CITATION: Bruno-Manser-Fonds v Royal Bank of Canada, 2017 ONSC [TBD]
COURT FILE NO.: CV-17-578681-00CL
DATE: 20170822

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

Plaintiffs

-and-

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

Defendants

BEFORE: F.L. Myers J.

COUNSEL: *Lincoln Caylor and Maureen M. Ward*, counsel for the Plaintiffs

HEARD: August 21, 2017

ENDORSEMENT

The Motion

[1] The plaintiffs request an order requiring the defendants to provide information concerning other people whom the plaintiffs have not yet sued. The defendants in this case are not the real target of the plaintiffs' legal proceedings. The defendants have information that the plaintiffs say they need in order to bring planned further proceedings against their real targets.

[2] The common law allows plaintiffs to sue record keepers just to obtain access to information that the plaintiffs require in order to see if they can commence legal proceedings against a different target. The modern availability of this narrow claim for discovery of information was recognized by the House of Lords in a case known as *Norwich Pharmacal Co. v. Comrs. of Customs and Excise*, [1974] A.C. 133, [1973] 2 All E.R. 943 (H.L.). This type of relief is therefore commonly referred to as a request for a "*Norwich Pharmacal* order."

[3] In this case, the plaintiffs seek a considerable amount of financial information from two banks, an insurance company, and an accounting firm concerning their customers or clients who are family members or corporations that are related to or affiliated with Mr. Abdul Mahmud Taib. The plaintiffs allege that Mr. Taib is a very senior and very corrupt government official in

the State of Sarawak, on the island of Borneo, in Malaysia. The plaintiffs claim that some or all of Mr. Taib, his family members, and their corporations (whom they define as the "Sakto Group) have committed crimes in Canada relating to the possession and laundering of funds here that were illegally obtained by Mr. Taib abroad.

[4] The plaintiffs want an order requiring the defendants to give the plaintiffs financial information about the flow of funds among a number of related people and affiliated entities over a substantial period of time to allow the plaintiffs to assess whether they have reasonable grounds to commence private criminal prosecutions against members of the Sakto Group under the *Criminal Code of Canada*.

[5] The plaintiffs move without notice to the defendants, Mr. Taib, or the others against whom they wish to bring criminal proceedings. For the reasons that follow, the motion is adjourned to be rescheduled after the plaintiffs give notice to the defendants and the members of the Sakto Group whose information they seek.

The Plaintiffs' Efforts to Combat Mr. Taib's Alleged Corruption

[6] The plaintiff Bruno-Manser-Fonds is a charitable non-commercial fund headquartered in Switzerland that is committed to the preservation of the rainforests and the indigenous population of the State of Sarawak. The plaintiffs allege that as a result of the corrupt issuance of logging licenses in Sarawak by Mr. Taib, the rainforests have been decimated and the indigenous peoples of the island of Borneo, including the Panan and the Kelabit tribes, have been impoverished and deprived of their traditional sources of livelihood. The plaintiff Mutang Urud is a member of the Kelabit tribe.

[7] I make no finding on the merits of the plaintiffs' allegations as yet. They have filed voluminous evidence with the court in support of their allegations against Mr. Taib, his family, and their corporations. In addition to some first-hand evidence, they rely on television shows, learned articles, graduate theses, and books that have all been published to document, as best as one can from private sources, the massive corruption that the plaintiffs and many others have alleged against Mr. Taib and his family.

[8] One thing that is clear from the material filed by the plaintiffs, is that their efforts to expose Mr. Taib and those associated with him as part of their mandate to protect the rainforests and the indigenous people who live in Sarawak are well known to Mr. Taib and his family members who live here. The sheer volume of information that has been made public in the media here, in the US, and elsewhere, is testament to this fact.

[9] For example, in 2016, Bruno-Manser-Fonds tried to commence proceedings against the Sakto Group before the Canadian National Contact Point for the OECD Guidelines for Multinational Enterprises. The OECD panel declined to open a case partly based on the "long standing and adversarial history of dispute between" the plaintiffs and the Sakto Group and the "aggressive challenge" to its jurisdiction mounted by the Sakto Group and its legal counsel. That is, the parties know that each has Canadian counsel who is already engaged in protecting their clients in Canada in relation to the underlying issues.

[10] In light of the very public nature of the plaintiffs' allegations and evidence, I raised with Mr. Caylor the question of whether the defendants and the Sakto Group should be served with notice of this proceeding. The plaintiffs fairly anticipated the issue and adduced some conclusory evidence that giving notice would impair the relief sought.

The Need for Notice

[11] The relief sought by the plaintiffs is extraordinary by any measure. Private parties do not have the right to obtain search warrants under the *Criminal Code*. Only government agents engaged in law enforcement may apply for search warrants in relation to suspected crime under the *Criminal Code*. The plaintiffs submit that notwithstanding the limitations on the investigatory powers of the state set out in the *Criminal Code*, any private person or entity can come to Canada and obtain what amounts to a search warrant by civil process in the form of a *Norwich Pharmacal* order without notice in support of a proposed private criminal prosecution.

[12] The plaintiffs rely on statements made by the Supreme Court of Canada and the House of Lords noting the fundamental importance of privately commenced criminal prosecutions especially as a check on lax government enforcement. *Quebec (Attorney General) v. Lachasseur et al.*, [1981] SCR 253 at 261 and *Gouriet v. Union of Post Office Workers*, [1977] 3 All ER 70 at 79 (HL). While the House of Lords has suggested that *Norwich Pharmacal* orders ought to be available to support proposed criminal proceedings, at least one case of this court questions that outcome. See *Ashworth Security Hospital v MGN Limited*, [2002] UKHL 29 at paras. 55 and 56 and *Ontario (Attorney General) v Two Financial Institutions*, [2010] ONSC 1229 at 37 in which D.M. Brown J. (as he then was) wrote that "*Norwich* orders should not be used for purposes of criminal investigation."

[13] Neither of these precedent cases deals directly with the precise issue that is before the court in this case. Here, the RCMP has apparently resisted the plaintiffs' efforts to interest it in investigating allegations of money laundering and possession of stolen property. The amounts involved are very large - over $250 million. If the plaintiffs' evidence is correct, there may be very significant criminal misconduct being committed here in aid of corrupt foreign official(s). There may be no one else here who is interested in uncovering the truth whether it has to do with criminality here, corruption abroad that Canadians are facilitating, or deforestation and destruction of indigenous habitat and culture in Malaysia.

[14] While Justice Brown's comment was made in a different context, there are many reasons to hesitate before readily recognizing a civil process as an adjunct to criminal prosecutions that may or may not be brought by private parties whether located here or abroad. Assessing the proper roles of private parties and civil courts in a proposed criminal process is complex. The public interest in exposing and punishing crime is a vital aspect of the protection of the rule of law and in maintaining a civilized society. On the other hand, what of the proposed targets' privacy rights in their financial information and their rights to be free from unreasonable search and seizure? Can anyone in the world just come to Canada, make an allegation, and obtain government sanctioned access to very private details about a resident or someone who does business here without that person having any say whatsoever? Perhaps the issues are so important and the evidence so clear that this ought to be the case. But, the existence of competing arguments is self-evident.

[15] It follows that this proceeding raises very important issues that I am hesitant to take on without legal argument and a fully developed fact base.

[16] The plaintiffs argue that *Norwich Pharamcal* orders are usually granted in civil cases without notice to the target of the plaintiffs' investigation. In addition, they point to the confidentiality of the private prosecution process which they argue must be respected in order to protect the rights of Sakto Group under criminal law.

[17] I will deal with each of these arguments in turn.

Notice in Civil Cases

[18] Procedural matters in this motion are governed by the *Rules of Civil Procedure,* RRO 1990, Reg 194. Rule 37.07 requires moving parties who seek relief by way of a motion, such as the plaintiffs in this case, to give notice of their motion to any "person who will be affected by the order sought."

[19] I have no doubt that the Sakto Group has an interest in the privacy of its information that is held by its bankers, accountants, and others. The banks and the accountants owe statutory or other duties of loyalty and confidentiality to Sakto Group. The interests of Sakto Group are affected by the risk of Norwich Pharmacal order being made against the defendants as sought by the plaintiffs. Sakto Group's privacy will be compromised if the *Norwich Pharmacal* order is granted. Therefore, at first blush, the Sakto Group is affected by the order sought and the *Rules of Civil Procedure* require that it be given notice.

[20] Under rule 37.07 (2) the requirement to give notice of a motion can be waived where giving notice is "impractical" or "unnecessary." Applying the usual civil considerations, I do not see how giving notice to the Sakto Group can be said to be impractical. There is no reason to fear that giving notice might prejudice the plaintiffs or negatively impact on their right to relief. Neither is serving the Sakto Group difficult. The Sakto Group has counsel who is known to the plaintiffs.

[21] Typically, plaintiffs request *Norwich Pharmacal* orders for one of two reasons. Either the plaintiff needs to know the name of someone who is alleged to have defamed it through an anonymous posting on the internet or it is chasing money that an alleged thief has stolen and hidden in one or more bank accounts. In both of these cases, and many similar scenarios, providing notice of the proceeding to the alleged target risks the loss of evidence or the loss of the plaintiffs' funds. In today's world, computer files can be destroyed and money can be moved abroad with the click of a key. In those cases, secrecy is required to protect the plaintiffs' entitlement to vindicate their legal rights.

[22] But the same types of risks do not exist in this case. There is no reason to fear that two major banks, a major insurance company, or a major accounting firm will destroy records relating to their customers if the customers are told that the plaintiffs want to see the information. In fact, the law requires that records of the types that the defendants can be expected to have must be kept for prescribed periods of time. If it is told that the plaintiffs propose to bring criminal proceedings and want to see documents in the defendants' possession before deciding whether they have grounds to do so, there is nothing the Sakto Group can do to affect the

ultimate outcome. The plaintiffs will have the burden to prove that they have reasonable grounds to lay a charge regardless of what evidence Sakto Group may have or may even destroy in their own offices. The plaintiffs do not seek civil relief against the Sakto Group. Even if the Sakto Group moves money out of Canada, that would be of no consequence to the issue of whether the paper trail that already exists with the defendants helps the plaintiffs make out cases of criminal misconduct. Similarly, the identity of the target is not in issue. There is no question of the Sakto Group being able to hide or alter evidence that might shield group members' identities were they to be told that the plaintiffs are seeking documents from the defendant record keepers.

[23] Under the prevailing civil *Rules*, in my view, notice is required so as to ensure that the important and novel issues raised in this proceeding are argued on properly developed and briefed facts and law. There is no civil basis to waive notice.

Preliminary Steps in Private Criminal Prosecutions are Confidential

[24] As noted above, Mr. Caylor also argues that the criminal process ought to be considered on this application because this proceeding is brought in furtherance of proposed criminal prosecutions.

[25] Under the *Criminal Code*, the police and other government agents can appear before a justice to obtain a search warrant. The proposed accused gets no advance notice of that process. The plaintiffs seek a parallel process for private prosecutors. But this action is not yet a criminal prosecution. The plaintiffs do not share the governments' entitlement to seek a search warrant under the *Criminal Code*. They are trying to fashion a parallel outcome in these civil proceedings. However, these proceedings are governed by the *Rules of Civil Procedure* as discussed above. I do not see how the civil rules can be ousted to provide a similar process to the *Criminal Code* when the *Criminal Code* does not apply to the relief sought. Parliament has chosen to refrain from giving private prosecutors a right to seek a search warrant without notice under the *Criminal Code*. In moving for relief in these civil proceedings, it must be the *Rules of Civil Procedure* that apply.

[26] Under the *Criminal Code*, anyone with reasonable grounds to believe that a person has committed an offence can "lay an information" or swear the formal documents needed to commence a criminal charge. The accused person does not get notice before a complainant appears before a justice to lay an information.

[27] Moreover, after a complainant lays an information in a private prosecution, there must be an evidentiary hearing at which a justice will decide whether to "issue process" in respect of the information. The justice will hear the complainants' evidence and decide if there is a sufficient basis to compel the accused to appear to face the criminal charge set out in the sworn information. If the justice declines to issue process, the charge set out in the information will not proceed. That hearing too is conducted without notice to the proposed accused. Moreover, it is held *in camera* so that if the justice decides that the information does not warrant proceeding any further, the identity and reputation of the proposed accused person is protected by confidentiality.

[28] The plaintiffs therefore argue that these proceedings should be held in confidence so as to protect the Sakto Group from the destruction of the confidentiality of the proposed criminal proceedings up to the time that a justice decides to issue process after a proper hearing. I do not agree.

[29] No matter what happens in this proceeding, the plaintiffs will always remain free to appear before a justice at a time and location of their choosing to try to lay an information and have the justice issue process under the *Criminal Code*. Nothing that can be done in this proceeding deprives the plaintiffs of their ability to proceed without notice before a justice. Nothing done in this proceeding deprives the Sakto Group of their right to confidentiality of that hearing unless or until a justice issues process against them.

[30] That is, the criminal processes of laying an information and the first hearing before the justice will remain available to the plaintiffs without notice to the Sakto Group even if notice of this proceeding is given to Sakto Group. It is certainly true that giving notice to the Sakto Group in this case will tell them that the plaintiffs are thinking about the possibility of commencing criminal proceedings against them. The publication of these reasons may similarly tell the public about this possibility. But that information does not have any legal effect. Sakto Group cannot do anything to prevent a plaintiff from attending before a justice as far as I am aware. It cannot know in advance when or if a plaintiff will actually appear before a justice somewhere in Canada (unless the plaintiff tells them). Certainly Sakto Group already knows that the plaintiffs or their affiliates are moving against them and their affiliates in legal, political, and media forums all over the world. Telling them that the plaintiffs may propose criminal proceedings in Canada is not revealing much of a secret and it is a revelation with no consequences in any event.

[31] It is true that the public may learn that the plaintiffs are thinking about trying to bring criminal proceedings that they currently say they lack sufficient information to bring without obtaining a *Norwich Pharmacal* order and studying the information that they hope to receive. Mr. Caylor does not argue that this knowledge is a breach of the confidentiality provisions of the *Criminal Code*. Publication of the issues in this proceeding is manifestly not the same as making public disclosure of the details of a privately laid information or a justice's *in camera* hearing in breach of a *Criminal Code* publication ban. Nothing prevents a person from holding a press conference to tell the public that he or she intends to appear before a justice to try to lay a private charge against a proposed accused person. That does not breach any publication ban. However, the actual proceedings before the justice (if brought) would remain subject to the publication ban as set out in the *Criminal Code* whether the proposed private prosecutor held a prior press conference or brought prior public civil proceedings for a *Norwhich Pharmacal* order as they have in this case.

[32] Moreover, it is a bit rich for the plaintiffs to purport to put forward a concern for Sakto Group's confidentiality rights in criminal proceeding, which the plaintiffs may or may not choose to bring, as a basis to deny Sakto Group notice of this proceeding. Mr. Caylor forthrightly agreed that if the Sakto Group was asked, it can surely be expected to want to have input into this application that seeks disclosure of its financial information from the defendants.

[33] The confidentiality of any private criminal prosecution process that the plaintiffs may choose to bring is simply not affected by any notice given in these proceedings.

Process to Proceed

[34] At the plaintiffs' request I ordered the file sealed until the motion was heard on August 21, 2017. Mr. Caylor agrees that in the event that I determine that the Sakto Group should receive notice of the proceeding, then there will be no further basis to seal the file. That is, the public interest that the plaintiffs relied upon for sealing was the protection of the Sakto Group's criminal procedure confidentiality rights. As I am not persuaded by that argument, it follows that the plaintiffs cannot meet the test for sealing a court file set out by the Supreme Court of Canada in *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41.

[35] I have not dealt at all with the merits of the claims or the tests applicable to a *Norwich Pharmacal* order as set out by the Court of Appeal in *GEA Group AG v. Flex-N-Gate Corporation*, 2009 ONCA 619 (CanLII). Those issues await the return of the motion after service.

[36] Accordingly the motion is adjourned pending service of the application record on the defendants and the Sakto Group as defined by the plaintiffs. I will keep the file and not release this decision to the legal publishers until the close of business on September 29, 2017 to give the plaintiffs a chance to seek a confidentiality order from another court pending an appeal if they are inclined to try to do so. If the defendants give notice as directed by this order, then counsel for all parties and all people served are to attend a 9:30 appointment before me to discuss scheduling as soon as practicable.

[37] I wish to note expressly that Mr. Caylor and Ms. Ward did an extraordinary job of ensuring that the issues were fully and completely put before the court in accordance with their duties on a hearing held without notice. Their factum is a model of how the interests of those who are not served are to be dealt with by moving counsel.

F.L. Myers J.

Date: August 22, 2017