



## Anton Piller orders require “compelling evidence” to establish dishonesty and a real possibility that a party will destroy evidence

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The rules governing examinations for discovery require litigants to disclose all documents relevant to a particular action to their opponent subject to considerations of solicitor-client privilege, litigation privilege, and settlement privilege. These rules rely on the good faith of the parties not to conceal or destroy any relevant documents. When, however, a party suspects that the other may destroy evidence, it can ask the court for what is called an Anton Piller order without prior notice to its opponent. Such an order compels the party subject to the order to allow access to its premises to search and seize documents specified in the order so that they may be preserved for use in the litigation. Because of their intrusive nature, Anton Piller orders are issued only when the applicant is able to demonstrate: (1) a strong *prima facie* legal claim; (2) very serious damages resulting from the defendant's alleged misconduct in the underlying cause of action in the litigation; (3) convincing evidence that the defendant has the documents that are sought to be seized; and (4) a “real possibility” that the defendant may destroy those documents before the discovery process if they are not preserved.

In its 2007 decision in *Catalyst Partners Inc. v. Meridian Packaging Ltd.*<sup>1</sup>, the Alberta Court of Appeal considered what evidence is required to satisfy the fourth of the above criteria - typically the

main obstacle to obtaining an Anton Piller order. In overturning the lower court's decision and setting aside the Anton Piller order in this case, the Court of Appeal made it clear that strong evidence showing a real possibility the defendant will destroy documents is necessary before such an extraordinary order will be granted.

The underlying litigation arose from a contract under which the defendant, Meridian, blended chemicals for the plaintiff, Catalyst. During their business dealings, Catalyst had given Meridian certain confidential information including chemical formulas for the blending process and a list of its customers. When the parties ended their contract, Meridian did not return the confidential information to Catalyst as required under the contract and Catalyst accused Meridian of misusing its proprietary confidential information. Catalyst then obtained an Anton Piller order on the basis that Meridian might destroy the confidential, proprietary documents relating to certain chemical formulas and customer lists in its possession if those documents were not seized and preserved.

In deciding whether to grant an Anton Piller order, courts typically infer a real risk of destruction of documentary records from evidence of dishonesty or misconduct by the defendant in relation to the underlying dispute. Here Catalyst pointed to five circumstances showing Meridian's dishonesty and a risk that it would destroy confidential documents.

<sup>1</sup> *Catalyst Partners Inc. v. Meridian Packaging Ltd.* [2007] A.J. No. 667 (C.A.)

The Alberta Court of Appeal concluded none of the plaintiff's allegations supported such an inference.

Firstly, the Court of Appeal rejected Catalyst's claim that an intention to destroy documents could be inferred from the fact that Meridian kept its confidential information. The Court accepted Meridian's explanation that it did not return the materials simply because nobody asked it to do so.

The Court also rejected Catalyst's second allegation - that Meridian was complicit in unfair competition against Catalyst by a former customer's employee; finding that the link between the employee's misconduct and alleged dishonesty by Meridian to be tenuous at best.

Similarly, the Court of Appeal refused to draw an inference of dishonesty from Meridian's failure to fully comply with a court order that it return a certain of Catalyst's property.

Finally, the Court of Appeal rejected Catalyst's claims that billing irregularities by Meridian and inconsistencies between the affidavit of Meridian's manager and his testimony on cross-examination indicated dishonesty – finding that they were more indicative of carelessness than dishonesty.

The moral of the story? An Anton Piller order, often called a civil search warrant, is a very invasive and extraordinary remedy. It infringes privacy rights and can adversely affect the reputation of a party in the community. As such, a party seeking an Anton Piller order cannot simply rely on information that they suspect *might* show the defendant in bad light to obtain the order. In order to obtain such an order, the evidence to support an inference of dishonesty and a real risk of the destruction of relevant documents must be very strong and compelling.



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