CITATION: Harrington Global Opportunities Fund S.A.R.L. v Investment Industry Regulatory Organization of Canada, 2018 ONSC 7739
COURT FILE NO.: CV-16-555535
DATE: 2018/12/31

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
HARRINGTON GLOBAL OPPORTUNITIES FUND S.A.R.L. and HARRINGTON GLOBAL LIMITED	)	*John Kingman Phillips* and *Laura Young* for the Applicants
Applicants	)	
– and –	)	
INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA	)	*Luisa Ritacca* and *Carlo DiCarlo* or the Respondent
Respondent	)	
	)	**HEARD**: December 6, 2018

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] Between 2016 and 2018, the value of the shares of Concordia International Corp. plummeted. Concordia lost approximately 3.9 billion dollars in market capitalization.

[2] Harrington Global Opportunities Fund S.A.R.L. and Harrington Global Limited (collectively "Harrington"), which had invested in the shares of Concordia, lost $150 million. Harrington believes that Concordia and its investors were victimized by a cabal of short-sellers that conspired to manipulate the market to profit at the expense of Harrington and its shareholders.

[3] In this application, Harrington applies for a *Norwich* Order against the Investment Regulatory Organization of Canada ("IIROC"), which is the regulator of investment dealers, to obtain information about all the persons trading in Concordia securities. Harrington believes that with IIROC's data about Concordia short sellers, it will be able to identify the wrongdoers who illegally manipulated the market price of Concordia shares.

[4] For the Reasons that follow, I dismiss Harrington's motion for a *Norwich* Order.

B. *Norwich* Orders

[5] By means of a *Norwich* Order, a plaintiff may obtain information from an innocent party to identify a wrongdoer and to ascertain the extent of his or her wrongdoing in order for the plaintiff to be able to bring proceedings or at least to consider whether to bring proceedings against the wrongdoer.[1]

[6] In *Norwich Pharmacal & Others v. Customs and Excise Commissioners*,[2] Norwich Pharmacal knew that a patent that it owned was being infringed, but it did not know the names of the infringers. It asked the Customs and Excise Commissioners in England, who did know, for the names of the infringers. After the Commissioners refused to provide the information, exercising an equitable jurisdiction associated with the ancient equitable bill of discovery, the House of Lords ordered the Commissioners to provide it.

[7] The fundamental principle underlying the *Norwich* Order is that the party against whom the Order is sought has an equitable duty to assist the applicant in pursuing its rights.[3] The purpose of the equitable discovery was to identify the identity of the wrongdoer, and the House of Lord's analysis in *Norwich Pharmacal & Others v. Customs and Excise Commissioners* was that persons who facilitated (got "mixed up" in) the wrongful acts of others had a duty to assist the injured party by giving him or her full information and by disclosing the identity of the wrongdoer. The person against whom a *Norwich* Order is made must be more than a witness or disinterested bystander, but must have become involved in the circumstances giving rise to the claim or potential claim and must be the only practical source for the needed information.

[8] The equitable jurisdiction employed in *Norwich Pharmacal* has been adopted and approved in Ontario and in courts across Canada.[4] The requirements for an order are:[5]

a. the plaintiff must have a *bona fide* claim or potential claim against a wrongdoer;

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[1] *GEA Group AG v. Ventra Group Co.* (2009), 96 O.R. (3d) 481 at para. 85 (C.A.); *Isofoton S.A. v. Toronto Dominion Bank* (2007), 85 O.R. (3d) 780 (S.C.J.).
[2] [1974] A.C. 133 (H.L.).
[3] *Hudspeth v. Whatcott*, 2017 ONSC 1708 at paras. 267-274; *Isofoton S.A. v. Toronto Dominion Bank* (2007), 85 O.R. (3d) 780 (S.C.J.).
[4] *1654776 Ontario Ltd. v. Stewart*, 2013 ONCA 184, leave to appeal refused [2013] S.C.C.A. No. 225; *GEA Group AG v. Ventra Group Co.* (2009), 96 O.R. (3d) 481 (C.A.); *York University v. Bell Canada Enterprises* (2009), 99 O.R. (3d) 695 (S.C.J.); *Isofoton S.A. v. Toronto Dominion Bank* (2007), 85 O.R. (3d) 780 (S.C.J.); *Meuwissen (Litigation Guardian of) v. Strathroy Middlesex General Hospital* (2006), 40 C.P.C. (6th) 6 (Ont. C.A.); *BMG Canada Inc. v. John Doe*, [2005] F.C.J. No. 858 (C.A.); *Straka v. Humber River Regional Hospital* (2000), 51 O.R. (3d) 1 (C.A.); *Alberta (Treasury Branches) v. Leahy*, [2000] A.J. No. 993 (Alta. Q.B.); *Kenny v. Loewen*, [1999] B.C.J. No. 363 (B.C.S.C.); *Glaxo Wellcome PLC v. M.N.R.*, [1998] F.C.J. No. 874 (C.A.), leave to appeal refused 165 D.L.R. (4th) vii; *Johnston (Re)*, [1980] P.E.I.J. No. 34 (C.A.).
[5] *1654776 Ontario Ltd. v. Stewart*, 2013 ONCA 184, leave to appeal refused [2013] S.C.C.A. No. 225; *GEA Group AG v. Ventra Group Co.* (2009), 96 O.R. (3d) 481 (C.A.); *Alberta (Treasury Branches) v. Leahy*, [2000] A.J. No. 993 (Alta. Q.B.); *Subway Franchise Systems of Canada, Inc. v. Trent University*, 2017 ONSC 4562; *Pavao v. Pavao Estate*, 2017 ONSC 542; *Johnston v. Ontario Provincial Police*, [2014] O.J. No. 1538 (Ont. S.C.J.); *Bergmanis v. Diamond*, 2012 ONSC 5762; *Tetefsky v. General Motors Corp*., 2010 ONSC 1675, aff'd 2011 ONCA 246;

b. the defendant to the *Norwich* proceeding must have a connection to the wrong beyond being a witness to it;

c. the defendant to the *Norwich* proceeding must be the only practical source of the needed information;

d. the interests of the party seeking the disclosure must be balanced against the interests of the defendant to the proceeding, including his or her interest in privacy and confidentiality, and any public interest that would justify non-disclosure; and,

e. the interests of justice must favour obtaining the information.

[9] A *Norwich* Order is an intrusive and rare extraordinary order available only if its demanding prerequisites are satisfied.[6] In *GEA Group AG v. Ventra Group Co.*,[7] the Ontario Court of Appeal emphasized that the jurisdiction to make a *Norwich* Order is an extraordinary jurisdiction that is rare and only exercised when the court is satisfied that it is necessary that it should be exercised. Necessity, however, is not limited to circumstances where the moving party needs the information in order to plead. In *GEA Group AG*, Justice Cronk stated:

> 85. [T]he precise placement of the necessity requirement in the inventory of factors to be considered on a *Norwich* application is of little moment. The important point is that a *Norwich* order is an equitable, discretionary and flexible remedy. It is also an intrusive and extraordinary remedy that must be exercised with caution. It is therefore incumbent on the applicant for a *Norwich* order to demonstrate that the discovery sought is required to permit a prospective action to proceed, although the firm commitment to commence proceedings is not itself a condition precedent to this form of equitable relief.[8]

[10] A party resisting the motion or application has the defence that the information sought is privileged.[9]

C. Short Selling

[11] Short selling is a lawful activity in Canadian capital markets. In selling short, the short-seller, seeks to profit from a stock that he or she believes is going to decrease in value. Short selling is the activity of selling borrowed shares into the marketplace and later purchasing shares to return to the lender. The short-seller hopes that the share price will have fallen when he returns the borrowed shares. The difference between the value of the shares when they were sold short and the lower price of the returned shares less the cost of the borrowing is the profit of the short-seller.

[12] To sell short, the short-seller will establish a short account with his or her investment dealer and on behalf of the short-seller client, the investment dealer will borrow the stock from a lender. The short-seller will then sell the borrowed stock. When the share price drops in value,

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[6] *GEA Group AG v. Ventra Group Co.* (2009) 96 O.R. (3d) 481 (C.A.); *Subway Franchise Systems of Canada, Inc. et al v. Trent University*, 2017 ONSC 4562.
[7] (2009), 96 O.R. (3d) 481 (C.A.).
[8] (2009), 96 O.R. (3d) 481 at para. 85 (C.A.).
[9] *1654776 Ontario Ltd. v. Stewart* 2013 ONCA 184, leave to appeal refused [2013] S.C.C.A. No. 225; *Straka v. Humber River Regional Hospital*, (2000), 51 O.R. (3d) 1 (C.A.).

the short-seller client will purchase replacement shares at the lower price, and return the shares to the dealer, who will return the shares to the lender.

[13] "Naked" shorting is a short sale where there is no borrowing. The effect of naked shorting is to create a fictional supply of shares for sale that depresses the market price for the shares. When this artificial sell pressure takes effect, it can feed on itself by triggering margin calls and stop loss orders.

[14] There is a strategy of market manipulation known as "short and distort" that uses short selling and naked short selling to manipulate the market. The strategy is for false or misleading information about a public company to be disseminated and then traders conspire to steadily make offers and to trigger stop loss orders that "walk the stock down." The stock's apparent weakness gives legitimacy to the contrived negative analysis of the news of the company's business in social media and in mainstream media. Such strategies are illegal, but they persist in the marketplace, particularly by hedge fund managers.

[15] There is a perception that the regulation of shorting selling is permissive and lax in Canada compared to other capital markets.

D. The Investment Regulatory Organization of Canada ("IIROC")

[16] Investment dealers sell investment products such as stocks, mutual funds, bonds. Securities regulators require that investment dealers be members of IIROC.

[17] IIROC is Canada's national regulator of investment dealers, and along with the provincial securities commissions, is a regulator of the country's capital markets.

[18] Pursuant to the Ontario *Securities Act*,[10] IIROC was recognized as a SRO (non-statutory self-regulatory organization) by the Ontario Securities Commission in a Recognition Order dated May 16, 2008, effective June 1, 2008. It is a successor of the Investment Dealers Association of Canada. The Recognition Order requires IIROC to set rules, policies and other instruments governing its members and others subject to its jurisdiction and to administer and monitor compliance by its members and their approved persons with IIROC's rules and with securities legislation.[11]

[19] The Recognition Orders, among other things, require IIROC to survey and monitor trading activity to ensure that trading is compliant with provincial securities law and with the Universal Market Integrity Rules ("UMIR").

[20] UMIR prohibits conduct that is manipulative and deceptive, including "spoofing or layering;" *i.e.*, making orders without having a reasonable expectation of settling the trades that results from the orders, and "short and distort" strategies of shorting and making misrepresentations to the market that overload the sell side and depress the price of shares.

[21] IIROC's rules impose a high standard of protecting the privacy of client information. IIROC is also required to adopt policies and procedures designed to ensure that private information remains private and confidential.

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[10] R.S.O. 1990, c. S.5.
[11] *Deutsche Bank Securities Ltd v Ontario (Securities Commission)*, 2012 ONSC 1576 paras. 1-5 (Div. Ct.).

[22] IIROC's monitoring of trading activity has three stages. The first stage is "real-time review," during which IIROC's Surveillance Team monitors all trades in equities as they are actually occurring.

[23] IIROC is able to monitor in real time because all Canadian trading venues, including stock exchanges, immediately provide data of all marketplace messages (*i.e.* bids, trades, *etc.*). IIROC is the only source for all Canadian market trading data, and other regulators and law enforcement come to IIROC to obtain trading data.

[24] With the assistance of information management technology, IIROC can detect anomalous trading that may indicate market manipulation.

[25] The second stage is "secondary review" which occurs when the Surveillance Team refers the detected anomalous trading to IIROC's Trade Review and Analysis Team (the "TRA Team"). The TRA Team reviews the data to determine whether there is evidence of non-compliance with UMIR.

[26] The third stage is "In-Depth Investigation," which occurs if the TRA Team believes that there is evidence of a trading violation, in which case it will refer the matter to IIROC's Enforcement Team or to the appropriate regulator.

[27] The Enforcement Team conducts an in-depth investigation and analysis. It obtains information from various sources, including investment dealers, other international regulators, and the Canadian Depository for Securities Limited ("CDS").

[28] The Enforcement Team's analysis includes reviewing the "Trades, Orders, and Quotes Reports" ("TOQ Reports") that are generated from data provided by investment dealers and by the trading venues.

[29] TOQ Reports contain an enormous quantity of data. A TOQ Report for a single day of trading in a security like Concordia will typically include thousands of lines of data reflecting the details of every order entered or modified for the security during the day, every trade that resulted and every change in the best bid or best offer for the security.

[30] TOQ Reports detail the type of trading activity, when the activity occurred, and the investment dealer that initiated the activity (known as "Trade Desk ID"). The TOQ Report may also identify clients ("Client ID"), but Client ID is not mandatory data from the investment dealers. It is a non-mandatory option for investment dealers to report client sellers and client purchasers.

E. Factual Background

1. Harrington, Concordia, and Valeant Pharmaceuticals International Inc.

[31] Harrington Global Opportunities Fund S.A.R.L. is an investment fund. It is a hedge fund managed by Harrington Global Limited (collectively "Harrington"). Harrington operates out of Bermuda, a territory of the United Kingdom. Daniel (Danny) Guy, a resident of Bermuda, is the Chief Investment Officer and a Director of Harrington.

[32] Mr. Guy has extensive experience in the investment management business as a research analyst, a trader, and a fund manager.

[33] Harrington Global is the manager of the Harrington Global Opportunities Fund, which invests in, among other things, Canadian securities listed on the Toronto Stock Exchange ("TSX"). The Harrington Fund owned approximately 2.7 million shares of the approximately 51 million issued and outstanding common shares of Concordia.[12]

[34] Concordia is in the business of acquiring and managing pharmaceutical companies. In December 2013, Concordia became a public issuer, and it began trading on the TSX under the stockticker CXR.TO. In June 2015, it began trading on NASDAQ under the stockticker CXRX.

[35] Concordia's business strategy was to grow through acquisition. In pursuance of this strategy, Concordia carried a substantial debt load. Because of its business strategy, Concordia was often compared to Valeant Pharmaceuticals International Inc., another Canadian pharmaceutical company.

[36] Beginning in September 2015, Valeant became embroiled in a political and media controversy regarding its business practices. Because of the notoriety of the controversy, from September to October 2015, Valeant's stock dropped in value by approximately 60%.

[37] On September 8, 2015, Concordia's shares had a opening share price high of $1l7.75.That day, Concordia announced the planned acquisition of Amdipharm Mercury Limited for US$3.5 billion.

[38] Despite generally positive analysts reports about Concordia's announced acquisition of Amidipharm, "Mergerlnsider.com" posted a unattributed news article stating that the deal "falls flat" and the article likened Concordia to the troubled Valeant.

[39] On Friday, September 25, 2015, Marc Cohodes, a trader who was well known for shorting shares, tweeted: "If anyone bought the CXRX secondary from my Good Friends at Goldman [Sachs] you might want to ask for your money back." Mr. Cohodes tweet included a reference to statutory rights of rescission.

[40] On September 26, 2015, the stock commentary website "The Motley Fool", posted an article likening Concordia to Valeant.

[41] On October I , 2015, the newspaper *Financial Post* posted an article, "Investors Take Losses on Concordia Healthcare But Will they Invoke Material Out Clause?" The article suggested that some commentators were musing whether investors who had just obtained Concordia shares might try to unwind their purchase.

[42] During this time, a significant decline in Concordia's shares occurred. In October, Concordia's share price plunged (down 79%) on unprecedented trading volumes.

[43] It was Mr. Guy's view that the decline in share value was artificial and did not reflect the reality of its business and financial position. Dean Holley, an expert retained by Harrington, opined that September-October 2015, was one of two periods when a cabal of individuals may have conspired to manipulate the market to artificially depress Concordia's share price.

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[12] As of March 23, 2016, Concordia had 51,051,872 issued and outstanding common shares. Of those, Concordia's directors and officers owned, directly or indirectly, 3,139,525 common shares. Institution and long-position shareholders accounted for about 20 million shares. Approximately 30 million shares were actively traded on the TSX and NASDAQ.

[44] However, there may have been other explanations for the decline in price. During his cross-examination for this motion, Mr. Holley conceded that Valeant's situation and the circumstance that U.S. politicians, including Hilary Clinton, who was running for president, were criticizing the pharmaceutical industry, might also explain why Concordia's shares were dropping in value. Mr. Guy's view, however, that the decline in Concordia's share price could not be explained by these circumstances.

[45] Another significant decline in the value of Concordia's share priced occurred between March and June 2016. This is the second period during which Harrington believes that there was a conspiracy and when there was illegal market manipulation.

[46] Harrington's belief was informed by social and mainstream media reports that led it to believe that a short and distort strategy might have been in play. From March to May 2016, Mr. Cohodes was again commenting about Concordia. He frequently posted extremely negative tweets about Concordia and about its CEO, Mark Thompson. On March 28, 2016, Bloomberg, a financial news media, reported that Pacific Square Research, the analyst company of Herb Greenberg, who is an associate of Mr. Cohodes, had disclosed that Concordia's auditors were taking a closer look at the just-released fourth quarter earnings report. The story was repeated, including on the Business News Network, a cable TV network, even after it became apparent that the report was an error and after Mr. Greenberg claimed that he been misquoted in the media.

[47] However, once again, there are other possible explanations for the decline in value of Concordia's shares because during this period there were other events affecting the global market in securities such as the Brexit debate in Britain.

2. Harrington and IIROC

[48] Harrington believed, however, that a group of unidentified conspirators had agreed to orchestrate Concordia's share price drop through a strategy of: (a) using social and mainstream media to disseminate misleading negative information about Concordia; and (b) short selling Concordia stock, probably by way of illegal naked short selling.

[49] On May 4, 2016, Mr. Guy met with IIROC representatives. He lodged a complaint to the regulator, and he expressed Harrington's belief that there was a conspiracy of short-sellers manipulating the market and lowering the price of Concordia shares. He alleged that the co-conspirators probably included Mr. Cohodes.

[50] Up to this point, IIROC had not detected any anomalous trading of Concordia shares that was sufficiently serious to cause a referral to the Enforcement Team.

[51] In response to Mr. Guy's complaint, on May 6, 2016, IIROC opened a file and undertook an extensive investigation and analysis of the trading in Concordia shares. IIROC assigned two managers and the investigation took approximately one year to complete.

3. Harrington's Application for a Norwich Order

[52] In June 2016, while IIROC was in the midst of its investigation, Harrington commenced an application for a *Norwich* Order. In its Notice of Application, Harrington sought an order that

would require IIROC to produce a TOQ report containing data for all trade activity in Concordia that occurred from April 1, 2015 to end of June 2016.

[53] In its application for a *Norwich* Order, Harrington relied on an expert report from Mr. Holley, who is a former British Columbia Securities Commissioner. During his time as a regulator, Mr. Holley was involved in hundreds of investigations of cases involving trading abuses, insider trading, misrepresentations, and other securities market misconduct. Mr. Holley is the president of CMC Capital Market Consulting Corp., a consulting firm that specializes in the standards and practices of the Canadian investment industry, regulatory requirements, and securities litigation.

[54] In his affidavit for the application for a *Norwich* Order, Mr. Holley provided a summary of the steps that would need to be taken to complete a market manipulation investigation. The only step that involved IIROC was that of it providing a TOQ report, after which Harrington could conduct its own analysis from which it could then make inquiries of investment dealers to identify the names and account numbers of the client(s) for whom each transaction in Concordia was executed.

[55] Harrington's *Norwich* application, however, was not argued. With IIROC's investigation ongoing, the parties reached an agreement on an interim disclosure order for the production of TOQ report data.

[56] In August 2016, on consent, Justice Dow ordered IIROC to produce trading data from its TOQ reports, excluding the identification of the client seller and the client buyer. Justice Dow ordered IIROC to provide Harrington copies of the TOQ Report for Concordia, inclusive of the short-sell regulatory designations, but excluding the Buyer Account ID and the Seller Account ID categories of information in digital form and in excel spreadsheet format.

[57] IIROC provided TOQ report data to Harrington in two tranches. The first tranche occurred in September 2016, when IIROC provided Harrington with truncated TOQ Reports for April 1, 2015 to October 17, 2016. The TOQ Reports disclosed the investment dealer (*e.g.*, TD Securities, *etc*.) associated with each transaction, as well as when the transaction occurred, what type of message was involved (*i.e.*, trade, order or quote) and a specific transaction number. IIROC removed the Trade Desk ID and the Client ID columns from these reports.

[58] Pausing here in the narrative, it should be noted that for the purpose of the motion now before the court nothing turns on the circumstance that IIROC did not fastidiously comply with Justice Dow's Order. On this motion, Harrington is not seeking to enforce the initial disclosure made by Justice Dow by a contempt order or in any other way. Rather, the motion before the court is an opposed motion to determine whether in the circumstances, including the circumstance that some information has already been provided by IIROC, the court should make a *Norwich* Order.

[59] Returning to the narrative, in December 2016, Harrington requested additional data. Based on its review of the data, Harrington identified trades occurring at five investment dealers during specific time periods that were of interest to its expert investigator, in particular: June 8, 2015 to June 11, 2015; September 4 and 25, 2015 October 21 to 23, and 28, 2015; February 4 to 8, 2016; and March 1 to April 30, 2016.

[60] In March, 2017, IIROC provided Harrington with anonymized Trade Desk ID data for the above-noted time periods. It provided Broker Information for a narrowed subset of the TOQ Report in "masked" or anonymized form.

[61] Thus, by February 2017, IIROC had delivered TOQ Reports for Concordia for the period April 1, 2015 to August 30, 2016, but the reports excluded certain Broker ID Information and certain Client ID Information that had been prescribed by Justice Dow's order of August 2016.

4. The IRROC Investigation

[62] Meanwhile, IRROC was continuing its own investigation. It examined and analyzed the trading in the time periods identified by Harrington. IIROC identified the investment dealers with the largest short positions and the Trade Desk IDs that were involved in short selling activities. IIROC contacted the dealers that it identified in its review of the TOQs and requested the identities of the clients holding short positions.

[63] For US-based trades, which represented approximately 80% of the short trades, the IIROC made a request of its American counterpart, Financial Industry Regulatory Authority ("FINRA") for client identities. The Enforcement Team also asked for information from CDS about failed trade data; *i.e.* data about transactions that failed to complete or settle, which activity may suggest an attempt to manipulate the market.

[64] IIROC's investigators concluded that no market manipulation had occurred. IIROC concluded that all of the short selling of Concordia that occurred was compliant with market rules and regulations. In particular, IIROC concluded that: (a) there was no evidence to support the existence of a cabal of collusive short sellers; (b) positions held short over longer periods were taken on by various persons and entities that were diverse and unconnected; (c) activity by high frequency traders or day traders was not manipulative or an explanation for price declines; and (d) there were no failed trades or settlement issues of significance on the Canadian or US markets; and (e) specific transactions or alleged wrongdoing identified by Harrington was not substantiated.

[65] In March 2017, IIROC reported to Harrington that it had completed its investigation and was closing its file. IIROC reported that that its review of activity on Canadian marketplaces did not discover sufficient evidence to pursue a violation of UMIR.

[66] Harrington however, submits that IIROC's investigation was inadequate and its conclusion unjustified. Harrington criticizes the IIROC investigation on a variety of grounds including: (a) IIROC focused only on Canadian transactions, notwithstanding that approximately 80% of the declared short positions in Concordia under investigation were held in the US and any manipulative transactions would not be detectable by IIROC unless the US transactions were investigated; (b) IIROC investigated only the period March 2016 to July 2016, despite the dramatic 50% price drop in a three-week period in September-October 2015; (c) IIROC's investigation of failed trade data was defective for numerous reasons; (d) although IIROC examined cancellations on the Canadian market, which may be an indication of market manipulation, its analysis was deficient because it did not also examine US data; (e) IIROC's conclusion that high frequency traders or day traders were influencing price declines was not supported by evidence and the analysis failed to consider high frequency trading in Concordia shares; (f) IIROC's investigators did not investigate a Bloomberg news report of a purported

publication of a research report by Pacific Square Research and did not know whether it even existed, despite acknowledging that the share price dropped during the currency of the report; (g) IIROC's investigators did not know whether the Pacific Square Research issue had been caught by IIROC's Surveillance Team; and (h) there is no indication that IIROC's investigators had examined any of the allegations of misrepresentations made to the market.

5. Harrington's Revived Application for a Norwich Order

[67] Notwithstanding its criticisms of IIROC's investigation, Harrington continued to review the data provided by IIROC. Harrington retained Bates Group LLC to review and analyze the data.

[68] The Bates Group delivered a report that concluded that the high level of cancellation activity, the low percentage of trade volume to order volume, and the various trading desk level metrics warranted further review of the trading activity in Concordia shares notwithstanding the conclusions of the IIROC investigation. The Bates Group concluded that the trades in Concordia shares were outside the normal behavior of other market participants, were potentially detrimental to Concordia, and did not follow the market trend of "best bid and offer," which would be expected of a competitive trading strategy.

[69] The Bates Report concluded that the data made available by IIROC, which aggregated information at the trading desk or dealer level, was inadequate for the necessary testing to determine whether there had been illegal market manipulation. The Bates Group opined that to understand whether there has been market manipulation, it was necessary to see additional data, including all Broker Information and some Client Information detail. It was the opinion of the Bates Group that obtaining the additional data from IIROC would allow Harrington to assess whether wrongful activity has taken place, and if so, by whom. Thus, Harrington submits that it requires the additional information to identity the wrongdoers and to determine the viability of its claim against them.

[70] Given the issues identified by the Bates Report, Harrington asked IIROC for the additional data. IIROC, however, refused to provide any additional information, and in March 2018, Harrington amended its Notice of Application and revived its application for a *Norwich* Order. Among incidental relief, Harrington seeks:

a. an Order requiring IIROC to forthwith disclose and produce to Harrington the complete TOQ Report relating to the securities of Concordia that is listed and traded on the TSX for the period April 1, 2015 to date in electronic format;

b. an Order requiring IIROC to provide all data in its possession for the trades set out in the TOQ Report, including the names of the registered brokers and clients involved in the transactions (the "Additional Data").

[71] Included with Harrington's Amended Notice of Application was a second expert report, prepared by Dr. Shane Shook of the Bates Group. Dr. Shook reviewed the TOQ data that IIROC had provided to Harrington. In his report, he identified transactions that he said may be indicative of manipulative trading. He identified the dealers from which these transactions originated. In response to Dr. Shook's report, IIROC re-reviewed the data, but it concluded that it did not indicate manipulative trading.

[72] On cross-examination, Dr. Shook conceded that there could just as easily be legitimate explanations for the transactions that he identified. Dr. Shook also acknowledged that Harrington had enough information to request client information from investment dealers. He conceded that the TOQ Reports provided to date included enough data to identify specific problematic transactions and the investment dealers involved, who, in turn, would be able to identify the clients involved in the transactions.

[73] In its renewed request for a *Norwich* Order, Harrington added a request that would require IIROC to produce all data in its TOQ Report's for Concordia, and also, information that IIROC had received from FINRA pursuant to the agreement between the regulators.

[74] The agreement between IIROC and FINRA, however, specifies that IIROC must use the information exclusively for carrying out its regulatory responsibilities and the agreement prohibits IIROC from sharing the information without FINRA's written consent.

[75] IIROC put FINRA on notice of Harrington's request for additional information. FINRA responded that it objected to Harrington's request, and FINRA noted that disclosure would violate the confidentiality of FINRA'S members. FINRA also stated that disclosure would harm its regulatory objectives, as it would discourage FINRA members from providing data and impair data sharing among regulators. FINRA's response stated:

> FINRA would object to producing this information if subpoenaed directly for it, and U.S. courts would likely uphold these objections. If this information is disclosed by IIROC in response to the Application, FINRA is less likely to provide such information in the future, rather than risk disclosure. Disclosure of this information would impair the effectiveness of FINRA's participation in the [Intermarket Surveillance Group] and stifle the flow of regulatory information that benefits everyone.

6. The Reorganization of Concordia

[76] In 2017, Concordia sought protection from its creditors under the *Companies' Creditors Arrangement Act*.[13] It brought an application under to stay proceedings against it and to reorganize.[14]

[77] From its highest point in June 2016, Concordia lost approximately 3.9 billion dollars in market capitalization. By 2018, the share price was below a dollar.

[78] By 2017, the Harrington Fund had sold its Concordia shares and crystallized a loss of approximately $150 million.

F. The Position of the Parties

[79] Harrington believes that the market was intentionally and illegally manipulated by a group of traders who conspired to orchestrate a share price drop in Concordia shares. It submits that the conduct of the group constituted an unlawful conspiracy to injure the shareholders of Concordia and that Harrington was injured by the conspiracy. Harrington brings an application

[13] R.S.C. 1985, c. C-36.
[14] *Re Concordia International Inc.*, 2017 ONSC 6357.

for a *Norwich* Order because it requires information to ascertain the identity of the conspirators and to determine the viability of a claim being brought against them.

[80] Harrington submits that: (a) it has a *bona fide* cause(s) of action against the conspirators; (b) it needs information to identify the wrongdoers; (c) IIROC's TOQ Reports and its possession of the additional data makes it the only practicable source for the information necessary to identify the conspirators; (d) IIROC has a responsibility to ensure market integrity; (e) IIROC will not be prejudiced by providing the information and Harrington will indemnify it for its reasonable costs in providing the information; and (f) the interests of justice favour the granting of an *Norwich* Order.

[81] Harrington submits that IIROC's concerns about maintaining the privacy and confidentiality of the investment dealers' clients' identities is overblow, because there is little privacy interest in being identified as a shareholder of a corporation because shareholder identities are public information in a corporation's share registrar. In any event, Harrington agrees that the client information could by anonymizing so that the innocent shareholder's identities would never be disclosed and this would obviate any privacy or confidentiality concern.

[82] Harrington submits that capital markets are essential to the Canadian economy, and the integrity and confidence in the integrity of Canadian capital markets is essential. It is salutary for market participants to want to address problems with the capital markets, particularly where a self-regulator cannot effectively do so. Harrington submits that IIROC is hobbled by its limited jurisdiction over only Canadian investment dealers and only trading in Canada and, therefore, IIROC should not shield its trading data from scrutiny and it should support the efforts of market participants policing the marketplace.

[83] For its part, IIROC submits that Harrington has not satisfied any of the requirements for a *Norwich* Order. IIROC submits that granting an Order would offend the principle that a *Norwich* Order is an extraordinary discretionary order that is rarely granted and that should only be granted if its demanding prerequisites are satisfied.

[84] IIROC submits that Harrington does not have a reasonable cause of action because its asserted claims of civil conspiracy, slander of title, and wrongful interference with economic relations are actions that may be available to Concordia but are not available to Concordia's shareholders. Further, IIROC submits that if Harrington did have causes of action, the actions would be statute-barred under the *Limitations Act, 2002*.[15]

[85] IIROC submits that there is no equitable perch to make an equitable discovery order against it because it was not mixed up in the tortious acts of the alleged cabal and IRROC did not facilitate the wrongdoing.

[86] IIROC submits that it is not the only source of the information that Harrington allegedly needs and that in any event Harrington does not need a *Norwich* Order against IIROC since Harrington has received sufficient information to make inquiries of the investment dealers or to obtain a *Norwich* Order against the implicated investment dealers. IIROC submits that the investment dealers are the better source because the pertinent information that IIROC may need is

[15] S.O. 2002, c. 24, Sched. B.

client identification, which is not comprehensively disclosed in TOQ Reports because disclosing client information is an optional reporting requirement for investment dealers. In any event, IIROC submits that Harrington has sufficient information to commence an action against at least of some of the wrongdoers whom it suspects to have manipulated the market for Concordia shares.

[87] IIROC submits that the granting of a *Norwich* Order would interfere with its role as regulator. It submits that if a *Norwich* Order were granted it would irreparably harm IIROC's ability to carry out its regulatory role and set a precedent that undermine the regulatory landscape in general.

[88] Further, IIROC submits that complying with the *Norwich* Order would irreparably harm its cooperation agreements with other regulators including FINRA, which has indicated that if IIROC is required to disclose client and broker data, it will be less likely to provide such information to IIROC in the future. Moreover, IIROC submits that complying with a *Norwich* Order would compromise and violate IIROC's responsibilities to protect confidential information and the privacy rights of others including the clients of investment dealers.

[89] Continuing its *in terrorem* argument, IIROC submits that Harrington's *Norwich* Order application is an attempt of a private party to co-opt a regulator as its personal investigator in order to settle a private dispute. IRROC submits that a *Norwich* Order would place it in the untenable position of having to disclose its work product and investigative techniques, which would compromise its ability to effectively carry out its regulatory mandate and its obligation to pursue leads that may be important to the integrity of the market. It submits that if the court grants Harrington its order, Harrington (and likely other hedge funds) will likely pursue similar remedies against IIROC in the future and this would fundamentally change the nature of IIROC's role as a regulator.

G. Analysis and Discussion

[90] Although I disagree with a some of IIROC's arguments or some parts of IIROCs various arguments, I agree with its ultimate submission that a *Norwich* Order should not be granted in the circumstances of the immediate case.

[91] I disagree with IIROC's argument that Harrington does not have a *bona fide* claim or potential claim against a wrongdoer.

[92] I disagree with IIROC'S argument that it was not the only practical source for the information that Harrington seeks, but I agree with IIROC'S arguments that Harrington does not now need further information in order to commence an action against the wrongdoers. In my opinion, Harrington does not satisfy the necessity requirement of the test for a *Norwich* Order.

[93] I also agree with IIROC's arguments: (a) that it is not connected to the alleged wrongdoing or wrongdoers in a way that would justify the extraordinary and intrusive *Norwich* Order (b) that in balancing Harrington's interests in disclosure against the interests of IIROC as a regulator the balance favors not making a *Norwich* Order; (c) that balancing Harrington's interest in disclosure with IIROC's own interest and the public interest in protecting privacy and confidential information that the balance favours not making a *Norwich* Order; and. (d) that the interests of justice do not favour the granting of a *Norwich* Order in the circumstances of the immediate case.

[94] By way of elucidation of these conclusions, I begin by saying that there may be some traction to IIROC's argument that Harrington does not have a cause of action for slander of title, and wrongful interference with economic relations, but there is no merit to IIROC's argument that Harrington does not have a *bona fide* action for civil conspiracy.

[95] The constituent elements of a claim for civil conspiracy are:

a. at least two defendants make an agreement to injure the plaintiff;

b. the defendants use some means (lawful or unlawful) for the predominate purpose of injuring the plaintiff (intention to injure civil conspiracy); or

c. the defendants use unlawful means with knowledge that their acts were aimed at the plaintiff and knowing or constructively knowing that their acts would result in injury to the plaintiff (unlawful means civil conspiracy);

d. the defendants act in furtherance of their agreement to injure; and,

e. the plaintiff suffers damages as a result of the defendants' conduct.[16]

[96] It is not plain and obvious that the unlawful means civil conspiracy, where the short-seller defendant uses unlawful means; *i.e.*, illegal market manipulation, while knowing or constructively knowing that shareholders like Harrington would be injured and where the shareholders are in fact injured, is not a *bona fide* action that is available to Harrington.

[97] It is also not plain and obvious that the conspirators would have a limitation period defence to preclude the civil conspiracy claim.[17]

[98] Thus, Harrington satisfies the first criterion for the granting of a *Norwich* Order. It, however, does not satisfy the remaining criteria save for the criterion that IIROC is the only practical source of the information that Harrington allegedly needs.

[99] Perhaps, the most important criterion for a *Norwich* Order is the criterion that there must be some connection or relationship between the target of the Order and the wrongdoer or the wrongdoing. *Norwich* Orders are a manifestation of the court of equity's *in personam* injunctive jurisdiction over the citizens of the realm, and the courts of equity required a reason or justification before exercising a jurisdiction that would interfere with the rights of an innocent party who was under no common law duty to the plaintiff.

[100] The importance of this connection criterion or proximity criterion is augmented by the general policy of the substantive law in Canada that protects personal freedom and rights of privacy, which rights have achieved constitutional law status in Canada. The importance of the connection criterion in the test for a *Norwich* Order is also augmented by the general policy of Ontario's Rules of Civil Procedure that non-parties, including even witnesses of the events involving the parties, are not discoverable during the interlocutory stages of a proceeding. Thus, for example, the jurisprudence about discovery from non-parties under rule 30.10 is very

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[16] *Pro-Sys Consultants v. Microsoft*, 2013 SCC 57; *Hunt v. T & N plc*, [1990] 2 S.C.R. 959; *Canada Cement Lafarge Ltd.* v. *British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452.
[17] See *Mancinelli v. Royal Bank of Canada*, 2018 ONCA 544.

restrictive.[18] Because of these policy imperatives, courts will not permit parties to use *Norwich* Orders to conduct fishing expeditions.[19] In *Subway Franchise Systems of Canada, Inc. v. Trent University*,[20] Justice Lederer stated:

> 1. This is an application seeking a *Norwich* Order. A *Norwich* Order is for discovery in advance of an action being commenced. Its roots are in equity. It derives from the ancient bill of discovery. Such a bill sought or seeks the disclosure of facts and nothing more. The granting of such an order is rare and extraordinary discretionary relief. This is as it should be. Freely allowing discovery in advance of an action would fundamentally change the process of the Court. It would lead to the tools of the court being used to search out and investigate speculative actions (the often referred to "fishing expedition") rather than deal with real and substantive disputes. The policy proposition is that on occasion there may be situations where a party cannot proceed based only on the information available to it. The purpose of an action for discovery "is to enable justice to be done": […]

[101] In *GEA Group AG v. Ventra Group Co.*,[21] Justice Cronk stated:

> 104. I reiterate that pre-action discovery is rare and extraordinary discretionary relief. It is not intended nor should it be permitted to serve as a substitute for the normal discovery regime mandated by the *Rules of Civil Procedure*. As noted by the Alberta Court of Appeal in *B.(A.), supra*, at para. 16: "[a] *Norwich* order is not intended as a device to circumvent the normal discovery process which can effectively achieve the same result." I agree.

[102] In the case at bar, there was a fulsome debate about whether or not IIROC's regulatory role in the market place facilitated the wrongdoing or was more akin to that of witness who perceives and memorializes what happened. IIROC denied facilitating or being the medium of wrongdoing, but Harrington accused IIROC of trivializing its role and its connection to the wrongdoing.

[103] In my opinion, the parties' debate missed the point that at issue is not a factual debate about classification of "just a witness" or classification as "more than a witness" but rather should be a debate about the norms, values, and policies of the regulation of the securities industry and the administration of justice. In *Straka v. Humber River Regional Hospital*,[22] Associate Chief Justice Morden observed that the real question with respect to an equitable action for discovery was the question about in what circumstances ought the remedy to be available. Viewed in that light, the question becomes the normative question of whether or not IIROC operating in the public law sector ought to have a duty to disclose trading information to an investor who is contemplating bringing a private law tort claim.

[104] In my opinion, the answer to that question is no. The legislated role and duties of IIROC are to do what it did in the immediate case, investigate a complaint and make its own decision about what information, if any, to release. It is inevitable that a regulator will get "mixed up" in the wrongdoing of the industry it is regulating, but that does not entail that it has a relationship with the wrongdoing or the wrongdoer that would impose a duty in equity to disclose information to the victims of the wrongdoing.

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[18] *Quenneville v. Robert Bosch GmbH*, 2018 ONSC 6775.
[19] *GEA Group AG v. Ventra Group Co.*, 2009 ONCA 619 at para. 106.
[20] 2017 ONSC 4562 at para. 1.
[21] (2009), 96 O.R. (3d) 481 (C.A.).
[22] (2000), 51 O.R. (3d) 1 at para. 104 (C.A.).

[105] As a regulator, IIROC was operating under public law regime and obliged to investigate Harrington's complaint, but how it carried out that obligation was for it to decide. The ways and means of its investigation was a matter within IIROC's jurisdiction and for it to decide. In an odd or perverse way, Harrington is using an application for a *Norwich* Order as a form of judicial review of the probity or reasonableness of IIROC's investigation and its regulatory role. It asks the court to weigh the merits of its criticism of IIROC's investigation and IIROC's conclusions. That is not an appropriate use of a *Norwich* Order.

[106] What information to disclose before, during, or after its investigation was a decision for IIROC to make. If IIROC's investigation had revealed that there were grounds to turn the matter of trading in Concordia shares over to its Enforcement Team or to the OSC, it would have been under no obligation to turn over the investigative information to Harrington to assist it in prosecuting its private law action, although the information may have become public knowledge. The fact that IIROC consented to Justice Dow's Order is not a foot-in-the- door way to create an obligation or duty on it to provide additional information.

[107] I appreciate that there is a public interest in the private prosecution of actions that promote compliance with the laws that governs Canada's capital markets and that private actions provide access to justice for the victims of illegal trading activities and modify and deter the bad behaviour of those that would seek to profit by circumventing the law that governs the capital markets, but it does not follow that the prosecutors in the public sector must share information with the private law prosecutors.

[108] In my opinion, in the immediate case, the connection or proximity criterion of the test for a *Norwich* Order is not satisfied.

[109] Further, the necessity requirement in the test for a *Norwich* Order is also not satisfied in the immediate case. Harrington already has a prospective action for the tort of civil conspiracy that can proceed against Mr. Cohodes and several other short-sellers or stock market analyst commentators that it believes may have conspired to short and distort the sale of Concordia shares. However, it seems that Harrington is reluctant to sue any of the possible stock market manipulators unless it knows the identities of all of the suspected conspirators and unless it is also satisfied that a successful claim against the conspirators actually exists. This approach turns the prosecution of a *bona fide* claim into fishing for a claim to prosecute. As noted above, a *Norwich* Order is not a means to search out and investigate speculative actions.

[110] Further still, in my opinion, the various balancing tests of the criteria for a *Norwich* Order are also not satisfied in the immediate case, in part, for the same reasons that the connection or proximity criterion is not satisfied.

[111] But there is more than the failure to satisfy the connection factor as an explanation of why the other *Norwich* factors are also not satisfied. Balancing the interests of IIROC against the interests of Harrington tips the balance against making a *Norwich* Order and the interests of justice also do not favour making a *Norwich* Order.

[112] IIROC's duties of keeping confidences and of protecting privacy interests and its interest in maintaining its relationship with FINRA and other regulators stand against the making of a *Norwich* Order. Harrington cannot minimize the intrusion on the privacy interests of the investors, the clients of the investment dealers, that IIROC has refused to disclose by the circumstance that the clients are already identified on the shareholder's registry of Concordia.

What Harrington is seeking is personal financial information about the activities of those shareholders and that is a major intrusion on the privacy and confidentiality interests of those shareholders.

[113] In *1654776 Ontario Ltd. v. Stewart*,[23] the plaintiff corporation purchased options and shares in BCE Inc. (Bell Canada Enterprises, Canada's preeminent communications company) in anticipation of a leveraged buy-out of BCE Inc. After a news article by the defendant Sinclair Stewart, a business reporter for the defendant Globe and Mail newspaper, was published, the plaintiff sold its shares and options at a loss of $35,900. In his article, Mr. Sinclair had relied on confidential unidentified sources to report that the buy-out was problem-plagued and would likely be delayed. The plaintiff corporation believed that the confidential sources had breached the *Securities Act*, and it proposed to bring a class action seeking 30 million dollars in general damages and $5 million damages from breaches of the Ontario *Securities Act*. The plaintiff corporation brought an application for a *Norwich* Order that Mr. Sinclair and the Globe and Mail disclose the identifies of the confidential sources. Affirming Justice Belobaba's decision in the court below,[24] the Court of Appeal dismissed the motion for a *Norwich Order*.

[114] Justice Juriansz, who wrote the decision for the Court of Appeal, concluded that the first, second, third, and fourth *Norwich* factors had been satisfied. The plaintiff corporation had a *bona fide* cause of action; the defendants were involved in the acts complained of; the defendants were the only practical sources of the information; and the defendants could be indemnified for any costs of making disclosure. The disposition of the *Norwich* Order action thus turned on the fifth *Norwich* factor; namely, whether the interests of justice favour the obtaining of the disclosure. In the circumstances of the plaintiff corporation's request for a *Norwich* Order, the fifth factor encompassed all the interests that had to be weighed. Justice Juriansz stated:[25]

> 77. The fifth Norwich factor is whether the interests of justice favour the obtaining of disclosure. This factor is broad and encompasses the interests of the applicant, the respondents, the alleged wrongdoers and the administration of justice. The interests of the respondents and the greater public interest sweep in their claim of journalist-source privilege. The privilege claim must be determined by application of the *Wigmore* test. In this way the *Norwich* and *Wigmore* tests intersect, as the application judge noted.
>
> 78 I also agree with the application judge that if the *Wigmore* test is satisfied by the media respondents, it probably will not be in the interests of justice to order disclosure, and on the other hand if the *Wigmore* test is not satisfied, it probably will be in the interests of justice to order disclosure.

[115] In an elaborate and detailed analysis of: (a) the criteria for recognizing a journalist source privilege, (b) the public interest in free expression, (c) the public interest in promoting compliance with the disclosure regime of regulated by the Ontario *Securities Act*, which includes both public sector and private sector regulation, and (d) the strength of the plaintiff

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[23] 2013 ONCA 184, leave to appeal refused [2013] S.C.C.A. No. 225.
[24] 2012 ONSC 1991.
[25] *1654776 Ontario Ltd. v. Stewart*, 2013 ONCA 184 at paras. 77-78, leave to appeal refused [2013] S.C.C.A. No. 225

corporation's case, Justice Juriansz concluded that a *Norwich* Order should not be granted; he stated:[26]

> 145. In the final weighing up I would conclude that the greater public interest is served by upholding the respondents' claim of privilege. The public interest in free expression must always be weighed heavily in the balance. The balance may well have been shifted, had the apparent strength of the appellant's case been compelling; however, the appellant has not put forward such a case. Whatever the merits of its case, the appellant can seek a remedy from BCE and Canada Inc. The public interest in promoting compliance with the disclosure regime regulated by the *Securities Act* can be adequately served by the appellant proceeding with its action against BCE.
>
> E. Conclusion
>
> 146 I would conclude that the respondents have satisfied the *Wigmore* test, and hence, the appellant has failed to satisfy the *Norwich* test. I would dismiss the appeal.
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> 147. This was a difficult case. Corporate executives who engage in the dangerous practice of providing journalists with information anonymously during the course of sensitive negotiations should understand the courts may not uphold a journalist's assurances of confidentiality.

[116] Returning to the immediate case, unlike *1654776 Ontario Ltd. v. Stewart*, where four of the five criteria for a *Norwich* Order were not satisfied and it was a close call on the fifth factor, the immediate case is not a difficult or borderline case. The *1654776 Ontario Ltd. v. Stewart* does demonstrate that the issuance of a *Norwich* Order is a rarely exercised extraordinary discretion and that the protection of privileges and confidences and the interests of the innocent target of the order are powerful forces against the issuance of an Order.

[117] In my opinion, the case at bar is not an appropriate case for a *Norwich* Order.

H. Conclusion

[118] For the above reasons, Harrington's application is dismissed.

[119] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with IIROC's submissions within twenty days from the release of these Reasons for Decision followed by Harrington's submissions within a further twenty days.

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Perell, J.

Released: December 31, 2018

[26] *1654776 Ontario Ltd. v. Stewart*, 2013 ONCA 184 at paras. 145-147, leave to appeal refused [2013] S.C.C.A. No. 225.

CITATION: Harrington Global Opportunities Fund S.A.R.L. v Investment Industry Regulatory Organization Canada, 2018 ONSC 7739
COURT FILE NO.: CV-16-555535
DATE: 2018/12/31

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

HARRINGTON GLOBAL OPPORTUNITIES FUND S.A.R.L. and HARRINGTON GLOBAL LIMITED

Applicant

– and –

INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA

Respondent

REASONS FOR DECISION

PERELL J.

Released: December 31, 2018