
CANADA / JUDGMENT

Bishop v. Minichiello

2009 BCSC 358

COURT

Supreme Court of British Columbia

DECIDED

7 April 2009

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2009 BCSC 358 Bishop v. Minichiello

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bishop v. Minichiello,

2009 BCSC 358

Date: 20090407

Docket: 16558

Registry: Cranbrook

Between:

Brendon Bishop by his litigation guardian

Charlotte Bishop

Plaintiff

And

Miles Minichiello and Richard Minichiello

Defendants

Before: The Honourable Mr. Justice Melnick

Reasons for Judgment

Counsel for plaintiff

N.M. Robertson, Q.C.

Counsel for defendants

E.C. Hughes

Date and Place of Hearing:

March 5, 2009

Cranbrook, B.C.

I. INTRODUCTION

- [1] The defence in a case in which the plaintiff alleges brain injury seeks production of the hard drive of the plaintiff's family computer. The defence wishes to have the hard drive analyzed to determine the period of time the plaintiff spends on Facebook between eleven at night and five in the morning each day. The computer is used by various family members for both business and personal purposes.
- [2] The plaintiff raises various arguments against production including that the hard drive is the equivalent of a filing cabinet - not a document - and is thus not producible. The plaintiff submits that the probative value of any limited and partial information obtainable concerning the usage of the computer is far outweighed by the problem of isolating the plaintiff's specific usage; by the limited value of the information available; by privacy concerns involving the plaintiff and others; and by the existence of alternative and more compelling expert evidence. Furthermore, as the information sought concerns the plaintiff's sleeping patterns and ability to work, it clearly has a functional focus and thus, he argues, this issue is far better dealt with, and will be dealt with, by the qualified medical experts being called.
- [3] The plaintiff has no objection to an order being made as in *Ireland v. Low*, 2006 BCSC 393, 35 C.P.C. (6th) 384, save that the plaintiff requests 30 days.
- [4] The defendants submit that the record of when the plaintiff logged into and out of Facebook is relevant to matters in issue in this lawsuit. The defence concedes that some of the information stored on the hard drive is not relevant and may involve privacy issues of others. However, the defence is seeking production of the hard drive only for the purpose of isolating and producing the information at issue.

II. ISSUE

- [5] Assuming the Facebook login/logout records are retrievable, is such a record producible as a document?

III. LAW

- [6] It is reasonably clear that documents stored in electronic form are discoverable in much the same way as paper documents.

- [7] Rule 1(8) of the Rules of Court defines "document" as including a " photograph, film, recording of sound, any record of a permanent or semi-permanent character and any information recorded or stored by means of any device". In *Prism Hospital Software Inc. v. Hospital Medical Records Institute* (1991), 62 B.C.L.R. (2d) 393, 40 C.P.R. (3d) 97 (S.C.), Mr. Justice Parrett held that the files and programs stored on magnetic media were "documents" and the computer expert called to comment on the recovered information was allowed to testify. More recently, specifically in relation to a computer's hard drive, Mr. Justice Joyce stated the following in Ireland at para. 6:

I am satisfied that electronic data stored on a computer's hard drive or other magnetic storage device fall within the definition of "document" under the Rules of Court (see *Northwest Mettech Corp. v. Metcom Services Ltd.*, [1996] B.C.J. No. 1915 (S.C. - Master) and *Prism Hospital Software Inc. v. Hospital Medical Records Institute*, [1991] B.C.J. No. 3732 (S.C.)).

- [8] Rule 26(1) of the Rules of Court requires disclosure of documents " relating to any matter in question in the action...". A party that is not satisfied with the level of voluntary disclosure may apply under R. 26(10) for the production of required documents. That rule reads: "The court may order the production of a document for inspection and copying by any party or by the court at a time and place and in the manner it thinks just."
- [9] Disclosure in the civil litigation context is largely informed by an inquiry into relevance and probative value. In addition, as stated in *Park v. Mullin*, 2005 BCSC 1813 at para. 7, " the development of the common law proceeds against the backdrop of values expressed in the 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 ". Relevant to this particular application are the values reflected in s. 8 of the Charter, which reads: "Everyone has the right to be secure against unreasonable search or seizure."
- [10] In a determination of whether to order production of documents under R. 26(10), the following passage on the purpose underlying R. 26, quoted from para. 17 of *Homalco Indian Band v. British Columbia* (1998), 56 B.C.L.R. (3d) 114, 4 W.W.R. 244 (S.C.), is instructive:

What is the underlying purpose of Rule 26? An examination of its terms and of the authorities considering it leads to the conclusion that its purpose is to promote the resolution of disputes on their merits by forcing disclosure in advance of all documents upon which a party plans to rely at trial and, in addition, all documents which may assist the other party at trial (subject to privilege). In this manner, Rule 26 avoids surprise and prevents the destruction, suppression or fabrication of evidence. The end is trial on the basis of full information; the means is disclosure of documents.

- [11] In *British Columbia*, it is apparent from the jurisprudence that "relevance" should be granted a broad scope. The Court of Appeal, in *Fraser River v. Can-Dive*, 2002 BCCA 219, 100 B.C.L.R. (3d) 146, stated the rule at para. 12 as follows:

Relevance in connection with discovery of documents is broadly defined. Any document which directly or indirectly may enable the party to advance his own case or destroy that of his adversary or which may fairly lead the party to a train of enquiry or disclose evidence which may have either of these consequences must be disclosed: *Compagnie Financiere et Commercial du Pacifique v. Peruvian Guano Co.* (1882), 11 Q.B.D. 55 at 62 (C.A.).

- [12] In *Boxer v. Reesor* (1983), 43 B.C.L.R. 352, 35 C.P.C. 68 (S.C.), Chief Justice McEachern held at 359 that relevancy was to be determined upon a description of the nature of the documents sought and a reasonable interpretation of the pleadings.
- [13] The decision whether to grant an order requiring production under R. 26(10) is a discretionary one: *Park* at para. 15. Rule 26(10) states that the court "may order" the production of a document or documents. At para. 15 of *Park*, Madam Justice Dorgan stated that the court has used its discretion to deny an application for the production of documents in the following two circumstances: firstly, where thousands of documents of only possible relevance are in question (see *Peter Kiewit Sons Co. v. B.C. Hydro* (1982), 36 B.C.L.R. 58 (S.C.); *B.C. Milk Marketing Board v. Aquilini*, [1996] B.C.J. No. 1433 (S.C.)); and secondly, where the documents sought do not have significant probative value and the value of production is outweighed by competing interests such as confidentiality and time and expense required for the party to produce the documents (see *Goldman, Sachs & Co. v. Sessions*, 2000 BCSC 67).
- [14] In *Park* the plaintiff's claim arose from a motor vehicle accident in which she claims to have sustained a head injury with consequent brain damage. The defendant applied for access to the plaintiff's computer for discovery purposes. The defendant submitted the documents sought were relevant to the plaintiff's income earning capacity. The defendant claimed that any information that may assist the defendant in assessing or comparing the plaintiff's pre- and post-accident level of functioning is relevant. Madam Justice Dorgan (in Chambers) found at para. 14 that the defendant's request was too broad as it would give the defendants access to a list of all of the files stored on the plaintiff's computer for the last three and one-half years. She characterized the defendant's request as being "in the nature of an authorization to search."
- [15] In that case, the evidence demonstrated that the computer in issue was located in the plaintiff's home and was used not only by the plaintiff but also by others. Thus, providing access to the plaintiff's computer raised privacy concerns not only for herself but for others using the computer. At para. 21, Madam Justice Dorgan stated, "[t]hat the issue of privacy is a robust and real issue should be taken into account on an application such as this."
- [16] It follows that privacy concerns should be considered in a determination under R. 26(10), where the order sought is so broad it has the potential to unnecessarily delve into private aspects of the opposing party's life.

- [17] In *Pritchard v. Crosfield*, 2005 BCSC 1872, the defendant, by notice of motion, sought an order for the production of certain electronic documents. Specifically, the defence sought the hard drive from the plaintiff's home computer for the purpose of determining a pattern of use, frequency of use, and the types of applications that were accessed.
- [18] In that case, the plaintiff was injured in a motor vehicle accident and was suffering from an alleged head injury with consequential intellectual damage and potential neurological deficit. The plaintiff objected to production of personal information but was prepared to produce all business documents, files, and e-mails, et cetera, generated on the computer in issue.
- [19] Master Patterson stated at paras. 13-16, that clearly all business-related work products generated by or on the home computer should be listed and produced as they were relevant to the plaintiff's claim; however, based on the information before the court, the request for private emails and internet searches was held to be a fishing expedition and, as the groundwork was not laid down to show that there were fish worth catching, was dismissed.
- [20] In Ireland, the defendants sought a "Halliday" type order for the discovery of certain files or parts of files that may have been resident on the plaintiff's computer hard drive. At issue in that action, amongst other things, was the extent of the plaintiff's injuries, the extent of his past loss of income, and whether or not he had suffered a loss of capacity to earn income in the future. Mr. Justice Joyce stated at para. 10 as follows:

In this case, the documents in question may fall within the broad scope of relevance encompassed by the Peruvian Guano test but it is my opinion that their probative value is so outweighed by competing considerations that it is appropriate to exercise my discretion in refusing the broad order that the defendants seek.

- [21] Mr. Justice Joyce discussed the privacy concerns to be considered, the significant cost involved in retrieving and listing "deleted" files, and the fact that the most probative evidence concerning the nature and extent of the plaintiff's injuries would come from the medical and vocational experts who would no doubt testify at trial.
- [22] As such, at para. 2, Mr. Justice Joyce pronounced an order on the following terms:
1. Within 14 days the plaintiff is to deliver an affidavit verifying his list of documents and for that purpose expressly state that he has reviewed the recycle bin and all folders associated with his email program of his computer and that all relevant documents have been listed in Part 1 or Part 3 as may be applicable.
 2. The plaintiff is not required to review deleted documents which would otherwise only be accessible with the assistance of a computer expert.

It is an order such as this that plaintiff's counsel does not object to in the case at hand.

- [23] *Baldwin Janzen Insurance Services (2004) Ltd. v. Janzen*, 2006 BCSC 554, 53 B.C.L.R. (4th) 329, was an application to compel the defendant to produce a supplemental list of documents listing his hard disk drives. The defendant objected to the request on the basis that it was a fishing expedition. Although the court acknowledged that the defendant raised legitimate issues regarding privacy concerns, generally and within the Charter framework, Madam Justice Humphries stated that there are methods to protect those concerns within the normal parameters of discovery and a Charter analysis by itself would not lead to the dismissal of the application. Additionally, the court confirmed there is no dispute that data and information in electronic form are documents. However, in the result, the plaintiff's application to compel the defendant to list the hard drive was dismissed as the plaintiff had produced no evidence to show that the defendant had withheld documents.
- [24] In *Northwest Mettech Corp. v. Metcon Services Ltd.*, [1996] B.C.J. No. 1915 (S.C.), Master Joyce, as he then was, had before him an application for production of four classes of documents, one of which was computer hard drives. The question was whether the hard drive was a document that must be listed and produced. He drew an analogy between a hard drive and a filing cabinet and made a distinction between the hardware and the information it contains. Mr. Justice Slade in *Roeske v. Grady*, 2006 BCSC 1975, 41 C.P.C. (6th) 89, stated at para. 18 that while the analogy may be imperfect, it remains apt. Mr. Justice Slade discussed the imperfection of the analogy at para. 22 stating, "[t]he contents of a hard drive, including deleted items, are not as readily accessible as those neatly filed in the old-fashioned way."
- [25] Mr. Justice Slade in *Roeske* agreed with the statement of Master Joyce, at para. 10 of *Northwest Mettech Corp.*, which is as follows:

In my view the plaintiff is not entitled to production of the hard drive itself. They are entitled to production of only the relevant electronic data which is resident on that hard drive. As I understand it, a computer hard drive is simply a medium on which data is stored on a semi-permanent basis in the form of electronic impulses. It may be thought of as an electronic filing cabinet which contains electronic files, each of which in turn contains electronic documents. The defendants are obliged to list all relevant documents of whatever form (including electronic documents resident on computer hard drives). In my view they are not required to list the entire contents of nor are they required to produce their entire electronic filing cabinet any more than a party is required to list or to produce the complete contents of its steel filing cabinets which house documents which are in paper format. In my view the plaintiff has not shown any proper basis to require production of the actual hard drive. The plaintiff is entitled to know with certainty, however, that all relevant electronic data which is resident on the hard drive has been disclosed. Accordingly, I order that the defendant Mr. Delcea provide an affidavit verifying all of the files still resident on the computer hard drive which relate to the matters in issue.

- [26] In *Roeske*, the defendant had applied for an order that the plaintiff produce her PowerBook computer, including but not limited to the computer's hard drive. The plaintiff had advanced a substantial claim for economic loss as a consequence of her stated inability to continue in her occupation as a stunt person due to injuries she sustained in two motor vehicle

accidents. There is evidence that the plaintiff used her computer before and after the accidents for both business and personal use, and that the information therein may have had a bearing on her claim for economic loss. Mr. Justice Slade concluded at para. 32 that in the circumstances, taking account of the marginal value for trial purposes and the onerous burden it would put on the plaintiff late in the day, he would exercise his discretion in favour of the plaintiff and deny the application.

[27] *Desgagne v. Yuen*, 2006 BCSC 955, 56 B.C.L.R. (4th) 157, was a motion by the defendants seeking production of electronic evidence. In argument, counsel relied most exclusively on R. 26 of the Rules of Court. In particular, the defendants sought production of the hard drive from the plaintiff's home computer for analysis by an expert. In that case, the plaintiff claimed damages for personal injury suffered as a result of a collision when she was riding her bicycle. She alleged that, as a result of her injuries, she could no longer work at her former job as a systems analyst at Telus.

[28] The proposed mechanism for delivery of the electronic evidence was as follows:

- a. The hard drive would be delivered to an expert chosen by the plaintiff who would prepare reports showing the information being sought;
- b. Those reports would be delivered to plaintiff's counsel, who would review them for privilege; and
- c. The reports and data, less anything in respect of which privilege was being claimed, would be disclosed to defence counsel in the form of a supplementary list of documents.

[29] The plaintiff submitted that production of the hard drive would violate the privacy of her friends who had access to her computer from time to time and, additionally, would allow the defendants to search through the hard drive as if it were a filing cabinet. In answer to this, Mr. Justice Myers cited the Court of Appeal's decision in *Privest Properties Ltd. v. W.R. Grace & Co. - Conn* (1992), 74 B.C.L.R. (2d) 353, 13 C.P.C. (3d) 205 (C.A.), where, after reviewing R. 26 and the duties imposed by it, Madam Justice Southin stated at para. 38 that R. 26(10) confers no power to make an order that is really authorization for a search.

[30] At para. 20 of *Desgagne*, Mr. Justice Myers stated as follows:

A request to be able to search a party's filing cabinets in the hopes that there might be found a document in which an admission against interest is made would clearly not be allowed. Its digital equivalent should also not be allowed.

Accordingly, Mr. Justice Myers dismissed that part of the motion seeking production of the electronic documents on the hard drive.

- [31] At para. 26 Mr. Justice Myers stated that the request for the metadata stands in a different light as it was not the contents of the documents the defendants sought, but rather it was information that showed the use to which the plaintiff put her computer. The defendants wished to obtain this information in order to enable them to assess the plaintiff's computer functionality after the accident. The first issue addressed was whether the metadata was a document.
- [32] What was sought by the defendants was a report of recorded data (i.e. the metadata) that is generated by computer software. That data is not something created by the user, but it is based on what the user does with her software. Mr. Justice Myers held at para. 29 that it appeared clear that metadata is "information recorded or stored by means of [a] device" and is therefore a document under R. 1(8) of the Rules of Court.
- [33] Although the term "metadata" was not used in *Park*, Madam Justice Dorgan refused to order production of records of the frequency and duration of computer use, finding at para. 22 that it had limited, if any, probative value. Mr. Justice Myers agreed with Madam Justice Dorgan in *Park* and, at para. 42, stated that the threshold of relevance had not been met; however, this conclusion carries with it the caveat that hard drives and other electronic documents may require production under R. 26 if the threshold of relevance is met.
- [34] The third and final category of electronic information sought by the defendants in *Desgagne* was the plaintiff's internet browser history. In *Park*, the defendant also sought production of internet browser and instant messaging histories. In that case, Madam Justice Dorgan declined production because she found the threshold of relevancy was not met. Additionally, as discussed above, a motion for discovery of internet searches was also before the court in *Pritchard* and, in that case, Master Patterson at para. 15 characterized the request as a fishing expedition.
- [35] In *Desgagne*, Mr. Justice Myers declined production on the basis of irrelevancy. Alternatively, even if the information was of tangential relevance, he declined to order its production due to the intrusive nature of the order in comparison to the probative value of the information.
- [36] In *Chadwick v. Canada (Attorney General)*, 2008 BCSC 851, 83 B.C.L.R (4th) 361, Mr. Justice Myers (in chambers) ordered that an individual produce a hard drive for analysis by a computer forensic expert selected by the defendants. That action arose out of a helicopter crash. Mr. Honour owned the helicopter and was piloting it at the time of the crash. Mr. Chadwick was a passenger. Both were killed in the crash. Mrs. Honour and Mrs. Chadwick brought the suit in their own capacities under the Family Compensation Act, R.S.B.C. 1996, c. 126, and as personal representatives of their deceased husbands. The defendants included the manufacturer of the helicopter, the manufacturer of the engine, the manufacturer of the fuel pump, and, through the Attorney General of Canada, Transport Canada.

- [37] The defendants' motion asked for an order that the hard drive of the Honour computer be produced for analysis by an expert selected by the defendants. The search terms to be used by that expert were specified in the draft order. The defendants proposed that they engage independent counsel to review the documents retrieved from the hard drive to ensure that all relevant documents were produced while avoiding the possibility of the defendants seeing privileged or irrelevant documents - the cost of which would be borne, initially, by the defendants.
- [38] The plaintiffs in Chadwick relied on Baldwin in which production of the defendant's hard drive was denied because it was held by Madam Justice Humphries to be a situation where the computer system itself, or its components, were not integral to the proof of the claim.
- [39] Further, the plaintiffs relied on Desgagne, where Mr. Justice Myers stated that a request to be able to search a party's filing cabinet, in the hopes that there might be found a document in which an admission against interest is made, would clearly not be allowed. Mr. Justice Myers continued at para. 20 that a digital equivalent should, likewise, not be allowed. However, there is a caution at para. 22 that the analogy is not always apt.
- [40] Mr. Justice Myers, in Chadwick, agreed with the plaintiffs that cases in the past have drawn a distinction between situations in which a hard drive should be treated as a document and situations in which a hard drive should be regarded as the digital equivalent of a filing cabinet. However, Mr. Justice Myers stated at para. 18 that despite agreeing with the plaintiffs that this was a case in which the hard drive was to be regarded as a file repository and not a document itself, such a distinction was not determinative of the application.
- [41] At para. 22 of Chadwick, Mr. Justice Myers pointed out that a search through a filing cabinet does not require any expert assistance - it can easily be done by the client or, if necessary, by counsel; however, that is not the case with respect to recovering deleted files from a hard drive.
- [42] At para. 25, Mr. Justice Myers held that under the circumstances the defendants were entitled to obtain an independent analysis of the hard drive. The search protocol was to be agreed to by the parties or, failing that, determined by the court. The search results were to be reported to plaintiff's counsel.
- [43] The real issue in that case was that the defendants could not verify the quality or thoroughness of the hard drive search conducted previously by the plaintiff's expert because the plaintiff did not provide them with the necessary information requested. Furthermore, as the former owner of the hard drive, Mr. Honour, was deceased, the defendants could not examine him for discovery as to the location of documents or discrepancies in the document list.
- [44] Mrs. Honour sought leave to appeal the order of Mr. Justice Myers requiring production of the Honours' home computer hard drive for forensic analysis: see 2008 BCCA 346, 83 B.C.L.R. (4th) 367. The Court of Appeal held that while an appropriate case may give rise to

important issues such as those submitted by the plaintiffs (privacy, solicitor-client privilege, expense, and time), this was not that case as Mr. Justice Myers' order was of narrow scope. Furthermore, it was determined an appeal would unduly interfere with the orderly and timely disposition of the action at trial. Thus, upon weighing the relevant factors, Mr. Justice Bauman (in chambers) for the court concluded that leave to appeal the order should not be granted and the application was dismissed.

- [45] The parties were again before the court for a ruling on the search terms to be applied in the forensic analysis: see *Honour v. Canada (Attorney General)*, 2008 BCSC 1631. The plaintiffs said that the search terms would yield a large number of irrelevant documents and the cost of plaintiffs' counsel reviewing the documents for relevancy and privilege outweighed the potential probative value. Mr. Justice Myers disagreed and allowed each of the 286 search terms, stating that the cost could be debated after the trial and that a broad search was permissible as plaintiffs' counsel would be given the results to screen for privilege and relevancy prior to forwarding the producible documents to the defence.

IV. ANALYSIS

- [46] Electronic data stored on a computer's hard drive or other magnetic storage device falls within the definition of "document" under R. 1(8) of the Rules of Court: *Ireland* at para. 6.
- [47] Rule 26(1) requires disclosure of documents relating to any matter in question in the action. The decision of whether to grant an order requiring production under R. 26(10) is a discretionary one: *Park* at para. 15. The court has used its discretion to deny an application for the production of documents in the following two circumstances: firstly, where thousands of documents of only possible relevance are in question; and secondly, where the documents sought do not have significant probative value and the value of production is outweighed by competing interests such as confidentiality and time and expense required for the party to produce the documents: *Park* at para. 15. Additionally, privacy concerns should be considered in a determination under R. 26(10), where the order sought is so broad it has the potential to unnecessarily delve into private aspects of the opposing party's life: *Park* at para. 21.
- [48] Disclosure in the civil litigation context is largely informed by an inquiry into relevance and probative value. Relevance should be granted a broad scope: *Peruvian Guano* at 62. Relevancy is to be determined upon a description of the nature of the documents sought and a reasonable interpretation of the pleadings: *Boxer* at 359.
- [49] Relevant to this particular application are the values enshrined in s. 8 of the Charter - the right to be secure against unreasonable search and seizure. Rule 26(10) confers no power to make an order that is really authorization for a search: *Privest Properties Ltd.* at para. 38.
- [50] Metadata is information recorded or stored by means of a device and is thus a document under R. 1(8): *Desgagne* at para. 29. Metadata is a report of recorded data that is generated by computer software. It is not something created by the user; rather, it is based on what the

user does with their computer. In both *Park* and *Desgagne*, it was held the threshold of relevance had not been met to order production of records of the frequency and duration of computer use. However, Mr. Justice Myers in *Park* stated at para. 42 that he did not mean to say that hard drives and other electronic documents need never be produced under R. 26. Thus, in the appropriate case if the threshold of relevance is met, a hard drive may require production.

- [51] This threshold was found to be met in *Chadwick*. Despite agreeing with the plaintiffs that this was a case in which the hard drive was to be regarded as a file repository and not a document itself, Mr. Justice Myers held that such a distinction was not to be determinative of the application.
- [52] Mr. Justice Bauman, for the Court of Appeal, held that leave to appeal the order should not be granted and the application was dismissed. The Court of Appeal stated that while an appropriate case may give rise to important issues such as privacy, solicitor-client privilege, expense, and time, this was not that case as Mr. Justice Myers' order was of narrow scope.
- [53] Similarly, the application at hand is of narrow scope. The defence wishes to have the plaintiff's hard drive of his family computer produced and analyzed to determine the periods of time the plaintiff spent on Facebook between eleven at night and five in the morning, each day.
- [54] Examination for discovery evidence of the plaintiff's mother confirms that the plaintiff is the only person in the family using the family computer between those hours. The plaintiff suggests that, at times, friends may use the computer once he logs onto Facebook. But that is an evidentiary issue for trial. The issues of privacy and solicitor-client privilege are basically resolved as only the plaintiff has the password to his Facebook account and he has not used this account to converse with his counsel.
- [55] It is true the Bishop family computer is more akin to a filing cabinet than a document; however, it is a filing cabinet from which the plaintiff is obligated to produce relevant documents. This sentiment was approved in *Chadwick*. Simply because the hard drive contains irrelevant information to the lawsuit does not alter a plaintiff's duty to disclose that which is relevant. If there are relevant documents in existence they should be listed and produced (or simply listed if they are privileged).
- [56] The defence argues that this case is distinguishable from *Baldwin* and that the information sought is relevant. The plaintiff advised Dr. Zoffman that his sleep varies with the time one of his friends goes to bed. This is because he spends a substantial amount of time on Facebook chatting with this friend. The plaintiff alleges that ongoing fatigue is preventing him from maintaining employment and thus his late-night computer usage is relevant to matters at issue in this lawsuit.

V. CONCLUSION

[57] The information sought by the defence in this case may have significant probative value in relation to the plaintiff's past and future wage loss, and the value of production is not outweighed by competing interests such as confidentiality and the time and expense required for the party to produce the documents. Additionally, privacy concerns are not at issue because the order sought is so narrow that it does not have the potential to unnecessarily delve into private aspects of the plaintiff's life. In saying that, I recognize the concern of the plaintiff that to isolate the information the defence does seek, its expert may well have consequent access to irrelevant information or that over which other family members may claim privilege. For that reason, I direct that the parties agree on an independent expert to review the hard drive of the plaintiff's family computer and isolate and produce to counsel for the defendant and counsel for the plaintiff the information sought or a report saying that the information sought is not retrievable, in whole or in part, if that is the case. I grant liberty to apply if counsel cannot agree on such an independent expert or if other terms of this order cannot be agreed.

[58] At the conclusion of the hearing on March 5, having been made aware that the passage of time was critical because of the potential for the memory of the plaintiff's family computer to be "overwritten" with ongoing use, I directed that within two weeks of that date, an expert engaged by the plaintiff's counsel, at the expense of the defence, produce two copies of the hard drive to be deposited with the court pending this ruling. One of those copies should be used for the analysis I have now ordered. The other copy should remain with the court as a backup to be accessed only with further order of the court.

"T.J. Melnick J"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/09/03/2009BCSC0358.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/bishop-v-minichiello-2009-bcsc-358>

Prepared on 26 October 2026 · Esheria