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Norwich order used to disclose identity of confidential informant

By **James R.G. Cook**

Law360 Canada (October 3, 2024, 11:15 AM EDT) -- Confidential informants — or whistleblowers — should take note of a decision of the Ontario Superior Court of Justice, *Taylor v. Metrolinx*, 2024 ONSC 4774, which concluded that the applicants in a prospective lawsuit had the right to obtain the names of parties who had filed a confidential complaint about them.

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The applicants in the case were two spouses, Brandon Taylor and Sarah Taylor, and Brandon's company, JAAX Inc. Brandon was an employee of Dufferin Construction Company (Dufferin) and worked for a subsidiary, Mosaic Transit Contractors General Partnership (MTC). He was involved in a project undertaken by MTC for the respondent, Metrolinx, for construction work on the Finch West LRT project in Toronto.

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In September 2022, senior executives at Metrolinx received an email that alleged various criminal activities by the Taylors, including racketeering, fraud and embezzlement against MTC and Metrolinx. The email stated that it had been conveyed to the complainant that the Taylors intended to take a luxury family vacation once in possession of stolen funds and that they had recently been on a two-week vacation in Mexico.

The complaint further alleged that the Taylors had a plan to defraud Metrolinx by invoicing an unknown company for materials that were not provided and depositing the money into a limited liability company in Sarah Taylor's name. The complainant stated that they were unsure whether the Taylors had followed through with their plan, but suspected they had. The complainant also stated that they did not wish to be associated with an investigation and feared retaliation from Brandon, who the complainant described as unpredictable and irresponsible.

A copy of the redacted complaint was provided by Metrolinx to Dufferin, who provided it to Brandon during an internal investigation. MTC retained a lawyer to conduct an independent investigation.

In September 2022, Brandon was placed on paid leave pending the outcome of the investigation and was subsequently terminated.

The Taylors subsequently sought to bring proceedings against the complainant(s) on the grounds that the allegations were baseless, unsubstantiated and defamatory. They brought an application for an unredacted copy of the complaint email, which would disclose the names of the complainant(s) from Metrolinx under Rule 14.05(3)(h) of the Ontario *Rules of Civil Procedure*.

To obtain a Norwich order, the applicant must establish certain requirements outlined by the Supreme Court of Canada in *Rogers Communications Inc. v. Voltage Pictures, LLC*, 2018 SCC 38, at paragraph 18, including that they have a bona fide claim against the unknown alleged wrongdoer and that the public interests in favour of disclosure outweigh the legitimate privacy concerns.

The requirement to establish a bona fide claim is intended to weed those claims that may be frivolous or doomed to fail. An applicant does not need to meet the threshold of proving a *prima facie* case. The Court of Appeal for Ontario has stated that the "threshold for granting disclosure is designed to facilitate access to justice by victims of wrongdoers whose identity is not known": *1654776 Ontario Ltd. v. Stewart et al.*, 2013 ONCA 184, at paragraphs 58–59.

In the case at hand, the Taylors intended to sue the complainant(s) for defamation, damages for intentional infliction of mental distress, and injurious falsehood and/or intentional interference with economic relations. The application judge reviewed the requirements for these causes of action and was satisfied that the applicants had the basis for the claims and that they were bona fide.

Before the application, Metrolinx reached out to the complainant to seek their consent to disclose an unredacted copy of the email in response to the initial request from the Taylors' counsel. The complainant expressly refused to provide such consent, raising concerns for their safety if their identity was disclosed.

In opposing the application, Metrolinx relied on its own internal policy on personal information collection, use and disclosure procedures, which was published on its website, as well as an affidavit from an employee of Dufferin who stated that Brandon was not terminated due to the email complaint but rather following the lawyer's investigation into his activities while employed at Dufferin, and for additional activities that took place while on leave after the investigation had commenced.

In the application judge's view, however, the court was being asked to take, at face value, the evidence that the complaint was *not* the cause of Brandon's termination and that none of the potential causes of action could be established. Conversely, the role that the complaint played in Brandon's dismissal was part of "the factual matrix," however minor, and could not be dismissed out of hand as playing no part in the termination. A Norwich application was not meant to be akin to a motion for summary judgment with a full adjudication of the merits.

Further, even if the email played no role in the dismissal, there was an open question as to whether its contents were true, which would be relevant to the proposed defamation action.

As to whether the public interest in favour of disclosure outweighed the legitimate privacy concerns of the complainant(s), the application judge acknowledged that it was in the public good and a valid public interest to encourage individuals to report misallocation of public money to government agencies. However, such reports could be made anonymously.

In the case at hand, the author of the email chose not to remain anonymous. Metrolinx's own disclosure policy warned that disclosure of personal information may be made when ordered by the court. Accordingly, disclosure ordered by the court would not run afoul of the policy. In the application judge's view, a reasonable member of the public, having read the Metrolinx publicly available policy, would not suffer loss of faith in a corporation that was required to disclose information pursuant to a court order.

The application was granted and Metrolinx was ordered to disclose the information sought. Whether the Taylors pursue a claim for damages against the complainant(s) remains to be seen.

At first blush, the case may raise concerns for confidential informants or whistleblowers who may be

reluctant to make complaints if their identities may be disclosed. At the least, they may choose to remain anonymous, which may reduce the legitimacy of the complaints. Balanced against this concern, however, is the right of a person who has been unfairly maligned to seek remedies against those making unsubstantiated complaints about them. The court's focus in a preliminary Norwich application is not to determine who will ultimately prevail.

James R.G. Cook is a partner at Gardiner Roberts LLP and has been with the firm since he articled there in 2002. As a litigator in the firm's dispute resolution group, he has experience in a broad range of commercial, real estate and professional liability litigation.

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