)

TAB B

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. *Criminal Code*, R.S.C., 1985, c. C-46

Information for search warrant

487 (1) A justice who is satisfied by information on oath in Form 1 that there are reasonable grounds to believe that there is in a building, receptacle or place

(a) anything on or in respect of which any offence against this Act or any other Act of Parliament has been or is suspected to have been committed,

(b) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence, or will reveal the whereabouts of a person who is believed to have committed an offence, against this Act or any other Act of Parliament,

(c) anything that there are reasonable grounds to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant, or

(c.1) any offence-related property,

may at any time issue a warrant authorizing a peace officer or a public officer who has been appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this Act or any other Act of Parliament and who is named in the warrant

(d) to search the building, receptacle or place for any such thing and to seize it, and

(e) subject to any other Act of Parliament, to, as soon as practicable, bring the thing seized before, or make a report in respect thereof to, the justice or some other justice for the same territorial division in accordance with section 489.1.

2. *Criminal Code*, R.S.C., 1970, c. C-34, *Martin's Annual Criminal Code, 1983*

INFORMATION FOR SEARCH WARRANT—Endorsement of search warrant—Form—Effect of endorsement.

443. (1) A justice who is satisfied by information upon oath in Form 1, that there is reasonable ground to believe that there is in a building, receptacle or place

(a) anything upon or in respect of which any offence against this Act has been or is suspected to have been committed,

(b) anything that there is reasonable ground to believe will afford evidence with respect to the commission of an offence against this Act, or

(c) anything that there is reasonable ground to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant,

may at any time issue a warrant under his hand authorizing a person named therein or a peace officer to search the building, receptacle or place for any such thing, and to seize and carry it before the justice who issued the warrant or some other justice for the same territorial division to be dealt with by him according to law.

(2) Where the building, receptacle, or place in which anything mentioned in subsection (1) is believed to be is in some other territorial division, the justice may issue his warrant in like form modified according to the circumstances, and the warrant may be executed in the other territorial division after it has been endorsed, in Form 25, by a justice having jurisdiction in that territorial division.

(3) A search warrant issued under this section may be in Form 5.

(4) An endorsement that is made upon a warrant pursuant to subsection (2) is sufficient authority to the peace officers to whom it was originally directed and to all peace officers within the jurisdiction of the justice by whom it is endorsed to execute the warrant and to take the things to which it relates before the justice who issued the warrant or some other justice for the same territorial division. 1953. 54, c. 51, s. 429.

BRUNO-MANSER-FONDS, Association for the Peoples of the Rainforest et al.
Applicants

and

ROYAL BANK OF CANADA et al.

Respondents

Court File No. CV-17-578681-00CL

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TORONTO

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