COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Prandi v. Salisbury,*
2023 BCCA 293

Date: 20230712
Docket: CA49156

Between:

Jessica Andrea Taylor Prandi

Appellant
(Claimant/Applicant)

And

Zahra Salisbury

Respondent
(Non-Party/Application Respondent)

Before: The Honourable Mr. Justice Groberman
(In Chambers)

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).

Oral Reasons for Judgment

Counsel for the Appellant: M. Vesely, K.C.
K.I.F. Coady

No one appearing for the Respondent

Place and Date of Hearing: Vancouver, British Columbia
July 12, 2023

Place and Date of Judgment: Vancouver, British Columbia
July 12, 2023

Summary:

The appellant applied in the B.C. Supreme Court for a "Norwich Pharmacal order" requiring the respondent to disclose information to her so that she could commence a defamation action against a third person. The application was dismissed, and she wishes to appeal. She applies for directions as to whether leave is required. Held: A Norwich Pharmacal order is not a limited appeal order under the Court of Appeal Act and Rules, so leave is not required. The procedure adopted by the appellant to bring the matter in the court below appears to have been irregular, however, in two ways: (1) the application had no connection to the proceeding in which it was brought, and (2) evidence adduced on the application may have violated the implied undertaking of confidentiality applicable to evidence obtained on discovery. The parties should be prepared to address any concerns that might arise from these irregularities at the hearing of the appeal.

[1] **GROBERMAN J.A.**: The appellant applied in the court below for what is commonly referred to as a "*Norwich Pharmacal"* (or simply "*Norwich"*) order (so-called because the principles surrounding the modern availability of the order were first discussed in *Norwich Pharmacal Co. v. Customs and Excise Commissioners*, [1973] UKHL 6, [1974] A.C. 133). The order applied for would have required the respondent to disclose information surrounding allegedly defamatory statements made to her by an anonymous third party. The appellant says that she wishes to commence a defamation action against the third person and can only identify that person if she obtains disclosure from the respondent.

[2] The judge refused to grant the disclosure order and the appellant wishes to appeal. The current application is for a direction that leave to appeal is not required or, in the alternative, for leave to appeal. The respondent does not oppose the application.

[3] Applications for *Norwich Pharmacal* orders are typically made in one of two ways. Where the application seeks information to expand an existing action or to furnish essential information for that action, an interlocutory application may be made within the existing litigation (see, for example, *Equustek Solutions Inc. v. Jack*, 2014 BCSC 454; *Cooper Creek Cedar Ltd. v. Ogden*, 2023 BCSC 465). Sometimes, however, a plaintiff may need disclosure of information before they can even commence litigation. In such cases, a *Norwich Pharmacal* order may be sought

in a stand-alone proceeding that makes a claim only for disclosure (see, for example, *Kenney v. Loewen* (1999), 64 B.C.L.R. (3d) 346, 1999 CanLII 6110 (B.C.S.C.); *Gold Bullion Development Corp. v. Stockhouse Publishing Ltd.*, 2013 BCSC 784).

[4] The rules of court provide the court with specific powers to order discovery from non-parties (see *Supreme Court Civil Rules* Rule 7-1(18) and Rule 7-5; *Supreme Court Family Rules* Rule 9-1(15) and Rule 9-4), but it is important to recognize that these powers are not the same as those exercised in granting a *Norwich Pharmacal* order. *Norwich Pharmacal* orders are founded in the inherent jurisdiction of the superior court. They are available where a plaintiff needs information in order to bring a claim. In contrast, the rules that I have referred to are used to gather evidence in support of a claim that is already fully asserted.

[5] Orders made under Part 7 of the *Supreme Court Civil Rules* are limited appeal orders under Rule 11(a)(iii) of the *Court of Appeal Rules,* B.C. Reg. 120/2022; orders made under Part 9 of the *Supreme Court Family Rules* are limited appeal orders under Rule 11(b)(iv) of the *Court of Appeal Rules*. On the other hand, *Norwich Pharmacal* orders are not limited appeal orders.

[6] Any confusion as to whether leave to appeal is required in the case before me is, to a large extent, a product of the unusual way that the appellant proceeded in the court below. As I will indicate, I have considerable doubt as to the propriety of the manner of proceeding that was employed. Nonetheless, it is my view that the order made in the court below was not a “limited appeal order” as that phrase is defined in s. 1 of the *Court of Appeal Act*, S.B.C. 2021, c. 6, and Rule 11 of the *Court of Appeal Rules*. Leave to appeal is not, therefore, required.

[7] The question of what consequences flow from the procedural choices made by the appellant in the court below is one that may have to be determined by the panel that hears the appeal.

[8] I turn, briefly, to the background of the case. The appellant was involved in family law proceedings against her husband. She had a close relationship with her husband's daughter from his previous marriage to the respondent. The daughter is alleged to have told the appellant that the respondent had received anonymous correspondence making allegations about the appellant's background and comportment.

[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.

[14] The concerns that I am raising may have to be considered by the panel hearing the appeal. They do not, however, affect the application before me. I am satisfied that the order made in the court below was not a limited appeal order insofar as it concerned the *Norwich Pharmacal* application. Accordingly, I declare that the appellant does not require leave to pursue the appeal.

[15] In terms of logistics, I am making the following directions for the purpose of providing clarity: (1) The notice of application for leave to appeal will serve as the notice of appeal; (2) The time limits for further filings in the appeal will be determined by deeming the appeal to have been brought on today's date.

"The Honourable Mr. Justice Groberman"