

CANADA / JUDGMENT

Prandi v. Salisbury

2024 BCCA 57

COURT

British Columbia Court of Appeal

DECIDED

22 February 2024

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2024 BCCA 57 Prandi v. Salisbury

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Prandi v. Salisbury,

2024 BCCA 57

Date: 20240222

Docket: CA49156

Between:

Jessica Andrea Taylor-Prandi

Appellant

(Claimant/Applicant)

And

Zahra Salisbury

Respondent

(Non-Party/Application Respondent)

Before:

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Hunter

The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated

June 6, 2023 (Prandi v. Mamdani, 2023 BCSC 967, Vancouver Docket E211620).

Counsel for the Appellant:

M. Vesely, K.C.

Counsel for the Respondent:

A. Cocks

D. Siracusa

Place and Date of Hearing:

Vancouver, British Columbia

September 12, 2023

Place and Date of Judgment:

Vancouver, British Columbia

February 22, 2024

Written Reasons by:

The Honourable Madam Justice Bennett

Concurred in by:

The Honourable Mr. Justice Hunter

The Honourable Mr. Justice Voith

Summary:

The appellant was involved in family litigation with her former husband. Within the confines of that litigation, she brought an application for a Norwich order to compel the respondent, a third party, to produce emails and social media messages from an anonymous person allegedly containing defamatory statements. The chambers judge declined to grant the application on the basis that the outstanding order against the social media company was a practical alternative source of the information and that the appellant was on a "fishing expedition". Held: Appeal dismissed. Although the chambers judge erred in her conclusion regarding the "practical source" element of the test, the Norwich application was not properly brought in the first instance due to its lack of connection to the underlying family litigation.

Reasons for Judgment of the Honourable Madam Justice Bennett:

- [1] The appellant, Jessica Taylor-Prandi, and her former husband, Hanif Mamdani, are engaged in family litigation. They have one child, Z. Within the confines of that litigation, Ms. Taylor-Prandi brought an application for a Norwich order (Norwich Pharmacal Co. v. Customs and Excise Commissioners, [1973] UKHL 6, [1974] A.C. 133) to compel the respondent, Zahra

Salisbury, to produce documents, including alleged defamatory Instagram messages and emails sent anonymously to Ms. Salisbury. Ms. Salisbury is the former wife of Mr. Mamdani and together they have three children, including R. Ms. Salisbury is not a party in the family litigation.

- [2] Ms. Taylor-Prandi obtained a Norwich order against Meta Platforms Inc., ("Meta"), the parent company of Instagram and served it upon their offices but did not receive a response from Meta.
- [3] The chambers judge refused the application, concluding that Ms. Salisbury was not the only practical source of information available based on the outstanding Meta order, and that Ms. Taylor-Prandi was on a "fishing expedition".
- [4] Ms. Taylor-Prandi appeals that order.
- [5] In an application for leave to appeal to this Court, Justice Groberman questioned whether the Norwich application was properly brought in the family litigation based on its lack of connection to the underlying proceeding: Prandi v. Salisbury, 2023 BCCA 293 at para. 12 (in Chambers) [Prandi BCCA Leave Reasons]. Justice Groberman concluded that leave was not required and left the procedural question to the division of the Court hearing the appeal.
- [6] In my view, the chambers judge erred in her conclusion that there were other "practical sources" of the information available and that Ms. Taylor-Prandi was on a fishing expedition. However, I also am of the view the application was improperly brought in the Supreme Court in the context of the family litigation. Thus, the appeal should be dismissed.

Background

- [7] Ms. Taylor-Prandi and Mr. Mamdani were married in 2017 and separated in 2021. Ms. Taylor-Prandi commenced the family litigation in July 2021.
- [8] Ms. Taylor-Prandi's father died in 2022. Shortly before his death, her father told her and Mr. Mamdani details regarding his life that were previously unknown to them. He had changed his name before she was born to hide his past and identity due to a safety risk involving dangerous third parties. Releasing that history publicly could put Ms. Taylor-Prandi and her son at risk.
- [9] Ms. Taylor-Prandi deposed that she has a close relationship with her former stepdaughter, R. R. is 18 years old but did not swear an affidavit for this application. Ms. Taylor-Prandi deposed that R. told her that in the fall of 2022, her mother, Ms. Salisbury, had received anonymous messages via Instagram and then by email that defamed Ms. Taylor-Prandi and exposed her father's past. In addition, R. said that her mother read the emails aloud to the family at a Christmas dinner, which included R.'s stepfather, Nick Salisbury, and his mother. Further, R. said that she saw a text message between her mother and Mr. Mamdani that suggested Mr. Mamdani could use the information against Ms. Taylor-Prandi in the family litigation.

- [10] Because Mr. Mamdani was one of the few people who knew the true identity of Ms. Taylor-Prandi's father, she suspected that he had direct or indirect involvement in sending the messages.
- [11] Ms. Taylor-Prandi asked Mr. Mamdani about the Instagram messages and he denied any involvement in authoring them. She alleges that when she informed him that she knew about the communication between Ms. Salisbury and Mr. Mamdani regarding using the messages in the family litigation, he replied that he was "just doing what the law allowed him to do".
- [12] Mr. Mamdani was questioned during examination for discovery in the context of the family litigation about the Instagram messages and emails to Ms. Salisbury in January 2023. He deposed that he knew about them from Ms. Salisbury but was not the sender. He said the Instagram account that sent the messages had a specific username. He did not know the account holder. He deposed that Ms. Salisbury had sent him parts of the emails but she did not forward them to him because the sender asked her not to forward them to anyone.
- [13] The emails received by Mr. Mamdani were produced to counsel for Ms. Taylor-Prandi, but they did not disclose the original sender. Ms. Salisbury refuses to produce the messages and emails.
- [14] Ms. Taylor-Prandi obtained an order for production against Meta Platforms Inc., the owner of Instagram, to produce the identity of the holder of the account in question. Meta is located in California and, although served with the order, has not responded.

Submissions before the chambers judge

- [15] Ms. Taylor-Prandi took the position on the initial application that she had a bona fide case of defamation. The connection to the family law proceeding was based on providing information to a psychologist who was preparing a report pursuant to s. 211 of the Family Law Act, S.B.C. 2011, c. 25. That connection is not pursued on the appeal.
- [16] Ms. Taylor-Prandi submitted that the application had to be brought within the family law litigation so she could rely on the discovery evidence of Mr. Mamdani because of the implied undertaking to not use that evidence outside of the proceeding.
- [17] Ms. Salisbury took issue with the "double" hearsay nature of R.'s evidence, inferentially, with the fact that the application was brought within the family litigation and the use of the discovery evidence of Mr. Mamdani, despite the implied undertaking not to use such evidence.
- [18] Ms. Taylor-Prandi submitted that not all of R.'s evidence was double hearsay. She relied on R. telling her that Ms. Salisbury read the texts and emails out loud, thus the evidence was not "double hearsay". Ms. Taylor-Prandi did not address the fact that R. did not file an affidavit. She did not raise the issue of whether the hearsay evidence was admissible for the truth of its contents or whether the evidence was tendered for a non-hearsay purpose. Nor did she

address the question of the use of hearsay in the context of an application as opposed to a summary trial.

Chambers judge's reasons

- [19] Ms. Taylor-Prandi applied for an order based on the inherent jurisdiction of the Court, or in the alternative, on Rule 9-1(15) of the Supreme Court Family Rules that allows documents to be ordered from a non-party. Both were refused by the chambers judge. She appeals only the order in relation to the inherent jurisdiction of the Court (the Norwich order).
- [20] The judge reviewed the law in relation to Norwich orders, and in brief reasons set out below, dismissed the application:
- [28] As Lyster J. noted in *Cooper Creek*, the Norwich orders are "not a dime a dozen remedies; they are rare and precious remedies", citing *Bergmanis v. Diamond & Diamond*, 2012 ONSC 5762 at para. 50. I am not satisfied one should be granted in these circumstances. Ms. Prandi has an outstanding order against Meta. Ipso facto, Ms. Salisbury is not the only practical source of information available.
- [29] This application appears to be nothing more than a fishing expedition in the context of acrimonious family litigation. The application is dismissed.
- [21] The chambers judge did not address the question of whether the application was appropriately brought within the family litigation, the use of the evidence of Mr. Mamdani or the admission of the hearsay evidence.
- [22] Ms. Taylor-Prandi sought leave to appeal the order. In the Prandi BCCA Leave Reasons, Justice Groberman questioned whether Ms. Taylor-Prandi followed proper procedure when bringing the application, stating:
- [9] It appears that the appellant initially considered the information to have some relevance to the family law proceedings, and asked questions about the matter in the course of examining her husband for discovery. She then brought an application within the family law proceedings for third party disclosure of documents and information by the respondent. The application purported to be brought both under the Supreme Court Family Rules and under the principles of Norwich Pharmacal. It is not clear whether, in bringing the application, the appellant continued to believe that the information she was seeking had some importance to the family law proceedings; she certainly does not continue to make any such assertion today.
- [10] Rather, the application appears to have been brought within the family law proceeding primarily because the appellant was of the view that by doing so, she would be able to use the evidence obtained in the discovery without restrictions. In her written argument today, the appellant says:

16. The appellant brought the applications within the underlying matrimonial proceeding because she needed to rely on evidence adduced in the matrimonial proceeding in support of the applications.
- [11] This assertion appears to represent a misapprehension of the law. The mere expedient of bringing an application within the proceeding where the examination for discovery took place does not relieve a party from the implied undertaking not to use discovery evidence except for the purpose of the action in which it was obtained: *AM Gold Inc. v. Kaizen Discovery Inc.*, 2021 BCCA 70. Unless the party who provided the information in the discovery waived the implied undertaking, the discovery transcript ought not to have been attached to the appellant's affidavit or relied upon in the Norwich Pharmacal application.
- [12] This leads to two potential difficulties for the appellant. First, on the face of it, the application, insofar as it was for the purpose of obtaining information to commence a defamation action, was not in any way connected to the action in which it was filed. It is not clear that the court ought to have entertained the application, at all, within that action. I acknowledge that the parties to this appeal fully argued the issues on their merits in the court below, and that no objection was taken to the manner of bringing the issue before the court. It may be open to this court to hold that any procedural irregularities are merely technical in nature, and do not affect the ability to proceed.
- [13] Second, some of the evidence filed in support of the application in the court below appears to violate the implied undertaking that evidence obtained on discovery can only be used for the purpose of the action in which it was obtained. Without evidence to show that the implied undertaking was waived, it is possible that some of the evidence relied upon should not have been before the court. Again, I acknowledge that this issue does not appear to have been raised in the court below. It may be that the person who gave the evidence on discovery can be inferred to have waived the implied undertaking.

Issues on appeal

- [23] Ms. Taylor-Prandi submits that the chambers judge erred by: i) failing to apply the correct legal test to the issuance of a Norwich order by finding Meta was a practical source of the information sought and that the same information was available from Meta; and ii) concluding that the application was a "fishing expedition".
- [24] Further issues arose as a result of the Prandi BCCA Leave Reasons, including whether the application could or should have been brought within the family action and whether the use of Mr. Mamdani's discovery evidence violated the implied undertaking in relation to that evidence.

Discussion

- [25] I propose to first address the merits of the application and then the issues raised as a result of Justice Groberman's decision in the Prandi BCCA Leave Reasons.

Standard of review

- [26] A Norwich order is a discretionary order and therefore entitled to a high degree of deference. The appellate court is not to substitute its views for that of the chambers judge. On the other hand, a discretionary order is not insulated from review. The appellate court may and should intervene where the judge has misdirected herself as to the applicable law or made a palpable and overriding error in assessing the facts: *GEA Group AG v. Flex-N-Gate Corporation*, 2009 ONCA 619 [GEA] at paras. 58-59, citing *B. (A.) v. D. (C.)*, 2008 ABCA 51 at para. 10; *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 at para. 43.

Legal framework

- [27] The origin of pre-action discovery lies in the ancient equitable "bill of discovery". It gained contemporary status after being revisited by the House of Lords in the 1974 *Norwich Pharmacal Co.* decision. The power to grant equitable relief to order discovery of a person against whom the applicant has no cause of action first found footing in Canada in *Glaxo Wellcome PLC v. Canada (Minister of National Revenue)*, [1998] 4 F.C. 439, 1998 CanLII 9071 (C.A.) at paras. 20-21 [Glaxo]. It is now well-established in Canada, although its parameters are still being defined: *GEA* at para. 54.
- [28] Initially, a Norwich order was seen as an extraordinary remedy. In the United Kingdom, the strictness of the remedy has eased as noted by Justice Cronk in *GEA*:
- [44] However, following *Norwich Pharmacal*, the reach of the equitable action for discovery in England was significantly expanded. In subsequent cases, pre-action discovery was granted where a cause of action against the respondent from whom discovery was sought was asserted on the basis of the respondent's own alleged wrongdoing (see *British Steel Corp. v. Granada Television Ltd.*, [1981] A.C. 1096, [1981] 1 All E.R. 417 (H.L.)), as well as where the object of the relief was to permit the tracing and freezing of assets (see *Bankers Trust Co. v. Shapira*, [1980] 3 All E.R. 353, [1980] 1 W.L.R. 1274 (C.A.); *A. v. C.*, [1980] 2 All E.R. 347, [1981] Q.B. 956 (Q.B.)). In addition, in *P. v. T.*, [1997] 4 All E.R. 200, [1997] ICR 887 (Ch. D.), Norwich relief was granted to permit an applicant to determine if, in fact, he had a cause of action against a suspected wrongdoer.
- [45] Moreover, in *Ashworth Hospital Authority v. MGN Ltd.*, [2002] 4 All E.R. 193, [2002] UKHL 29 (H.L.), it was held, at para. 44, that the "Norwich jurisdiction" was not linked "to any requirement that the information should be available to the individual who had been wronged only for the purpose of enabling him to vindicate that wrong by bringing proceedings". In other words, the court in *Ashworth* accepted that a Norwich order could be

obtained in the absence of a settled intention to sue the alleged wrongdoer or the person from whom discovery is sought. (See, also, *Norwich Pharmacal*, at p. 175 A.C., per Lord Reid.) The rationale for this expansive approach to Norwich relief was explained by Lord Woolf C.J. in *Ashworth*, at para. 57:

New situations are inevitably going to arise where it will be appropriate for the jurisdiction to be exercised where it has not been exercised previously. The limits which applied to its use in its infancy should not be allowed to stultify its use now that it has become a valuable and mature remedy.

- [29] Canadian superior courts have described Norwich orders as "rare and precious remedies" where discovery must be "absolutely necessary" in order to proceed with an action: *Cooper Creek Cedar Ltd. v. Ogden*, 2023 BCSC 465 at para. 76 [*Cooper Creek*] citing *Equustek Solutions Inc. v. Jack*, 2014 BCSC 454 at para. 10; *Bergmanis v. Diamond & Diamond*, 2012 ONSC 5762 at para. 50.
- [30] The "absolutely necessary" proposition arises from para. 76 of GEA, where Justice Cronk noted that necessity appeared to have been a fundamental element of a bill of discovery, quoting the decision in *Norwich Pharmacal Co.* at 205.
- [31] However, *Cooper Creek* and *Equustek* do not refer to the lengthy discussion in GEA regarding the meaning of necessity in the context of a Norwich order, where Justice Cronk concludes that there is no suggestion in the established jurisprudence that necessity is a stand-alone requirement for granting a Norwich order: paras. 77-84.
- [32] Furthermore, the use of Norwich orders has increased in Canada with the rise of anonymous online wrongdoing, as noted by the Supreme Court of Canada in *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34 at para. 31:

Norwich orders are analogous and can also be used to compel non-parties to disclose information or documents in their possession required by a claimant (*Norwich Pharmacal Co. v. Customs and Excise Commissioners*, [1974] A.C. 133 (H.L.), at p. 175). Norwich orders have increasingly been used in the online context by plaintiffs who allege that they are being anonymously defamed or defrauded and seek orders against Internet service providers to disclose the identity of the perpetrator (*York University v. Bell Canada Enterprises* (2009), 311 D.L.R. (4th) 755 (Ont. S.C.J.)). Norwich disclosure may be ordered against non-parties who are not themselves guilty of wrongdoing, but who are so involved in the wrongful acts of others that they facilitate the harm. In *Norwich*, this was characterized as a duty to assist the person wronged (p. 175; *Cartier International AG v. British Sky Broadcasting Ltd.*, [2017] 1 All E.R. 700 (C.A.), at para. 53). Norwich supplies a principled rationale for granting injunctions against non-parties who facilitate wrongdoing (see *Cartier*, at paras. 51-55; and *Warner-Lambert Co. v. Actavis Group PTC EHf*, 144 B.M.L.R. 194 (Ch.)).

[Emphasis added].

- [33] A Norwich order can be used to obtain the identity of a wrongdoer, to evaluate whether a cause of action exists, to plead a known cause of action and to trace assets or to preserve property or evidence (see GEA at para. 91). The list is not exhaustive.
- [34] In *Rogers Communications Inc. v. Voltage Pictures, LCC*, 2018 SCC 38, the Supreme Court of Canada set out the elements of the test for obtaining a Norwich order at para. 18:
- (a) [a bona fide claim] against the unknown alleged wrongdoer;
 - (b) the person from whom discovery is sought must be in some way involved in the matter under dispute, he must be more than an innocent bystander;
 - (c) the person from whom discovery is sought must be the only practical source of information available to the applicants;
 - (d) the person from whom discovery is sought must be reasonably compensated for his expenses arising out of compliance with the discovery order in addition to his legal costs;
 - (e) the public interests in favour of disclosure must outweigh the legitimate privacy concerns.
- [35] The requirement for no other "practical source" of the information was discussed in *Glaxo*. Mr. Justice Stone examined the other alternative sources of information to a Norwich order in detail and discounted them as not efficient, futile, ineffective, and impracticable: paras. 45-57.
- [36] The chambers judge at para. 24 of the underlying proceedings cited *Cooper Creek* at para. 27 for the proposition that Norwich orders can only be granted where discovery is "absolutely necessary". In declining to grant the Norwich order, she reiterated that the orders are "rare and precious": at para. 28. That conclusion does not seem to accord with the decision in *GEA* questioning necessity as a stand-alone requirement; and *Google Inc.*, where the Court suggests that the orders are more frequently relied on in the world of anonymous Internet activities.

Issue One - did the judge err in concluding that the Meta order provided a practical source of information?

- [37] As noted above, on April 4, 2023, Justice Brongers ordered Meta disclose the name and other identifying information relating to the holder of the Instagram account identified under the specific username. There was no response from Meta, although duly served with the order in California.
- [38] Ms. Taylor-Prandi was uncertain of the exact name of the Instagram account. The name was provided by Mr. Mamdani during his examination for discovery, and Ms. Taylor-Prandi lacks the ability to verify whether the username is correct.

- [39] Ms. Taylor-Prandi submits that the judge failed to consider whether the Meta order amounted to a "practical source" of information. She submits that it clearly is not. She further submits that the source of the emails is not something that Meta can provide -- only Ms. Salisbury has that information.
- [40] Ms. Salisbury contends that there were many bases on which the judge could have dismissed the claim, including that there was no admissible evidence to support the application. She submits that there is no evidence of defamation, and that her privacy interests outweigh the claim sought by Ms. Taylor-Prandi. None of those issues were addressed by the judge.
- [41] In terms of whether the Meta order was a practical source of information, Ms. Salisbury submits that Ms. Taylor-Prandi should enforce the order against Meta, as opposed to seeking an order of disclosure from her.
- [42] The judge did not analyse whether there was another practical source of the information. She did not consider that Meta could not provide any information regarding the emails, only the Instagram messages, sent to Ms. Salisbury. She simply concluded that because an order against Meta existed, that was enough to refuse the order sought. In my respectful view, she erred in her application of the law. There was no evidence that Meta was a practical source of information. The evidence was that it was not. Despite being served with a court order, it did not respond.
- [43] In my view, the judge failed to properly apply the aspect of the test for a Norwich order with respect to whether Ms. Salisbury was the only practical source of the information. Her conclusion amounted to a palpable and overriding error.

Issue Two - did the judge err in concluding that the appellant was on a fishing expedition?

- [44] A fishing expedition in the context of litigation is seeking information without a foundation for its existence, in the hope that it does exist. As Madam Justice Southin said in *Proconic Electronics Ltd. v. Wong*, 1985 CanLII 253 (B.C.S.C.) at para. 9:

While the expression "a fishing expedition" is hallowed by usage, it really does not provide a principle upon which a decision can be founded. Some fishing expeditions are, if I may put it so, licensed by the Rules of Court and authority; others are not. Perhaps it is not too fanciful to say that a litigant cannot have a licence to fish in his opponent's private swimming pool unless he can provide some evidence from which it can be inferred that there may be fish in that pool. If there is no such evidence, the defendant need not let him in to see if there is a fish.

- [45] The chambers judge concluded that Ms. Taylor-Prandi was on a "fishing expedition". A Norwich order may not be granted when the applicant is on a "fishing expedition" (see *GEA* at paras. 42, 106) as there would be an absence of evidence supporting it.

- [46] As noted by Ms. Salisbury, the judge did not address the other elements of the test in dispute (1 and 5). Nor did she address the admission of the evidence of either the hearsay or the discovery evidence. If some or all evidence was admissible, there would arguably be a foundation for the application. Accordingly, it is not clear on what basis she concluded that Ms. Taylor-Prandi was "fishing".

Procedural issues

- [47] I turn now to what I see as the most important issues on appeal.
- [48] The parties addressed the issues raised by Justice Groberman in the Prandi BCCA Leave Reasons. Justice Groberman suggested that the family litigation had taken a back seat during the leave to appeal application, and indeed was not asserted as a basis for the order in that application.
- [49] On appeal, Ms. Taylor-Prandi relies on the family litigation as one basis for the Norwich order when addressing the issues raised by Justice Groberman in the Prandi BCCA Leave Reasons. She argues the Norwich order properly arose from the family law action because it was likely someone associated with her husband authored the Instagram messages, given that he was one of the few people who knew her father's birth name.
- [50] Ms. Salisbury submits that the application had a dual purpose: to further the highly contested family claim and to support a claim against Ms. Salisbury and Mr. Mamdani.
- [51] In the submissions before the chambers judge, Ms. Taylor-Prandi relied almost exclusively on the alleged defamation contained in the messages and emails and the information provided by R. The use of the order, if any, in the family proceeding was tangential.
- [52] The purpose of a Norwich order is to obtain information from a non-party to litigation or as a stand-alone application if there is no litigation extant: Prandi BCCA Leave Reasons at para. 3. If the application is brought within the confines of existing litigation, the application must have some relation to that litigation. Here, there appears to be little, if any, relationship to the family litigation. In my view, the application should not have been brought within the family case. Although it was raised inferentially by Ms. Salisbury, there was little argument before the chambers judge to draw her attention to the difficulty with bringing the case before her.
- [53] Furthermore, there was no waiver of the implied undertaking, and thus, the discovery evidence was not properly before the judge. The admissibility of R.'s hearsay evidence was not addressed by the judge.

Conclusion

- [54] Although the judge erred in her application of the test with respect to the Norwich order, I would dismiss the appeal on the basis that the underlying application was not properly brought in the first instance.

[55] However, that conclusion does not prevent Ms. Taylor-Prandi from bringing an application on a proper basis, that is to discover who is allegedly defaming her, if she has evidence to support such an application. It would be on a different basis and not res judicata.

[56] I would therefore dismiss the appeal, and order costs of the appeal in favour of Ms. Salisbury.

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Mr. Justice Hunter"

I AGREE:

"The Honourable Mr. Justice Voith"

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