When the Going is Bad:
How to Avoid Harm Caused By Departing Employees

Civil Court Weapons Against Departing Employees

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INTRODUCTION

Sometimes an employer only learns an employee's true value after he or she leaves and joins a competitor or starts a competitive business. While we live in a society that allows and encourages free market competition, there are legal limits on how and when a departing employee may compete with a former employer. This paper does not address the substantive causes of action that an employer might have against a departing employee but rather, what steps are available to an employer to enforce those rights before it is too late.

A departing employee can devastate a business. In one reported case,[1] a company put forth evidence that its Canadian business suffered a 96% decline in the two months following the departure of a key sales employee. An employer faced with the loss of a key employee that is competing unfairly often cannot wait until trial for its day in court. It needs some form of relief right away. What are some of the options available?

INJUNCTIONS TO RESTRAIN DEPARTING EMPLOYEE CONDUCT

Injunctions are often called an extraordinary remedy. They can also be extraordinarily taxing upon counsel. Instead of handling a proceeding that winds its way through the Court system at a leisurely pace and having time to ponder the issues, strategy and approach to take, counsel are very quickly faced with an onslaught of information and materials that must be absorbed, understood, and presented clearly and concisely to the Court in the form of affidavit material and written legal argument.

A party seeking an injunction is asking the Court for substantive relief before it has proved its case on a balance of probabilities. Why would a Court ever make such an Order? The answer is simple: injunctions are granted to preserve rights pending trial. In applying the test for obtaining an injunction, the Court is essentially doing no more than ensuring that there remains an issue for it to resolve at the trial of the action. A Court will accordingly grant an interlocutory injunction where the plaintiff's rights will be forever lost if the injunction is not granted.

It is trite law, although apparently sometimes misunderstood,[2] that an interlocutory injunction is only a remedy, not a self-supporting cause of action. In order for a plaintiff to obtain an interlocutory injunction, there must be a *lis* between the parties deserving of a trial, i.e. an action in which a permanent injunction is claimed.[3] Before moving for an interlocutory injunction against a departed employee, a careful analysis must be made of the legal relationship between the employer and the employee to determine whether the plaintiff has a cause of action in which a permanent injunction can be claimed at trial.

A. What must a plaintiff show to obtain an injunction?

The test for obtaining an injunction is well settled. In *RJR MacDonald Inc. v. Canada (Attorney General)*,[4] the Supreme Court of Canada applied the reasoning in

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[1] Gunning & Associates Marketing Inc. v. Kesler, 2005 CarswellOnt 1066 (S.C.J.)
[2] see Cellular Rental Systems Inc. v. Bell Mobility Cellular Inc., 23 O.R. (3d) 766 at 778-779.
[3] see Cellular Rental Systems Inc. v. Bell Mobility Cellular Inc., at 779
[4] RJR MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311

American Cyanamid v. Ethicon[5] and ruled that to obtain an injunction, a plaintiff must show:

(a) there is a substantial issue to be tried or, in some cases, that he or she has a strong prima facie case[6];

(b) the balance of convenience favours the granting of an injunction; and

(c) he or she will suffer irreparable harm if the injunction is not granted.

B. Substantial Issue/Strong prima facie case

In most cases, it will be difficult for the Court, on a motion for an injunction, to assess the strength of the plaintiff's case or to predict how the case will be determined at trial. If the threshold for establishing a substantial issue to be tried is pitched too high, a plaintiff would have great difficulty ever obtaining an injunction. Both in the seminal case of *American Cyanamid v. Ethicon*[7], and the leading Canadian case *RJR-MacDonald*, the Court ruled that to meet the "substantial issue to be tried" test, the Court must simply be satisfied that the claim is not frivolous or vexatious. However, where the granting or refusal of the injunction will have the practical effect of putting an end to the action, Courts have ruled that the party seeking the injunction must meet a higher threshold and establish not only that its claim is not frivolous or vexatious but that it has a strong *prima facie* case[8]. This higher threshold test has been applied often in the departing employee context[9]. This is because a departing employee's obligations

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[5] American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396
[6] the test that applies in a given case will be discussed in more detail below.
[7] American Cyanamid Co. v, Ethicon Ltd., [1975] A.C. 396
[8] N.W.L. Ltd. v. Woods, 1 W.L.R. 1294 (H.L.). This case has been widely applied in Ontario.
[9] see Mercury Marine Ltd. v. Dillon (1986), 56 O.R. (2d) 266 (Ont. H.C.), Gerrard v. Century 21 Armour Real

are time limited[10] and in many cases the time period will expire before the case reaches trial. The granting of the injunction accordingly does in a true sense "put an end to the action" as the plaintiff will have obtained all of its relief (for example a 12 month non-compete period) before the case reaches trial.

C. Irreparable harm

The *RJR MacDonald* case defines irreparable harm as follows:

> The only issue to be decided is whether a refusal to grant relief could so adversely affect the applicant's own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.
>
> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.[11]

Most injunction cases turn on whether the plaintiff can establish irreparable harm. Irreparable harm can be difficult to prove. The cases have made clear that evidence of irreparable harm cannot be inferred. It must be clear and not speculative.[12] If the damages can be quantified, the harm is not irreparable i.e. it can be "repaired" with a damage award at trial. Experts can arguably quantify almost any loss.

Estate Inc. (1991), 4 O.R. (3d) 191 and Universal Showcase Ltd. v. Alliance Store, 2002 CarswellOnt 680

[10] Non-compete and non-solicitation provisions are indeed invalid if they are not time limited. Similarly, a fiduciary's duty to not solicit his or her ex-employer's customers applies only for as reasonable time.

[11] RJR Macdonald Inc. v. The Attorney General of Canada at 341.

[12] see Centre Ice Ltd. v. National Hockey League, 1994 CarswellNat 1332 (F.C.) and Kanda Tsushin Kogyo Co. v. Coveley, 1997 CarswellOnt 80 (Div Ct.)

Courts have found irreparable harm to exist where there is a real concern that the defendant will not have the means to satisfy a damage award made at trial,[13] where the plaintiff puts forth evidence that it will be put out of business or will lose market share if an injunction is not granted,[14] and where the plaintiff shows it will suffer a loss to its reputation and goodwill. The bottom line is that the harm must be something that cannot be compensated for by a damage award at trial.

D. Can an injunction be obtained without showing irreparable harm?

Although an employer must meet the higher onus "strong *prima facie* case" test when seeking an injunction to enforce a restrictive covenant against a departing employee, a line of cases stands for the proposition that the employer need not prove irreparable harm. In *Bank of Montreal v. James Main Holdings Ltd.,*[15] the Ontario Divisional Court held that where a plaintiff establishes a clear breach of a negative covenant by the defendant, an injunction restraining such breach will issue without the need to show irreparable harm. The same result obtained in *Canadian Medical Laboratories v. Windsor Drug Store Inc.*[16] In *Canpark Services Ltd. v. Imperial Parking Canada Corp.*[17], the Court ruled that if a plaintiff puts forth evidence of a breach of an enforceable restrictive covenant, a presumption of irreparable harm is established which the defendant must rebut or an injunction will be granted. While these cases should be considered in the departing employee context, counsel must be mindful that

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[13] see Hubbard v. Pitt, [1976] Q.B. 142 (C.A.), however this principle is controversial as it could result in poor defendants being treated differently from rich defendants.
[14] see Las Vegas Restaurant & Tavern Ltd. v. Zanzibar Tavern Inc., 1996 CarswellOnt 1805 (C.A.), G.T. Precision Welding (Ont.) Ltd. v. Nelligan, 1984 CarswellOnt 431 (HCJ) and Jostens Canada v. Gendron (1993), 1 C.C.E.L (2d) 275 (Ont. Gen. Div.)
[15] Bank of Montreal v. James Main Holdings Ltd. (1982), 28 C.P.C. 157 (Ont. Div. Ct.).
[16] Canadian Medical Laboratories v. Windsor Drug Store Inc., 1992 CarswellOnt 826 (Gen. Div.)

they involve restrictive covenants in the commercial context. The employer –employee relationship has always been a special relationship[18] and employees considered a "vulnerable group in society"[19]. This factor may well lead courts to refuse to apply this line of cases in the employment law context.

E. Balance of convenience

If the employer establishes that it has a strong enough case and will suffer irreparable harm, the Court then considers the balance of convenience. There is no clear direction in the caselaw on what factors the Court will consider when considering the balance of convenience. Indeed in *American Cyanamid*, the Court specifically stated that it would be unwise to even attempt to list them.

One guiding factor is that the Court will, where all other things are equal, attempt to preserve the status quo. This becomes tricky. Should the status quo on the day before the employee left be considered or on the day after? Taken literally, this consideration would always favour the departed employee except where the employer learned of his or her plans before he or she left and sought immediate injunctive relief. That said, the longer an employer waits before bringing injunction proceedings, the more entrenched becomes the status quo in which the departed employee has been competing and the more this factor will weigh in favour of the employee.

What is really going on at this stage is an inquiry into the relative impact an injunction will have on the employer and the employee. This means the Court will

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[17] 2001 CarswellOnt 3525 (Gen. Div.)
[18] see Machtinger v. HOJ (1992), 91 D.L.R. (4th) 491
[19] see Wallace v. United Grain Growers (1997), 152 D.L.R. (4th) 1 (S.C.C.)

consider the harm to the employee if an injunction is granted. The Court may well refuse an injunction on this part of the test if it concludes that an injunction would deprive the employee of the ability to earn a livelihood or that his or her reputation and career would be jeopardized.[20]

F. Interplay of the three factors

The three part test for an injunction cannot be applied mechanically. The three parts of the test are to a large degree interwoven. If the Court is convinced that the plaintiff has a very strong case on the merits, it will likely be less stringent on the irreparable harm branch of the test. If the Court feels that the plaintiff's case is weak, it will more carefully scrutinize the evidence of irreparable harm and will be more likely to find that the balance of convenience favours the defendant.

ANTON PILLER ORDERS

A. General

The *Anton Piller* [21] order is indisputably the most draconian remedy known to the civil law. These orders, by their very nature, must be obtained without notice to the defendant. There is no situation more fraught with potential injustice and abuse of the Court's powers than an application for an *ex parte* injunction.[22]

However, if the onerous test for granting this type of order is met, the Court will grant a plaintiff the right to search the defendant's business premises and even his

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[20] see Mercury Marine Ltd. v. Dillon (1986), 56 O.R. (2d) 266 (Ont. H.C.)
[21] the order gets its name from the 1976 case Anton Piller KG v. Manufacturing Processes Ltd, [1976] Ch 55 (C.A.)
[22] Watson v. Slavik, [1996] B.C.J. No. 1885, cited in US v. Friedland, [1996] O.J. No. 4399 (Gen Div) at para 26

or her residence for property, information and documents. The whole basis for the granting of an *Anton Piller* is similar to the underlying rationale for injunctions: the plaintiff is granted relief because to refuse it will mean he or she will lose his or her rights before the case can be decided at trial. Indeed, one prominent author (now a Justice of the Ontario Court of Appeal) has written that *Anton Piller* orders are made ... "where it is clear that the defendants are rogues who would flout the ordinary process of the Court and effectively deprive the plaintiff of a remedy".[23]

In the *Anton Piller* case itself, the Court granted the plaintiff the right to search for and remove confidential industrial drawings and designs taken from it by the defendant as part of a scheme to deliver them to one of the plaintiff's foreign competitors. The plaintiff asserted that if the order was not granted, the drawings and designs would be sent out of the country to one of its competitors and forever lost to it. In granting the order, the Court recognized that such orders should be granted only "where the normal processes of the law would be rendered nugatory if some immediate and effective measure was not available".[24]

It is open to debate whether in the digital age an *Anton Piller* order should ever be granted. If an employee departs with digital confidential information (and almost all information is now in digital form), it will likely be impossible for the employer to ever recover it or stop it from falling into the wrong hands. Within minutes, the information can be copied and hidden on a server anywhere in the world. Obtaining and executing an *Anton Piller* order in this era arguably gives little comfort to any

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[23] see Sharpe, Injunctions and Specific Performance (2nd Ed.) at para. 2.1100.
[24] Anton Piller at p. 62

employer that it has recovered all copies of the information and that its information is safe.

Nonetheless, the appropriateness and relevance of *Anton Piller* orders were recently considered in detail in the departing employee context in *Ridgewood Electric v. Robbie.*[25] In *Ridgewood*, an employer obtained an *Anton Piller* order granting it access to the residences of two ex-employees to search for and seize documents and other property belonging to the employer. When the defendants moved to set the order aside, Mr. Justice Corbett upheld the order and indeed the appropriateness and relevance of *Anton Piller* orders.

B. Test to obtain an Anton Piller Order

In *Ridgewood*, Mr. Justice Corbett articulated the test for obtaining an *Anton Piller* order as follows:[26]

(a) the plaintiff must show a strong *prima facie* case for the relief sought;

(b) the plaintiff must show that very serious potential harm could occur if the order is not granted;

(c) the plaintiff must show the defendant has possession of the documents or other items to be seized; and

(d) the plaintiff must show that there is good reason to believe that the respondent will destroy or secret the documents or items to be seized if given notice of the motion.

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[25] Ridgewood Electric v. Robbie, 2005 CarswellOnt 614. This case is appended to this paper as it provides an excellent analysis of Anton Piller Orders from both theoretical and practical perspectives.
[26] Ridgewood at para. 26.

All *ex parte* orders, including *Anton Piller* orders can only be granted for 10 day period.[27] It is normal practice to serve the defendant with a notice of motion for a motion returnable within the 10 day period at the time the *Anton Piller* order itself is served and executed. This gives the defendant an opportunity to attack the order before the Courts, albeit after it has already been executed. On the return date, the Court can decide if the Order ought to have been granted or whether it should continue.

C. Electronic data

The term "documents" includes electronic data.[28] It is very easy for a departing employee to take electronic data to use in his or her new venture. As became clear in the *Genuity* case, electronic data can be a very fruitful source of evidence for a plaintiff suing departing employees.[29] The retrieval of electronic data from computers and other storage devices belonging to the plaintiff can be tricky. Care must be taken to retrieve the data (which may be hidden on the computer or password protected) without destroying other data belonging to the defendant. Also, data that has seemingly been "erased" from a computer can often be retrieved by computer experts. If an employer has evidence that electronic data has been taken, consideration should be given to retaining a computer expert to give both affidavit evidence and assist in the execution of the *Anton Piller* order. The order should specifically provide for the participation of the computer expert.

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[27] see Rule 40.02 (1) of the Rules of Civil Procedure
[28] Rule 30.01 (1)(a) of the Rules of Civil Procedure and Reichmann v. Toronto Life Publishing Co. (1988) 66 O.R. (2d) 65
[29] CIBC World Markets v. Genuity 2005 CarswellOnt 633 (SCJ)

D. Conditions and Procedural Safeguards

The intrusive nature of an *Anton Piller* order demands that it be drawn and executed in a way that balances the rights of the plaintiff and the defendant. Courts have placed the following procedural safeguards on *Anton Piller* orders in order to balance these rights:

(a) the order should be drawn in a manner that allows the plaintiff to achieve his or her purpose but that protects the defendant's rights as much as possible. This means that the description of the locations that may be searched and the documents or other items that may be searched for and seized should be limited as much as possible and restricted to the documents and items the plaintiff deposes are in the possession of the defendant;[30]

(b) the order should have a provision advising the defendant of his or her right to consult counsel before being required to give entry to the premises;[31]

(c) in *Ridgewood*, Corbett J. suggested that police officers should supervise or even participate in the execution of the Order. Section 141 of the *Courts of Justice Act* provides that civil Court Orders are to be directed to a sheriff for enforcement and that it is only where the sheriff believes that the execution of the Order may give rise to a breach of the peace that the sheriff may require the assistance of a police officer. *Ridgewood* appears to suggest that despite this provision, police should be involved in the search even where the sheriff is not concerned that there will be a breach of the peace;

(d) all items seized should be held by an independent third party until the parties agree on a process for the review of the documents and items seized or further order of the Court;[32]

(e) the order should limit the number of people authorized to participate in the search;

(f) a detailed record ought to be kept of all material seized;[33] and

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[30] see Ridgewood at para 25.
[31] see Grenzservice Speditions v. Jans (1995), 129 D.L.R. (4th) 733
[32] see Ridgewood para. 33

(g) the search should be supervised by a solicitor;[34]

UNDERTAKING AS TO DAMAGES

A plaintiff seeking an injunction must give the court an undertaking to pay any damages caused to the defendant should the Court subsequently determine that the injunction should not have been granted. The best practice is to include the undertaking in the plaintiff's affidavit material or file a separate written undertaking at the time the motion is argued. The undertaking must be meaningful in the sense that the plaintiff must establish, if challenged, that it has the means to support the undertaking.[35]

POTENTIAL PITFALLS

A. Duty to make full disclosure of all material facts

Because the Court is being asked to grant an *Anton Piller* order without the other side having the chance to present its case, there is a high onus on the moving party to make full disclosure of all material facts. The cases make clear that this is an onerous duty. If the Court ultimately finds that full disclosure was not made, the *Anton Piller* order can be set aside on this basis alone.[36]

Before preparing the affidavit material for an *Anton Piller* order, it would be prudent to review the decision of Mr. Justice Sharpe in *US v. Friedland*[37]. *Friedland*

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[33] Columbia Pictures Industries v. Robinson [1987] 1 Ch. 38
[34] Ridgewood para. 29, see also Universal Thermosensors Ltd. v. Hibben [1992] 1 W.L.R. 840
[35] see Equitas Investment Corp. v. Goodman, (1987) 54 O.R. (2d) 795 (H.C.J.) and Manos Foods International Inc. v. Coca-Cola Ltd., 1997 CarswellOnt 1655
[36] see Rule 39.01 (6) of the Rules of Civil Procedure.
[37] [1996] O.J. No. 4399 (Gen Div)

outlines very clearly the duty on a party seeking an *ex parte* injunction to make full disclosure, the rationale for this duty and the consequences of not making full disclosure.

The duty to make full disclosure is onerous. It has been described as an exceptional duty on the party seeking relief.[38] The lawyer preparing affidavit material is often under pressure to get the motion heard quickly. The client may well not bring all documents to the lawyer and may, intentionally or unintentionally, leave out a document that favour the defendant's case. Despite the rushed atmosphere in which many *ex parte* motions are brought, it is a crucial and wise investment of time to ensure that the client produces all contracts, emails, letters, faxes or other documents and that these materials are reviewed carefully prior to the preparation of affidavit material. Often the client does not know what is relevant and may well in good faith not produce a relevant document.

By way of example of how onerous is the duty to make full disclosure, Courts have ruled that the moving party must specifically point out to the judicial officer hearing the motion a material provision in an agreement. It is not good enough to simply append an agreement to an affidavit without bringing it to the Court's attention.[39]

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[38] US v. Friedland, [1996] O.J. No. 4399 (Gen. Div.) at para 27

[39] Cimaroli v. Pugliese, [1987] O.J. No. 2464 (Master). For other examples of how onerous the duty is see Valeo Sylvania v. Ventra Group, [2001] O.J. No. 5629, Passarelli v. Di Cienzo, [1989] O.J. No. 113 (H.C.J.), Bank of Nova Scotia v. Rawifilm, 18 O.R. (3d) 743 (Master).

B. Injunction may be dissolved if moving party does not pursue the action diligently

It can only get worse for a party that has obtained an injunction: the relief is in place, they have won the battle and they can only lose the war. The Courts will require a plaintiff to move the case to trial without delay, failing which the injunction can be set aside simply on the basis of the plaintiff's delay.[40]

COSTS OF THESE WEAPONS IN TERMS OF MONEY, REPUTATION, TIME AND ENERGY: ARE THEY WORTH IT?

Injunctions and *Anton Piller* orders are very expensive and time consuming propositions. Counsel must carefully consider whether the time, cost and chances of success warrant the pursuit of these remedies. Costs awards against an unsuccessful plaintiff can be substantial.[41] An important consideration is whether the defendants are likely to have the means to satisfy any judgment obtained at trial. If any of them do, counsel and client may consider foregoing the injunction route and focussing on going to trial. Consider the case of *RBC Dominion Securities v. Merrill Lynch*. When the branch manager and virtually all investment representatives in RBC's Cranbrook and Nelson British Columbia offices left without warning to join Merrill Lynch, RBC sought an injunction restraining those employees from unfairly competing with it.[42] The injunction was denied. RBC took the case to trial and ended up obtaining a substantial judgment against the former employees and Merrill Lynch, including

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[40] see Bell ExpressVu Ltd. Partnership v. Tedmonds & Co., 2001 CarswellOnt 1393 (S.C.J.)
[41] see Apotex v. Egis, 1991 CarswellOnt 3149 (H.C.J.) where the moving party was ordered to pay solicitor-client costs which were fixed at close to $200,000. Hourly rates have nearly doubled since 1991.
[42] RBC Dominion Securities v. Merrill Lynch, 2000CarswellBC 2579 (B.C. S.C.)

punitive damages totalling $275,000.[43] This case is proof that there is life for plaintiffs after being denied an injunction.

Sometimes companies bring injunctions for strategic reasons: the company usually has far greater financial resources than the departing employee. The departing employee's new venture may not be able to survive fighting off an injunction even if it ultimately wins the motion. Time that would be better used building the business is spent responding to the motion, not to mention the stress added to the stress that already goes along with starting a new business.

However, the plaintiff is itself not immune from these factors. Its employees will also be distracted with pursuing the injunction. Hours will be spent collecting documents, meeting with lawyers, reviewing drafts of affidavits and attending cross-examinations. This is all time that could be spent focussing on replacing the departed employees and keeping the business on track.

There is no doubt that an employer's reputation in dealing with departed employees becomes known to other employees and in the market place. A reputation for aggressively pursuing departed employees may serve to dissuade other employees from leaving and joining competitors.

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[43] RBC Dominion Securities v. Merrill Lynch, 2004CarswellBC 2631 (B.C. S.C.) (decision on damages) and RBC Dominion Securities v. Merrill Lynch, 2003CarswellBC 2923 (B.C. S.C.)(decision on liability)

CONCLUSION

Injunctions and *Anton Piller* orders can be very effective tools in the right case. The employer and counsel should carefully consider the matter, with as little emotion as possible, to determine if the facts warrant seeking extraordinary relief, whether there are "bigger picture" considerations for doing so, or whether an action for damages is more appropriate in the circumstances.

9 C.P.C. (6th) 1, 74 O.R. (3d) 514

2005 CarswellOnt 614

Ridgewood Electric Ltd. (1990) v. Robbie

RIDGEWOOD ELECTRIC LIMITED (1990) v. NIGEL ROBBIE, GRAEME MITCHELL and THERMARENS LTD.

Ontario Superior Court of Justice

Corbett J.

Judgment: February 18, 2005
Docket: 1685/04

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Counsel: William R. Gilmour for Plaintiff

Malcolm J. MacKillop for Defendants

Subject: Civil Practice and Procedure

Injunctions --- Form and operation of order -- Continuance of interim or interlocutory injunctions -- General

Employer obtained Anton Piller order to search homes, cars and laptop computers of its employees R and M -- Search team arrived at R's house at 5:00 p.m. and was told by R's 10-year-old son that R was not home -- Neighbour protected child and blocked entry until R arrived minutes later -- Solicitor retained by employer to supervise search handed R documents and explained gist of order -- Search began at 5:45 p.m. after R was unable to contact his lawyer -- Similar search was simultaneously conducted at M's home -- Sheriff's officer and investigator at M's house joined team at R's house -- R brought motion to set aside order -- Motion dismissed -- Breaches were merely technical -- Requisite procedural safeguards include prior judicial authorization, execution by peace officer properly trained in execution of search warrants, safe retention and listing of material seized in manner respecting potential privilege claims, and careful judicial scrutiny of execution of orders to balance interests to ensure fair disposition of substantive issues -- Time-honoured principle is that person's home is their castle -- Employer had strong prima facie case that R wrongly took its information and commingled it with his own materials -- Prejudice to R from being deprived of his own material was minimal and limited to reasonable amount of time -- Failure to give R more time to obtain legal advice resulted from all circumstances and employer could not reasonably have done more than it did without material risk of losing benefit of order which required search to begin before 6:00 p.m -- Search was conducted professionally and in manner adequately protecting R's rights -- Joinder of additional persons in search should not have happened but was not fatal.

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9 C.P.C. (6th) 1, 74 O.R. (3d) 514

Injunctions --- Form and operation of order -- Form of order -- Scope of order

Employer obtained Anton Piller order to search homes, cars and laptop computers of its employees R and M -- Five persons including sheriff's officer and private investigator were authorized to be present when order executed -- Search team arrived at R's house at 5:00 p.m. and was told by R's 10-year-old son that R was not home -- Neighbour protected child and blocked entry until R arrived -- Solicitor retained by employer to supervise search handed R documents and explained gist of order -- R unsuccessfully attempted to contact his lawyer -- Search began at 5:45 p.m -- Similar search was conducted at M's home at same time -- Sheriff's officer and investigator at M's house joined team at R's house -- R alleged breaches in execution of order -- R brought motion to set aside order -- Motion dismissed -- Breaches were merely technical -- Principle that person's home is their castle is time-honoured principle -- Failure to give R more time to obtain legal advice was result of circumstances but employer could not reasonably have done more than it did without material risk of losing benefit of order which required search to begin before 6:00 p.m -- Potential prejudice to employer in losing benefit of order outweighed prejudice to R in not obtaining immediate legal advice -- Search was conducted professionally and in manner adequately protecting R's rights -- Solicitor retained by employer ensured that persons conducting search were briefed on terms of order, was available to resolve ambiguities, was present and was consulted and satisfactorily discharged these aspects of his duties -- Order went beyond that which was justified without notice by prohibiting R and M from conduct in competition with employer so those portions were set aside.

Injunctions --- Form and operation of order -- Service of order

Employer obtained Anton Piller order to search homes, cars and laptop computers of its employees R and M -- Order was 21 paragraphs and 8 pages long -- Order required that search begin no later than 6:00 p.m -- Search team arrived at R's house at 5:00 p.m. and was told by R's 10-year-old son that R was not home -- Neighbour protected child and blocked entry until R arrived minutes later -- Solicitor retained by employer to supervise search handed R documents by 5:30 p.m. and explained gist of order but did not read order in its entirety -- R unsuccessfully attempted to contact his lawyer -- Search began at 5:45 p.m -- Similar search was conducted at M's home at same time -- Sheriff's officer and investigator at M's house joined team at R's house -- R alleged breaches in execution of order -- R brought motion to set aside order -- Motion dismissed -- Breaches were merely technical -- Reading and explaining entire order was preferable but exigencies of circumstances made this impractical -- Substance of order was conveyed and R understood order.

Cases considered by Corbett J.:

Adobe Systems Inc. v. KLJ Computer Solutions Inc. (1999), 1999 CarswellNat 732, [1999] 3 F.C. 621, 1 C.P.R. (4th) 177, 166 F.T.R. 184, 1999 CarswellNat 2490 (Fed. T.D.) -- referred to

Anton Piller KG v. Manufacturing Process Ltd. (1975), [1976] 1 Ch. 55, [1976] 1 All E.R. 779, [1976] F.S.R. 129, [1976] R.P.C. 719, [1976] 2 W.L.R. 162 (Eng. C.A.) -- considered

Bhimji v. Chatwani (No. 1) (1990), [1991] 1 W.L.R. 989, [1991] 1 All E.R. 705 (Eng. Ch. Div.) -- referred to

Celanese Canada Inc. v. Murray Demolition Corp. (2004), 2004 CarswellOnt 529, 46 C.P.C. (5th) 285, 69 O.R. (3d) 632, 237 D.L.R. (4th) 516, 183 O.A.C. 296 (Ont. Div. Ct.) -- referred to

Columbia Picture Industries Inc. v. Robinson (1985), [1986] F.S.R. 367, [1986] 3 All E.R. 338, [1987] Ch. 38 (Eng. Ch. Div.) -- referred to

Computer Security Products Inc. v. Forbes (1999), 1999 CarswellOnt 3936 (Ont. S.C.J.) -- referred to

Entick v. Carrington (1765), 95 E.R. 807, 19 State Tr. 1029, 2 Wils. K.B. 275, [1558-1774] All E.R. Rep. 41 (Eng. K.B.) -- considered

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Fila Canada Inc. v. Jane Doe (1996), 48 C.P.C. (3d) 1, 68 C.P.R. (3d) 1, (sub nom. Fila Canada v. Doe) 114 F.T.R. 155, (sub nom. Fila Canada Inc. v. Doe) [1996] 3 F.C. 493, 1996 CarswellNat 2585, 1996 CarswellNat 725 (Fed. T.D.) -- considered

Geophysical Service Inc. v. Sable Mary Seismic Inc. (2003), 2003 NSSC 73, 2003 CarswellNS 129, 213 N.S.R. (2d) 303, 667 A.P.R. 303, 32 C.P.C. (5th) 280 (N.S. S.C.) -- referred to

Grenzservice Speditions GmbH v. Jans (1995), 129 D.L.R. (4th) 733, 15 B.C.L.R. (3d) 370, 64 C.P.R. (3d) 129, [1996] 4 W.W.R. 362, 1995 CarswellBC 1041 (B.C. S.C.) -- considered

Hallmark Cards Inc. v. Image Arts Ltd. (1976), [1977] F.S.R. 150 (Eng. C.A.) -- referred to

Ontario Realty Corp. v. P. Gabriele & Sons Ltd. (2000), 2000 CarswellOnt 4323, 50 O.R. (3d) 539, 50 C.P.C. (4th) 278, 78 C.R.R. (2d) 189 (Ont. S.C.J. [Commercial List]) -- considered

Ontario Realty Corp. v. P. Gabriele & Sons Ltd. (2001), 2001 CarswellOnt 408, 142 O.A.C. 93 (Ont. Div. Ct.) -- referred to

Pulse Microsystems Ltd. v. SafeSoft Systems Inc. (1996), [1996] 6 W.W.R. 1, 47 C.P.C. (3d) 360, 134 D.L.R. (4th) 701, 67 C.P.R. (3d) 202, 110 Man. R. (2d) 163, 118 W.A.C. 163, 1996 CarswellMan 214 (Man. C.A.) -- referred to

Robert Half Canada Inc. v. Jeewan (2004), 71 O.R. (3d) 650, 49 C.P.C. (5th) 270, 33 C.C.E.L. (3d) 302, 2004 CarswellOnt 2793 (Ont. S.C.J.) -- referred to

Viacom Ha! Holding Co. v. Jane Doe (2002), 2002 FCT 13, 2002 CarswellNat 74, 2002 CFPI 13, 2002 CarswellNat 4873 (Fed. T.D.) -- referred to

955105 Ontario Inc. v. Video 99 (1993), 48 C.P.R. (3d) 204, 1993 CarswellOnt 770 (Ont. Gen. Div.) -- referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally -- referred to

s. 8 -- referred to

Words and phrases considered

anton piller order

The order in question is known as an "Anton Piller order". It is an extraordinary exercise of the court's equitable jurisdiction to issue injunctions. [. . .]

[. . .]

Opinion is divided on the true nature of an Anton Piller order. Some liken it to a search warrant. Denning L.J. was at pains to deny this characterization in the Anton Piller case itself [Anton Piller K.G v. Manufacturing Process Ltd. (1975), [1976] 1 Ch. 55, [1976] 1 All E.R. 779, [1976] F.S.R. 129, [1976] R.P.C. 719, [1976] 2 W.L.R. 162 (Eng. C.A.)]. Rather, Denning L.J. found that it was an exercise of the court's inherent jurisdiction to protect its own

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process. The order does not authorize entry. Rather, it commands the defendant to permit entry. The defendant may deny entry, and thereafter face contempt proceedings and possible adverse inferences. However, the plaintiff's agents may not use force to effect entry in the face of the defendant's denial of permission.

[...]

[...] I agree that the jurisdiction for an Anton Piller order is found in the court's inherent jurisdiction to protect its own process. But the source of the jurisdiction for the order and its substance are two different things. The substance of the order is entry, search and seizure of private property. Since the substance of an Anton Piller order is entry, search and seizure, the distinction between Anton Piller orders and search warrants is "subtle to say the least" (Sharpe, Injunctions and Specific performance (2nd ed.), para. 1.1280), [...]

[...]

[...] Anton Piller orders must evolve to reflect technological change in the past thirty years and the broadening context in which they are used. To be effective and fair, they must provide immediate access to the premises to be searched. Those premises will often be residential and often employers will execute these orders against former employees. And as a result, the court should revisit the careful safeguards devised by the English Court of Appeal in Anton Piller. Those safeguards should now include:

(a) Prior judicial authorization (as is required for a search warrant); and

(b) Execution by a peace officer, properly trained in the execution of search warrants; and

(c) Safe retention and listing of materials seized in a manner that respects claims of privilege that may be asserted subsequently; and

(d) Careful judicial scrutiny of execution of Anton Piller orders to balance the interests of both sides to ensure a fair disposition of the substantive issues in the case in a process that is fair to both sides.

MOTION to set aside Anton Piller order.

Corbett J.:

1 Nigel Robbie arrived home on April 14th, 2004, to find a neighbour barricading his front door. His ten-year-old son had been taken to another neighbour's house, distraught. The neighbourhood was in an uproar. A cadre in suits stood at the front of his house brandishing a thick wad of papers, demanding to be let in.

2 This cadre was acting under authority of a court order issued without notice to Robbie. It required Robbie to permit this group to search his house, his car, and his laptop computer.

3 The order in question is known as an "*Anton Piller* order". It is an extraordinary exercise of the court's equitable jurisdiction to issue injunctions. It is a creature known to a specialized portion of the bar, law students and academics, and to virtually no one else. Although it has been with us for nearly thirty years, its "standard terms" still vary considerably across the Province.

4 While everyone is taken to know the law, the Robbies and their neighbours might be excused for not knowing about *Anton Piller* orders. And so the Robbies and their neighbours were left to wonder what kind of country we live in, where one's former employer, acting secretly, may obtain a court order and then enter and search one's private residence.

5 The motion before this court is brought by Robbie to set aside the order and return the items seized during the search. He also seeks additional remedies in damages for himself and his family.

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6 The plaintiff, Ridgewood, says that it has acted according to established practice and the authority of a valid court order. There were minor breaches of the order during its execution, but none so substantial to warrant setting it aside. The order was justified at first instance and ought to be upheld now.

7 I conclude that the real problem in this case lies not with Ridgewood in its execution of the *Anton Piller* order, but with the order itself. Further, the portion of the order that authorized the search and seizure is crafted scrupulously to adhere to the protections developed by the courts over the years. So Ridgewood is not at fault for the problems with the order. Rather, the difficulties lie with the general practices respecting *Anton Piller* orders, at least as they relate to searches of private dwellings. In this regard, I note the heavy onus on counsel seeking an *Anton Piller* order to bring forward all the relevant evidence *and* the relevant law *and* a draft order in terms that "ensure sensitivity for the rights of the defendant" (see: *Celanese Canada Inc. v. Murray Demolition Corp.*, [2004] O.J. No. 372 (Ont. Div. Ct.).

8 Having so concluded, I find that the order should be upheld. However, in future, *Anton Piller* orders should be structured to avoid the problems that arose in this case. The time honoured principle that a person's home is his "castle" still rings as a bell of freedom and hallmark of a free and democratic society, and rightly so. Searches and seizures from private dwellings should be conducted by officials who are trained and accountable for this work: the police. And the tenuous distinction between an *Anton Piller* order and a search warrant ought to be abolished. It was created to enhance the protections of the parties being searched, not to derogate from them, but they have the opposite effect and can only serve to undermine the public legitimacy of the order. The public understands what a warrant is; the public does not understand what an *Anton Piller* order is.

9 My findings in respect to the proper practice for *Anton Piller* orders may go further than is necessary to dispose of this motion. However, motions to obtain *Anton Piller* orders are invariably brought without notice and often on an urgent basis. The court does not have the time, the resources, or the benefit of responding submissions to consider larger issues on the original motion. Thus, the best time to reflect upon the proper scope and structure of these orders is after execution, when the court has the benefit of a factual record as to the effect of the order.

The Nature of the Lawsuit

10 The defendants Robbie and Mitchell are former Ridgewood employees. Robbie moved from England to take up employment with Ridgewood in early 1999. His employment with Ridgewood was terminated on April 15, 2004. Mitchell also moved from England to take up employment with Ridgewood, in November 2000. His employment with Ridgewood was terminated March 31, 2004. Both Robbie and Mitchell had previously worked for an English company called "Thermatool".

11 Robbie was Ridgewood's Manager of Technical Services. Mitchell was a Design and Application Engineer for Ridgewood.

12 Robbie and Mitchell both signed employment contracts after they commenced employment with Ridgewood. The employment contracts contain non-competition clauses. Robbie's evidence is that he was told not to worry about the non-competition provisions, because they are unenforceable.

13 Ridgewood alleges that Robbie and Mitchell took various property belonging to Ridgewood, and were using or would use this material for their benefit and to Ridgewood's detriment. Langdon J. was satisfied that Ridgewood's evidence supporting these allegations met the stringent test for an *Anton Piller* order, and this substantive determination was not challenged before me. The hearing on the return of an *Anton Piller* order is not a review of the original court's exercise of discretion, but a fresh hearing to consider whether the order ought to be continued (see *Robert Half Canada Inc. v. Jeewan* (2004), 33 C.C.E.L. (3d) 302, 49 C.P.C. (5th) 270, 71 O.R. (3d) 650 (Ont. S.C.J.); *Pulse Microsystems Ltd. v. SafeSoft Systems Inc.* (1996), 134 D.L.R. (4th) 701 (Man. C.A.).

The Anton Piller Order

13 The *Anton Piller* order authorized entry and searches of the homes of both Robbie and Mitchell. The order provided for the attendance of a solicitor during the search. Christopher Harrison was retained by Ridgewood's

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solicitors to supervise the search at Robbie's residence, accompanied by Sheriff's Officer Eve Martin. The search team arrived at Robbie's residence shortly after 5:00 p.m. on April 15, 2004. Robbie was not home.

14 However Robbie's ten year-old son, Sam, was home. Sam was asked by these strangers for a key to his house and for his father's cell phone number. Fortunately neighbours intervened. One took Sam into her house until his parents came home. Another blocked entry to the residence until Robbie arrived.

15 Robbie arrived home shortly afterwards. His wife, Karen, was with him. Harrison handed Robbie a large stack of documents (presumably the motion record and the order). Harrison did not read the order to Robbie. Apparently Robbie read some of the order, but not all of it.

16 Robbie's wife asked if they could consult a lawyer. Harrison told them that they could. Robbie and his wife then searched for their lawyer's business card. Eventually they found an invoice that bore the firm's number. They called. The office was closed, and they left a voice mail message. They then sought to contact other counsel, since their own lawyer was not available immediately. At about 5:45, Sheriff's Officer Martin advised that it was time to start the search. Robbie says that she said something to the effect that "no one can help you at this point". In all, Robbie was given about fifteen minutes to contact a lawyer, unsuccessfully.

17 There was one sheriff's officer and one private investigator present when the search began. A similar search was conducted at the defendant Mitchell's home. When that search was complete, the sheriff's officer and private investigator at the Mitchell residence joined the search at the Robbie residence. The order had authorized one sheriff's officer and one private investigator, and a total of five persons to be present in the Robbie residence during execution of the order. There were seven persons present during the latter part of the search with the additional sheriff's officer and investigator.

18 During the course of the search, Harrison sat in the kitchen with Robbie and his wife. He did not actively supervise the search conducted by the other members of the search team, who did their work throughout the house.

19 Robbie says that Ridgewood has breached the terms of the *Anton Piller* order. These breaches deprived him of his right to counsel, and under-cut the safeguards put in place by the court to ensure proper supervision of the search. These breaches also created an air of profound violation, as Robbie and his family had seven strangers searching through their personal belongings in their home.

Analysis

20 Opinion is divided on the true nature of an *Anton Piller* order. Some liken it to a search warrant. Denning L.J. was at pains to deny this characterization in the *Anton Piller* case itself. Rather, Denning L.J. found that it was an exercise of the court's inherent jurisdiction to protect its own process. The order does not authorize entry. Rather, it commands the defendant to permit entry. The defendant may deny entry, and thereafter face contempt proceedings and possible adverse inferences. However, the plaintiff's agents may not use force to effect entry in the face of the defendant's denial of permission.

21 From the defendant's perspective, this is a distinction without a difference. Under authority of court process, strangers appear at his front door demanding entry. With a search warrant, those strangers are police officers, who may use reasonable force to execute their search. With an *Anton Piller* order, the strangers are not police officers (although they will usually include at least one peace officer, often from the Sheriff's office). They will not use force to gain entry, but rather the threat of jail or other punishment. The foci of the two procedures are different: a warrant authorizes the searcher to do something (enter and search); an *Anton Piller* order orders the subject of the search to do something (permit entry and search), but the result is the same: the premises are entered and searched. Differences only arise if the subject of the search resists or refuses entry.

22 I have considered the reasoning of Farley J. in *Ontario Realty Corp. v. P. Gabriele & Sons Ltd.* (2000), 50 O.R. (3d) 539 (Ont. S.C.J. [Commercial List]). I agree that the jurisdiction for an *Anton Piller* order is found in the court's inherent jurisdiction to protect its own process. But the source of the jurisdiction for the order and its substance are two different things. The substance of the order is entry, search and seizure of private property. Since

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the substance of an *Anton Piller* order is entry, search and seizure, the distinction between *Anton Piller* orders and search warrants is "subtle to say the least" (Sharpe, *Injunctions and Specific performance* (2nd ed.), para. 1.1280), with one court going so far as to call it "hypocrisy" (see *Bhimji v. Chatwani (No. 1)* (1990), [1991] 1 W.L.R. 989 (Eng. Ch. Div.) at 1001, per Scott J.).

23 The reason for this distinction is said to hearken back to the ancient and revered authority of *Entick v. Carrington* (1765), 2 Wils. K.B. 275, [1558-1774] All E.R. Rep. 41, 95 E.R. 807 (Eng. K.B.), in which the court stated the following fundamental principle: a person's home is her "castle", her own private domain. Even officers of the state may not invade that sanctum without the permission of the householder. To honour this principle, the courts have described an *Anton Piller* order as something other than a search warrant. But the description and analysis does not change the fact that, in substance, an *Anton Piller* order is a search warrant. And it is time that the theoretical distinction between *Anton Piller* orders and search warrants be abandoned, not to denude privacy and property rights, but to protect them. I so conclude for the following reasons:

(a) *Anton Piller* orders play an increasingly important role in protecting businesses from disgruntled or departing employees. These orders protect the court's own process, important property interests and the values underlying the relationship between employer and employee. The premise of these orders is that (a) the defendant is likely to act to frustrate the order if given notice of it in advance; and (b) there is a strong *prima facie* case that the defendant has already acted very badly.

(b) With the advent of computer technology, in many cases *Anton Piller* orders will be effective only if they can be enforced with speed and with an element of surprise. It is not acceptable that the search be delayed for days, or even hours, once the defendant has notice of the order. The information or property to be preserved may be copied, transferred across the world, and erased from a computer with a few apt keystrokes. Once the order is served, the premises must be secured immediately, and the search must proceed. *Anton Piller* was decided in 1976. Computer technology did not exist then as it does now. The business world was, truly, a different place.

(c) *Anton Piller* orders are made regularly. Perhaps the ease with which documents may be copied and stored electronically affords greater opportunity to engage in conduct that grounds an *Anton Piller* order. So although the *Anton Piller* remedy remains "extraordinary" and relatively "rare", it is increasingly used in employment law cases.

(d) Although early *Anton* Piller orders sometimes provided for search of private residences, that was not the norm. When the *Anton Piller* order was developed, in the mid-1970's to mid-1980's, new technology had made it possible to duplicate information routinely stored on tapes. This theft of intellectual property involved production of "bootlegged" copies of music and movies. It was possible to conduct these activities from a home, but large scale "pirates" operated with banks of machines, usually in low-rent commercial premises. Because of the advent of the personal computer, it is now practical for vast quantities of business documents to be secreted on a home or portable computer or on easily portable data discs or tapes. These materials may be kept at home, in a car or in a briefcase, and can be carried easily. Consequently, it is increasingly common for *Anton Piller* orders to provide for search of private dwellings, vehicles and luggage where computers may be found. These are traditional personal spaces, the core of the protected area in *Entick v. Carrington*. But a home is not just a person's "castle" nowadays. It is also, often, that person's office. It may contain a vast store of records on a small machine on the corner of the family desk, or in a laptop computer in the trunk of the car, or on a disc located in a shallow table drawer. For *Anton Piller* orders to be effective in this context, they must provide for searches of these intimate private spaces.

(e) Back when the *Anton Piller* order was introduced into our jurisprudence, there was generally no past connection between the plaintiff and defendant. In current employment law cases, *Anton Piller* orders are often obtained by employers with the means and knowledge to engage expert legal counsel. The defendants are often former employees of average means, who often lack sophistication and knowledge of legal matters or even knowledge of which lawyers or law firms might have the expertise

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> to assist them during execution of the order. The usual power imbalance in the employer/employee relationship would surely serve to create an atmosphere of intimidation and oppression, which is exacerbated by an imbalance of resources, knowledge and expertise. The remedy is intended to protect the administration of justice, and not to create an atmosphere of oppression at the very outset of costly litigation.

24 For these reasons, I conclude that *Anton Piller* orders must evolve to reflect technological change in the past thirty years and the broadening context in which they are used. To be effective and fair, they must provide immediate access to the premises to be searched. Those premises will often be residential and often employers will execute these orders against former employees. And as a result, the court should revisit the careful safeguards devised by the English Court of Appeal in *Anton Piller*. Those safeguards should now include:

> (a) Prior judicial authorization (as is required for a search warrant); and
>
> (b) Execution by a peace officer, properly trained in the execution of search warrants; and
>
> (c) Safe retention and listing of materials seized in a manner that respects claims of privilege that may be asserted subsequently; and
>
> (d) Careful judicial scrutiny of execution of *Anton Piller* orders to balance the interests of both sides to ensure a fair disposition of the substantive issues in the case in a process that is fair to both sides.

Prior Judicial Authorization

25 *Anton Piller* orders are sought without notice, and must satisfy the general test for any order sought on that basis (see *Robert Half Canada Inc. v. Jeewan* (2004), 33 C.C.E.L. (3d) 302, 49 C.P.C. (5th) 270, 71 O.R. (3d) 650 (Ont. S.C.J.)). The relief sought on the motion should not extend beyond that which is justified without notice. As noted by Huddart J. in *Grenzservice Speditions GmbH v. Jans* (1995), 15 B.C.L.R. (3d) 370 (B.C. S.C.) at 385:

> Clearly the order should be drawn so as to extend no further than the minimum extent necessary to achieve its purpose, that is the preservation of documents or articles that might otherwise be destroyed or concealed: *Columbia Picture Industries Inc. v. Robinson* (1985), [1986] 3 All E.R. 338 at 371 (Ch. D.)

In the case at bar the original order went beyond that which is justified without notice, and included terms prohibiting the defendants from various conduct in competition with the plaintiff. I set aside those portions of the original order at the time of argument before me, for the reasons expressed in *Robert Half Canada Inc. v. Jeewan*, supra.

26 The test for an *Anton Piller* order is as follows:

> (a) the applicant must show a "strong" or "extremely strong" prima facie case for the substantive relief grounding the request for the order;
>
> (b) the applicant must show that very serious potential harm could occur if the order is not granted;
>
> (c) the applicant must show that the respondent has in its possession the documents or other items to be seized; and
>
> (d) the applicant must show that there is good reason to believe that the respondent will destroy or secret the items to be seized if given notice of the motion.

See: *Anton Piller KG v. Manufacturing Process Ltd.* (1975), [1976] 1 Ch. 55 (Eng. C.A.); *Adobe Systems Inc. v. KLJ Computer Solutions Inc.* (1999), 1 C.P.R. (4th) 177 (Fed. T.D.); *Robert Half Canada Inc. v. Jeewan*, supra.

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27 These principles, summarized, stand for the proposition that there must be prior judicial authorization for an *Anton Piller* order, which may be obtained only upon satisfying the court that there is a proper basis for this extraordinary remedy.

Execution by a Peace Officer Properly Trained to Execute Searches

28 Currently, an *Anton Piller* order is framed to require the person to whom it is addressed to permit entry to premises by enumerated persons, to search for specified property, and to seize such property, if it is located. As discussed, the distinction between an order requiring permission for this conduct, and an order authorizing such conduct (including the use of reasonable force where necessary) is more theoretical than practical, at least in most cases. In terms of the public legitimacy of the entry and search, the privately executed *Anton Piller* is not known and understood by the public, and is therefore not as readily accepted by the public, as a search warrant executed by police.

29 A police officer with a warrant to search is not likely to excite the consternation of the community. It is known and accepted that the officer has been given prior authority by a judicial officer to enter and search. It is known and accepted that the officer is accountable for her conduct in executing the warrant both in court and as a matter of professional discipline. Of course, the same is true for *Anton Piller* orders, but the appearance is quite different. As in this case, the people who appear to conduct the search are not public officials such as police officers, but the subject party's former employer, that employer's lawyer and in this case, a sheriff's officer. Ridgewood has observed current "best practices" by also bringing an independent lawyer to supervise the search, in his capacity as an "officer of the court".

30 Lawyers have duties "officers of the court". However, that is a role in which they are perceived by judges and other lawyers, and not by members of the public. In their traditional roles, lawyers are partisans whose conduct is circumscribed by ethical and professional standards of conduct. They are not accountable to the courts or to the Law Society for their partisanship, but for adherence to minimum standards of conduct, principally in respect to competence, honesty and integrity. When a lawyer is acting for a client, she is not, and she is not seen to be, independent, impartial, or even necessarily fair. A lawyer acting as an independent "officer of the court" during the execution of a search warrant is not perceived as independent and impartial by virtue of his position as an "officer of the court." In the case before me, from Robbie's perspective, Mr. Harrison was a lawyer hired by Ridgewood to search his home, not an "officer of the court" present to ensure fair play.

31 If the order had required the participation of a police officer instead of Harrison, whose task it was to execute the search, it is unlikely that neighbours would have been so inflamed. No doubt Mr. Robbie and his family would still have felt that their privacy had been invaded, and they might have felt wronged in that, but they would have known at the time that they would have recourse in court if there was impropriety in the execution of the search or the process for obtaining authorization for it.

32 This reasoning could lead to future orders that police conduct searches in aid of civil matters. This could lead to several potential problems. First, the police set their own priorities. Police forces may not wish to spend their resources on "civil matters". In my view, there is no reason that police searches pursuant to *Anton Piller* orders could not be done at the expense of the party requesting this assistance. Off-duty police officers are made available for various duties, such as crowd control, and there is no reason that police officers could not also be available on a fee-for-services basis for *Anton Piller* searches, so that the cost is borne by the parties.

33 Second, in a criminal investigation the police are responsible for preserving and organizing the materials seized during the search. I do not see that as being a necessary adjunct in *Anton Piller* searches. The seized property could be held by police, or by some other third party until further order of the court. However, the eventual organization and distribution of copies of the seized materials need not involve police resources. The requirements of each case will be different, but in general terms:

> (a) Seized items should be held by an independent third party until the parties agree on a process or until the Court makes a further order on notice and;

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(b) Arrangements should be made to copy and return seized materials as quickly as possible.

34 Third, this process would not mean that the moving party would be uninvolved in the search. That would not be practical. Particularly in respect to electronic records, it may be essential to have representatives of the moving party and its lawyers present to assist in the search.

35 Finally, this approach could lead to a "blending" of *Anton Piller* jurisprudence with search and seizure jurisprudence under the *Charter*, which is discussed further below. I see no conceptual difficulty in the law developing in this fashion. I find that there ought to be a greater public law dimension to the private *Anton Piller* remedy because a judicially authorized search of a private residence should not be a purely private matter. The sanctity of the private residence ought to attract some level of public law protection, even in a private law context: that is the heart of the principle in *Entick v. Carrington*.

Safe Retention of Seized Materials

36 "Safe retention" issues in *Anton Piller* cases will vary among cases. The following issues, however, arise routinely:

(a) some or all of the materials seized may be required urgently by the subject of the search, in order to continue operating a business or for some other legitimate purpose. Often it is possible to copy materials quickly and return originals. Sometimes there may be good reason to deprive the subject of the search of the seized materials for a longer period.

(b) In some cases the subject of the search has privilege claims in respect to some of the materials seized. The ability to assert those claims needs to be preserved until a process for assessing those claims has been completed. It is important that materials over which privilege is claimed not be reviewed by the opposing party or its counsel before the privilege claim is determined.

(c) It will be necessary to prepare an inventory of seized materials, and returned materials, for use by all parties.

37 In most cases there will be no reason for police to perform these tasks. Once there has been a seizure, so long as the seized materials are held safely by a non-party (such as an independent solicitor) pending agreement between the parties or further order of the court, then the interest that the subject of the search has in the seized materials may also be protected. One would expect that in the ordinary case, the order and seized materials would be returned before the court, on notice, to ensure that a proper process is agreed or ordered for these steps.

Scrutiny of the Execution of the Order in this Case

(i) Too Many People at the Search

38 Limits on the number of persons present at the execution of an *Anton Piller* order are intended to make the search process manageable, and to minimize intimidation. Thus I agree with the responding parties that strict adherence to this term of the order is most important at the start of the search: *Viacom Ha! Holding Co. v. Jane Doe*, 2002 FCT 13 (Fed. T.D.) at para. 24; *Geophysical Service Inc. v. Sable Mary Seismic Inc.*, [2003] N.S.J. No. 118 (N.S. S.C.).

39 In this case, the search was well underway by the authorized persons before the additional two persons arrived to assist. They came after completing the search at the Mitchell residence, which proceeded simultaneously with the search at the Robbie house. There is no evidence that the addition of these two persons increased the intimidation felt by Robbie and his family. Indeed, it is likely that the faster the search was completed and the searchers gone, the happier the Robbies would be. The additional persons were comprised of one sheriff's officer and one private investigator. Had the additional persons been employees of the responding party, the matter might have been different. However, the presence of an additional sheriff's officer should have served to enhance confidence in the

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search process, rather than diminish it.

(ii) Over-Breadth of Seizure

40 Ridgewood seized materials that were the subject matter of the search. They also seized materials that belonged to the Robbies and were not part of the search. Where a search is over-broad and there is prejudice to the object of the search, that may be a ground to set aside the search, in whole or in part. Here, however, the record discloses that the information belonging to the Robbies was co-mingled with material belonging to Ridgewood, which was properly seized pursuant to the order. Ridgewood has a strong prima facie case Robbie has wrongly taken its information and copyright material, and co-mingled that information with his own materials. Further, Ridgewood returned Robbie's computers on the second business day following execution of the search. All of the information is being held securely pending disposition of this motion. Thus the prejudice suffered by Robbie from being deprived of his own material is limited to two business days' loss of use, which is reasonable in all the circumstances. There is no evidence before this court that the search was timed to interfere with Robbie's use of his own material at a critical juncture for him. I conclude that any prejudice resulting from an overbroad seizure is minimal. I also conclude that any over-breadth in the seizure is likely the result of Robbie's co-mingling of materials belonging to him with materials belonging to Ridgewood. Robbie cannot rely on his own handling of improperly taken materials to justify setting aside the order: *Columbia Picture Industries Inc. v. Robinson* [(1985), [1987] Ch. 38 (Eng. Ch. Div.)], [1987] I.C.H. All E.R. 38 at 43.

(iii) No Reasonable Opportunity to Consult Counsel

41 "[T]he defendant must have the right to consult counsel before being required to permit entry to his or her premises; the defendant must be advised of that right." These rights are both "firstly" and "most importantly" in the eyes of some courts: *Grenzservice Speditions GmbH v. Jans* (1995), 15 B.C.L.R. (3d) 370 (B.C. S.C.). See also *Columbia Picture Industries Inc. v. Robinson* (1985), [1986] 3 All E.R. 338 (Eng. Ch. Div.); *Anton Piller KG v. Manufacturing Process Ltd.* (1975), [1976] 1 All E.R. 779 (Eng. C.A.).

42 An *Anton Piller* order is said not to be subject to Section 8 of the *Charter*, but still must be enforced with "due circumspection": see *Ontario Realty Corp. v. P. Gabriele & Sons Ltd.* (2000), 50 O.R. (3d) 539 (Ont. S.C.J. [Commercial List]) per Farley J.;[FN1] *Anton Piller*, supra., per Denning L.J.

43 In the case at bar, the order required that the search commence prior to 6:00 p.m. The plaintiff's representatives arrived at the Robbie home at about 5:00 p.m. The Robbies arrived there a few minutes later. I find that the Robbies had been given the motion materials and the order by about 5:30, and then started to contact their solicitor. By 5:45 p.m. they had left a voice mail message, but had not spoken with counsel. At that time the sheriff's officer announced that the search had to begin.

44 It would be easy to frame an *Anton Piller* order to comply with its terms and yet deny the recipient an adequate opportunity to consult counsel. During argument, counsel for the plaintiff advised that the timing of the search was dictated by availability of sheriff's officers to attend, and not wilful calculation by the plaintiff. This was not included in the affidavit evidence before me, but I am prepared to accept it and rely upon it as a statement from counsel. It relates to the mechanics of arranging the search, and not what happened at the Robbie residence itself.

45 It is apparent that the Robbies were not at home at 5:00 p.m. There is no evidence before me to suggest that they would have been home earlier in the day. Thus it may not have been possible to execute the order at their residence any earlier than it was. This would not be unusual for many families today, where both spouses work full time.

46 The order was executed on the Mitchell residence on the same day, at about the same time. Once that happened, as a matter of common sense it should have been obvious that Robbie would come to hear of it. If the search of the Robbie home had been delayed by even twelve hours, once Robbie was aware of the order it would have been possible for him to delete files and transfer data. Timing is crucial in a search for electronically stored information.

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47 It would have been preferable for Ridgewood to wait, even for a few hours, for the Robbies to obtain legal counsel before the search commenced, provided the risk of destruction or removal of materials could be ameliorated in the meantime. However, had Ridgewood done so, then it would have been in violation of the terms of the order requiring that the search commence before 6:00 p.m. The terms of the order were intended to ensure a fair and reasonable search, but the combined circumstances actually resulted in an element of unfairness for the Robbies. They did not have a reasonable time to consult with counsel.

48 If there had been inappropriate conduct in the search itself, such as a truly over-broad seizure, violations of solicitor/client privilege, failure to return materials within a reasonable time after the search, failure to preserve the seized records in proper form, or other non-technical breach of the order causing actual prejudice to the Robbies, then the failure to accord them a reasonable period of time to consult counsel might well have been fatal in combination with those other irregularities. However, in this case the search was conducted professionally, and in a manner that protected the Robbies' rights adequately. In this context, the comments of the sheriff's officer, although perhaps indelicate, were correct: there was no proper advice a solicitor could have given that would have changed the course of the search materially. Put another way, if counsel had been reached and had given appropriate advice, there is no reason to believe there would have been any material difference in the result of the search.

49 Generally, in the course of execution of a search warrant, the object of the search may contact counsel immediately. Counsel may attend at the search, provided she does not interfere with it, and she may make suggestions and representations on behalf of the client to the officers conducting the search about matters such as protection of privilege. And of course, counsel may immediately bring an application to the court respecting the search. But none of these steps would have the effect of stalling or terminating the search, unless the court intervened.

50 As noted above, it is said that an *Anton Piller* order differs from a search warrant in that the object of the order may decline entry, in violation of the order. If this happens, then a range of sanctions may arise, from negative inferences to contempt of court. A solicitor cannot counsel his client to commit a contempt of court. There is some dicta in the cases that suggests that a contempt may not lie if it turns out subsequently that the order ought not to have been granted: see *Hallmark Cards Inc. v. Image Arts Ltd.* [(1976), [1977] F.S.R. 150 (Eng. C.A.)], 73 Law Soc. Gaz. 596 per Lord Buckley. I respectfully disagree. Deliberate disobedience of a court order is contempt of court. Until an order is set aside, it is to be obeyed. Otherwise, reasonable doubt as to whether the recipient of the order sincerely and reasonably believed the order was improper would excuse non-compliance, a position that is inconsistent with giving full authority and effect to court orders.

51 In all the circumstances of this case, I find that the failure to accord the Robbies more time to obtain legal advice was a product of the totality of circumstances, and that Ridgewood could not reasonably have done more than it did without a material risk of losing the benefit of the order. I find that the potential prejudice to Ridgewood in losing the benefit of the order outweighs the prejudice to Robbie in not obtaining immediate legal advice.

(iv) Inadequate Explanation of the Order

52 Robbie says that the entire order was not read to him by the supervising solicitor, Harrison. The order runs for 21 paragraphs and is eight pages long. A copy of the order was given to Robbie. Harrison explained the gist of the order, which was that Robbie was ordered to permit entry and search for the plaintiff's property and related materials. It would have been better if the entire order had been read and explained, paragraph-by-paragraph, but the exigencies of the circumstances, combined with the Robbies' understandable focus on securing legal advice rather than hearing a lecture on the law, made this impractical. I am satisfied that the substance of the order was conveyed to Robbie and that he understood it.

(v) Inadequate Supervision of the Order

53 Harrison's task, as an officer of the court, was to explain matters to Robbie, ensure that the terms of the order were complied with, be available for consultation for the persons doing the searching and seizing, and generally ensure compliance with the terms of the order. Robbie's evidence is that Harrison sat in the kitchen of the house with Robbie and his wife while others conducted the search. Thus it is said that Harrison failed to supervise the search by

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watching what was going on.

54 This complaint would be stronger if it was said that anything inappropriate was done by the persons carrying out the search and seizure. The only material complaints in this regard are (i) the over-broad seizure, and (ii) the two additional persons who joined the search in its latter stages. I have already found that the seizure was not over-broad. If it had been, that would have been no fault of Harrison's: it was not his task to perform the search and the seizure itself, and it would not be expected that he would be briefed sufficiently on the factual details of the case to be able to make determinations about whether particular materials were within or outside the scope of the order. It was his task to ensure that the persons conducting the search were briefed on the terms of the order, and that they came to him for direction if they encountered a situation that seemed to them ambiguous. He was present, he was consulted from time to time by persons conducting the search, and I am satisfied that he discharged this aspect of his duties satisfactorily. In respect to the two additional persons who joined the search, the impact of this non-compliance of the order is not heightened by the fact that Harrison had a role in supervising the search. It should not have happened, but it is not a sufficient basis for discharging the order.

55 It would have been preferable for Harrison to be in the area of the search, watching it. It would not have been practical for him to be "everywhere at once", but the impression created for the Robbies was more that Harrison was present to keep them in the kitchen and away from the search, and not that he was there to ensure proper execution of the search. However, this impression, negative though it is, is not a sufficient basis for finding there was a fatal wont of supervision when no harm resulted.

(vi) Inappropriate Treatment of the Robbie Child

56 Robbie says that his ten-year-old son has been traumatized by these events. The boy was outside the home, alone. A group of adults, all strangers to him, came and started asking him questions about where his parents were. They asked him to let them into the family home.

57 This was not appropriate.

58 If the group had been headed by a police officer, and if the officer had the power to enter and conduct a search, all of this might have been different. First, the police might well have planned matters to ensure that adults were home at both the Robbie and Mitchell residences at the time the warrants were executed. Second, if the police had a warrant to search, they could have entered without the boy's permission. No doubt this still would have been alarming to the youngster, but perhaps he would have been somewhat reassured by the presence of a police officer.

59 I have no doubt matters would have played out differently with the neighbours if this had been a warrant executed by police. No doubt it would have been upsetting for them for a house in the neighbourhood to be searched, but the spectre of a well-meaning neighbour barricading entrance to the house would have been avoided. There was a reason for this scene: people do believe, rightly, that uninvited private persons are not entitled to barge into a private residence without permission. People do believe, rightly, that this sanctity of the hearth does give way to a properly authorized police search. People do believe, rightly, that misconduct in a police search can be addressed in the courts. I suggest, with respect, that the use of *Anton Piller* orders in private residences is not understood by the public, and creates an atmosphere that is not consistent with a free, open and democratic society.

60 However, this small scene in a quiet residential neighbourhood did not arise because of serious wrongdoing by Ridgewood. Asking to be let into the house may not have been appropriate, but beyond that I cannot fault Ridgewood's agents. The order authorized them to act prior to 6:00 p.m. Why would they not ask the boy, at 5:00 p.m., whether his parents would be home soon? If the order had not contained the absolute time constraints about the time of commencement of the search, they could have waited.

61 I make no finding as to whether the plaintiff's conduct respecting the ten-year-old Robbie boy was legally wrongful. If the Robbies believe that an independent wrong has been done to their boy, which has caused him damage, they may pursue independent legal proceedings on his behalf. In terms of compliance or non-compliance with the order, I find that, on the materials before me, this aspect of the process is not established as a breach of the order.

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9 C.P.C. (6th) 1, 74 O.R. (3d) 514

Summary

62 I am satisfied that any breaches of the order have been no more than technical and do not warrant setting the order aside (see *Geophysical Service Inc. v. Sable Mary Seismic Inc.*, [2003] N.S.J. No. 118 (N.S. S.C.), per Hall J., at para. 53; *Computer Security Products Inc. v. Forbes*, [1999] O.J. No. 4573 (Ont. S.C.J.), per Wein J.; *955105 Ontario Inc. v. Video 99* (1993), 48 C.P.R. (3d) 204 (Ont. Gen. Div.), per Mandel J.). It is upheld and continued in respect to the materials seized during the course of the search. If the parties require directions concerning duplication and distribution of these materials among the parties, or terms for the use of these materials during the proceedings, they may make an appointment to see me.

63 Although I conclude there has not been breach of the order material enough to set it aside, I also conclude that this process is unsatisfactory, at least in respect to residential premises.

64 The principle in *Entick v. Carrington* is as strong today as it ever was. The response of the Robbie neighbours is cogent evidence of this principle at work in the imagination of members of the public. It is simply not acceptable that people may come to a private residence and demand entrance, unless they be duly authorized peace officers.

65 Finally, this court did not rely upon s.8 of the *Charter* in reviewing the execution of the *Anton Piller* order. The application of the *Charter* to *Anton Piller* orders was not argued before me. Since the *Anton Piller* order in this case was executed privately, in accordance with its terms, I decline to consider whether *Charter* protections will apply to police execution of *Anton Piller* orders, and if so, to what effect. Those issues should be canvassed, if and when they arise, in a particular factual context, and not in the abstract. [FN2]

Costs

66 In my view Robbie was justified in bringing this motion, even though he has not succeeded. I also conclude that the technical breaches of the order by Ridgewood support some sort of response so that it is clear that, though the seizure has been upheld, the court still requires strict compliance with *Anton Piller* orders. On the other hand, Ridgewood has prevailed on the motion. Taking everything into account, costs shall be to the defendants in the cause, fixed at $5,000 plus GST.

Motion dismissed.

FN1. Leave to appeal to the Divisonal Court refused for non-*Charter* reasons: (2001), 142 O.A.C. 93 (Ont. Div. Ct.).

FN2. In this regard, I note *Fila Canada Inc. v. Jane Doe*, [1996] 3 F.C. 493 (Fed. T.D.), per Reed J., at para. 6 (finding that "it is at least arguable that "it (the Charter) applies to the civil search and seizures authorized... under an Anton Piller order", and *Ontario Realty Corp. v. P. Gabriele & Sons Ltd.* (2000), 50 O.R. (3d) 539 (Ont. S.C.J. [Commercial List]), per Farley J., where His Honour finds that the *Charter* does not apply to Anton Piller orders.

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