

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

WALDEN ELECTRICAL LTD.

Respondent/Plaintiff

- and -

LOPES MECHANICAL LIMITED, DOUG
HINDS, NORM KAUMANEN, GUY
THERRIEN, FELIX LOPES JR. and GUY
CHRETIEN

Applicants/Defendants

)
)
) Michael S. Hebert and Susanne M.
) Sviergula, for the Respondent/Defendant
)
)

)
)
)
) Scott C. Hutchison, for the
) Applicants/Defendants Lopes Mechanical
) Limited, Felix Lopes Jr. and Guy Chretien

)
)
)
)
) Martin James & Dawn Dubois for the
) Applicants/Defendants Doug Hinds, Norm
) Kauhanen and Guy Therrien

)
)
)
) HEARD: June 9 and June 12, 2006

Regional Senior Judge J. S. Poupore

Decision on Motion

[1] On January 9, 2006, counsel for Walden Electric Ltd. ("Walden") appeared before Justice H. S. Polowin of the Ontario Superior Court sitting in Ottawa, to advance an ex parte in camera motion for an Anton Piller order. The purpose of the order was to authorize Walden to search the business premises of Lopes Mechanical Ltd. ("Lopes") and the home of Doug Hinds ("Hinds") for specific articles identified in the order which, Walden alleged, had been taken from Walden.

[2] Based on the materials presented and the arguments of counsel for Walden, Justice Polowin made the order sought.

[3] On January 12, 2006, the order was executed at Lopes business premises and the Hinds home. This Court also varied the order that day by transferring the file to Sudbury, appointing a local law firm as the repository of the seized materials, modifying the terms under which certain electronic data could be imaged, and extending the time for execution of the order to 4:00 p.m. on Saturday, January 14, 2006.

[4] The Defendants now move to set aside the Anton Piller order.

The Parties

[5] The Plaintiff Walden is an Ontario Corporation and maintains its head office in the Regional Municipality of Sudbury. It has carried on business since 1957 and specializes in heavy industrial, electrical sub-surface work for the mining industry.

[6] The Defendant Lopes is an Ontario Corporation and maintains its head office in the Regional Municipality of Sudbury. It has carried on business since 1976, primarily in the field of surface mechanical contracting in the mining industry.

[7] The Defendant Hinds is an individual residing in the Regional Municipality of Sudbury and is a trained electrician. He was an employee of Walden from 1989 to July 5, 2004, holding the position of General Foreman for almost the entirety of his tenure. Since July 5, 2004, Hinds has been employed by Lopes.

[8] The Defendant Norm Kauhanen ("Kauhanen") is an individual who resides in the Regional Municipality of Sudbury and is a trained electrician. He was an employee of Walden from 1995 to February 4, 2005, holding the position of Estimator for all quotations submitted by Walden. Since February 4, 2005, Kauhanen has been employed by Lopes.

[9] The Defendant Guy Therrien ("Therrien") is an individual who resides in the Regional Municipality of Sudbury and is a trained electrician. He was an employee of Walden from 1999 to February 24, 2005 and held the position of Foreman from July of 1999. Since February 24, 2005, Therrien has been employed by Lopes.

[10] The Defendant Felix Lopes Jr. ("Lopes Jr.") is an individual who resides in the Regional Municipality of Sudbury and, at all material times, was a Director of Lopes.

[11] The Defendant Guy Chretien ("Chretien") is an individual who resides in the Regional Municipality of Sudbury and, at all material times, was an employee of Lopes.

Background

[12] Walden is one of approximately five suppliers of heavy industrial electrical work to the mining industry in and around the Greater Sudbury area. Following an ownership change in 1986, Walden's sales grew from \$250,000 to \$300,000 per year to \$3 to \$4 million per year throughout the 1990s.

[13] Walden generates work by submitting bids and quotations in response to tenders put forth by the various mining companies. Typically, Walden submits quotations as a subcontractor to a number of general or mechanical contractors bidding for a particular project.

[14] During the 1990s and until mid-2004, Lopes subcontracted electrical work to Walden. Walden also subcontracted with other general and mechanical contractors when they were awarded the contract.

[15] The team at Walden who prepared all quotations was comprised of the owner of Walden, Paul Ferguson ("Ferguson"), Hinds and Kauhanen. Hinds was Ferguson's second in command at Walden. Kauhanen obtained all his training in industrial and mining contracting and acquired all his knowledge as to how to estimate this type of work to prepare a quotation while employed at Walden.

[16] Lopes specialized in surface mechanical contracting work. At some point in the spring of 2004, Lopes commenced operating an electrical division.

[17] Lopes continued to bid on projects as the mechanical contractor, but was now able to include the electrical component in its own quotation, rather than subcontract it out to another electrical contractor.

[18] On July 5, 2004, Hinds, without any notice or warning, abruptly resigned from his employment at Walden. He advised that he would be taking some time off. Immediately after his resignation, Hinds began working for Lopes.

[19] On February 4, 2005, Kauhanen, without any notice or warning, abruptly resigned from his employment at Walden. Immediately after his resignation, Kauhanen began working for Lopes.

[20] On February 24, 2005, Therrien, without any notice or warning, abruptly resigned from his employment at Walden. He advised that he was having health problems. Immediately after his resignation, Therrien began working for Lopes.

[21] During the period shortly before Hinds' departure from Walden, to and including the departure of Kauhanen and Therrien from Walden, Walden and Lopes were submitting quotations for a number of the same projects for the mining industry in Sudbury.

The Motion to Set Aside

[22] The Defendants, Applicants in the motion, move to set aside the Anton Piller order for the following reasons:

The Plaintiff has acted with a recklessness to the truth that is inconsistent with the obligation placed on a party who seeks relief on an ex parte basis. In particular:

- (i) The Plaintiff withheld from Justice Polowin a chain of correspondence dating back to 2004 between the solicitors for the parties setting out the position of the defendants on the matters in issue and disclosing the partisan role of the independent solicitor offered to the Court by the Plaintiff.
- (ii) The Plaintiff misrepresented or withheld relevant 'forensic' information related to (a) photocopying done around the time of some departures; (b) an email address appearing in an ad placed by the Defendant Lopes Mechanical; and (c) the forensic value of trace evidence said to be consistent with a 'wiping' software existing on a computer of the Plaintiff and whether such software had been used.
- (iii) The Plaintiff misrepresented to Justice Polowin that an "independent" solicitor would supervise the execution of the Order. This assurance – specifically sought by Justice Polowin – was addressed by hiring the lawyer who had previously acted against Lopes Mechanical in this very matter.
- (iv) The Plaintiff withheld relevant information available to it about the circumstances of the employment of Hinds and Therrien, in particular that their employment was governed by a Collective Agreement that provided for specific terms related to the termination of their employment;
- (v) The Plaintiff misled Justice Polowin as to the nature of the order they sought, telling Her Honour that it was limited to the recovery of property taken from the Plaintiff. The order was then used to seize documents in no way connected to the Plaintiff.
- (vi) The Plaintiff provided Her Honour with a draft order that contained a number of legally questionable provisions, including:
 - (a) an interlocutory injunction inconsistent with Rule 40.01;
 - (b) a provision for forced entry inconsistent with the law governing Anton Piller orders.
- (vii) There were a number of lesser misrepresentations or omissions which further evidenced the recklessness of the Plaintiff.

Discussion

Withholding Correspondence between Solicitors

[23] The Plaintiff withheld from Justice Polowin a chain of correspondence between the then solicitor for the Plaintiff, Mr. Reynolds Mastin ("Mastin"), and the solicitors for Lopes. Mastin was retained by Walden as early as August 2004. The chain of correspondence sets out the claim as it related to the departure of Hinds and another former employee of Walden and, more importantly, sets out the Defendants' response to that claim.

[24] In addition to setting out the Defendants' position in respect of the claim, this letter put the Plaintiff on notice that the Defendants had counsel and were prepared to defend the action.

[25] Further, this chain of correspondence demonstrated that the Plaintiff contemplated bringing an action against Lopes for damages one year prior to obtaining the Anton Piller order.

Independent Solicitor

[26] During the hearing on the ex parte motion, the Plaintiff's counsel assured Justice Polowin that, in addition to the Plaintiff's counsel, an "independent and separate" solicitor would be present at each location where the order was executed. Below are two excerpts from the transcript of the hearing before Justice Polowin referring to the said independent solicitor.

MR. HEBERT: Yeah, including a personal undertaking to see that it's done properly. I can advise you that what is being intended is that not only is the undertaking given if the order is granted, it's our intention to not only have myself present, but to have an independent and separate solicitor. . .

Transcript of Ex Parte Hearing before Justice Polowin (p. 28)

THE COURT: Okay. So I'm comfortable with that. The idea of privileged communications that you've noted in your Order, I'm now – I wasn't comfortable with it when I read it on Friday, but now that you tell me that there's going to be an independent solicitor at each location, I am comfortable with it, because basically, anything that you come across that smells of being privileged, the independent solicitor puts it in an envelope . . .

Transcript of Ex Parte Hearing before Justice Polowin (p. 41)

[27] Unbeknownst to Justice Polowin, however, the solicitor proffered by the Plaintiff to Her Honour as the "independent and separate" solicitor for the Lopes premises was Mastin, who was in fact the Plaintiff's lawyer.

[28] Mastin acted for the Plaintiff at the time of the before-mentioned undisclosed correspondence being exchanged with Lopes solicitor. His involvement continued up to the time of the motion, acting as a local agent for the Plaintiff's Ottawa based counsel. He commissioned affidavits and was asked to look after logistical matters in respect of the Anton Piller order, including identifying additional counsel to act as "independent solicitors" and engaging the services of the Sudbury Police to assist in the execution of the order.

[29] On Mastin's recommendation, the Plaintiff's solicitor retained another Sudbury lawyer to act as an independent and separate solicitor to attend at the Hinds' residence for the execution of the order. This second solicitor's firm had previously acted for the principal of Walden.

The Scope of the Evidence Seized

[30] In the course of submissions at the ex parte hearing of the Anton Piller motion, Plaintiff's counsel repeatedly represented to the Court that the evidence sought by the Plaintiff under the order was limited to the property allegedly taken from the Plaintiff, and it is clear from Justice Polowin's comments that her comfort with the order depended on this representation. The following are relevant exchanges from the transcript of the hearing:

MR. HEBERT: [...] what the order is seeking is limited – the designated materials, we've limited them to just exactly what it was that we say is our property, and what it was that we say was misappropriated.

THE COURT: Right.

MR. HEBERT: There's no attempt or indeed any colour of right to go and look at anything else other than just those specific things, and we've been careful, I think, in drafting that to restrict the wording of what we've requested the court to assist us with, to be just that stuff.

Transcript of Ex Parte Hearing before Justice Polowin, p. 8

THE COURT: [...] And I note that the list of documents that you're taking are all the documents that would have emanated from the plaintiff.

MR. HEBERT: Correct.

THE COURT: This is, actually, a fairly limited kind of Anton Piller Order. *Basically, you're just looking for your own documents back?*

MR. HEBERT: Correct.

THE COURT: *Okay, so I'm comfortable with that.* [...]

Transcript of Ex Parte Hearing before Justice Polowin, p. 41

THE COURT: [...] I want to go through the Order, because I read the Notice of Motion, but I don't know that I looked at the Order all that carefully. The last at – you're looking for the list at paragraph (a)(iv) – 1(a)(iv)?

MS. GERHARD-MCLUCKIE: Yes.

THE COURT: That is the list of projects that the concern is that the defendant improperly used the information on?

MR. HEBERT: Yes.

THE COURT: All right. *But it's prepared by the plaintiff.* It's their own materials.

MR. HEBERT: Well...

THE COURT: Well, that's what it says.

MR. HEBERT: Yes.

THE COURT: *Prepared by the plaintiff.*

MR. HEBERT: Yes.

THE COURT: *Okay. I'm comfortable with that. [...]* [emphasis added]

Transcript of Ex Parte Hearing before Justice Polowin, pp. 47-48.

[31] Notwithstanding these representations by Plaintiff's counsel, and the indication from Justice Polowin that her comfort depended on this limitation of the scope of the order, the Plaintiff used the order to seize what would appear to be material that was in no way prepared by the Plaintiff.

Material Facts Regarding the Alleged Forensic Evidence

[32] Prior to the hiring of Kauhanen, Lopes placed an advertisement in the Sudbury Star for an electrical estimator position. The advertisement contained a website address for applications.

[33] In its material before Justice Polowin, Walden alleged that the advertisement placed in the Sudbury Star was a "fake". This allegation was based exclusively on the opinion offered by Walden's IT expert that the advertised email address was a "fake" address. Subsequent to the execution of the order, after tests were conducted by Lopes, it could not be substantiated that the email address in question was fake. Further, the whole theory put forward in the affidavit material before Justice Polowin suggesting that any inference at all could be drawn about the advertisement from the email address could simply not be substantiated. The advertisement included the correct mailing address and an accurate fax number for applicants. These were facts that were known to Walden but withheld from Justice Polowin.

[34] Further, Walden's IT expert's affidavit placed before Justice Polowin alleged that an examination of Walden's computers disclosed "traces" of a program called "Shredder 95". The IT expert deposed to Justice Polowin the following:

Forensic analysis of the computers in the reception area at Walden, that were known to be used by Karen Hinds, Doug Hinds and Guy Therrien showed traces of wiping software.

I found evidence of this software being used on the computers in the reception and office area used by the defendants at Walden.

[35] As it turned out there was no evidence that so-called wiping software had been used on these computers. At its highest there was some evidence of files common to wiping software and other innocent software was present.

The Law

[36] In *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 SCC 36, Binnie, J. stated at paras. 35 and 36:

There are four essential conditions for the making of an *Anton Piller* order. First, the plaintiff must demonstrate a strong *prima facie* case. Second, the damage to the plaintiff of the defendant's alleged misconduct, potential or actual, must be very serious. Third, there must be convincing evidence that the defendant has in its possession incriminating documents or things, and fourthly it must be shown that there is a real possibility that the defendant may destroy such material before the discovery process can do its work.

Both the strength and the weakness of an *Anton Piller* order is that it is made *ex parte* and interlocutory: there is thus no cross-examination on the supporting affidavits. The motions judge necessarily reposes faith in the candour and complete disclosure of the affiants, and as much or more so on the professional responsibility of the lawyers participating in carrying out its terms. We are advised that such orders are not available in the United States.

[37] The rationale for the broad disclosure obligations and for the consequences for failure to meet it was explained by Sharpe J. (as he then was) in *United States of America v. Friedland*, [1996] O.J. No. 4399 (Gen. Div.) at paras. 26-28:

It is a well established principle of our law that a party who seeks the extraordinary relief of an *ex parte* injunction must make full and frank disclosure of the case. The rationale for this rule is obvious. The Judge hearing an *ex parte* motion and the absent party are literally at the mercy of the party seeking injunctive relief. The ordinary checks and balances of the adversary system are not operative. The opposite party is deprived of the opportunity to challenge the factual and legal contentions advanced by the moving party in support of the injunction. *The situation is rife with the danger that an injustice will be done to the absent party.* As a British Columbia judge noted recently:

There is no situation more fraught with potential injustice and abuse of the Court's powers than an application for an *ex parte* injunction. (*Watson v. Slavik*, [1996] B.C.J. No. 1885, August 23rd, 1996, paragraph 10.)

For that reason, the law imposes an exceptional duty on the party who seeks *ex parte* relief. That party is not entitled to present only its side of the case in the best possible light, as it would if the other side were present. Rather, *it is incumbent on the moving party to make a balanced presentation of the facts in law. The moving party must state its own case fairly and must inform the Court of any points of fact or law known to it which favour the other side. The duty of full and frank disclosure is required to mitigate the obvious risk of injustice inherent in any situation where a Judge is asked to grant an order without hearing from the other side.*

If the party seeking *ex parte* relief fails to abide by this duty to make full and frank disclosure by omitting or misrepresenting material facts, the opposite party is entitled to have the injunction set aside. *That is the price the Plaintiff must pay for failure to live up to the duty imposed by the law. Were it otherwise, the duty would be empty and the law would be powerless to protect the absent party.* [emphasis added]

[38] This principle is embodied in Rule 39.01(6) of the *Rules of Civil Procedure*, which provides:

Where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application.

[39] Where a party is seeking an extraordinarily intensive type of relief such as an "*Anton Piller*" order, a very high standard of disclosure is required. This high standard has been summarized by Then J. in *Lynian Ltd. v. Dubois* (1990), 45 C.P.C. (2d) 231 (Ont. Gen. Div.) at 233 as follows:

[T]he plaintiff is required to disclose every fact within his or her knowledge relevant to the "weighing operation which the court has to make in deciding whether or not to grant the order" (*Thermax Ltd. V. Schott Industrial Glass Ltd.* (1985), [1981] F.S.R. 289 at 298 (Ch. D.)). In *Columbia Picture Industries v. Robinson* (1985), [1986] F.S.R. 367 at 441 (Ch. D.), Scott J. held "that the affidavits in support of applicants for ['Anton Piller' orders] ought to err on the side of excessive disclosure. In the case of material falling into the grey area of possible relevance, the judge, not the plaintiffs' solicitors, should be the judge of relevance."

[40] The high standard of disclosure required when seeking *Anton Piller* relief was also expressed thusly in *Bardeau Limited v. Crown Food Service Equipment Limited* (1982), 38 O.R. (2d) 411 (H.C.) at 413:

The remedy is a most exceptional one, and there must be an extremely high standard of conduct on the part of any applicant bringing such an application, including full disclosure. Whether or not the applicant believes that the matters are of material consequence they must be disclosed so that the Court may determine their relevance.

In the present case a factor which was material was not brought to the attention of the Court. This undisclosed fact may or may not have altered the granting of the order, but weighed with all the other factors it was a factor that was material enough that it should have been disclosed.

[41] In particular, the relevant facts that a Plaintiff seeking an *ex parte* order must disclose include "*facts which may explain the defendants' position if known to the plaintiff.*" [emphasis added] *Chitel v. Rothbart* (1983), 39 O.R. (2d) 513 (C.A.) at 519.

[42] Indeed, "any fact that would have been weighed or considered by the motions judge in deciding the issues, regardless of whether its disclosure would have changed the outcome, is material." *Forestwood Co-operative Homes Inc. v. Pritz*, [2002] O.J. No. 550 (Div. Ct.) at para. 26.

Discussion

[43] At the outset of the *ex parte* hearing in the present case, the motions judge reminded Plaintiff's counsel of the Plaintiff's obligation, and that it was heightened by the extraordinary nature of the remedy sought:

THE COURT: I'm fully aware of the nature of the Anton Piller Order and it seems to me that it behooves the court – I mean, in any *ex parte* application, the courts should carefully scrutinize the materials provided and lawyers are, of course, *have to use their utmost good faith in preparing those materials*. But in terms of the Anton Piller Order, the level of scrutiny has to be even greater because it has the effect of – I mean, there's a dispute in the jurisprudence as to whether you call it a civil search warrant or not, but it has the effect – it's a very extraordinary remedy, so I want to make sure there is a grounding in this fact situation for it. [emphasis added]

Transcript of Ex Parte Hearing before Justice Polowin, p. 5

[44] Notwithstanding its obligation to do so, however, the Plaintiff failed to make full, frank and fair disclosure of all material facts in its materials and in its submissions to the court.

[45] First, the Plaintiff failed to disclose to the court that there had been detailed correspondence between counsel for the Plaintiff and counsel for the Defendant Lopes prior to the seeking of the order, in which the Defendant Lopes set out its position.

[46] As noted above, the Plaintiff had an obligation to disclose to the court "facts which may explain the position of the defendant if known to the plaintiff." Since the Plaintiff had been made aware of the Defendant's position through correspondence from its solicitor, the Plaintiff therefore had an obligation to disclose that correspondence to the Court.

[47] Indeed, in *Lynian, supra*, the Court set aside an Anton Piller order for this reason alone. The Plaintiff had not disclosed to the judge hearing the original application that it had received a letter from the Defendant's solicitors some five weeks earlier setting out the Defendant's position with respect to the action. The Court reasoned at 233-34 as follows:

Here, the plaintiff had been advised of this defendant's position and yet does not appear to have specifically brought that position and the facts in support of it to the attention of the judge hearing the ex parte application when that could have been accomplished by simply enclosing a copy of the letter from the defendant's solicitor with the application materials or by disclosing its contents to the court. In my view a close examination of the affidavit material tendered in support of injunctive relief reveals a paucity of material justifying such an order against this defendant.

Accordingly, in fairness to both the judge and this defendant, it was particularly important to disclose the position of this defendant to the judge hearing the *ex parte* application. In these circumstances, *I am of the view that there is no alternative but to set aside in toto the ex parte order made on November 23, 1990.* [emphasis added]

[48] If the Plaintiff had honoured its duty and included the correspondence, Polowin J. would have been aware that:

1. The Defendants were on notice of the claim and were prepared to defend.
2. The Defendants had a bona fide legal and factual defence which they had presented in answer to the claim.
3. The supposedly independent lawyer had previously acted for the Plaintiff/Respondent.

[49] Second, the facts presented by the Plaintiff's computer forensics "expert" were materially incomplete and misleading, and therefore unfair to the parties not present on the *ex parte* motion, who had no opportunity to challenge them.

[50] Third, the Plaintiff did more than fail to bring the 2004 correspondence to the Court's attention: it actively misled the Court by representing that the proposed search would be supervised by an independent solicitor. The Plaintiff did not disclose to the court that the solicitor who was to act as independent supervising solicitor was in fact far from independent, in that he had acted as the Plaintiff's solicitor on this very matter right up until the motion. Indeed, the solicitor who attended at Lopes' head office as "independent supervising solicitor" was the very solicitor who had corresponded on behalf of the Plaintiff with counsel for the Defendant Lopes about this matter in August of 2004, and who continued to act for the Plaintiff in May and June, 2005, and later in December, 2005.

[51] In *Celanese* (supra at para. 40), Binnie, J. recognized that the appointment of an independent solicitor should form part of an *Anton Piller* order:

Unless and until model orders are developed by legislation or recommended by law societies pursuant to their responsibility for professional conduct, the following guidelines for preparation and execution of an *Anton Piller* order may be helpful, depending on the circumstances:

(1) Basic Protection for the Rights of the Parties

(i) The order should appoint a supervising solicitor who is independent of the plaintiff or its solicitors and is to be present at the search to ensure its integrity. The key role of the independent supervising solicitor was noted by the motions judge in this case "to ensure that the execution of the *Anton Piller* order and everything that flowed from it, was undertaken as carefully as possible and with due consideration for the rights and interests of all involved". He or she is "an

officer of the court charged with a very important responsibility regarding this extraordinary remedy”.

[52] In this case, it is clear that Mr. Mastin, the supervising solicitor, among other things:

1. did nothing to constrain or control the execution of the order by the Plaintiff's representatives at Lopes' head office;
2. permitted a representative of the Plaintiff to mark for seizure items that were not covered by the order; and
3. left the premises to get lunch.

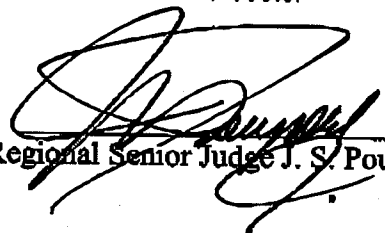
[53] It is unlikely that any of these things would have occurred had the supervising solicitor been an independent actor who took seriously his obligations as an officer of the court to protect the rights of all parties, *including the Defendants*, during the search.

[54] Similarly, this Court cannot endorse the manner in which the present search was carried out and supervised. The responsibility for the infringement of the Defendants' rights must be borne by the Plaintiff, who failed to arrange for a truly independent solicitor to supervise the search, and who withheld material evidence that would have alerted the motions judge to the problem.

[55] Even if Mastin's shortcomings as a supervising solicitor had been inconsequential, his status as an agent for the Plaintiff still merits the Court's disapproval in this case. The Plaintiff had assured Justice Polowin that if she granted the order, an independent solicitor would be present. As noted above, it was not lost on Justice Polowin that an independent solicitor would provide safeguards for the Defendants' rights. Public confidence in the administration of justice would surely be shaken if it were acceptable for the Plaintiff to obtain an Anton Piller order on the strength of a representation to the Court that the Defendants' rights will be protected, and then fail to implement the promised protection.

Conclusion

[56] An Order shall issue setting aside the Order of Polowin, J. dated January 9, 2006. Counsel are requested, as soon as possible, to make an appointment with me through the Regional Manager for representations with respect to the form of the Order and costs.


Regional Senior Judge J. S. Poupore

Released: August 29, 2006

COURT FILE NO.: 9359/06

DATE: 20060829

ONTARIO

SUPERIOR COURT OF JUSTICE

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WALDEN ELECTRICAL LTD.

Plaintiff

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Defendants

DECISION ON MOTION

Regional Senior Judge J. S. Poupore

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