

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
Direct Energy Marketing Limited)	
)	Paul Le Vay and Justin Safayeni, for the
Applicant/Responding Party)	Applicant/Responding Party
)	
- and -)	
)	
National Energy Corporation)	Brad Teplitsky, for the Respondent/Moving
)	Party
Respondent/Moving Party)	
)	
)	
)	HEARD: May 16, 2013

O'NEILL, J

Reasons on Motion

[1] **Part A: Introduction**

[2] On February 18, 2013 National Energy Corporation filed a motion for:

- a) An Order appointing a computer forensic expert to examine the computer systems of Direct Energy and Jason Frost to determine if the email dated May 9, 2012 from Jason Frost to Mike Kowalski re “Outbound” and the email dated May 8, 2012 from Mike Kowalski to Jason Frost re “Outbound” are authentic, including but not limited to, whether they are or ever have been on the Direct Energy computer systems and the computer(s) of Jason Frost;
- b) An Order directing the employees or agents of Direct Energy to assist the expert with all reasonable requests to fulfill its mandate.

[3] The motion was argued before me at Toronto on Thursday May 16, 2013. At the conclusion of submissions, I reserved my decision pending the release of written reasons. For the reasons which follow, I would dismiss the said motion with costs.

[4] **Part B: Factual Background**

[5] The factual background is generally set out chronologically in paragraph 16 of National Energy Corporation's factum. Other facts are set out by Direct Energy Marketing Limited in Part II of its factum.

[6] In its factum on the motion, under Part 4 – Relief Sought, National Energy Corporation requested the following orders:

- (a) An Order appointing a forensic expert to inspect Direct's computer servers including the vault to determine if there is evidence that the subject email was stored in the Vault or deleted therefrom;
- (b) An Order that a further case conference be held to provide directions regarding the forensic examination.

[7] **Part C: Direct Energy's response to the emergence of the subject email**

[8] The email(s) in question are found at Tab 2(a) in Volume I of the Supplementary Responding Motion Record of the Applicant. The first email is from Mike Kowalski to Jason Frost dated May 8, 2012. The second email is from Jason Frost to Mike Kowalski dated May 9, 2012. National Energy's position is that Direct Energy has not been transparent and forthcoming with respect to the authenticity of the emails. At paragraph 4 of its factum, National Energy set out the following summary with respect to Direct Energy's lack of transparency/disclosure:

- a) Failing to have Mr. Kowalski swear an Affidavit to confirm that:
 - (i) the subject email is not authentic;
 - (ii) to deny that he was the person who sent the audio recording and subject email to Mr. Silver;
 - (iii) to deny that he sent anonymous emails to Mr. Silver in February of 2013 asking for money in return for his assistance; and,
 - (iv) to deny that Direct tipped him off regarding the Bell Order and the Anton Piller Order;

[9] In its factum, National Energy went on to submit that the lack of transparency with respect to the email(s) was established on the basis that:

- i) Instead of having Mr. Kowalski swear an Affidavit, Direct decided to introduce his information through Mr. Frost on information and belief on issues other than those referenced above.
- ii) Refusing to permit National's IT expert to inspect Mr. Kowalski's or Mr. Frost's work laptop computers.

- iii) Mr. Green, Direct's IT expert, initially failing to disclose whether he had examined Mr. Kowalski's work laptop for any record of Mr. Kowalski's having connected external storage devices (ie USBs) to the laptop and only later admitting, when the question was raised by National's IT expert, Mr. Warren, that he had in fact searched for this and found a record of numerous devices having been connected.
- iv) Refusing to permit National's expert IT expert to inspect its computer servers including the Vault.
- v) Claiming that Mr. Alvarado conducted a forensic review (or any review for that matter) of Direct's computer servers (the "Vault") when that was obviously not the case;
- vi) Failing to provide an Affidavit from the person at Direct who has the most involvement and knowledge of the Vault (Mr. Cahill) and who, according to Mr. Green, actually performed the extraction of the emails between Mr. Frost and Mr. Kowalski;
- vii) Instead of adducing evidence directly from Mr. Cahill, producing an Affidavit from its IT expert, Mr. Green, whose Affidavit is based almost entirely on information and belief from Mr. Cahill and others and who knows virtually nothing about the Vault;
- viii) Failing to produce any independent evidence to corroborate its claim that emails cannot be deleted from the Vault despite Mr. Warren's request for same;
- ix) Refusing to produce relevant documents;
- x) Stating that it had produced all of Mr. Frost's documents regarding Direct's "Customer Awareness Campaign" when it in fact had not done so; and,
- xi) Likely informing Mr. Kowalski about the Bell Order and the Anton Piller Order.

[10] The steps taken by Direct Energy to determine origin, authenticity and background with respect to the subject email(s) is set out at pages 8 through 17 of Direct Energy's factum. Direct Energy's position is that the email(s) are not authentic, were never exchanged by Mr. Kowalski or Mr. Frost, do not appear on Direct Energy's live exchange and do not appear in its Vault.

[11] **Part D: Analysis and Conclusion**

[12] National Energy's position is that the email(s) is authentic on its face. Both Jason Frost and Mike Kowalski had the ability to make an email exchange, and the reference to "Outbound Calls" is reference to a real event. Counsel referred to the email which Mr. Silver received in February 2013 from the IT address in the vicinity of Mr. James' residence. The sender of that email referenced an earlier communication with Mr. Silver

and delivery of the USB port containing details with respect to the outbound calling program.

- [13] In this context, counsel questioned why Mr. Kowalski would not have provided a direct affidavit on this motion, denying his involvement in the sending or receiving of the subject emails.
- [14] Counsel went on to submit that extractions from the Vault were actually carried out by the Wintel team members, and not by Mr. Green or Mr. Alvarado. Counsel questioned Mr. Green's level of expertise, and he submitted that Mr. Alvarado could not have conducted a forensic extraction of emails from the Direct Energy Vault.
- [15] Counsel further submitted that based on the affidavit materials from Thomas Warren sworn February 4, 2013 and April 19, 2013, the evidence adduced by Direct Energy regarding its review of the Vault was unreliable. In paragraph 15 of its factum, National Energy stated that based on Mr. Warren's evidence, its position was:
- (a) no forensic review of the Vault was conducted;
 - (b) neither Mr. Alvarado nor Mr. Green extracted any information from the Vault
 - (c) Mr. Green's and Mr. Alvarado's Affidavits are largely if not entirely based on hearsay, most of which is inadmissible; and,
 - (d) Mr. Warren, National's IT expert, is the only person with any real expertise in working with the Symantec Vault software and his virtually uncontradicted evidence is that whoever examined the Vault failed to carry out several important functions such that there is no reliable evidence as to whether the subject email is or is not in the Vault.
- [16] I accept Direct Energy's position that the affidavit and documentary evidence filed on the motion supports the conclusion that:
- i. There was no trace found of the subject email(s) in the Vault or the live exchange (January 2013 extraction and review and July 2012 extraction and review);
 - ii. There was no trace found of the subject email(s) after a forensic examination of Direct Energy's devices.
- [17] On January 21, 2013, after the review of the Vault and the live exchange by Mr. Alvarado, and after Mr. Frost and Mr. Diplock had finalized their affidavits regarding the authenticity and contents of the subject email(s), counsel to Direct Energy wrote to counsel to National Energy and advised that Direct Energy's internal investigation "points to the conclusion that exhibit 14 [the Subject Email] is not authentic and is, in fact, a fabrication".

[18] I also accept that on the record, there was no trace found of the call recording, the subject email or the anonymous emails in any of the materials seized under the two Anton Piller orders.

[19] Further, I accept the submission that the relief that National Energy is seeking on this motion is extraordinary, to the extent that an order is being sought for a forensic inspection and examination of a competitors computer services. It is to be borne in mind that my task on the motion is not to authenticate or otherwise declare invalid the subject email(s). Rather, with respect to the motion to inspect, I accept the proposition that an inspection as invasive as the one proposed ought not to be undertaken simply on the basis of suspicion, speculation or conjecture. At paragraphs 109 and 110 of its factum, Direct Energy stated:

Accordingly, in the circumstances of this case, the threshold test can be stated as such:

Has National put forward evidence to satisfy this court that – notwithstanding the evidence provided by Direct Energy on this motion – there is a real likelihood that the Subject Email both existed at one point, and then was subsequently deleted from Direct Energy’s computer servers (namely, the Vault)?

If the threshold test is satisfied, then the Court has discretion to decide whether to ultimately grant relief by weighing the probative value of the order being sought against other relevant interests, including proportionality, the delay and expense to the parties, privacy concerns, access to justice, and the fair and efficient use of scarce resources in the administration of justice.

[20] I adopt for the purposes of this motion, both the threshold test proposed and the weighing process outlined with respect to whether the court ought to exercise its discretion to grant the relief claimed.

[21] As to the issue whether there is any real likelihood that the subject email(s) existed, I accept Direct Energy’s summary of the evidence on the record before me as set out at paragraph 112 (a) through (h) inclusive in its factum. As to whether there is any real likelihood that the subject email(s) was deleted from the Vault, I conclude on the materials before me:

- i) There is no evidentiary basis to conclude that the Vault’s configuration was changed by an administrator so as to enable users to delete emails including the emails in question.

[22] I am satisfied that the extraction and review process set out and described by Direct Energy was sufficient in all of the circumstances. In that regard, I accept counsel’s position that on the record before me, the order sought by National Energy is disproportionate and unnecessary, and the value to be gained through the order proposed is limited. In this regard, I reproduce the principle of proportionality summarized at paragraph 134 of Direct Energy’s factum:

The principle of proportionality now informs the application of all Rules of Civil Procedure. In *Warman v. National Post*, the Court explained the importance and impact of this principle as follows:

The time has come to recognize that the “broad and liberal” default rule of discovery, has outlived its useful life. It has increasingly led to unacceptable delay and abuse. Proportionality by virtue of the recent revisions has become the governing rule. To the extent that there remains any doubt of the intention of the present rules I see no alternative but to be explicit.

Proportionality must be seen to be the norm, not the exception – the starting point, rather than an afterthought. Proportionality guidelines are not simply “available.” The “broad” and “liberal” standard should be abandoned in place of proportionality rules that make “relevancy” part of the test for permissible discovery, but not the starting point.

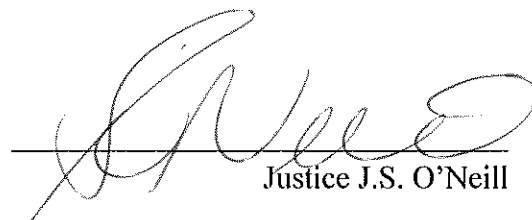
Warman v. National Post CO., 2010 ONSC 3670.

[23] As to the issue of deleting data from within the Vault, I note in particular paragraphs 53, 73 and 75 from Mr. Green’s affidavit sworn March 6, 2013, as well as the question and answer document found at Tab 52 of National Energy’s motion record. This document speaks directly to Direct Energy’s position that an email that is deleted and that is stored in the Vault “will always be retained and accessible via the Enterprise vault archive explorer as we have the global setting disabled preventing users from deleting items from their archives, and this applied to all vault users including administrators.”

[24] *Conclusion*

[25] For the reasons herein given, I conclude that National Energy’s motion is to be dismissed with costs. The costs of this motion are to be fixed by me following my review of submissions from Direct Energy and National Energy. Direct Energy shall forward its Bill of Costs and cost submissions to the Trial Coordinator at Parry Sound by June 21, 2013. National Energy shall file its response, if any, by July 2, 2013.

[26] Order accordingly.


Justice J.S. O’Neill

CITATION: Direct Energy Marketing Ltd v. National Energy Corp., 2013 ONSC 4048

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Direct Energy Marketing Limited

Applicant/Responding Party

– and –

National Energy Corporation

Respondent/Moving Party

REASONS ON MOTION

Justice J.S. O’Neill

Released: June 11, 2013