Case In Point

Court Orders for Preservation of Evidence: What You Need to Know

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We are all familiar with the concept of a search warrant, from watching police dramas on TV or in a movie theatre. But you may not know that the courts can issue a type of search warrant to litigants in a civil case. These are called "*Anton Piller*" orders, and they are typically meant to be used where there is good reason to believe that one party to a lawsuit is in possession of relevant documents and might try to destroy them. What's more, these orders are typically granted "*ex parte*", which means that the target of the order does not know that the order is being sought or granted until the order is executed. As an employer, you might find yourself on the receiving end of an *Anton Piller* order to collect and preserve evidence. Some insights on how to obtain, or respond to, an *Anton Piller* were recently provided by the Ontario Superior Court in a decision called Bergmanis v. Diamond & Diamond.

The plaintiff alleged that the defendant law firm breached a professional services contract. It sought and obtained an *ex parte order,* against the defendant (respondent) law firm and two non-parties, permitting the plaintiff's representatives "to enter and remain on [the Respondents'] premises for the purpose of identifying, inspecting, copying, and preserving evidence pertaining to the Respondents' alleged breach of the professional services contract." The non-parties affected by the order brought a motion to set it aside.

Perell J. found that this was not a case which was appropriate for an *Anton Piller* order, and set the order aside. Among other things, His Honour concluded that the plaintiffs had not established the "real possibility" that evidence would be destroyed, which is a required element for the issuance of such an order. Instead, the Court found that there was "virtually no evidence" that the respondents might destroy the materials, nor was there any evidence showing "dishonesty or suspicious circumstances or misappropriation of property." The Court found that at best, this was a case involving a breach of a contract, which may be subject to an award for damages, but did not require an extreme remedy such as an *Anton Piller* order. Justice Perell's comments are instructive:

[47] An interlocutory injunction is an extraordinary remedy and an Anton Piller order is an extraordinary-extraordinary remedy and it is not shelled out simply because the target of the order has relevant information that it has the ability to destroy. […]

[49] It is not and cannot be the case that courts grant intrusive orders akin to a criminal search warrant with nothing more than evidence that there has been a breach of contract, and it is not and cannot be the case that courts grant intrusive orders akin to a criminal search warrant against a non-party, even a non-party who may be the means by which a contract has been breached, with nothing more than evidence that there has been a breach of contract.

[50] *Anton Piller* orders … are not a dime a dozen remedies; they are rare and precious remedies. […]

This case is important for employers, whether you are seeking an *Anton Piller* order or responding to one, because it demonstrates the high standard for obtaining this kind of order and is a stark reminder that civil search warrants should not be lightly sought or granted.