
CANADA / JUDGMENT

Sonepar Canada Inc. v. Thompson

2016 BCSC 1195

COURT

Supreme Court of British Columbia

DECIDED

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2016 BCSC 1195 Sonepar Canada Inc. v. Thompson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sonepar Canada Inc. v. Thompson,

2016 BCSC 1195

Date: 20160609

Docket: S157572

Registry: Vancouver

Between:

Sonepar Canada Inc. dba Gescan

Plaintiff

And

Michael Thompson, Darryl Butler, David Tsuchiya

and Robertson Electric Wholesale British Columbia Limited

Defendants

Before: The Honourable Mr. Justice Pearlman

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

J.G. Howard

Counsel for the Defendants:

J.E. Frank

Place and Date of Hearing:

Vancouver, B.C.

June 7, 2016

Place and Date of Judgment:

Vancouver, B.C.

June 9, 2016

- [1] THE COURT: The plaintiff Gescan applies for relief concerning the defendants' failure to list and produce material and relevant electronic documents pursuant to their obligations under Rule 7-1 of the Supreme Court Civil Rules. The plaintiff seeks an order striking the defendants' response to civil claim. Alternatively, the plaintiff seeks orders that would authorize the examination of electronic documents of the defendants Butler and Thompson by a forensic expert retained by the plaintiff and require the defendants to list and produce the results of those examinations.
- [2] The plaintiff also seeks an order that would require the defendants Thompson and Butler to reattend for examination for discovery on the information obtained by the plaintiff and any other relevant matters as a result of the inspections that the plaintiff asks the court to order.
- [3] Finally, the plaintiff seeks an order for the special costs of this application and of the costs incurred in examinations for discovery that the plaintiff says are attributable to the defendants' failure to list and produce relevant documents.
- [4] The relief is sought in an action where the plaintiff claims against the defendants for injunctive relief and damages for the alleged misappropriation of confidential product pricing information. The plaintiff alleges that the defendants conspired to misappropriate its property and to unlawfully interfere with contractual relations between Gescan and its customers.
- [5] For the purposes of this application, I will refer only to those portions of the pleadings that are relevant to the relief sought.
- [6] In the notice of civil claim, the plaintiff pleads that the defendant Michael Thompson is a former Gescan employee who is now vice president and general manager of the defendant Robertson Electric Wholesale British Columbia Limited, a competitor of the plaintiff's.
- [7] The defendant Darryl Butler is a former Gescan employee who is now an inside sales representative for Robertson.
- [8] At paragraph 6, the plaintiff alleges that:

Thompson was employed by Gescan from August, 1998 to December 12, 2013. From February, 2010, Thompson held the position of General Manager, British Columbia, which title was later changed to Regional Director for British Columbia. In this position, Thompson was a part of Gescan's senior management and reported directly to Gescan's President.

[9] The plaintiff alleges that in that capacity, Mr. Thompson owed a fiduciary duty to Gescan, as well as a duty of confidentiality.

[10] The plaintiff also pleads that:

[Mr.] Thompson acknowledged he was bound by Gescan's Employee Handbook, which provided that:

"Confidential information about [the plaintiff], its customers, clients, suppliers or employees should not be divulged to anyone other than persons who are authorized to receive [that] information"

[11] The plaintiff further alleges that:

Thompson was aware that Gescan considered information about its customers, including their contact information, past purchases, cost of products and pricing and other terms offered to customers to be highly confidential.

[12] That information is referred to as the "Gescan Confidential Information".

[13] At paragraph 8, the plaintiff alleges that at the time of Mr. Thompson's termination of employment on December 12, 2013:

. . . Gescan requested that [Mr.] Thompson immediately return his Company laptop which contained a . . . volume of Gescan Confidential Information. [Mr.] Thompson responded that he had left it at his Gescan office knowing this was not correct. Thompson only returned the laptop the following day and thus had an opportunity to make copies of confidential information on the laptop.

[14] At paragraph 15, the plaintiff alleges that:

On September 3, 2014 . . . [when Mr.] Butler gave his resignation notice to Gescan for the purposes of commencing employment with Robertson BC, [allegedly] at Thompson's request, [Mr.] Butler emailed to his home email the North Vancouver branch's Price Book.

[15] The plaintiff pleads that:

As Butler and Thompson were well aware, the Price Book is a highly-confidential document that contained large volumes of confidential and commercially-sensitive information . . .

[16] The plaintiff then went on to particularize the nature of that information, which included the names and contact information for Gescan's regular North Vancouver customers and the pricing levels made available to them, as well as Gescan's costs and selling prices.

[17] At paragraph 18, the plaintiff alleges:

The Defendants have misused Gescan Confidential Information . . . for the purposes of unfairly competing with Gescan in breach of the individual Defendant's duties to Gescan . . .

[18] At paragraph 19, the plaintiff alleges that:

Robertson BC had, at all material times, knowledge of the confidentiality obligations of the individual Defendants to Gescan and actively participated in and profited from the breach thereof.

[19] In the response to civil claim, the defendants deny the allegations in the statement of claim to which I have referred by way of a general denial.

[20] At paragraph 20, the defendants plead that:

On December 12, 2014, Gescan terminated Thompson's employment without notice. The circumstances of his termination were as follows:

. . .

- (d) Thompson did not have his company laptop with him and was unable to immediately return it to [Mr.] Durkuch;
- (e) Thompson ceased to have access to Gescan's offices, branch locations and information systems that day . . .

[21] Then at paragraph 26:

Thompson specifically denies that he:

. . .

- (b) Breached any legal, common law or statutory obligation to Gescan;
- (c) Used, collected or disclosed any of Gescan's confidential information for his own benefit or for the benefit of any third party, including while employed by Robertson;

[22] At paragraph 32:

Butler and Tsuchiya each specifically deny that they:

- (a) Breached any contractual, statutory, or legal obligation to Gescan;
- (b) Disclosed any of Gescan's confidential information to Robertson Electric;
- (c) Used, collected or disclosed any of Gescan's confidential information for his own benefit or for the benefit of any third party, including while employed by Robertson; [and]
- (d) Misused confidential information of Gescan . . .

- [23] Those pleadings squarely put in issue the question of whether Mr. Thompson had lied to Gescan when he said that he did not have his Gescan laptop. They also put in issue the question of whether or not Mr. Thompson had retained copies of confidential information and whether Mr. Butler had appropriated a copy of the North Vancouver price book.
- [24] On his examination for discovery, Mr. Thompson acknowledged that while employed with Gescan he worked on a company-owned laptop. He admitted that he had lied when he informed the company president he did not have that computer with him at the time of termination. Mr. Thompson also acknowledged that he had made a full copy of the contents of his "My Documents" directory from his company laptop onto a hard drive before returning the company laptop the following day.
- [25] The documents contained in the "My Documents" directory included both several hundred Gescan documents, many of which contain information relating to company customers, prices, and other information which Mr. Thompson acknowledged on his examination for discovery he understood to be viewed as confidential information by the plaintiff.
- [26] Mr. Thompson also kept personal information in the "My Documents" directory, including photographs and a number of tax returns.
- [27] The plaintiff maintains that the defendants have failed to produce documents of critical significance to this litigation by failing to list either the Gescan documents copied to the hard drive by Mr. Thompson or a September 3, 2014, email that Mr. Butler sent to an email account of his own with the North Vancouver price book attached.
- [28] Again, on his examination for discovery, Mr. Butler admitted that he took a copy of the plaintiff's price book and emailed to his personal Hotmail account. Mr. Butler claimed that he had never used that document.
- [29] Mr. Thompson admitted on his examination for discovery that one possible use of the company documents that he had copied to the hard drive was for competition with Gescan. However, he asserted that he has never used the documents for that purpose.
- [30] The defendants take the position that there has been no non-compliance with the Rules relating to document disclosure on their part. They say that the plaintiff failed to provide adequate particulars of its claims or to establish an adequate basis for requiring production of the Gescan documents copied to the hard drive by failing to particularize their relevance.
- [31] The defendants say that at the discovery stage, when documents and information were requested, they were subject to a broader obligation disclosure and that they are prepared to produce relevant documents from Mr. Thompson's hard drive, as well as the September 3, 2014, email of Mr. Butler. However, the defendants say that any inspection of the hard drive or Mr. Butler's Hotmail account should be conducted by a forensic expert of their choosing under the supervision of defence counsel.

- [32] They say that it is essential that any order the court makes balance the interest of the plaintiff in obtaining full disclosure with the privacy interests of the defendants, and that this is not a case where it would be appropriate, at least in the first instance, to authorize the necessary inspections of these electronic documents by an expert retained by the plaintiff.
- [33] I do not propose to review the lengthy exchange of correspondence between counsel for the plaintiff and counsel for the defendant with respect to the plaintiff's demands for production of the documents in issue and the defendants' response to those demands. I will, however, refer briefly to the defendants' demand for particulars and the plaintiff's response to that demand as it relates to the documents in issue.
- [34] As I have noted, the defendants took the position that, without further particulars, they were not obliged to list and produce the documents sought on this application. The defendants issued a demand for particulars. The plaintiff was asked to provide particulars of its claim in paragraph 8 of the notice of civil claim. The particulars provided by the plaintiff are as follows:

Further and better particulars of Gescan Confidential Information that was allegedly (a) contained on the laptop; (b) retained by Thompson; and (c) disclosed to Robertson BC.

Response: Thompson's laptop contained large volumes of Gescan Confidential Information . . . Gescan does not have full particulars of such information but it would have included internal and external email, correspondence re proposals and quotes to customers, [profit and loss] statements, marketing and sales plans and strategy in respect of Gescan's BC operations, information about Gescan's cost of product, pricing to customers, and other terms offered to and information, including customer contact information, about Gescan customers.

- [35] The defendants maintain that those particulars were inadequate.
- [36] In my view, the issue of the alleged misappropriation of confidential information of Gescan was squarely raised in the notice of civil claim. The particulars provided by the plaintiff were more than adequate to identify the nature of the Gescan confidential information that the plaintiff alleged that Mr. Thompson had appropriated.
- [37] It ought to have been apparent to the defendants that the documents contained in Mr. Thompson's "My Documents" file and copied to his hard drive were material and relevant to matters in issue and dispute in this litigation, and by those documents, I am referring specifically to the corporate documents as opposed to any private documents that Mr. Thompson also stored in his "My Documents" file.
- [38] Rule 7-1(1) of the Supreme Court Civil Rules provides that:
- Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
- (a) prepare a list of documents in Form 22 that lists

- (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party of record at trial to prove or disprove a material fact . . .
- [39] In my view, the September 3, 2014, email of Mr. Butler attaching the North Vancouver pricing book was clearly a document that could be used by any party of record at trial to prove or disprove a material fact. Material facts in issue include whether or not Mr. Butler had taken a copy of the pricing book. Further, the metadata associated with that document might also prove or disprove whether Mr. Butler had opened that file or sent it to another electronic device.
- [40] Similarly, Gescan documents containing pricing information, client contact information, copies of client contracts, or other information relating to Gescan's competitive position and business practices also constitute documents that could be used by a party of record to prove or disprove a material fact.
- [41] The material facts in issue include whether Mr. Thompson had appropriated such documents and whether or not he had accessed those documents or shared them with others. Again, the metadata associated with those electronic documents and the software on which they were stored is capable of proving or disproving whether and when such documents were opened, accessed, or sent to another electronic device.
- [42] The defendants also had obligations under Rule 7-1(9) to provide a supplemental list of documents, either when it came to their attention that the list was inaccurate or incomplete, or that additional documents had come into their possession or control that could be used by any party of record to prove or disprove a material fact.
- [43] Rule 7-1(11) sets out a process by which a party who receives a list of documents and believes the list should include other documents or classes of documents that are within the listing party's possession, power, or control, and that relate to any or all matters in question in the action may be demanded.
- [44] Although here the plaintiff did not make a demand which fully complied with the requirements of Rule 7-1(11), I am satisfied that the plaintiff's response to the demand for particulars clearly put the defendants on notice that the plaintiff was seeking additional documents relating to matters in question in the action, and provided an adequate identification of the documents or classes of documents sought.
- [45] Finally, I will refer to Rule 7-1(17) which authorizes the court to 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 considers appropriate.
- [46] During the course of submissions, counsel referred to numerous authorities that deal specifically with the principles applicable to the production of electronic documents from a computer hard drive or other electronic devices. From those cases, I draw the following principles:

- 1) A computer hard drive is the digital equivalent of a filing cabinet or documentary repository. While the court may order the production of relevant documents stored on the hard drive, Rule 7-1 does not authorize the court to permit the requesting party to embark upon an unrestricted search of the hard drive: *Desgagne v. Yuen et al.*, 2006 BCSC 955 at para. 20; *Peter Scherle Holdings Ltd. v. Gibson Pass Resort Inc.*, 2007 BCSC 770 at para. 21.
- 2) A computer hard drive as a document storage facility is generally not producible in specie. A hard drive will often contain large amounts of information that is irrelevant to the matters in issue in the litigation, including information that is private and confidential and that ought not to be produced: *Innovative Health Group Inc. v. Calgary Health Region*, 2008 ABCA 219 at para. 33.
- 3) In exceptional circumstances where there is evidence that a party is intentionally deleting relevant and material information, or is otherwise deliberately thwarting the discovery process, the court may order the production of the entire hard drive for inspection by an expert. There must be strong evidence, rather than mere speculation, that one party is not disclosing or is deleting relevant information in order to justify such an order: *Innovative Health Group Inc.* at paras. 3 and 39.
- 4) On an application for production of electronic records from a computer hard drive, the court must balance the objective of proper disclosure with the targeted party's privacy rights: *Greg Court Developments Ltd. v. Sievert*, 2014 BCSC 551 at para. 34; *Desgagne* at paras. 36 to 40; *Park v. Mullin*, 2005 BCSC 1813; *Privest Properties Ltd. v. W.R. Grace & Company*, 1990 CarswellBC 1745 (B.C. S.C.); and *Bishop v. Minichiello*, 2009 BCSC 358.
- 5) Proportionality is a factor for the court to consider in determining the scope of the search parameters: *Greg Court Developments Ltd.* at para. 36.
- 6) Metadata consisting of information stored on the software which shows the use of the computer, such as dates when a file was opened, last accessed, or sent to another device, is information recorded or stored by means of a device and is therefore a document within the meaning of the Rules: *Desgagne* at paras. 28 and 29.
- 7) As a general rule, the producing party's counsel should have the first opportunity to vet for relevance and privilege any information produced from the hard drive or from any other source of electronic data containing private information unrelated to the lawsuit: *Roeske v. Grady*, 2006 BCSC 1975 at para. 27.
- 8) To that, I would add that there may be circumstances where it will be appropriate to depart from the general rule, for example, where there is evidence that the producing party has deliberately destroyed records or is likely to interfere with or thwart the production of relevant information.

- [47] I must balance the privacy interest of the defendants with the plaintiff's right to obtain disclosure of material and relevant documents, and the public interest in ensuring that litigation is conducted with the full disclosure contemplated by the Rules.
- [48] Although I have found that Mr. Thompson was untruthful when he denied to his employer that he had his company laptop with him, and have also found that, despite the denials in the pleadings, Mr. Butler did appropriate and email to his home Hotmail account a copy of the plaintiff's North Vancouver pricing book, I am not satisfied that that conduct is so egregious that the court should depart from the general rule that at least the initial forensic examination of electronic records should be conducted by the producing party's expert and under the supervision of the producing party's lawyer.
- [49] In this case, counsel for the defendants, albeit in my view somewhat belatedly, has acknowledged that the relevant records sought by the plaintiff should be produced. I am satisfied that counsel is fully aware of her duties as an officer of the court and will ensure that the inspection of Mr. Butler's Hotmail account and of the hard drive is conducted in a manner that will produce the relevant documentation.
- [50] The application for the order striking the defendants' response to civil claim is dismissed. The defendants' conduct is not so egregious as to warrant the draconian remedy of an order striking pleadings.
- [51] With respect to the Hotmail account of Mr. Butler, I make the following order: On a date to be agreed, but within 14 days, the defendant Darryl Butler will attend at the office of defendants' counsel and in the presence of a computer forensic expert retained by the defendant:
- (a) log into his online Hotmail account using a computer provided by counsel for the defendant;
 - (b) identify an email received on September 3, 2014, at approximately 9:00 a.m. from his Gescan email account which attached a Gescan price book, which I will refer to as "the email";
 - (c) allow the defendants' computer forensic expert to verify whether the email has been previously opened or forwarded to another account;
- (2) conduct a search of the Hotmail for the word "Gescan" to verify whether there are any other emails containing that word; and
- (3) take screen shots of the in box showing the email and any other emails or attachments to emails containing the word "Gescan", to preserve the displayed information regarding whether such emails had been opened or forwarded, and to make copies of any documents containing such word.
- [52] There will also be an order that the defendant Butler shall not access, allow access to, or otherwise deal with the contents of the Hotmail account prior to the inspection ordered.

- [53] Counsel for the defendant will review the documents produced as a result of the defendants' forensic expert's inspection and will list and produce to the plaintiff a copy of the email and any other relevant documents or attachments discovered as a result of the examination described above.
- [54] MR. HOWARD: My Lord, would that include the screen shots?
- [55] THE COURT: Yes.
- [56] MR. HOWARD: We would get copies of the screen shots -- okay.
- [57] THE COURT: With respect to Mr. Thompson's hard drive, Mr. Thompson will deliver his hard drive to the defendants' counsel. I should say, I understand that has already been done.
- [58] MS. FRANK: Yes, My Lord.
- [59] THE COURT: Defendants' counsel will forward the hard drive to the defendants' forensic expert. The defendants' forensic expert will provide a mirror copy of the hard drive. The defendants' counsel will review the mirror hard drive and will list and produce electronic versions of all relevant documents, including the Gescan documents referenced during Mr. Thompson's discovery, within 14 days of completion of the forensic examination of the hard drive.
- [60] The defendants' forensic expert will also prepare a report setting out its methodology and the results of the examination. That report will be disclosed to the plaintiff.
- [61] The original hard drive and mirror copy will remain in the possession of the defendants' counsel and/or the defendants' forensic expert during these proceedings.
- [62] In the event that plaintiff's counsel is not satisfied with the results of the defendants' forensic examination of the hard drive, the plaintiff will have liberty to apply following receipt of the defendants' forensic expert's report for a further examination of the hard drive by a forensic expert retained by the plaintiff.
- [63] MR. HOWARD: My Lord, may I ask, on the hard drive, one of the big issues for our client was -- for the application was one of the first things we'd want the forensic expert to do is determine has that hard drive been accessed? If so, you know, which files, what's been done, that sort of metadata analysis that you've allowed for in the Hotmail account, and that can be done by the computer expert. I'd ask that that be added to the scope of his report and examination.
- [64] THE COURT: I had fully anticipated that he would perform an examination of the metadata and report on his findings.
- [65] MR. HOWARD: Could you add that, My Lord?

- [66] THE COURT: So I will add to the order a provision that the defendants' forensic expert will review the mirror image of the hard drive in order to determine whether Mr. Thompson has accessed any of the files copied from his Gescan laptop on December 12, 2013, and, if so, record and/or copy information that provides particulars of such access and any use, including copying, deletion, and forwarding of data and documents thereon, and prepare a report identifying the dates and times such files have been accessed.
- [67] There will also be an order that the defendants Butler and Thompson shall attend to be examined for discovery on the information and documents obtained as a result of the forensic inspections ordered and any other relevant matters on a date to be agreed by counsel, within eight weeks of the completion of the defendants' expert's inspection, and that the time spent examining on the results of the orders made today shall not count against the discovery time limits.
- [68] I turn now to the plaintiff's application for special costs. Special costs are awarded to sanction reprehensible conduct in the course of litigation: *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352.
- [69] Reprehensible conduct includes not only conduct that is scandalous or outrageous, but also lesser forms of misconduct deserving of reproof or rebuke: *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.).
- [70] In *Romfo v. 1216393 Ontario Inc.*, 2007 BCSC 1772, rev'd by 2008 BCCA 179 but not on this point, the court made an award of special costs for non-disclosure of documents where the defendants failed to produce relevant documents, were late producing others, and produced a representative for discovery who was uncooperative to the point of rendering his examination a complete waste of plaintiff's counsel's time. The court awarded special costs for the document motions and for preparation and conduct of the wasted examination for discovery.
- [71] Here, as I have noted, the defendants failed to list Mr. Butler's email of the pricing list or any of the Gescan documents which Mr. Thompson copied to his hard drive at the first stage of the document disclosure required under Rule 7-1. The defendants have since acknowledged that Mr. Butler did take a copy of the pricing list and that Mr. Thompson lied when he said he did not have his company laptop with him. The defendants have also acknowledged that the information sought is subject to production. The forensic examinations ordered today will be conducted at the defendants' cost.
- [72] In these circumstances, I am not persuaded that an order for special costs is necessary or that the court should exercise its discretion to order special costs. However, recognizing that, as a result of positions taken by the defendants, the plaintiff has been significantly delayed in obtaining production of material and relevant documents, there will be an order that the plaintiff have the costs of this application in any event of the cause.
- [73] Thank you, counsel.

"Pearlman J."

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