

CANADA / JUDGMENT

Honour v. Canada (Attorney General)

2008 BCCA 346

COURT

British Columbia Court of Appeal

DECIDED

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2008 BCCA 346 Honour v. Canada (Attorney General) COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Honour v. Canada (Attorney General), 2008 BCCA 346 Date: 20080909 Docket: CA036224; CA036223 Docket CA036224 Between: Reta G. Honour on her own behalf and as personal representative of the Estate of Robert David Honour, Deceased Appellant (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, Lycoming Engines, a division of Avco Corporation, and Avco Corporation Respondents (Defendants) And Richard Cooper Respondent (Third Party) Docket: CA036223 Between: Linda Lee Chadwick, Jeanne Ng and Douglas Stuart Chadwick Appellants (Plaintiffs) 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, Lycoming Engines, a division of Avco Corporation, and Avco Corporation Respondents (Defendants) And Reta G. Honour on her own behalf and as personal representative of the Estate of Robert David Honour, Deceased Respondent (Defendant) And Richard Cooper Respondent (Third Party) Before: The Honourable Mr. Justice Bauman (In Chambers) S.D. Matthews and J.L. Thornback Counsel for the Appellant, R.G. Honour A. Wade and G.S. Lilles Counsel for the Respondent, Canada (A.G.) M.M. Skorah, Q.C. and S.D. Jacob Counsel for the Respondent, Avco Corp. S.D. Gill Counsel for the Respondent, Crane Co. U. Radoja Counsel for the Respondent, Enstrom Helicopter Corp. Place and Date of Hearing: Vancouver, British Columbia 29 July 2008 Place and Date of Judgment: Vancouver, British Columbia 9 September 2008 Reasons for Judgment of the Honourable Mr. Justice Bauman: I.

- [1] Reta Honour, on her own behalf and as personal representative of the Estate of Robert Honour, seeks leave to appeal an order of Mr. Justice Myers requiring the production of the Honours' home computer hard-drive for forensic analysis.
- [2] On 29 May 2008, Mr. Justice Myers made this interlocutory order as the case management judge in this litigation: THIS COURT ORDERS that:
1. the Plaintiff, Reta Honour, shall make available at her residence on or before June 26, 2008 the personal home computer of Reta Honour and Robert Honour so that a mirror image of the computer hard drive may be taken by Deloitte & Touche LLP ("Deloitte");

2. Deloitte may perform forensic analysis on the mirror image of the hard drive;
 3. counsel for the parties shall endeavour to agree on the search terms for the forensic computer examination. If there is any disagreement, the matter shall be referred to the court for determination;
 4. the search for data by Deloitte will be confined to the period from January 1, 2004 until September 17, 2005;
 5. upon the completion of the analysis, Deloitte shall list the data obtained as a result of its search of the hard-drive and provide the data obtained to counsel for the Plaintiff, Reta Honour, so that counsel for Reta Honour may review the documents for relevance and privilege and provide a supplemental List of Documents if any;
 6. the cost of the forensic computer examination may be spoken to by counsel at the conclusion of the analysis of the documents;
 7. the parties are at liberty to make further application concerning the manner and method of the search performed by Deloitte;
 8. the Order be approved as to form by counsel for the Plaintiff, the Attorney General of Canada and Avco Corporation; and
 9. the cost of this application be costs in the cause. II.
- [3] Myers J.'s reasons, delivered on 20 June 2008, are indexed as *Chadwick v. Canada (Attorney General)*, 2008 BCSC 851. He sets out the background so:
- [3] This action arises out of a helicopter crash which occurred in Duncan, B.C., on September 17, 2005. Robert Honour bought the helicopter in June, 2005. He was piloting the aircraft at the time of the crash. Mr. Chadwick was a passenger. Both Mr. Chadwick and Mr. Honour were killed in the crash. Mrs. Chadwick and Mrs. Honour bring these lawsuits in their own capacity under the Family Compensation Act, R.S.B.C. 1996, c.126, and as the personal representatives of their deceased husbands.
- [4] The defendants include 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.
- [5] After lists of documents were exchanged by the parties, counsel for Avco Corporation made a Freedom of Information Request of the Transport Safety Board. Pursuant to that request, the Board disclosed an email from Mr. Honour to Mr. Comeault which had not been included in Mrs. Honour's list of documents. Mr. Comeault is a defendant and is president of the defendant company A & L Aircraft Sales and Maintenance Inc. That company was a prior owner of the helicopter and also serviced the helicopter for Mr. Honour.

- [6] The email attached a document prepared by Mr. Honour in which he listed problems he noted with the aircraft (a "snag list" in aviation terminology).
- [7] Following the disclosure of that email, defence counsel asked counsel for Mrs. Honour - Mr. Camp - to review the hard drive of her late husband's computer in order to retrieve any relevant documents from it, including documents that had been deleted.
- [8] Mr. Camp engaged Mr. Kojima of Totally Connected Security Ltd. to perform a forensic analysis of Mr. Honour's computer in order to retrieve any relevant documents. Mr. Kojima recovered the email with the attached snag list. He also recovered a computer version of a segment of the helicopter log book. It is therefore apparent that Mr. Honour kept both a handwritten log and a full or partial computer version of that log.
- [9] Mr. Camp forwarded the documents mined from the hard drive to defence counsel. They requested that Mr. Camp provide them with the technical data regarding the methodology used in reconstructing the data on the hard drive. I will not describe the technical aspects of this; suffice it to say the plaintiffs do not dispute that the information sought would be of use in verifying the techniques used by Mr. Kojima.
- [10] Mr. Camp refused to provide that information to the defendants.
- [11] There was also disagreement between the defendants and Mr. Camp over the search terms used by Mr. Kojima in his analysis.
- [12] Those disputes prompted this motion by the Attorney General of Canada. The other defendants supported the motion. I will refer to the defendants collectively when I state the position taken by any one of them in this motion.
- [13] The motion asked for an order that the hard drive be produced for analysis by an expert selected by the defendants. The defendants also listed the search terms to be used by that expert. The defendants proposed that they engage independent counsel to review the documents retrieved from the hard drive. The cost of the analysis and the independent counsel would initially be borne by the defendants.
- [14] The reason for engaging independent counsel was twofold. The first was to ensure that all relevant documents are produced. The defendants were not content to rely on Mr. Camp vetting the documents. The second was to avoid the possibility of the defendants seeing documents that were privileged or not relevant. The proposed use of independent counsel and the rationale for it were the same or similar to those seen in Anton Piller orders.
- [15] I note that none of the defendants sought an order for the disclosure of the methodology employed by Mr. Kojima. Nor did the plaintiffs offer to provide that at the hearing. Rather, the motion was argued on an all-or-nothing basis with respect to the production of the hard drive itself.

- [4] As noted, Myers J. ordered that Mrs. Honour produce the hard-drive for analysis by a forensic expert selected by the defendants. He declined to order that the results be submitted to independent counsel.
- [5] Myers J. began his reasons by reviewing two authorities, *Baldwin Janzen Insurance Services (2004) Ltd. v. Janzen*, 2006 BCSC 554, 53 B.C.L.R. (4th) 329, and *Desgagne v. Yuen et al.*, 2006 BCSC 955, 56 B.C.L.R. (4th) 157.
- [6] Mr. Justice Myers concluded:
- [23] Turning to the case at bar, there is no doubt that Mr. Honour's hard drive contains relevant documents and that some of these have been deleted or overwritten. Further, Mr. Camp had arranged for an expert to perform an analysis of the hard drive, so there can be no issue that obtaining expert assistance is an appropriate task to be undertaken.
- [24] The real issue here is that the defendants cannot verify the quality or the thoroughness of the hard drive search because Mr. Camp has not provided them with the necessary information. Mr. Camp 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.
- [25] Under these circumstances, in my view the defendants are entitled to obtain an independent analysis of the hard drive. III.
- [7] I will consider the application in light of the factors to be addressed on an application for leave to appeal, which are:
- (i) whether the point on appeal is of significance to the practice; (ii) whether the point raised is of significance to the action itself; (iii) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and (iv) whether the appeal will unduly hinder the progress of the action: *Power Consolidated (China) Pulp Inc. v. B.C. Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C.C.A.).
- i. Significance to practice
- [8] This is the aspect most heavily stressed by counsel for Mrs. Honour. At para. 23 of her submissions, Ms. Matthews notes that there are "a number of important questions that need to be answered in relation to discovery of electronic documents". Counsel then refers to this observation by the Alberta Court of Appeal in *Innovative Health Group Inc. v. Calgary Health Region*, 2008 ABCA 219 at para. 23: Although technology is helpful in the sense that it

makes fuller disclosure possible, it also creates an unfortunate paradox. The cost of sorting and producing all the relevant information in a party's possession may put litigation beyond the economic ability of a vast number of litigants. Thus, it is necessary to ask such questions as: How much discovery is enough? Do all cases justify the same type of disclosure? Should there be some rule of proportionality that governs production based upon the issues in the lawsuit? How is irrelevant and immaterial information protected from production in those situations where a court orders production of a hard drive for examination by an expert? Who pays the cost?

- [9] Counsel stresses the expense of undertaking forensic searches of computer hard-drives and submits: It would be absurd to suggest that a forensic search must be performed in every case where it is possible that there are undisclosed relevant documents on a computer. The proposed appeal will give the Court an opportunity to provide guidance to the profession on the circumstances which make a forensic search appropriate.
- [10] Finally, Ms. Matthews notes that important issues of privacy and solicitor/client privilege are engaged when access to a computer hard-drive, which contains various and sundry materials, is granted.
- [11] While an appropriate case may give rise to these important issues, it is not clear to me that this is that case.
- [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 this search will be at the defendant's expense, at least initially. The order contemplates a search protocol agreed to by the parties, or, failing that agreement, determined by the court. The search results are to be reported to Mrs. Honour's counsel. The analysis has been authorized in circumstances that are somewhat unique. As Mr. Justice Myers observes:
- [24] The real issue here is that the defendants cannot verify the quality or the thoroughness of the hard drive search because Mr. Camp has not provided them with the necessary information. Mr. Camp 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.

- [13] In my respectful view, the plaintiff overstates the significance of the point on appeal to the general practice, given the circumstances of the case and the scope of the order at bar. ii. Significance of the point raised to the action itself
- [14] Mr. Justice Myers' order is intended to facilitate document discovery in a complex action. From that perspective, the order is significant to the action, but I do not see the point on appeal as significant to the proceeding. iii. The merits of the appeal
- [15] One cannot suggest that the appeal is without merit. Mr. Justice Myers noted the debate in the cases raised by the issue of the production of computer hard-drives. The applicants point to the decision of this Court in *Privest Properties Ltd. v. W.R. Grace & Co. - Conn.* (1992), 74 B.C.L.R. (2d) 353, which dealt with the arguably analogous issue of access to a document repository maintained by the defendants there.
- [16] That said, the decision of Mr. Justice Myers also represents the exercise of discretion by a case management judge in the course of complex litigation. This Court will rarely interfere with such orders: *567 Hornby Apartment Ltd. v. Le Soleil Hospitality Inc.*, 2008 BCCA 293 *Kedia International Inc. et al v. Royal Bank of Canada*, 2007 BCCA 47 at para. 22 *Robak Industries Ltd. v. Gardner*, 2006 BCCA 395 (Chambers), at paras. 12-13 See also *Bronson v. Hewitt*, 2008 BCCA 46 (Chambers) at paras. 8-9 iv. The appeal and progress of the action
- [17] It is this consideration which tells most against granting leave in this matter. The trial is currently scheduled for May 2009. While the plaintiff maintains that other issues may cause the parties to lose that date, the defendants say that an appeal herein will undoubtedly result in the trial date being lost. The defendants, as much as the plaintiff, are entitled to the trial of this action at an early date. In my view, the appeal will unduly interfere with the orderly and timely disposition of this action. IV.
- [18] On weighing the relevant factors, I conclude that leave to appeal the order should not be granted. The application is dismissed. "The Honourable Mr. Justice Bauman"

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