Court of King’s Bench of Alberta

Citation: PTW Canada Ltd v Smith, 2024 ABKB 83

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Date: 20240216
Docket: 2201 05725
Registry: Calgary

Between:

PTW Canada Ltd

Plaintiff/Applicant

- and -

Brett Smith, Vital Controls Inc and Jayson Pancoast

Defendants/Respondents

Memorandum of Decision
of the
Honourable Justice R.A. Neufeld

I. Overview

[1] In April 2022 Brett Smith and Jayson Pancoast stopped providing services to PTW Canada Ltd (“PTW”). Mr. Smith gave notice that he would be quitting his job as area manager of PTW’s Medicine Hat branch. He had held that position for two years, having worked his way up in the company over the previous 5 or 6 years. Mr. Pancoast provided services to PTW under contract. According to PTW, together with Mr. Smith, Mr. Pancoast oversaw the electrical division of PTW’s Medicine Hat branch. He had worked with or for PTW and its predecessors as an employee or contractor for approximately 14 years before terminating his contract with PTW on April 29, 2022.

[2] PTW suspected that Mr. Smith and Mr. Pancoast had taken confidential information with them. It continues to suspect that they planned their departure together and in concert with a PTW competitor – Vital Controls Inc (“Vital”), for whom they now work. PTW immediately commenced legal proceedings.

II. The Claim

[3] The Statement of Claim issued against Mr. Smith, and later amended to include Mr. Pancoast and Vital as co-Defendants, makes broad claims. It alleges unfair and unlawful competition by the Defendants. It alleges that Mr. Smith and Mr. Pancoast breached their contractual, common law and fiduciary obligations owed to PTW. It also alleges that they conspired with Vital Controls to use PTW’s confidential information regarding its business, clients, suppliers, and personnel to compete with PTW and to misappropriate PTW’s corporate opportunities for the Defendants’ benefit.

[4] The key portions of the Statement of Claim can be found in paras 5-23.

III. Procedural History

[5] Shortly after issuance of its Statement of Claim, PTW applied for and was granted an *Ex-Parte* Anton Piller order (“APO”) that included injunctive provisions against Mr. Smith. The APO authorized search and seizure of Mr. Smith’s residence, place of business, and electronic records. It appointed an Independent Supervising Solicitor (“ISS”) to gather and prepare evidence. The search yielded evidence of potential wrongdoing by Mr. Smith as well as Mr. Pancoast and Vital, who were subsequently added as defendants.

[6] From the outset, case management of this matter has been by Justice Jones of this Court. The particulars of the suspicious activity of concern to PTW, and the Court, are discussed in Justice Jones’ decision of October 21, 2022. In that decision, he determined that Vital would continue to be enjoined from utilizing information that the trial judge might determine to be confidential, and from destroying evidence.

[7] In the October 2022 APO review hearing, the Court decided that the APO against Mr. Smith had been properly issued in the initial instance.

[8] Before written reasons were released however, another issue arose: whether the APO should continue going forward.

[9] On that issue, the Court decided that the search provisions of the APO were spent. Mr. Smith should no longer have them hanging over his head “like a sword of Damocles”: ***PTW Canada Ltd v Smith***, 2022 ABKB 781 at para 15.

[10] While removing the search and seizure provisions of the APO, the injunction provisions remained in place. At paras 14-21, the Court discussed that aspect of the APO. It found that there was convincing evidence that Mr. Smith had incriminating evidence or things in his possession. Moreover, the appointment of the ISS continued. Even though the search and seizure provisions were considered spent to that point, the door was left open for the parties to re-attend if the ISS determined that further searches were necessary.

[11] Subsequently, the Court provided further reasons in support of its initial findings as to why an APO was appropriate. It explained that at the time of granting the APO, it was satisfied

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that Mr. Smith had incriminating objects or documents, and that conclusion was not displaced by the APO being executed. The information seized and the advice of the ISS confirmed that there was evidence implicating Mr. Smith in the conversion of property, including a hard drive containing Outlook accounts, as well as the cloning of Mr. Smith's PTW issued laptop: ***PTW Canada Ltd v Smith***, 2023 ABKB 56 at para 13.

[12] Given the series of contested applications, it is not surprising that significant costs were incurred. A dispute over costs in respect of the APO and injunction application resulted in another decision by the case management justice: ***PTW Canada Ltd v Smith***, 2023 ABKB 138. In that decision the Court dismissed an application by PTW for a 'very large" costs award of approximately $1 million, inclusive of disbursements. It held that costs should be dealt with at trial.

[13] At paras 9 – 11, the Court stated:

> [9] As I see it, the fundamental difficulty in this case is that the true benefits of the APO and the Injunction have yet to be ascertained. The purpose of an Anton Piller order is to preserve evidence where there is a risk that it may be lost or destroyed before the discovery process can do its work. That has been achieved here in the sense that various materials have been seized from Mr. Smith and examined. However, it has not yet been established that any of the seized materials were confidential information belonging to PTW. The purpose of the Injunction was to preclude Vital from using PTW's confidential information but again, it is not yet established that Vital came into possession of any such information.
>
> [10] Mr. Smith contends that PTW's claim against him for misappropriation of confidential information is without foundation because none of the materials he took fell into that category. Vital too claims to be innocent of PTW's claims against it.
>
> [11] Whether the materials Mr. Smith took were or were not confidential information belonging to PTW is a determination for the trial judge, as is the question of whether Vital received or used any such confidential information. It is not my place to make these determinations on this interlocutory application.

IV. The Application

[14] The parties have exchanged Affidavits of Records, pursuant to Rules 5.5 and 5.6. Those Rules state:

> 5.5(1) Every party must serve an affidavit of records on each of the other parties in accordance with the time period specified in subrule (2), (3) or (4).
>
> (2) The plaintiff must serve an affidavit of records on each of the other parties within 3 months after the date the plaintiff is served with a statement of defence, or the first statement of defence if more than one is served.
>
> (3) The defendant must serve an affidavit of records on each of the other parties within 2 months after the date the defendant is served with the plaintiff's affidavit of records.

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(4) A third party defendant who has filed a statement of defence must, within 3 months after that filing, serve an affidavit of records on each of the other parties.

Form and contents of affidavit of records

5.6(1) An affidavit of records must

(a) be in Form 26, and

(b) disclose all records that

(i) are relevant and material to the issues in the action, and

(ii) are or have been under the party's control.

(2) The affidavit of records must also specify

(a) which of the records are under the control of the party on whose behalf the affidavit is made,

(b) which of those records, if any, the party objects to produce and the grounds for the objection,

(c) for those records for which there is no objection to produce, a notice stating

(i) the time when the record may be inspected, which must be within 10 days after the affidavit is served, and

(ii) the place where the record may be inspected, which must be

(A) the address for service of the party serving the affidavit,

(B) a place agreed on by the parties or ordered by the Court, or

(C) if the record is in constant use, the place where it is usually kept,

(d) which relevant and material records the party previously had under the party's control, and

(i) the time when, and the manner in which, those records ceased to be under that party's control, and

(ii) the present location of the records, if known,

and

(e) that the party does not have and has never had any other relevant and material record under the party's control.

(3) If a party does not have and has never had any relevant and material records under the party's control, the affidavit must say so.

[15] Vital served two such affidavits – a partial and admittedly incomplete Affidavit of Records on December 5, 2022, and a Supplemental Affidavit of Records on March 24, 2023 containing almost 10,000 pages of documents.

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[16] Questioning of Mr. Smith and Mr. Pancoast took place on April 3, 2023 and April 4, 2023 respectively.

[17] The records identified by Mr. Smith and Mr. Pancoast consist of documents that had previously been attached to affidavits filed in respect of the APO/Injunction applications – seventeen in all.

[18] There appear to be three reasons for this relative paucity of records as compared to those of Vital.

[19] First, Mr. Smith and Mr. Pancoast appear not to have undertaken a thorough review of electronic devices in their possession. For example, the review initially done in response to the APO searched only for documents containing the term "PTW."

[20] Second, Mr. Smith and Mr. Pancoast appear to believe that documents already produced by Vital, or seized by the ISS, do not need to be identified in their Affidavits of Records.

[21] Third, Mr. Smith and Mr. Pancoast consider, on advice of counsel, that the action against them is fundamentally for conversion of confidential information. Records relating to other issues, such as how they planned their departure from PTW, or their current dealings with known former customers of PTW at Vital are not relevant and material to the action. They also contend that certain records seized by the ISS may be irrelevant or immaterial to the action because the APO was broadly worded and consequently captured records beyond the scope of the Statement of Claim. Hence the mere fact that those records were seized does not show that they are relevant and material to the Action.

[22] PTW contends that Mr. Smith and Mr. Pancoast are flagrantly breaching their obligation to identify and produce records. It says that this is a continuation of misconduct that led to the issuance of the APO/Injunction almost two years ago.

[23] It applies for an order pursuant to Rule 5.11 compelling full production of records within a specified period. It also proposes a novel procedure, in which the ISS under the APO would oversee document production by Mr. Smith and Mr. Pancoast. It relies on Rule 5.3 as authority for issuing an injunction requiring the ISS to undertake that role, as an officer of the court, and argues that the tripartite test can be used to assess the merits of the proposal. It also seeks enhanced costs.

V. Assessment

[24] Production of records is critical to the fair and efficient resolution of disputes. It is dealt with in Part 5 of the *Rules of Court*. Rule 5.1 describes the purpose of Part 5:

> 5.1(1) Within the context of rule 1.2, the purpose of this Part is:
>
> > (a) to obtain evidence that will be relied on in the action,
> >
> > (b) to narrow and define the issues between parties,
> >
> > (c) to encourage early disclosure of facts and records,
> >
> > (d) to facilitate evaluation of the parties' positions and, if possible, resolution of issues in dispute, and

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(e) to discourage conduct that unnecessarily or improperly delays proceedings or unnecessarily increases the cost of them.

(2) The Court may give directions or make any order necessary to achieve the purpose of this Part.

[25] Rule 5.2 codifies the common law criteria for determining relevance and materiality:

5.2(1) For the purposes of this Part, a question, record or information is relevant and material only if the answer to the question, or the record or information, could reasonable be expected

(a) to significantly help determine one or more of the issues raised in the pleadings, or

(b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.

(2) The disclosure or production of a record under this Division is not, by reason of that fact alone, to be considered as an agreement or acknowledgement that the record is admissible or relevant and material.

See ***Dow Chemical Canada v Nova Chemicals Corp***, 2014 ABCA 244 at paras 17, 19 and 21.

[26] The proper identification and production of documents is the responsibility of litigants and their counsel. Consequently, it invokes both statutory and ethical obligations. In ***NEP Canada ULC v MEC Op LLC***, 2016 ABQB 186, Master Farrington (as he then was) put it this way:

[10] The point of an affidavit of records is to confirm that a party has complied with its production obligations and to make certain that there is someone who has taken responsibility for doing so. The affidavit of records is not only about confirming what documents exist by virtue of, in this case, extensive lists. It is also about confirming that production obligations have been met.

[11] Counsel play an important role in the production process. One of the elements of that role is to make certain that the client clearly understands its production obligations. Another element of the role is to review documents and assist the client with making appropriate production decisions. This involves both legal and ethical considerations.

[12] In this application all parties have extremely experienced and capable counsel who well understand their obligations.

[27] Counsel for Mr. Smith and Mr. Pancoast argues strenuously that he has fulfilled his duty to ensure that all relevant and material documents that are in control of his clients have been produced. His clients both swore affidavits in response to this application attesting to having no records under their control or possession that are relevant and material to the Action. They were not questioned on those affidavits.

VI. Disposition

[28] In my view, the Defendants have not adequately identified and disclosed the records that are, or were, in their control and that are relevant and material to the action.

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[29] Before explaining why I have reached that conclusion, two general observations are in order.

[30] First, I have no doubt that counsel for the Defendants has taken his ethical obligations seriously in advising them as to what records must, and what records need not, be produced in the Action. This was fairly conceded in argument by counsel for the Plaintiff.

[31] Second, this is a very unusual situation in terms of document production. Before any steps were taken in the defence of the action, the Plaintiff sought and obtained an *Ex-Parte* APO, which was enforced by the ISS with police assistance. Pursuant to that order, thousands of documents (and many devices) were seized. Some devices were forensically analyzed, at considerable expense. It is understandable that a layperson who has left his employer for a better job might wonder what more his former employer wants of him in terms of document production. This is especially the case for an employee or contractor who had never given non-competition covenants.

[32] It is less understandable why the Defendants (and their counsel) consider that the only actionable allegations in the Statement of Claim are those that specifically relate to conversion (ie. theft) of confidential information belonging to PTW, and therefore seek to confine their Affidavits of Records to evidence that is relevant and material to that issue alone.

[33] The Statement of Claim does not simply allege conversion of confidential information. It alleges that Mr. Smith and Mr. Pancoast had contractual and fiduciary duties that were breached. It also alleges unfair competition by Vital and that Mr. Smith and Mr. Pancoast conspired with Vital in effectuating such competition.

[34] The Statements of Defence join issue on those and other allegations but unless they are struck or dismissed, they remain in play, as pleaded.

[35] Records that are relevant and material to the allegations contained in the Statement of Claim must therefore be identified as required under the *Alberta Rules of Court*. Without limiting the generality of this finding, this includes records regarding communications with known PTW customers, suppliers, and employees before and after the hiring of the individual defendants by Vital. It also includes records relating to communications amongst and between the individual Defendants and Vital prior to their departure from PTW.

[36] It is my expectation that given this finding alone, counsel for Mr. Smith and Mr. Pancoast would revisit with his clients the need for a much more complete Affidavit of Records, including a proper review of the records remaining in their possession (digital or otherwise); the Affidavit of Records of Vital; and records seized by the ISS (and identified by the ISS as non-privileged and relevant – at least for the purpose of the APO).

[37] For the avoidance of doubt, however, I will order that complete Affidavits of Records be sworn and served by the Respondents within 120 days and in accordance with my decision.

[38] I am not prepared to grant an injunction or other order requiring that preparation of complete Affidavits of Records be done under supervision by the ISS.

[39] As evidenced by the million dollar cost claim advanced by PTW in 2022, this action has been extraordinarily expensive. The ISS appears to have done a thorough and proficient job. However, that thoroughness and proficiency has contributed to the cost of litigating a claim that

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may, in the end, have minimal value either because no actionable wrong has been committed, or no provable losses were incurred.

[40] Ordering the ISS to undertake a novel and continuing role in overseeing the preparation of Affidavits of Records is, in my view, not warranted. There are two reasons for this.

[41] First, I am not satisfied that requiring the ISS to undertake a new role would save costs. The fundamental disagreement here was the scope of the claim advanced in the Statement of Claim, and hence the scope of documents that would be producible. That has now been resolved in favor of the Applicant, and document production and questioning can proceed, with that clarification. If the Respondents do not provide sufficient Affidavits of Records in compliance with this decision, PTW may apply for relief through the Case Management Justice or, on his direction, an Applications Judge or other member of the Court of King's Bench. This would be a more economical method of ensuring compliance than interposing the ISS into the process.

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[42] Second, I am reluctant to extend the reach of an inherently draconian remedy- an APO- into what should now be a conventional civil litigation process.

[43] An APO "is a form of civil search warrant that displaces the normal rules of discovery of records": ***Catalyst Partners Inc v Meridian Packaging Ltd***, 2007 ABCA 201 at para 6. Its primary purpose is preservation of records pending litigation of an underlying claim. An ISS appointed under such an order is expected to do so expeditiously, with the order ordinarily being of very limited duration: ***Secure 2013 Group Inc v Tiger Calcium Services Inc***, 2017 ABCA 316 at para 110.

[44] Accordingly, I am not prepared to utilize the APO and the ISS appointed under it as a mechanism for overseeing document production under Part 5 of the *Rules of Court*. To do so would contravene the fundamental principle that such orders are to be sparingly given and restricted in scope and duration.

VII. Costs

[45] PTW was successful in obtaining an order requiring the Respondents to provide full and complete Affidavits of Records. This was a necessary step, and one that should also head off disputes at questioning regarding the scope of information that can appropriately be sought at that time. Its novel request to expand and extend the mandate of the ISS, while somewhat ingenious, unnecessarily complicated the application.

[46] On balance, I consider that the Applicant was the more successful party. As such it is entitled to costs.

[47] In the circumstances it is not appropriate to order enhanced costs. It is also unnecessary to invite further submissions from the Respondents, as they requested. Instead, I order that each of the Respondents shall pay $1500 in costs to the Applicant, within sixty days. Should they fail to provide sufficient Affidavits of Records, and an application is required to compel compliance with my order, they can expect a much higher cost award at that time, as contemplated under Rule 5.12 (1).

Heard on the 15th day of January, 2024.
Dated at the City of Calgary, Alberta this 16th day of February, 2024

R.A. Neufeld
J.C.K.B.A.

Appearances:

Richard N. Billington K.C. and Lori Brienza
for the Plaintiff/Applicant

Norman D. Anderson and Clifford A. Sukhai
for the Defendants/Respondents, Brett Smith and Jayson Pancoast

Todd M. Lee
for the Defendant/Respondent, Vital Controls Inc.

Oliver Ho
Independent Supervising Solicitor

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