

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

THE HONOURABLE)
)
JUSTICE LEDERMAN)

FRIDAY, THE 8TH
DAY OF AUGUST, 2008

B E T W E E N:



CANADIAN NATIONAL RAILWAY COMPANY

Plaintiff

and

SCOTT PAUL HOLMES, JENNIFER LYNN PARISIEN also known as
JENNIFER LYNN FLYNN in her personal capacity and as the sole proprietor
and operating as EFFICIENT CONSTRUCTION, JANICE SHIRLEY
MAUREEN HOLMES, MURRAY FUSSIE, SCOTT ALBERT POLE, RICK
SOUSA in his personal capacity and operating as TRAX UNLIMITED,
MICHAEL SOUSA in his personal capacity and operating as TRAX
UNLIMITED, JULIE SOUSA, 2035113 ONTARIO LTD, 1322474 ONTARIO
LTD. operating as COMPLETE EXCAVATING LTD., 1340619 ONTARIO
LTD. operating as MONTEREY CONSULTING & CONSTRUCTION LTD.,
2071438 ONTARIO LTD. operating as COMPLETE TRAX, THE SCOTT
HOLMES LIVING TRUST and THE JENNIFER LYNN FLYNN LIVING
TRUST

Defendants

ORDER

THIS MOTION, made by the Plaintiff for an Order requiring the Defendants, Scott Paul Holmes, Jennifer Lynn Parisien, Jennifer Lynn Flynn, 2035113 Ontario Ltd., 1322474 Ontario Ltd., (operating as Complete Excavating Ltd.), 1340619 Ontario Ltd., (operating as Monterey Consulting & Construction Ltd.), Jennifer Lynn Parisien, (operating as Efficient Construction),

the Scott Holmes Living Trust and the Jennifer Lynn Flynn Living Trust (referred to collectively as “the AP Defendants”), to permit representatives of the Plaintiff, its lawyers, and other necessary persons, to enter and remain in the premises of the AP Defendants for the purpose of identifying, inspecting, removing and preserving certain evidence set out in Schedule “A1” hereto pertaining to invoices submitted by the AP Defendants to the Plaintiff for payment, was heard this day at Toronto, Ontario.

ON READING the Statement of Claim, the Affidavit of Michael Farkouh, the Affidavit of Scott C. Hutchison and the undertaking of Scott C. Hutchison, on hearing the submissions of the lawyers for the Plaintiff, and on noting the undertaking of the Plaintiff to abide by any Order this court may make concerning damages arising from the enforcement of this Order,

AND ON being satisfied that certain of the AP Defendants have been served personally and attempts have been made to bring this motion to the attention of all AP Defendants,

1. **THIS COURT ORDERS** that the time for service and filing of the motion materials is abridged.
2. **THIS COURT ORDERS** that further personal service of this motion is not required.
3. **THIS COURT ORDERS** that the AP Defendants, their officers, directors, servants, agents, employees and anyone else acting on their behalves, and any person(s) appearing to be in charge of the premises known municipally as:

- (a) **1027 Charlotteville Road 5, RR #2, Simcoe, Ontario, N3Y 4K1** (address relating to Scott Paul Holmes, Jennifer Lynn Parisien, Jennifer Lynn Flynn, Jennifer Lynn Parisien (operating as Efficient Construction), The Scott Holmes

Living Trust, and The Jennifer Lynn Flynn Living Trust, 2035113 Ontario Ltd., and 1322474 Ontario Ltd. (operating as Complete Excavating Ltd));

(b) **786 Charlotteville W. 1/4, R.R. #1, St. Williams, Ontario, N0E 1P0** (address relating to 1340619 Ontario Ltd. (operating as Monterey Consulting & Construction Ltd.));

(c) any storage units located on the above premises or elsewhere for which the AP Defendants have rights of access.

(known collectively as “the Premises”) shall forthwith permit entry into the Premises to the persons authorized herein for the purposes of searching for, identifying, inspecting, preserving, reproducing, and removing into the custody of the Independent Supervising Solicitor (as defined in paragraph 2 herein), any and all documents, items, devices, equipment and any component thereof, relating to the issues in this action, which are listed in Schedule “A1” hereto (“the Evidence”) or which the Plaintiff’s lawyers believe to be the Evidence.

4. **THIS COURT ORDERS** that for the purposes of this Order, the AP Defendants and any person(s) appearing to be in charge of the Premises shall grant entry and permit re-entry into the Premises during the times and in the manner specified in this Order to the following persons, collectively or individually, at the same time or different times (such persons hereinafter collectively referred to as “Authorized Persons”):

(a) two lawyers, students-at-law, or law clerks from the law firm of Wishart Law or the law firm of Lenczner Slaght Royce Smith Griffin LLP, lawyers for the Plaintiff;

- (b) two lawyers from the law firm of Stockwoods LLP (“the Independent Supervising Solicitor”), and such other persons as they may require;
- (c) two specialized individuals designated by the Plaintiff for the purpose of identifying the backhoes, Brandt trucks or Mack trucks, or for the purpose of identifying the computers used to generate the invoices submitted to CN; and
- (d) two specialized individuals with training in forensic computer analysis.

5. **THIS COURT ORDERS** that any person with a key or ability to open any part of the Premises that is locked will, upon being served with this Order, attend at that place and provide access.

6. **THIS COURT ORDERS** that the Independent Supervising Solicitor shall act as an officer of the court in respect of the observances and implementation of the terms of this Order.

7. **THIS COURT ORDERS** that all persons responsible for service and execution of this Order be entitled to take all necessary reasonable measures to enforce it and to reasonably prevent or remove any impediment to its execution.

8. **THIS COURT ORDERS** that the Ontario Provincial Police (“OPP”) and/or other law enforcement authorities, provide assistance and cooperation to the Independent Supervising Solicitor, including, but not limited to assistance required to:

- (a) locate, identify, access and enter the Premises; and
- (b) locate and identify the AP Defendants, their officers, directors, servants, agents, employees and anyone else acting on their behalves.

9. **THIS COURT REQUESTS** the aid and recognition of any court or any judicial, regulatory or administrative body in any province or territory of Canada, and any judicial, regulatory or administrative tribunal or other court constituted pursuant to the Parliament of Canada or the legislature of any province and any court or any judicial, regulatory or administrative body of the United States of America and the states or other subdivisions of the United States and any other nation or state to act in aid of and to be complementary to this Court in carrying out the terms of this Order.

10. **THIS COURT ORDERS** that this Order may only be served and the initial entry to the Premises made between 9:00 a.m. and 5:00 p.m. on a weekday. The Authorized Persons may remain on the Premises after 5:00 p.m. in order to complete the execution of this Order.

11. **THIS COURT ORDERS** that following the service of the Order on any person(s) appearing to be in charge of the Premises, no entry to the Premises shall be permitted unless there are present at the time of the entry the Authorized Persons, or any of them, provided that one Independent Supervising Solicitor and such other persons as he may require are also present.

12. **THIS COURT ORDERS** that the AP Defendants, their officers, directors, servants, agents, employees, and anyone else acting on their behalves, and any person(s) appearing to be in charge of the Premises shall allow the Authorized Persons to remain on the Premises until further Order of this Honourable Court, to exercise their rights and discharge their duties as set out in this Order.

13. **THIS COURT ORDERS** that the AP Defendants, their officers, directors, servants, agents, employees, and anyone else acting on their behalves, and any person(s) appearing to be in charge of the Premises shall allow the Authorized Persons to record by audio, video or

photograph the Evidence, the Premises, and all acts, conversations and discussions occurring in the course of the Authorized Persons' search of the Premises and that relate to this Order between the time this Order is served and the completion of the search, with the exception of communications between the AP Defendants and their lawyers.

14. **THIS COURT ORDERS** that if it is deemed impracticable by the Independent Supervising Solicitor in his discretion, to search for, identify, inspect or reproduce Evidence located on any of the AP Defendants' computers, CD-ROMs or other electronic media at the Premises, the Independent Supervising Solicitor shall be entitled to remove such electronic Evidence into its possession for these purposes for a period of 72 hours or such further period as may be agreed to by the parties or ordered by this Honourable Court.

15. **THIS COURT ORDERS** that at the time of initial entry into the Premises, the AP Defendants and any person(s) appearing to be in charge of the Premises shall be served with this Order, the Statement of Claim herein, and a copy of the Motion Record containing the Evidence by which the Order was obtained, with only one lawyer of the Plaintiff and the Independent Supervising Solicitor being present at the time of initial entry into the Premises.

16. **THIS COURT ORDERS** that upon service of this Order, the persons served shall forthwith be advised in plain language by the Independent Supervising Solicitor of the nature of the Order and their legal rights, including the right to seek legal advice and to segregate documents over which legal privilege is claimed ("Privileged Documents"), provided that they do so forthwith, and while seeking legal advice and segregating Privileged Documents may refuse entry to the Premises for a period not to exceed two hours to all of the Authorized Persons except for the Independent Supervising Solicitor and such other persons as he/she may require,

who shall be and hereby are authorized to enter the Premises and to take such steps as they deem necessary to secure and preserve the Evidence therein and ensure that no steps are taken to alter, deface, discard, conceal or destroy any of the Evidence while the AP Defendants and/or persons served are seeking legal advice.

17. **THIS COURT ORDERS** that the AP Defendants and their lawyers shall be entitled, although not obligated, to be present during the search.

18. **THIS COURT ORDERS** that any Privileged Documents identified as provided for in paragraph 16 shall be provided directly to the Independent Supervising Solicitor and sealed pending further Order of this Honourable Court.

19. **THIS COURT ORDERS** that the Plaintiff's lawyer shall ensure that a list is made of all the Evidence that is seized or delivered up pursuant to this Order and shall serve a copy of that list on the AP Defendants or the AP Defendants' lawyers.

20. **THIS COURT ORDERS** that upon service of the Order, the AP Defendants and any persons upon whom the Order is served shall forthwith disclose to the Authorized Persons and grant access and deliver up to the Authorized Persons any and all of the Evidence, where situate, including but not limited to the whereabouts of all the Evidence, whether under possession, custody or control of the AP Defendants or any third party.

21. **THIS COURT ORDERS** that upon service of this Order, the AP Defendants and any persons upon whom the Order is served, shall forthwith render any necessary assistance to the Authorized Persons to locate, decode, access and decrypt the Evidence and any and all information or electronic data to which the Authorized Persons may not have ready and

immediate access, including the provision of all keys, identification codes, passwords, pass phrases, and any other such information or knowledge necessary to achieve access thereto.

22. **THIS COURT ORDERS** that upon service of this Order, the AP Defendants and any persons upon whom the Order is served, shall forthwith render any necessary assistance to the Independent Supervising Solicitor and the persons assisting him to enable them to effectively carry out their responsibilities under this Order.

23. **THIS COURT ORDERS** that all Evidence seized pursuant to this Order, including the Privileged Documents, shall be held in the custody of the Independent Supervising Solicitor pending the trial of this action, or until such time as this Honourable Court orders otherwise.

24. **THIS COURT ORDERS** that the AP Defendants and/or their lawyers shall be provided with reasonable access to all Evidence in the custody of the Independent Supervising Solicitor for the purpose of examining and making copies of the said Evidence in the presence of a representative of the Independent Supervising Solicitor.

25. **THIS COURT ORDERS** that the Plaintiff shall not be permitted to access the Evidence seized prior to the delivery of the AP Defendants' Affidavit of Documents, unless the AP Defendants consent or this Honourable Court orders otherwise.

26. **THIS COURT ORDERS** that the Evidence seized shall be used by the Plaintiff only for the purposes of this action, unless this Honourable Court orders otherwise.

27. **THIS COURT ORDERS** that unless otherwise ordered by this Honourable Court, the AP Defendants, any of their officers, directors, servants, agents or employees, and any persons served with this Order, shall not directly or indirectly, by any means whatsoever:

- (a) remove any Evidence from the Premises, erase or delete from any means of electronic storage, or transmit any of the Evidence from the Premises, or alter, deface, discard, conceal or destroy in any manner any of the Evidence; and
- (b) touch, activate, or operate any computer equipment either locally or remotely from any location, or access or alter any text, graphics, electronic data, information, or other content of any webspace site or their databases or any electronic mail, news group or Internet relay chat communications, or other information, instructions or data stored in any location remote from the Premises that may contain or constitute the Evidence.

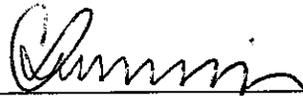
28. **THIS COURT ORDERS** that, in order to give effect to the Order, any person who is ordered not to do something shall not do it personally, through others acting on his behalf, or on his instructions, or with his encouragement or acquiescence, or in any other way.

29. **THIS COURT ORDERS** that the terms of this Order shall remain in force and be effective for ten (10) days and shall thereafter terminate unless the Plaintiff returns to this Honourable Court on or before August 18, 2008 to apply to continue this Order.

30. **THIS COURT ORDERS** that the AP Defendants or any person with notice of this Order may apply to this Honourable Court at any time to vary or discharge this Order or so much of it

as affects such person, but anyone wishing to do so shall provide the Plaintiff's lawyers with at least 24 hours notice thereof.

31. **THIS COURT ORDERS** that the Independent Supervising Solicitor, upon receipt of a request in writing from any party, shall within seven business days of receiving such request, deliver a report which describes the execution of this Order, who was present at the execution and what materials were reproduced and/or removed into the custody of the Independent Supervising Solicitor, and deliver a copy of the report to the parties, or their lawyers of record and that the costs of the preparation of such a report shall be them paid by the party requesting the report unless ordered otherwise by this Honourable Court.



(Signature of Judge)

C. Irwin, Registrar

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:

LE / DANS LE REGISTRE NO.:

AUG 08 2008

PER/PAR:



SCHEDULE A1
SCHEDULE TO THE ANTON PILLER ORDER

This Schedule "A1" to the Order, in the form of an Anton Piller Order, in *Canadian National Railway Company v. Scott Holmes et al*, Case No. CV-08-7670-00CL, lists the Evidence to be identified, inspected, removed and preserved:

All documents, items, devices, computers, equipment, vehicles and any component thereof, including but not limited to invoices, time records, equipment rental or leasing agreements, external data storage, and fleet records, in the AP Defendants' possession or control, relating to the provision of construction and maintenance services, labour, and/or equipment.

Any computer hardware or computer-related equipment capable of creating or storing information in electronic or magnetic form including, but not limited to hard disks, floppy disks, cassette tapes, magnetic tapes, integral RAM or ROM units, and any other permanent or transient storage devices; any computer software, documentation, operating logs and instruction manuals relating to the operation of the computer; any computer software, documentation, operating logs and instruction manuals relating to the operation of the computer; any electronically stored communications or messages, including any of the items to be seized that may be found in electronic mail ("e-mail") or other correspondence; and any and all paper copies of the above.

CANADIAN NATIONAL RAILWAY COMPANY
Plaintiff

-and- SCOTT PAUL HOLMES et al.
Defendants

Court File No. CV-08-7670-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIT)**

PROCEEDING COMMENCED AT
TORONTO

ORDER

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