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Court of Appeal of Alberta Upholds Employers Anton Piller Order



By [Albert Nolette](#)

Among the Court of Appeal of Alberta's first decisions of the New Year, was its decision in ***Peters & Co Limited v Ward, 2015 ABCA 6 (CanLII)***, regarding the matter of an *Anton Piller* Order obtained by an employer, an investment firm. The Order permitted the search and seizure of a former employee's residences, vehicles, computer and other digital storage devices, and an office building, for property allegedly taken from the employer.

Anton Piller Orders are highly intrusive and enable a plaintiff to attend at the premises of the defendant, without notice, and take possession of records or items to which the plaintiff asserts a claim.

[1] Furthermore, they are obtained *ex-parte*, meaning in the absence of the party against whom the order is being sought. Accordingly, courts will only grant *Anton Piller* Orders in circumstances that demand their imposition.

Notwithstanding the exceptional nature of *Anton Piller* Orders, Employers have not been deterred from regularly seeking them in cases where employees depart with confidential or sensitive company information, trade secrets or intellectual property. The recent *Peters & Co Limited v Ward* case can be added to this growing list of cases.

This case arose from the employer's concern that its employee had tendered his resignation to accept employment with a competitor and had taken steps to secure for his new employer, work he had commenced prior to his departure. Upon investigation, the employer concluded that the employee had, among other things:

1. Downloaded the employer's entire contact list to his iPhone;
2. Printed various documents of the employer's including sensitive information about active and inactive corporate transactions, client board-level advisory presentations and documents belonging to the employer's clients;

3. Been identified in a security video with his spouse leaving the employer's office with two carts loaded with eight full size bankers boxes and three half sized banker boxes at 10:00 p.m. on the same evening as the employer's Christmas party, which was being held at another location; and
4. Been identified in the same security video with his spouse leaving the employers office several hours later with six full size banker boxes and other material.

In light of these facts and the material before the court, the chambers judge granted the employer an *Anton Piller* Order.

On appeal by the defendant employee, the Court of Appeal was asked to review the decision of the chambers judge and to determine if the employer had indeed met the prerequisites for the granting of an *Anton Piller* Order. The Court of Appeal confirmed this with ease. It concluded that the chambers judge had properly applied the applicable legal test to the facts before him.

The type of materials that were removed and downloaded, as well as the employee's abrupt resignation from his employer to join a competitor, were key findings made by the Court in granting the Order. The Court of Appeal agreed that these facts, among others, clearly established that the employee's actions "were not only suspicious, but [...] in flagrant disregard of his duties under his contract of employment, as well as his fiduciary obligations to the [employer]." [2]

This decision of the Court of Appeal does not modify the well-established law with respect to the test for *Anton Piller* Orders. Nonetheless, it exemplifies when an Employer may ask a court to "exercise the extraordinary power of granting an *Anton Piller* Order" [3] in order to protect and preserve its confidential information.

As illustrated in *Peters & Co Limited v Ward*, employers will have a strong argument to obtain an *Anton Piller* order against a departing employee where they can demonstrate that:

- A strong *prima facie* case exists;
- The damage caused by the employee's alleged misconduct, potential or actual, is very serious;
- There is convincing evidence that the employee has in their possession incriminating documents, items, or property; and
- There is a real possibility that the employee may destroy the employer's material or property before the court's normal discovery process can take place.

The strength of an employer's argument on these factors will be influenced by the nature of the removed or downloaded documents and information, the level and nature of the position held by the employee, the circumstances surrounding the employee's departure and the manner in which the information was taken.

Proving these well-established factors before a court of law is seldom an easy task for employers, who rarely have video evidence like the employer had in the *Peters & Co Limited v Ward* case. Field Law's Labour and Employment and Privacy Groups can advise and assist employers with respect to breaches or suspected breaches of an employee's confidentiality obligations. Field Law's lawyers can also help

employers develop good practices and procedures in the handling and protection of sensitive information.

[1] See generally *Catalyst Partners Inc. v Meridian Packaging Ltd.*, 2007 ABCA 201 and *Celanese Canada Inc. v Murray Demolition Corp.*, 2006 SCC 36.

[2] Para 25.

[3] *CCS Corporation v Secure Energy Services Inc*, 2009 ABQB 275 (CanLII), 476 AR 111, paras 43-44.

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