**CITATION:** Taylor v. Metrolinx, 2024 ONSC 4774
**OSHAWA COURT FILE NO.:** CV-23-375-00
**DATE:** 20240829

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Brandon Taylor, Sarah Taylor and JAAX Inc., Applicants

**AND:**

Metrolinx, Respondent

**BEFORE:** The Honourable Madam Justice S.E. Healey

**COUNSEL:** Frank Portman and Emma Chapple, Counsel for the Applicants

Natalie Kolos, Counsel for the Respondent

**HEARD:** August 8, 2024



## ENDORSEMENT

### Nature of the Motion

[1] This is an application for the equitable remedy of a Norwich order, seeking discovery of a non-party prior to litigation.

[2] The evidence is largely undisputed and accordingly this application is brought pursuant to r. 14.05(3)(h) of the *Rules of Civil Procedure*. The respondent concedes that this court has jurisdiction to make an order for discovery against a non-party, as confirmed in *Straka v. Humber River Regional Hospital et al*., 2000 CanLII 16979 (ON CA), at para. 36.

[3] The issue to be decided is a narrow one. The applicants seek disclosure of an unredacted complaint sent to the respondent, Metrolinx, by an individual whose identity is currently unknown to the applicants. The complaint was delivered by email to three executives at Metrolinx and is approximately a page and a half in length.

[4] The applicants intend to commence legal action against the author of the complaint (the "complainant") based on various tortious causes of action.

[5] The respondent opposes the application. It concedes that it possesses an unredacted copy of the complaint. The respondent has not consented to release the complainant's name on the basis that such communication is protected by privilege, and the release of the person's identity would violate Metrolinx' confidentiality and privacy policies, and would undermine public trust and confidence in Metrolinx' commitment to privacy and confidentiality.

**Evidence on the Motion**

[6] The applicants' evidence is that the applicant Brandon Taylor was an employee at Dufferin Construction Company. He also completed work for its subsidiary, Mosaic Transit Contractors General Partnership ("MTC"), a company that undertook construction work on behalf of the respondent. Metrolinx is a Crown Corporation and accountable for how public funds are spent on construction projects. Mr. Taylor had been seconded to work as part of MTC to construct the Finch West LRT project.

[7] The applicant Sarah Taylor is his common-law spouse. The applicant JAAX Inc. is a company owned by Brandon Taylor. JAAX provides traffic management consulting services, traffic safety consulting and sells and rents traffic construction materials to contractors on road projects throughout Ontario. Mr. Taylor says that his work with JAAX is completely unrelated to his other employment.

[8] Senior executives at Metrolinx received an email in September 2022 that alleged various criminal activities by the Taylors including racketeering, fraud and embezzlement against Dufferin and a subsidiary company, Mosaic Transit Group ("MTC"), as well as against Metrolinx. The email states that it had been conveyed to the complainant that Mr. Taylor intended to take his family on a luxury vacation once in possession of stolen funds, and that the Taylors had recently been on a two-week vacation in Mexico.

[9] The complaint alleged that Brandon and Sarah Taylor had a plan to defraud the three companies 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.

[10] The complainant also stated that they did not wish to be associated with an investigation and feared retaliation from Brandon Taylor, who the complainant described as unpredictable and irresponsible.

[11] A copy of the redacted complaint was provided by Metrolinx to Dufferin, who provided it to Mr. Taylor during an internal investigation.

[12] The respondent's evidence is that MTC retained a lawyer, Matthew Vella, to conduct an independent investigation. On September 22, 2022, Mr. Taylor was placed on paid leave pending the outcome of the investigation. He was terminated from his position on November 4, 2022. Mr. Taylor's affidavit states that he lost his job because of the complaint.

[13] 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 applicants' counsel. The complainant expressly refused to provide such consent, raising concerns for their safety if their identity was disclosed.

[14] Metrolinx has developed confidentiality and privacy policies, and relies on its policy entitled Personal Information Collection, Use & Disclosure Procedures (the "Policy") to oppose this application.

[15] Metrolinx also relies on the contents of an affidavit sworn by Carl Cassian, who confirmed that Mr. Taylor worked within his department at Dufferin and was seconded to work as part of a multi-company partnership team known as MTC, which was contracted to construct the Finch West LRT project. Mr. Cassian's evidence is that Mr. Taylor was not terminated due to the complaint, but rather following Mr. Vella's investigation into his activities while employed at Dufferin, and additional activities that took place while on leave after the investigation had commenced.

[16] The applicants allege significant emotional distress, reputational harm, lost business opportunities and special expenses from what they say is a baseless and unsubstantiated complaint.



## Legal Test for a Norwich Order

[17] The parties agree that the requirements for a Norwich order are as confirmed by Brown J. in *Rogers Communications Inc. v. Voltage Pictures, LLC*, 2108 SCC 38, [2018] 2 S.C.R. 643, at para. 18:

> (a) [a bona fide claim] against the unknown alleged wrongdoer;
>
> (b) the person from whom discovery is sought must in some way be 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; and
>
> (e) the public interests in favor of disclosure must outweigh the legitimate privacy concerns.

[18] The respondent concedes that the elements described at (b), (c) and (d) are either satisfied or not at issue in this case.

## Analysis

### *A bona fide claim*

[19] Under this branch of the Norwich test, the applicant does not need to show a *prima facie* case. Nor is the application judge required to do an in-depth analysis of the evidence at this

stage. While the court must ensure that it weeds out potential claims that may be frivolous or vexatious or doomed to fail, 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*, 2013 ONCA 184, at paras. 58-59.

[20] The applicants contemplate that they will commence a claim against the complainant for defamation, damages for intentional infliction of mental distress, and injurious falsehood and/or intentional interference with economic relations. On the evidence available on this motion, I conclude that they have the basis for any one or all these claims.

[21] The test for defamation is set out in *Grant v. Torstar Corp*., [2009] 3 S.C.R. 640 at p. 658. Applying that test, the content of the email would tend to lower the reputation of the applicants in the eyes of a reasonable person, the words used specifically named each of the applicants, and they were published once sent to the recipients of the email.

[22] The tort of intentional infliction of mental distress is established by proof of conduct that is flagrant and outrageous, that is calculated to produce harm, and that results in visible and provable injury: *Prinzo v. Baycrest Centre for Geriatric Care*, (2002), 60 O.R. (3d) 474, at para. 43. If the allegations contained in the email are shown to be baseless, it will not be difficult to show that they were sent with the intention to cause harm to the individual applicants. Mr. Taylor's evidence is that the serious allegations of criminal activity caused significant emotional distress for both him and his wife, high levels of stress and anxiety, and each has experienced changes to eating habits and sleeping patterns.

[23] Finally, the tort of intentional interference with economic relations/causing loss by unlawful means requires the intentional infliction of economic injury on the aggrieved party arising from the defendant's unlawful act against a third party: *A.I. Enterprises v. Bram Enterprises*, [2014] 1 S.C.R. 177, at para. 23. The evidence is that JAAX has experienced harm to its reputation, including the loss of lucrative contracts and expansion of his business, and that economic loss has resulted for the Taylors and JAAX. Further, Mr. Taylor attributes his loss of job to the email.

[24] In summary, there is enough basis in the evidence to support each of the contemplated causes of action. I conclude that *bona fide* claims are being proposed against the complainant.

[25] In reaching this conclusion, I have considered the evidence from the respondent that the allegations contained in the complaint were not the cause of Mr. Taylor's termination, and that the applicants have not disclosed the conclusions of the independent investigation nor the basis upon which MTC terminated his employment. The respondent's factum asserts that in the absence of this evidence, the court is being asked to speculate that the complaint is the cause of his dismissal. Further, in the absence of this evidence, the court should draw the inference that a defamation claim is bound to fail.

[26] To the contrary, the court is being asked to take at face value the respondent's evidence that the complaint was not the cause of the termination and accept that none of the potential

causes of action will be able to be established. While the evidence of Mr. Cassian is uncontested on this motion, it remains to be tested in any way. With the email triggering both an internal and independent investigation, it is difficult to dismiss it out of hand as playing no part in Mr. Taylor's termination. Further, if the email played no role in the dismissal, the question remains open as to whether its contents is true. It remains unknown whether any aspect of the allegations in the email have been substantiated. If they cannot be substantiated and the elements of the tort of defamation established, damages are presumed: *Grant*, at para. 28. This application is not akin to a motion for summary judgment; the role that the complaint played in Mr. Taylor's dismissal is at this point part of the factual matrix about which this court has insufficient evidence to evaluate whether it in fact played a role, however minor, in the dismissal.

[27] As stated by Morden J.A. in *Straka*, at para. 53, "the general object is to do justice", and accordingly, a rigid view should not be taken toward the elements of the claim. While the evidence of Mr. Cassian casts doubt on the strength of the applicants' proposed claims, the applicants have presented sufficient *bona fides* to lift the proposed litigation beyond the realm of frivolous or wholly lacking in merit.

***Public Interest***

[28] This fifth Norwich factor is "broad and encompasses the interests of the applicant, the respondents, the alleged wrongdoers and the administration of justice": *Stewart*, at para. 77.

[29] The respondent asserts that the identity of the informant is protected by confidential source privilege. As such, the applicable principles are derived from what is known as the four-part "Wigmore test": Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 3d ed. (Markham: LexisNexis, 2009) at p. 915; *M.(A.) v. Ryan*, [1997] 1 S.C.R. 157, at para. 20. In *Stewart*, at para. 77, Juriansz, J.A. held that privilege claims, as determined by the Wigmore test, intersect with this fifth factor of Norwich.

[30] The Wigmore test places the onus on the respondent to establish the following factors:

(a) The communication originated in a confidence that the source's identity will not be disclosed;

(b) The confidence must be essential to the relationship in which the communication arises;

(c) The relationship is one which should be sedulously fostered in the public interest; and

(d) The public interest served by protecting the identity of the informant outweighs the public interest in getting at the truth.

[31] These factors will be examined in turn.

*(a) Communication Must Originate in a Confidence*

[32] The respondent points to the wording of the email, in which the complainant stated that they did not wish to be associated with any potential investigation, citing fear of retaliation, and that Mr. Taylor knows where the individual lives and works. When later asked directly about disclosure of their identity, the complainant declined to consent.

[33] The applicants submit that the email does not actually indicate an expectation on the part of the complainant that their name will remain confidential, but only a request that it remain so.

[34] The applicants also ask this court to examine the wording of the Policy, which does not support the conclusion that personal information given to Metrolinx will be kept in confidence. I note that it is quite possible that the complainant reviewed the Policy on Metrolinx' website at the time that they were searching for names of individuals to whom the complaint should be directed, as it seems that they searched for Metrolinx' publicly available information. The email states: "I am unsure to whom this communication should be addressed….and I was only able to find email addresses for Metrolinx executives publicly, so I hope this communication ultimately ends up in the hands of an individual who is able to investigate it appropriately…".

[35] The Policy addresses the collection and use of personal information. Under the heading "Consent for the Collection, Use and Disclosure of Personal Information", the reader is advised that by submitting personal information to Metrolinx "you give Metrolinx consent to collect, use and disclose your personal information" in accordance with the Policy and for such purposes as are permitted by applicable law. A reasonable person would be informed that by providing their name, Metrolinx could then use and disclose it pursuant to the Policy.

[36] Under the heading "Purposes for the Collection of Personal Information", the reader is informed that Metrolinx shall have the right to use personal information for purposes that include responding to comments or complaints, or to detect and prevent fraud, theft and other illegal activities, as well as for any other purpose required or authorized by law.

[37] Under the heading "Disclosure of Personal Information", the reader is informed that Metrolinx may provide personal information to third parties "who have a need to know the information for one of the purposes described above", which may include circumstances where "disclosure is required or permitted by law or pursuant to a court order".

[38] It is submitted by the applicants that this is a broadly worded policy that clearly signals that once personal information is in the hands of Metrolinx, the sender has consented to its use in accordance with the terms of the Policy, thereby relinquishing control over it. It is not specifically designed to create a process that allows complaints to be made anonymously. I agree.

[39] Even if the Policy did not exist, this is an unsolicited email sent to complete strangers, with whom the complainant had no prior relationship on which to base any real expectation that their personal details would be kept in confidence.

[40] As this factor cannot be established, privilege cannot arise to protect the complainant's identity in this situation. Although the analysis of the Wigmore test can end here, I will continue to examine the other factors.

*(b) Confidentiality Must be Essential to the Relationship*

[41] This factor requires the court to examine the relationship between the complainant and the respondent. This court must be satisfied that confidentiality is essential to the relationship between the complainant and the respondent.

[42] The facts as currently known are that the complainant was not someone associated with Metrolinx. This is not an individual acting in the capacity of employee, seeking to take advantage of protections available to a corporate whistleblower.

[43] The respondent relies on *Cadillac Fairview Corp. Ltd. v. Standard Parking of Canada Ltd*., 2003 CanLII 23598, at para. 24, for the proposition that Metrolinx is a victim and the complainant an informant, and that this is enough to create a relationship to which confidentiality is essential "since it is more likely that employees would blow the whistle on criminal acts carried out by a co-employee either to their own employer or to the victim of the criminal acts if confidentiality were promised".

[44] While it may be more likely for a private citizen to come forward to a Crown corporation to report alleged misuse of public funds if an assurance of confidentiality is made, it is not "essential" to the victim/complainant relationship in the same way that it is for employees who have a stake in maintaining relationships with employers and co-workers. I conclude that in this case, confidentiality is not essential to the relationship.

*(c) The Relationship Should be Sedulously Fostered*

[45] Assuming that a different conclusion had been reached about the confidentiality of the communication and the relationship, I agree with the respondent's argument that it is in the public good to encourage individuals to report misallocation of public money to government agencies such as the respondent. There is value to the public in such a relationship, which should be "sedulously fostered" if the communications had originated in confidence.

*(d) Whether Public Interest in Protecting the Identity of the Informant Outweighs the Public Interest in Ascertaining the Truth.*

[46] This branch of the test requires that the respondent establishes that the harm that would inure to the relationship in question is greater than the benefit gained for the correct disposal of the litigation: *Ryan*, at para. 52. However, where it has been determined that

any one of the first three Wigmore criteria are not fulfilled, as is the case here, the privacy interests at stake are no longer to be considered: *Ryan*, at para. 59.

[47] Even though I have concluded that the application of the Wigmore test has not produced a privileged communication, the applicants still bear the burden of establishing that the public interests in favor of disclosure outweighs the legitimate privacy concerns.

[48] As previously stated, it is in the public good and a valid public interest to encourage individuals to report misallocation of public money to government agencies. However, such reports can always be made anonymously. In this case the author chose not to remain anonymous. If disclosure was ordered by the court, it would not run afoul of Metrolinx's Policy, which warns that disclosure of personal information may be made when ordered by the court. A reasonable member of the public, having read the Policy, would not suffer loss of faith in a corporation that was required to disclose information pursuant to a court order as prescribed by the Policy. Especially not one written in plain language and published in the public domain.

[49] The only other potential harm identified is strictly a private one, based on the allegations by the complainant of fear of retaliation and for their safety. The policing and criminal justice systems are designed to address that concern.

[50] The benefits of ordering disclosure are, in my view, quite apparent. I have previously examined the strength of the applicants' proposed case – there is a basis in the evidence for each cause of action. There is a public interest in having civil claims correctly disposed of, and adjudicated on their merits: *Stewart*, at para. 134. There is a further public interest in not allowing individuals to hide behind anonymity when making malicious and unfounded comments about others, especially if those comments unravel the personal and financial well-being of the subject individuals. The applicants should be permitted to clear their name if the allegations made against them are without foundation.

[51] In the final weighing up, I find that the benefit gained from getting at the truth and correctly disposing of the proposed litigation by disclosing the identity of the complainant far outweighs the benefit to the interests served by protecting their identity from disclosure.

[52] For these reasons, the application is granted.

[53] If the parties are unable to reach an agreement on costs, they may exchange and file written submission not exceeding five pages, not including a costs outline and any authorities relied on. Such submissions are to be filed with the court and uploaded to Case Center on the following timeline: the applicant, by September 6, 2024, the respondent, by September 13, 2024, any reply (not to exceed two pages) by September 18, 2024. These deadlines may be altered by counsel on consent, with notice to the court.

Healey J.

**Date:** August 29, 2024