INDEPENDENT FORENSIC AUDITS RE EMAILS

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Overview

On some files your opponent may be taking the position that there are no relevant emails in addition to the ones already disclosed, but you doubt this assertion. You would like to apply for the appointment of an independent computer audit to ascertain if there are indeed more relevant emails.

The leading Alberta case regarding independent computer audits is *Innovative Health Group Inc.* v. *Calgary Health Region* (2008), 433 A.R. 312, 2008 ABCA 219, which applied the leading case of *Spar Aerospace Ltd.* v. *Aerowerks Engineering Inc.* (2007), 428 A.R. 84, 2007 ABQB 543, affirmed at (2008), 50 C.P.C. (6th) 312, 2008 ABCA 47. These principles were also recently tangentially discussed in *CCS Corp.* v. *Secure Energy Services Inc.* (2009), 476 A.R. 111, 2009 ABQB 275.

The bottom line seems to be that in order to meet the requisite threshold for the appointment of an independent computer audit there must be some evidence that the other party is attempting to "thwart the litigation process", and the evidence must go beyond mere speculation.

> "It is not sufficient for a client to say in the course of a lawsuit "I believe there are more documents," or "it appears to me that documents are being hidden". That would be no more than a fishing expedition. **There must be specific evidence of non-disclosure**." [Emphasis added.][i]

There are various forms that an independent computer audit can take in terms of a formal order of the court. What seems to happen most frequently is that an independent computer consultant will be authorized to review the hard drive/server and the material that the

independent computer consultant finds will be reviewed by an independent supervising solicitor (or arbitrator) to see if it is relevant and material to the litigation, and not privileged.

It is also common in the cases to have the party seeking disclosure enter into a confidentiality agreement wherein the common law implied undertaking not to disclose material produced in the course of discovery for another purpose or in other litigation is contractually agreed to.[ii]

In conducting an independent computer audit the party is entitled to review the records in their technical form, and the necessary passwords and systems must be revealed so that this technical review is possible.[iii]

The cases are inconsistent as to who should bear the costs of the independent computer audit, and usually the court states that if the parties cannot agree on the costs an application can be made to the court.

Discussion

The leading Alberta case is *Innovative Health Group Inc.* v. *Calgary Health Region* (2008), 433 A.R. 312, 2008 ABCA 219, a decision of the Court of Appeal per Conrad J.A. She dealt with whether a hard drive had to be produced *in specie*, but also discussed the appointment of an independent computer audit in a more general sense in *dicta*.

The case management judge had ordered the production of the imaged hard drives *in specie*. In overturning the case management judge, Conrad J.A. stated:

> "Although relevant and material information stored on a computer's hard drive is producible, a hard drive is not ordinarily subject to production. In exceptional circumstances, a court can order production of a hard drive for examination by an expert, on appropriate terms, **but only where evidence establishes that a party is intentionally deleting relevant and material information or otherwise deliberately thwarting the discovery process**. Even in such a case, the applying party is only entitled to relevant and material

> information and it is the duty of the judge to protect the irrelevant, confidential and private material." [Emphasis added.]

In this case the plaintiff operated physiotherapy clinics which provided both publicly and privately funded treatment. The Calgary Health Region suspected that it was being double-billed by the physiotherapy clinics. As each patient of the clinic had only one file, information about the patients could pertain to both privately and publically funded treatment – the so-called "hybrid files". The Calgary Health Region's agents attended at the clinics to do a spot audit, and the clinics allowed their computer drives to be copied and deposited with the courts. A Chambers Judge ordered the plaintiff to turn over the hybrid files on the basis of the Calgary Health Region's audit rights under the *Health Information Act*, *inter alia*, which decision was overturned on appeal. The plaintiff clinics then brought an action against the Calgary Health Region for damages caused by its attempt to conduct a spot audit, and the Calgary Health Region counterclaimed alleging breaches of contract and fiduciary duty. A case management judge ordered production of copies of the plaintiff's imaged hard drives *in specie*, along with physical and electronic copies of the hybrid files. It was this order that Conrad J.A. overturned on appeal.

Initially the applications before the case management judge were by both parties to compel a further and better affidavit of production.

Conrad J.A. began her judgement by noting that the principle of proportionality applied to electronic discovery, and quoted Madam Justice Veit in *Spar Aerospace Ltd.* v. *Aerowerks Engineering Inc.* 2007 ABQB 543 at para. 57 as follows:

> "It appears to be accepted in Canadian practice that the obligation of discovery is tempered by the application of proportionality or cost/benefit ratio: in Alberta, this means that records must only be disclosed if they are not only relevant, but also material. Although this is a principle of general proportionality that is articulated in the Rules of Court, I accept that there is an implicit requirement that limits production to those records which are reasonably accessible."

She then noted that it would only be in exceptional cases when a computer hard drive was producible *in specie* as it would inevitably contain a good deal of stored data that was neither relevant nor material to the lawsuit. She stated at para. 38:

> "… It is the duty of the party preparing the affidavit of records, however, to disclose all relevant and material information found on it [a computer hard drive]. When a dispute arises as to relevance and materiality, the matter should be settled by the court. **Where matters are particularly complicated, the court may want to appoint its own expert to examine the hard drive to assist it in determining what must be produced**." [Emphasis added.]

She then stated at para. 41:

> "… Even in circumstances where it is clear that a litigant is thwarting the litigation process, and the court deems it appropriate to order production of a hard drive, measures should be taken to protect disclosure of irrelevant and immaterial information which the producing party objects to produce. Although litigation confidentiality exists, many times it will not be sufficient to protect personal, confidential and private material. **A judge should always hear representations of how information that is neither material nor relevant can be protected from exposure, and frame any production order in the least intrusive manner**." [Emphasis added.]

She then concluded at para. 53:

> "In summary, there was no basis for the case management judge to order production of the imaged hard drive, *in specie*, nor was he entitled to allow the CHR to review the entire hard drive and make copies of the imaged hard drive for independent review. Innovative has the obligation to produce relevant and material information and the CHR has no right to rummage through its files to determine what it thinks is relevant and material."

And further at para. 58:

> "… Here the CHR was on a fishing expedition. A litigant does not have the right to rummage through an opponent's filing cabinets to see if it can find something interesting, and this is just an attempt at electronic rummaging."

Innovative Health Group Inc. v. *Calgary Health Region* (2008), 433 A.R. 312, 2008 ABCA 219 has been applied by the Ontario case of *Borst* v. *Horizon Financial Group Inc.* 2009 CarswellOnt 5984, a decision of Master Brott, at para. 5 as follows:

> "In the ordinary discovery process, it is the responsibility of each party to review all of its documents and to deliver copies of all Schedule "A" documents to the other party. I agree with the Court of Appeal of Alberta in *Innovative Health Group Inc. v. Calgary Health Region*, 2008 ABCA 219 (Alta CA) at para. 58 where it states: "A litigant does not have the right to rummage through an opponent's filing cabinets to see if it can find something interesting …" The Court of Appeal analogized a request for the electronic data to a request to inspect the filing cabinet and the court deemed the request to be a fishing expedition and denied the request."

In the earlier leading Alberta case of *Spar Aerospace Ltd.* v. *Aerowerks Engineering Inc.* (2007), 428 A.R. 84, 2007 ABQB 543, affirmed on appeal at (2008), 50 C.P.C. (6th) 312, 2008 ABCA 47, Madam Justice Veit did allow access to the other party's hard drive *in specie*, however, in view of the exigent circumstances of the case. Spar Aerospace Ltd. ("Spar") was an Alberta company which specialized in aviation services including management, support and training services for the Canadian Forces. Previous employees of Spar established their own competing company Aerowerks Engineering Inc. ("Aerowerks") and were successful in obtaining a contract from the Department of Defence for the maintenance of the Canadian Forces Hercules aircraft. Prior to that award, Spar had been the holder of the Hercules maintenance contract for many years. Spar sued, alleging that that Aerowerks had copied and taken technology belonging to Spar, and claimed damages for breaches of both contractual and fiduciary duties by Aerowerks. Spar obtained an *ex parte* Anton Piller order against the defendants, which was executed and five hard drives seized. Aerowerks brought an application to set aside the Anton Piller order and the case management judge ordered it to file an affidavit of record no later than a specified date and, failing to do so, Spar would be entitled to obtain the imaged hard drives and all the records in their entirety. This order was not appealed.

An affidavit of records was filed, and Spar asserted that Aerowerks had not provided all relevant emails, amongst other things. It asked that the order of the case management judge

be enforced and that they be entitled to the imaged hard drive of Aerowerks. In the result, Veit J. enforced the order of the case management judge and allowed Spar access to the imaged hard drives.

It appears that there was a joint confidentiality order that safeguarded the right to confidentiality of the documents revealed in the course of production, over and above the common law implied undertaking, as is indicated at para. 44:

> "In other words, the joint confidentiality order developed by the parties in this case achieves the first level of confidentiality as described in the American article referred to below: the parties and their lawyers cannot use the records produced for any purpose other than this litigation on pain of being found in contempt of court and sanctioned for that contempt, and the persons and individuals other than the parties to whom disclosure of the records may be made must accept a contractual obligation that mirrors the implied undertaking of the parties and their lawyers."

And further at para. 47:

> "...Here, disclosure which is compelled during the litigation process is protected, without any protective order, but by the general law, which includes, and enforces, the implied undertaking that the discovered material will be used solely for the purposes of the litigation in which it was obtained. The materials compelled in discovery cannot be used in direct competition; moreover, the accurate recording of the material provided in disclosure will presumably actively discourage attempts to use the material in competition because of the ease with which the material can be traced. **As indicated above, however, even in Canadian practise, the implied undertaking should be shored up by contracts with the various persons and individuals to whom the disclosure of confidential records may be made with a view to extending to them the undertaking that binds the parties' and the party's lawyers**." [Emphasis added.]

She then explicitly ordered that the emails must be produced, as well as deleted or destroyed records, and ordered that the passwords to the systems and software necessary to access the records be produced as well, in order that Spar could review the production in its technical form. She stated at para. 71:

> "… Moreover, it is obvious that the defendants should produce their electronic records electronically: not only is hard copy production considerably more expensive, but it is also less searchable and is inferior because it does not retain potentially critical meta-data such as when and by whom a record was created or amended: … In order to access the electronic disclosure, it is obvious that a receiving party requires from the producing party whatever passwords and other systems necessary in order to constitute the disclosure."

This case may be distinguishable on the basis that the judge held the unusually high level of disclosure imposed was justified by: the underlying fact that the defendants were employees of the plaintiffs when they began working in competition with the plaintiffs, the judicial determination that it was an appropriate case in which to issue an Anton Piller order, the size of the claim, which exceeded $50M, and the great IT expertise of the parties which presupposed that at least some of the work required to be provided required levels of expertise that could be done in-house.

The Alberta Court of Appeal decision upholding Veit J. is interesting in that it notes that one of the affidavits filed in support of the application by Spar contained strong evidence of gaps in a defendant's production and deletions from their computer. It detailed many missing documents and gave a great deal of evidence of altered dates or supressed meta-data.

These principles have been tangentially referred to recently in *CCS Corp.* v. *Secure Energy Services Inc.* (2009) 476 A.R. 111, 2009 ABQB 275, wherein Wittmann A.C.J.Q.B. of the Alberta Court of Queen's Bench decided to uphold an *ex parte* Anton Piller order. A number of computer hard drives were imaged during the execution of the Anton Piller order, and the defendant's cross-applied for instruction from the court as to how to access the materials. Wittmann A.C.J.Q.B. ordered at paras. 125, 126:

> "I agree with the Secure Defendants' suggestion that the User-File Index of the electric [sic] documents should be reviewed jointly by Secure's counsel and the ISS [Independent Supervising Solicitors]. Together they will create a new User-File Index that omits any files that basically are irrelevant or

> privileged based on the description. The remaining files will be produced in hard copy to counsel for the Secure Defendants in order to be vetted for privilege. Any contested claims of privilege will be brought before me for determination.
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> Any electronic files over which privilege is not claimed, but that the Secure Defendants believes ought not to be produced on any other grounds will be the subject of a further application before me. Those documents which Secure does not object to producing will be provided to CCS. Surrendering the documents shall not be construed as admissions of Secured Defendants that those documents are the property of CCS."

A British Columbia Court of Appeal case, *Chadwick* v. *Canada (Attorney General)*, [2008] 12 W.W.R. 612, 2008 BCCA 346, is analogous in that it was alleged that not all of the relevant email had been produced. The case involved a helicopter crash in which both the pilot Mr. Honour and the passenger were killed. The spouses of the deceased sued for dependency relief. The defense counsel asked the pilot's spouse to review the hard drive of her late husband's computer as it was thought that there was email regarding noted deficiencies on the helicopter contained in the emails. The plaintiff's counsel engaged a security firm to perform the forensic analysis of the computer in order to retrieve any relevant documents, which were then forwarded to defense counsel. The defense counsel requested technical data regarding the methodology used in reconstructing data on the hard drive, and this was refused. The defendants then brought a motion for an order that the hard drive be produced for analysis by an expert of their choice and proposed that independent counsel be retained to review documents retrieved from the hard drive. The motions judge ordered that the hard drive be produced for analysis by the forensic experts selected by the defendants but declined to order that the results be submitted to independent counsel.

The plaintiff brought an application to appeal this to the British Columbia Court of Appeal, and this application was dismissed. Bauman J.A. stated at para. 24:

> "The real issue here is that the defendants could not verify the quality or the thoroughness of the hard drive search because Mr. Kemp has not provided them with the necessary information. Mr. Kemp can only rely on the advice of

> Mr. Kojima that the hard drive analysis was done using the appropriate methodology; he did not presume to have the technical expertise to effectively supervise that exercise. Therefore, the defendants cannot rely on the obligation of counsel to ensure that all relevant documents are listed. The defendants are left with having to accept as a matter of blind faith that Mr. Kojima retrieved all relevant documents. That takes on a particular edge in this case because the former owner of the hard drive, Mr. Honour, is deceased. This is not a case where the owner of the hard drive can be examined for discovery as to the location of documents or discrepancies in the document list."

In denying the application for leave to appeal, Bauman J.A. concluded at para. 12:

> "Mr. Justice Myers' order is of a narrow scope. It permits a forensic analysis of the mirror image of the hard-drive for a defined period of less than one year. Such an analysis has already been undertaken by plaintiff's counsel and the search will be at the defendant's expense, at least initially. The order contemplates a search protocol agreed to by the parties, or, barring their agreement, determined by the court. The search results are to be reported to Mrs. Honour's [the plaintiff's] counsel…"

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[i] *Nicolardi* v. *Daley*, [2002] O.J. No. 595 at para. 33 (Ontario Master), applied by the Alberta Court of Appeal in *Innovative Health Group Inc*. v. *Calgary Health Region* (2008), 433 A.R. 312, 2008 ABCA 219 at para. 39

[ii] *Spar Aerospace Ltd.* v. *Aerowerks Engineering Inc.* (2007), 428 A.R. 84, 2007 ABQB 543 at paras. 44, 47, affirmed at (2008), 50 C.P.C. (6th) 312, 2008 ABCA 47

[iii] *Ibid* at para. 71