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INCREASING PREVALENCE OF ANTON PILLER ORDERS

Picture the following situation: it is a normal workday, when suddenly, a large group of people enter onto your premises. Many of them are wearing uniforms of the Sheriff's Office. They are headed by a lawyer who claims he has an order from the Court that allows his party to search your premises and copy and/or remove whichever documents they wish. The order from the Court he presents to you appears legitimate. What do you do?

The above scenario describes what will likely happen should your Company or workplace be served with an Anton Piller order, also known as an evidence preservation order or a civil search warrant.

As the economy becomes increasingly more knowledge based rather than manufacturing based, the value attached to trade secrets, confidential information, and inside processes becomes ever more valuable.

Further, as this information is often stored electronically and thus is more easily destroyed, the importance of securing such documentation in advance of any litigation becomes more and more important.

Accordingly, the Anton Piller order, the civil equivalent of a search warrant, has become more prominent.

This brief article sets out the uses to which an Anton Piller order can be put, the means by which they can be acquired, and how to respond if you are served with one.

JUSTIFYING AN ANTON PILLER ORDER

Anton Piller orders exist primarily to preserve evidence. As such, they are also commonly referred to as evidence preservation orders. The means by which they preserve evidence is through a Court-sanctioned entry onto another person or company's property in order to search for and copy or remove such evidence. It is an extraordinary power – rarely ordered and expensive to obtain.

The name Anton Piller order derives from an English case, *Anton Piller KG v. Manufacturing Processes Limited*. In that case, the Court set out three essential preconditions for the making of such an order:

1. A strong *prima facie* case.
2. Potential or actual damage that is "very serious" for the Applicant seeking the order.
3. Clear evidence that the Respondents [i.e. the people who will be subject to the order] have in their possession incriminating documents or things and there is a real possibility that they may destroy such material.

The Supreme Court of Canada confirmed that such orders may be granted in Canada in the case of *Celeanese Canada Incorporated v. Murray Demolition Corporation* where it adopted the same test as in the Anton Piller case.

It is usually a safe assumption that when an Applicant is contemplating seeking an Anton Piller order it will be able to establish a strong *prima facie* case and that there will be "very serious" consequences to the Applicant if the information is

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Spring 2011

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Labour & Employment Group.

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destroyed. Accordingly, the key issue is usually whether the proposed Respondent does, in fact, have incriminating or relevant documentation in its possession and if there is a significant chance that such documentation may be destroyed.

Anton Piller orders are granted without notice to the proposed Respondent, since to do so otherwise would be to give them warning and allow them to destroy the evidence in question. This means that Respondents usually have no idea what is coming until the order is actually served upon them and executed.

When a party is served with an Anton Piller order it must comply with it or face contempt of court charges. However, Courts are also very strict in terms of how such orders are executed. An order that is improperly executed may leave the Applicant liable for damages or a declaration that the order was improperly granted or executed.

If, as an employer, you suspect that a departing employee has taken confidential and/or proprietary information, you may wish to consider applying for such an order. If you do so, it will be important for you to be able to identify, with as much particularity as possible, where your former employee and/or his current employer likely has the documents. Moreover, it will be crucial for you to seek legal advice as soon as possible in order to prepare for a quick turnaround.

RESPONDING TO AN ANTON PILLER ORDER

If you find yourself in the position of being served with an Anton Piller order, the following steps are in order:

1. Contact your own solicitors immediately.
2. Ensure that there is an Officer of the Court appointed to oversee the order and that this Officer of the Court is not representing the Applicant's interests. It should be an independent solicitor or similar.
3. Examine the order closely to determine the limits that have been placed upon the Applicant's ability to search, remove and/or copy materials. Often such orders will be limited in scope to certain areas of the premises or to certain documents/records. The Applicant is not usually given *carte blanche* to remove or copy all documents/records on the premises.
4. Similarly, the Applicant may not be entitled to enter into certain areas of the premises or may be entitled only to copy, not remove, certain documentation/records.
5. There should be a date for a rehearing of the matter so that the party being searched may present arguments to the Court regarding the manner in which the order was granted and the search conducted. The order should contain a provision for that eventuality.
6. The order should also be accompanied by a Statement of Claim.
7. Finally, the supervising solicitor should provide a clear explanation of the obligations and limitations of the order.

In conclusion, an Anton Piller order, while rare, is something that any employer could find itself facing one day. In a time when many employers possess substantial volumes of documentation and electronic records, it is important to be aware of the possibility of an Anton Piller order as well as the obligations and rights that flow from such an order.