

CANADA / JUDGMENT

Honour v. Canada (Attorney General)

2008 BCSC 1631

COURT

Supreme Court of British Columbia

DECIDED

27 November 2008

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2008 BCSC 1631 Honour v. Canada (Attorney General) IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Honour v. Canada (Attorney General), 2008 BCSC 1631 Date: 20081127 No. S065902 Registry: Vancouver Between: Reta G. Honour on her own behalf and as personal representative of the Estate of Robert David Honour, Deceased Plaintiff And Attorney General of Canada, Enstrom Helicopter Corporation, Crane Co., Mountain Aircraft Sales & Maintenance Inc., also known as A & L Aircraft Maintenance, Art Comeault, Richard Cooper and Avco Corporation Defendants And Richard Cooper Third Party Before: The Honourable Mr. Justice Myers Reasons for Judgment Counsel for the Plaintiff: S. Matthews J. Thornback Counsel for the Defendant, Canada (Attorney General): A. Wade G.S. Lilles V. Anderson Counsel for the Defendant, Avco Corporation: M.M. Skorah S.D. Jacob A. Rudakoff Counsel for the Defendant, Crane Co.: S.D. Gill S.E. Fraser Counsel for the Third Party, Cooper: R.J. Fenn Counsel for Enstrom Helicopter Corp.: W.S. Taylor F. Begy Date and Place of Hearing: November 24, 2008 Vancouver, B.C.

- [1] On May 29, 2008, I ordered Mrs. Honour to produce a hard drive for analysis by a computer forensic expert selected by the defendants. In my reasons, indexed under the companion case of Chadwick v. Canada (Attorney General), 2008 BCSC 851, I stated:
- [30] In its motion, the Attorney General of Canada specified the search terms their expert proposed to use. There was some disagreement as to those terms. As I indicated during the hearing, if those differences cannot be resolved, they may be spoken to. The parties have not been able to agree on the search terms. This is my ruling on that issue.
- [2] In my prior reasons I set out the background facts of this action and the motion for the production of the hard drive. I will not repeat those here.
- [3] The defendants propose 286 search terms. I will not detail them in these reasons. In general, the searches are meant to uncover all documents on the hard drive which relate to the condition and history of the helicopter in which the fatal crash occurred.
- [4] With respect to the majority of the proposed search terms, the plaintiff argues that:

- (a) the search words are common words and will therefore return documents that are not relevant to the action;
 - (b) the proposed searches invade the privacy of the plaintiff;
 - (c) there is no evidence that the hard drive contains documents that meet the search parameters;
 - (d) the search will yield a large number of irrelevant documents and the cost of plaintiff's counsel reviewing the documents for relevancy outweighs the potential likely probative value.
- [5] There is also an issue with respect to the search of unallocated clusters and I will deal with that issue later in these reasons.
- [6] In my view, the first three arguments incorrectly equate the forensic analysis of the hard drive to the production of the documents. The documents which are revealed by the search are not to go to the defendants. Rather, they are to be sent to plaintiff's counsel for review. It is plaintiff's counsel who will then make the determination as to relevance and privilege and decide whether to disclose the documents.
- [7] It must be borne in mind that the underlying problem here is that Mr. Honour is deceased, Mrs. Honour has no personal knowledge of the contents of the hard drive, and defence counsel do not have the technical capability to perform the analysis. There is no way of knowing what is on the drive and what the searches will reveal. Although plaintiff's counsel had its own forensic analysis preformed, the searches were more limited. Further, plaintiff's counsel refused to provide the defendants with the technical data regarding the methodology used in reconstructing the data on the hard drive.
- [8] With respect to the fourth argument, it is true that the Courts have refused to order production of documents where the production will be expensive and the documents are likely to be of tangential relevance.[1] However, the data sought here is of direct and key relevance. What is not known is whether it exists on the drive.
- [9] In my view, all of the requested search terms should be allowed.
- [10] I turn now to the issue of unallocated clusters. The plaintiff argues that no searches should be allowed of unallocated clusters (which are created when deleted documents are overwritten). This is so because the search ordered was to be date limited and it is not possible to do a date-limited search of unallocated clusters. In response, the defendants argue that either the forensic experts or plaintiff's counsel do their best to manually segregate the retrieved documents which are outside of the relevant date range.
- [11] Although the order provided for a date-restricted search, the issue of the inability to do a date-restricted search of unallocated clusters was not fully argued at the original hearing.

- [12] The plaintiff's concerns regarding irrelevancy, privilege and privacy are mitigated by the "firewall" between the forensic expert and defence counsel.
- [13] The plaintiff also argues that the review of the documents retrieved from the unallocated clusters will cause unjustified work for the plaintiff's counsel and therefore expense for the plaintiff. There are two answers to this. First, that is something which is remediable in whole or in part by an order for costs. Second, at the close of the hearing at which the production of the hard drive was ordered, it was disclosed that Mrs. Honour was continuing to use the computer containing the hard drive. That was surprising because her ongoing use of the computer would - to plaintiff's counsel's knowledge - continue to overwrite the space freed by deleted files, creating further unallocated clusters.[2] It follows that if the plaintiff is burdened with increased work with respect to viewing documents retrieved from the unallocated clusters, that is something for which she or her counsel are partially responsible.
- [14] I conclude that the search of the unallocated clusters should proceed. Whether the forensic expert or plaintiff's counsel do the manual culling I leave for the plaintiff to choose. I will note that the intent of my reasons, and the rationale for the forensic analysis of the hard drive, is to ensure that all relevant documents are produced. Therefore if a document or partial document is retrieved from an unallocated cluster, and it is relevant, I would expect it to be produced even though it is unable to be dated.
- [15] In my prior reasons for judgment I concluded:
- [32] Neither party requested an order prohibiting the forensic expert from communicating the results of the analysis to the defendants. Therefore I did not make such an order but I note that that "fire-wall" was the premise of the mechanism proposed by the defendants and the basis upon which I reached my decision. Counsel may appear again before me if this needs to be addressed further as the case progresses. It is appropriate to make this order at this time. Therefore, except by agreement between the parties or further court order, Mr. Fodchuk and Deloitte & Touche LLP are prohibited from disclosing any information obtained from the analysis of the hard drive to anyone but counsel for the plaintiff.
- [16] Once again, if there is some difficulty with respect to the implementation of the search, the parties may come back before me. However, I would hope that counsel can work together to move this matter forward in a timely manner, given that the current trial date now appears to be impossible to achieve. "E. M. MYERS, J." December 8, 2008 - Revised Judgment Corrigendum to the Reasons for Judgment issued advising that in paragraph 4(d) the second line should be amended to read: "cost of plaintiff's counsel " rather than "..cost of defence counsel ". In paragraph 12 the second line should be amended to read " forensic expert and defence counsel " rather than " forensic expert and plaintiff's counsel ". The name of counsel on the cover page should be amended to read "Mr. Rudakoff" rather than "Mr. Rudikoff".
- [1] See, for example, *Desgagne v. Yuen et al.*, 2006 BCSC 955, 56 B.C.L.R. (4th) 157

- [2] Evidence regarding the creation of unallocated clusters was adduced at the original production motion.
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