

**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 AND TORONTO-DOMINION BANK,  
MANULIFE FINANCIAL CORPORATION and DELOITTE & TOUCHE

Respondents

**FACTUM OF THE RESPONDENT  
MANULIFE FINANCIAL CORPORATION  
(Application for a *Norwich* order,  
returnable February 5, 2018)**

January 31, 2018

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## **PART I – INTRODUCTION**

1. The Applicants seek a *Norwich* order to obtain confidential information relating to a number of individuals and entities, not in connection with an action or proposed action, but for the purpose of determining (i) whether there are reasonable grounds for a private criminal prosecution of offences relating to alleged money laundering and the possession of property obtained by crime, and (ii) against whom such putative prosecution could be pursued.

2. The Applicants' request for a *Norwich* order is simply an attempt to obtain a criminal search warrant in a civil proceeding. To grant such relief would be inappropriate and contrary to established Canadian law. This Court should not grant a *Norwich* order in aid of a private prosecution, as the applicants do not meet the statutory requirements to obtain a search warrant, and cannot be permitted to circumvent those requirements in a civil proceeding. However, even if this application were an appropriate use of this Court's jurisdiction, the test for a *Norwich* order is not met in any event.

## **PART II – FACTS**

3. Manulife Financial Corporation ("Manulife", which includes, for this application, its subsidiary corporations) adopts the statements of facts as set out in the factums of the other Respondents, Deloitte & Touche, the Royal Bank and TD Bank.<sup>1</sup> Manulife sets out some additional facts below relating primarily to Manulife and the order sought in respect of Manulife.

### ***Manulife***

4. Manulife is a federally regulated financial institution, headquartered in Toronto. Manulife provides, among other things, financial advice, insurance and wealth and asset management to more than 220 million customers around the world. As a financial institution and custodian of records containing personal financial information, Manulife has a legal duty to protect the confidentiality of information relating to existing and former clients.

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<sup>1</sup> Capitalized terms used in this factum have the meanings ascribed to them in the factums of the other Respondents and the Saktó Non-Parties.

### ***Procedural Background***

5. The Applicants initially commenced this proceeding on July 11, 2017 as an action against Manulife and the other Respondents. On August 11, 2017, the Applicants brought an *ex parte* motion for a *Norwich* order to compel the Respondents to disclose confidential information concerning customers and clients who are related to or affiliated with Abdul Mahmud Taib and the Sakto Group. The Applicants' intention was and is to use this information for the purpose of determining whether there are reasonable grounds for a private prosecution of criminal offences involving alleged money laundering and the possession of property obtained by crime.

6. Justice Myers adjourned the motion on August 21, 2017, pending service of the Respondents and the Sakto Group. In his endorsement, Justice Myers characterized the relief sought by the applicants as "extraordinary by any measure," and acknowledged the far-reaching implications of the applicants' position:

The plaintiffs [i.e., now the Applicants] 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.<sup>2</sup>

7. On December 20, 2017, the action was reconstituted as an application. The allegations and relief sought in this application are consistent with those included in the statement of claim.

8. The Applicants do not allege any wrongdoing against Manulife or the other Respondents, and have undertaken not to commence any proceedings against them beyond this request for documents.

### ***Scope of Information Sought from Manulife***

9. The scope of the production sought is ill-defined and poorly tailored to its stated goal.

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<sup>2</sup> Endorsement of Justice Myers, Exhibit F to the McGlynn Affidavit, Joint Motion Record of the Respondents, Tab 2F, para. 11.

- (a) The Applicants' proposed *Norwich* order, as it applies to Manulife, is temporally unlimited, and would apply to approximately thirty named entities as well as additional, unspecified entities.<sup>3</sup>
- (b) The information sought from Manulife includes broad categories of documents, including "any account information and particulars" with respect to accounts held by any one of the thirty named entities, corporate accounts over which the "Taib Entities" have authority to conduct transactions, as well as accounts of any entity or individual appearing to act on their behalf.<sup>4</sup>
- (c) The "account information and particulars" sought by the applicants includes entire mortgage/loan files, as well as "information, documents and account statements" relating to, among other things, the sources of funds used by the Affected Third Parties and others affiliated with them.<sup>5</sup>

10. The Applicants specifically point to loans provided to the Sakto Group by The Manufacturers Life Insurance Company (a Manulife subsidiary); they claim that further information is required from Manulife in order to determine the connection between Mr. Taib and the payment of the original loans with Manulife.<sup>6</sup> There is, in fact, no evidence of an actual connection; there is only speculation.

11. Manulife has previously attempted to respond to the Applicants' inquiries to the extent permissible under privacy law. In a letter dated May 2, 2014, Stephen Sigurdson, Manulife's Executive Vice President and General Counsel at that time, addressed the inquiries made by the Applicant, BMF, that related to facts or issues within the public record, but explained that Manulife cannot, for legal and privacy reasons, discuss the details of particular transactions.<sup>7</sup> In

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<sup>3</sup> Schedule A to the Applicants' Factum.

<sup>4</sup> Draft Order, Schedule E to the Applicants' Factum.

<sup>5</sup> Draft Order, Schedule E to the Applicants' Factum.

<sup>6</sup> Affidavit of Dr. Lukas Straumann, sworn June 27, 2017, Applicants' Motion Record ("AMR"), Tab B, pp 71-73. BMF asserts that, based upon available documents, Manulife has advanced at least three separate loans, arranged as mortgages, totalling at least \$73 million. The loan principle amounts are \$13 million, \$15 million and \$45 million. The evidence does not demonstrate a link between those loans and Mr. Taib.

<sup>7</sup> Letter from Stephen Sigurdson (Manulife Financial) to Dr. Lukas Straumann, dated May 2, 2014, AMR, Tab 87, p. 1841.

his letter, Mr. Sigurdson also reiterated Manulife's commitment to ethical business practices and responsible investments, including all anti-money laundering requirements. He explained that Manulife's operations have robust processes and procedures in place to vet counterparties against established lists of those identified as posing a risk for money laundering or similar illegal behaviour.<sup>8</sup> Manulife has and continues to take the position that the Applicants' concerns should be handled by law enforcement entities.

### **PART III – SUMMARY OF LAW AND ARGUMENT**

12. Manulife adopts and relies on the legal arguments set out in the factums of the other Respondents. For reasons of efficiency, Manulife does not repeat those arguments here, other than by way of a very brief summary, below.

#### ***A Norwich Order Should Not be Granted in Aid of a Private Prosecution***

13. For the reasons set out in the factums of the other Respondents, seeking to use this Court's *Norwich* order jurisdiction to obtain a search warrant is an inappropriate extension of the principles underlying that equitable jurisdiction.

- (1) A *Norwich* order is an equitable remedy, available in a civil proceeding for the narrowly circumscribed purpose of assisting a party to initiate civil proceedings. Even in those circumstances, a *Norwich* order is an “intrusive and extraordinary remedy.”<sup>9</sup>
- (2) The Applicants' request for a *Norwich* order is simply an attempt to obtain a search warrant in a civil proceeding. This would be an extremely intrusive and even more extraordinary remedy, and one that should not be granted by a Court in a civil proceeding.

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<sup>8</sup> Manulife's policy requires it to check third parties in whom or with whom they invest against commercially available lists of Politically Exposed Foreign Persons (PEFP). Those on the PEFP list appear not for any wrongdoing, but affirmative matches require a higher level of due diligence and confirmation, which becomes part of the investment evaluation process. See Letter from Stephen Sigurdson (Manulife Financial) to Dr. Lukas Straumann, dated May 2, 2014, AMR, Tab 87, p. 1842.

<sup>9</sup> *GEA Group AG v. Ventra Group Co.*, 2009 ONCA 619 at para. 85, Applicants' Book of Authorities (“ABOA”), Tab 8.

- (3) *Norwich* orders should not be used for purposes of criminal investigation. This principle was articulated by Justice Brown (as he then was) in *Two Financial Institutions*:
- (i) “Norwich orders should not be used for purposes of criminal investigation.”
  - (ii) "The equitable jurisdiction of the courts on which rests the power to issue Norwich orders should not be used to assist in criminal investigations."<sup>10</sup>
- (4) The principle articulated by Justice Brown is applicable to this application, and is unaffected by: (i) the fact that in *Two Financial Institutions* it was the Attorney General seeking the *Norwich* order rather than a private party; or (ii) the English cases cited by the Applicants, which are neither binding nor persuasive given the narrow issues and findings in those cases.
- (5) The appropriate process for obtaining and executing a search warrant is through the *Criminal Code*, where the subjects of the proposed search warrant have the benefit of *Charter* protections, including a threshold test that is more demanding than the test applicable in a *Norwich* order application. The Applicants cannot be permitted to circumvent the protections of the law by converting a civil remedy into a device used to investigate possible crimes.

***The Applicants Do Not Meet the Test for a Norwich Order in Any Event***

14. Even if it were appropriate for this Court to use its *Norwich* order equitable jurisdiction to grant a search warrant for a criminal investigation, the well-developed test for this Court to exercise its jurisdiction to grant a *Norwich* is not satisfied by the Applicants.

- (1) The Applicants do not need a *Norwich* order. The Applicants have admitted that they may have sufficient evidence to lay an information for a private prosecution, and to the extent they do not, there is a criminal law procedure available – a

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<sup>10</sup> *Ontario (Attorney General) v. Two Financial Institutions*, 2010 ONSC 47 at para. 37, ABOA, Tab 19.




search warrant – to obtain additional evidence, assuming the applicable tests can be met.

- (2) The Applicants have failed to demonstrate a *bona fide* or reasonable claim. The Applicants have failed to demonstrate:
  - (i) sufficient evidence to prove the commission of a crime in Malaysia;
  - (ii) a reasonable basis for believing that funds held in Canada can ultimately be traced back to Malaysia;
  - (iii) how the information sought will assist in determining whether there are reasonable grounds to believe that a crime has been committed; and
  - (iv) how Manulife is implicated in any of this.
- (3) The RCMP have already reviewed the Applicants' case and determined that there was no evidence of a violation of law that would allow them to prosecute the case. The Applicants' attempt to compel major Canadian financial institutions to broadly disclose confidential information amounts to nothing more than a fishing expedition for which there is no basis in law. Having failed to succeed in persuading the RCMP of the merits of their allegations, they now come to this Court seeking equitable relief not properly available to them.
- (4) The interests of justice do not favour a *Norwich* order in this case:
  - (i) the Applicants have a history of knowingly and willfully misusing confidential information, as set out in the factums of the other Respondents; and
  - (ii) Manulife is subject to strict duties of confidentiality, as set out above, and the circumstances of this case do not justify this Court's interference with these duties.

**PART IV – ORDER REQUESTED**

15. Manulife seeks an order dismissing the Application, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

  
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Lawyers for the Respondent,  
Manulife Financial Corporation

BRUNO-MANSER-FONDS, , et al. v. ROYAL BANK OF CANADA AND  
Plaintiff TORONTO-DOMINION BANK et al.  
Defendants

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COMMERCIAL LIST**

Proceeding commenced at Toronto

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