



Canada's top court removes plaintiff's counsel after its receipt of privileged documents

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In its recent decision in *Celanese Canada Inc. v. Murray Demolition Corp.*¹ the Supreme Court of Canada unanimously favoured protecting solicitor-client privilege over the right to be represented by one's solicitor of choice.

The case arose out of an improperly executed *Anton Piller* order. Sometimes likened to a civil or private search warrant, an *Anton Piller* order authorises a plaintiff's representative to seize documents relevant to pending litigation from a defendant without prior notice in order to prevent the documents from being removed or destroyed. Unlike criminal search warrants, private parties carry out the seizures authorised by an *Anton Piller* order rather than a public authority such as a police service.

During the execution of the *Anton Piller* order in this case, approximately 1,400 of the defendant's electronic documents were copied and some of those copies found their way onto the plaintiff's lawyers' computers. Privilege attached to some of the emails among the seized documents. The plaintiff's lawyers admitted to reading some of the emails but it was not clear whether any privileged communications were actually read.

The plaintiff's solicitors refused subsequent demands by the defendants to return the copies of the documents and provide a list of the individuals who had examined them. Instead, the plaintiff's lawyers simply advised that they had deleted the documents from their systems. It was admitted that 13 lawyers, 3 clerks and 2 law students from the plaintiff's Canadian counsel had access to the privileged documents. An additional 12 lawyers

from the plaintiff's U.S. law firm also had access to the documents.

The defendants subsequently brought a motion to remove the Canadian and U.S. counsel as solicitors of record for the plaintiffs – a motion which was initially dismissed and then proceeded through two levels of appeal before arriving at the Supreme Court of Canada. The Supreme Court of Canada ordered the plaintiff's counsel removed, finding that: 1) A presumption of prejudice arises once it is established that privileged materials came into possession of a party's solicitors; 2) The party in possession of the privileged materials has the burden of proving that no prejudicial materials were examined; and 3) The evidence supporting an assertion that no examination of prejudicial materials occurred must be more than mere undertakings and affidavits deposing to the fact.

It is now clear that, unless it can establish that its solicitors' receipt of an opponent's privileged materials caused no prejudice, a party will end up looking for new counsel to represent it in the action. This highlights the need for extreme care in executing such an extraordinary remedy as an *Anton Piller* order.



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¹ For full text of decision visit: <http://scc.lexum.umontreal.ca/en/2006/2006scc36/2006scc36.html>