Civil Procedure
Law 225

Fall 2017

Lecture Notes No. 6

Complex Motions

ANTON PILLER ORDERS

An *Anton Piller* Order is essentially a civil search warrant; it is granted *ex parte* (without notice) and as an interlocutory (pre-trial) relief. The order derives its name from the case of *Anton Piller K.G. v. Manufacturing Processes Ltd.*, [1976] 1 All. E.R. 779 (C.A.).

Requirements:

1. The moving party must demonstrate a strong prima facie case.

2. The damage to the moving party of the defendant's alleged misconduct, potential or actual, must be very serious.

3. There must be convincing evidence that the defendant has in its possession incriminating documents or things.

4. 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.

5. The moving party is under a heavy obligation upon the moving party to make full and frank disclosure of all relevant facts to the Court.

6. The moving party must give an undertaking for damages.

Process:

1. The Order must be served under the supervision of an independent lawyer who will take custody of the original evidence.

2. The Order is returnable within a short time to allow for its continuance and to allow the respondents to make submissions before the Court.

3. Failure to abide by the Order is punishable in contempt.

4. The defendant needs to be provided reasonable time to consult with legal counsel;

5. The premise is not to be searched except in the presence of the defendant or a responsible employee of the defendant;

6. The order should set out provisions for dealing with solicitor-client privilege;

7. A detailed list of the evidence seized should be made and provided to the defendants for inspection before removing the evidence;

8. No material should be removed from the premises unless it is clearly set out in the order.

[See *Celanese Canada, Inc. v. Murray Demolition Corp.*, 2006 SCC 36 (S.C.C.)]

Dish Network LCC v. Ramkissoon
2010 ONSC 773 (Ont. S.C.J.)

Per Cummins J.

The Execution of the Second Anton Piller Orders and the Motions for Findings of Contempt

[36] **Injunctions such as Anton Piller orders are "readily enforceable through the court's contempt power", and when one party alleges that another has failed to comply with such a court order, a motion for contempt may be made**: see Robert J. Sharpe, *Injunctions and Specific Performance*, looseleaf (Aurora: Canada Law Book, 1992) at para. 2.10.

[37] As stated above, **Anton Piller orders find their legitimacy in the court's inherent power to prevent the frustration of its process through destruction of evidence.** This inherent power extends to finding parties who so frustrate court orders to be in contempt.

[38] **A contempt motion is quasi-criminal in nature, as there is a potential for imprisonment. Therefore, proof beyond a reasonable doubt is required.**

[39] The plaintiffs are not required to prove that a defendant intended to act contemptuously. Instead, the plaintiffs are required to prove that a defendant must have intentionally committed an act prohibited by the Order.

[40] The test for a finding of contempt was considered recently by the Court of Appeal in Bell ExpreesVu Ltd. Partnership v. Torroni, 2009 ONCA 85 (CanLII), 2009 ONCA 85, 94 O.R. (3d) 614 [Torroni]. In Torroni, the court overruled a contempt finding on the basis that the motion judge failed to consider each element in the three-part test for contempt. At para. 21 of the decision, these elements are set forth as follows:

• the order that was breached must state clearly and unequivocally what should and should not be done;

- the party who disobeys the order must do so deliberately and wilfully; and

- the evidence must show contempt beyond a reasonable doubt.

[41] The first prong of the test can be determined by looking at the contents of the Orders. Are they clear? Do they make sense? Are they "clear to a party exactly what must be done to be in compliance with the terms of an order"?: Torroni at para. 22.

[42] In the second prong of the test, one must consider the conduct of the alleged contemnors. What do their actions demonstrate? Evidence on the conduct of the Ramkissoons included an audio recording, affidavits from the ISS and representatives of legal counsel for the Plaintiffs and viva voce evidence from the Ramkissoons themselves.

[43] If there is legitimate confusion about the nature and scope of the contents of the Orders, contempt cannot be made out. In this instance, Orders were issued which allow for a search of the home and business of the Defendants and their cars. The items subject to the Orders are listed at para. 1 of the Orders. The rights and responsibilities of the Ramkissoons are laid out in the Orders, as well as the permissible method of execution. As stated above, the terms are clear and unequivocal.

[44] The rights and responsibilities of the Ramkissoons are clearly spelled out in the Orders, which are to, inter alia, allow the ISS to exercise their rights and discharge their duties and require the Defendants to "render any necessary assistance" to the ISS.

…

[49] On December 16, 2009, the Plaintiffs' representatives attended at the Digital Store premises at 34 Futurity Gate and the Jane Street residence to execute the Second Anton Piller Orders. The representatives included Mark Abradjian ("Abradjian"), Brad Wiseman ("Wiseman") and Renata Kis ("Kis"), the ISS appointed pursuant to the Second Anton Piller Orders, Steve Rogers ("Rogers") from the computer forensic firm Digital Evidence International Inc. ("DEI"), and Ira Nishisato ("Nishisato") and Isabella Massimi ("Massimi") from the Plaintiffs' law firm.

[50] Mr. Abradjian, the senior person of the ISS group, was not cross-examined on his affidavit dated December 29, 2009. Nor did counsel for Mr. and Ms. Ramkissoon ask that Mr. Abradjian or Mr. Nishisato be cross-examined at the hearing on the return of the motion for contempt. I accept the affidavit evidence of Mr. Abradjian and Mr. Nishisato and I prefer their evidence where there is conflict with the evidence of Mr. and Ms. Ramkissoon.

[51] I do not find either Mr. Ramkissoon nor Ms. Ramkissoon to be credible witnesses in their testimony, including their recounting of, and explanations for, their actions and behaviour during the execution of the

Second Anton Piller Orders by the ISS and Plaintiffs' counsel. I accept the evidence of Mr. Abradjian and Mr. Nishisato in preference to that of the Ramkissoons where their evidence is in conflict. I add that the detailed notes of Mr. Abradjian, affixed to his affidavit, as to the events of December 16, 2009, together with the audio recording (and transcription thereof) for part of the time in the course of the events upon the execution of the Orders, support and confirm the affidavit testimony of Messrs. Abradjian and Nishisato and contradict the claims of the Ramkissoons. The audio recording confirms that Messrs. Abradjian and Nishisato calmly and patiently tried to explain why they were on the premises, the efforts at service of the Second Anton Piller Orders, the efforts at explaining the contents and nature of the Orders, and that they were seeking to preserve and protect the Evidence.

[52] Mr. Abradjian states that the execution of the Second Anton Piller Orders commenced at about 5:23 p.m. December 16, 2009 when Mr. and Ms. Ramkissoon arrived by car outside the Digital Store. Mr. Ramkissoon entered the Digital Store. Ms. Ramkissoon waited in the car. The Digital Store has a carpeted store area with a doorway leading to a hallway and outer office area with a back office which is entered by a doorway from the outer office area.

[53] Mr. Abradjian, followed by Mr. Nishisato within about 30 seconds, entered the premises following upon Mr. Ramkissoon's entrance. Mr. Abradjian states that Mr. Ramkissoon and another man, later determined to be Mr. Krishna Ramkissoon ("Krishna"), met him just inside the doorway leading from the carpeted store area into the outer office area. Mr. Abradjian says he identified himself as the ISS appointed officer pursuant to a Court Order and observed Mr. Nishisato identify himself and attempt to serve the Orders on both of them, together with a box containing the court materials to be served, although the Orders were not taken by Mr. Ramkissoon.

[54] Mr. Abradjian says he explained that the Second Anton Piller Orders required them to permit entry to the premises and that he wished to explain the Orders. Mr. Ramkissoon said he wanted to call his lawyer and took out his cell phone whereupon Mr. Abradjian says he said that Mr. Ramkissoon would have an opportunity to call his lawyer but was asked to put down his cell phone until Mr. Abradjian had a chance to explain the Orders and that nothing would happen while he explained it.

[55] Mr. Abradjian states that he was "…trying to ease a tense situation and was continuing to try to explain that they would have an opportunity to refuse entry to certain people for up to two hours and speak to their lawyers and that we could all go into the store area where I could explain the Order in an orderly way….".

[56] Mr. Nishisato confirms the account by Mr. Abradjian in Mr. Nishisato's own affidavit. Mr. Nishisato says he attempted to serve the Orders but that Mr. Ramkissoon refused to accept them. Mr. Nishisato says that Mr. Ramkissoon:

refused to permit Abradjian to explain the Orders at this time and walked back towards the Office, and out of our view, with his phone to his ear….Krishna emerged from the Outer Office Area into the Hallway where Abradjian and I were standing …[and] would not permit Abradjian to move towards the Office to observe Ravin and physically blocked Abradjian's way.

[57] Ms. Ramkissoon had entered the premises by this point and was served by Mr. Nishisato. Mr. Abradjian states that Ms. Ramkissoon "took up the cause of demanding we leave and was insisting that we leave into the front store area and was edging us out of the back area".

[58] Ms. Ramkissoon prevented the passage of Messrs. Abradjian and Nishisato beyond the doorway from the store area into the outer office area while Mr. Ramkissoon went to the back office where he called his lawyer but could not be seen.

…

[62] Following upon further discussions between counsel, Mr. Moldaver and Mr. Nishisato agreed on a process to facilitate the execution of the Orders. Mr. Abradjian then explained the Orders to the Ramkissoons and, at approximately 7:55 p.m., the implementation of the search began with the ISS, Nishisato and Rogers, a computer forensic expert from DEI, walking through the premises to identify the Evidence.

[63] Mr. Abradjian states that, for the better part of the first hour following his initial entry, the Ramkissoons and Krishna "refused to allow me into the back office area and refused to come out the front store area for an explanation of the Order…":

I explained to both Mr. Ramkissoon and Mrs. Ramkissoon that I was concerned with the possibility that evidence could be deleted while Mr. Ramkissoon was in the back and Mrs. Ramkissoon refused entry thereto and my requests to attend in the backroom were repeatedly refused.

[64] While it is understandable that the Ramkissoons would be surprised and angry about the fact of the Orders, they knew the purpose of those Orders and the importance of being cooperative. They had experienced the execution of the First Anton Piller Orders and their aftermath. The Ramkissoons knew the Plaintiffs' accusations that they had deliberately prevented timely access to the execution of the First Anton Piller Orders. They were aware of the Plaintiffs' accusations that Mr. Ramkissoon had deliberately destroyed evidence while delaying access.

[65] Moreover, the Ramkissoons knew there was no objection to their calling their counsel, with privacy, for advice. Indeed, Mr. Nishisato told them he wanted them to speak with their counsel. But they also knew that the ISS wanted to keep Mr. Ramkissoon away from the Evidence while the ISS explained the nature of the Orders and while counsel was being contacted. The Ramkissoons knew that the predominant concern of the ISS and Plaintiffs' counsel from the point of their entry to the premises was to ensure that the Evidence was preserved and protected. The Ramkissoons knew and

understood that Messrs. Abradjian and Nishisato had real and serious concerns that the Orders might be compromised and rendered ineffective if they could not ensure that the premises and Evidence therein were secure while they explained the Orders and the Ramkissoons spoke with their counsel. Indeed, from 5:27 p.m. to 5:37 p.m., Mr. Ramkissoon spoke with his counsel but Mr. and Ms. Ramkissoon denied the ISS and Mr. Nishisato access beyond the doorway of the store area into the outer office area and the back office until about 6:55 p.m.

[66] Diagrams or sketches of the premises were put into evidence by both sides to the dispute. I find on the evidence that Mr. Ramkissoon and Krishna could not be observed by the ISS and Mr. Nishisato for much of the time between 5:23 p.m. and 6:55 p.m. such that the objective of preserving the Evidence was compromised and jeopardized by their actions and the actions of Ms. Ramkissoon.

[67] Computers that are the subject of the Second Anton Piller Orders were determined to be in the outer office area and the back office beyond the view of the ISS and Mr. Nishisato but were not delivered up to the ISS prior to 7:55 p.m.

[68] Mr. Ramkissoon and Ms. Ramkissoon refused to permit the ISS to fully explain the Second Anton Piller Orders between 5:20 p.m. and 6:55 p.m. despite repeated requests by the ISS to be able to do so. Telephone discussions between Messrs. Nishisato and Abradjian with Mr. Moldaver ultimately resulted in the ISS gaining access about 7:55 p.m. to the outer office area and the back office for the purpose of effectively executing the Second Anton Piller Orders.

[69] I find beyond any reasonable doubt on the evidence that Mr. and Ms. Ramkissoon intentionally did not disclose, deliver up and grant access to the outer office area and back office in a timely manner during the execution of the Second Anton Piller Orders. They wilfully and deliberately blocked and prevented entry and access to these areas of the premises to frustrate the purpose of the Orders in preserving the Evidence. They intentionally prevented the ISS upon their entry to the premises from being able to observe Mr. Ramkissoon and Krishna who had access to the Evidence in the outer office area and back office. They were intentionally in breach of ss. 2 , 4, 5, 17, 18 and 19 of the Orders by not allowing the ISS to keep the Evidence under observation until access would be granted. They did not render the necessary assistance to the ISS to effectively carry out their responsibilities under the Orders.

[70] I find beyond a reasonable doubt that the Ramkissoons deliberately and wilfully disobeyed the Second Anton Piller Orders. I find that Mr. and Ms. Ramkissoon are in contempt of the Second Anton Piller Orders. I turn now to a consideration of the specific components of the Evidence sought through the Second Anton Piller Orders.

On appeal, 2011 ONCA 478:

> [1] We view the actions of the appellants in refusing to comply with the Second Anton Pillar order as quite serious. Their conduct was both prejudicial to the respondents and an affront to the court. In our view, the sentences of four months' imprisonment for Mr. Ramkissoon, two months' imprisonment for Mrs. Ramkissoon and the order requiring that they pay the respondents' costs were fit sentences when imposed.
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> [2] That said, the appellants have filed fresh evidence indicating they have now purged their contempt to the extent that they are able to do so, setting out their circumstances and expressing their remorse to the court. Importantly, the respondents do not oppose the motion to introduce fresh evidence or the appeal.
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> [3] In the circumstances, the appeal is allowed and the sentence of imprisonment imposed on Mr. Ramkissoon is varied to time served (64 days); and the sentence of imprisonment imposed on Mrs. Ramkissoon is vacated. The order that the appellants pay the respondents costs shall remain in full force and effect.

Bergmanis v. Diamond & Diamond
2012 ONSC 5762 (Ont. S.C.J.)

Per Perrell J.:

> [44] **I accept that evidence of dishonesty, suspicious circumstances or misappropriation of property, etc. can justify the inference that there is a risk that evidence will be destroyed, but the onus remains on the plaintiff or applicant for an Anton Piller Order to prove that there is a real possibility that the defendant may destroy evidence before the discovery process can do its work**: Celanese Canada Inc. v. Murray Demolition Corp., supra, at para. 35, but it is not enough that an inference of dishonesty can be drawn from the evidence; rather, **the inference of dishonesty must be compelling**: Catalyst Partners Inc. v. Meridian Packaging Ltd., 2007 ABCA 201 (CanLII), [2007] 10 W.W.R. 436, at para. 34 (Alta. C.A.).
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> [45] **To obtain an Anton Piller order, opinion, supposition or the plaintiff's fear or paranoia that documents will be destroyed will not suffice**: PricewaterhouseCoopers LLP v. Phelps, 2010, 2010 ONSC 1061, at para. 30 (S.C.J.); Agracity Ltd. v. Skinner, [2009] S.J. No. 555 (Sask. Q.B.), 52, 97-102, at paras. 52 and 53.
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> [46] In my opinion, no dishonesty or suspicious circumstances or misappropriation of property has been shown in the case at bar. There is no evidence of wrongdoing by Jeremy Diamond or Alex Ragozzino, nor does the evidence establish any grounds for believing that there is any risk that

Jeremy Diamond or Alex Ragozzino would destroy any evidence in their possession.

[47] At best, the evidence on this motion establishes that there has been a breach of contract by the Respondents for which the normal remedy is damages. An interlocutory injunction is an extraordinary remedy and an Anton Piller order is an extraordinary-extraordinary remedy and it is not shelled out simply because the target of the order has relevant information that it has the ability to destroy.

[48] In his text, R.J. Sharpe, Injunctions and Specific Performance, (Canada Law Book: Aurora, ON, looseleaf, 2009) at ¶ 2.1240, Justice Sharpe writes:

It is one thing to justify a significant invasion of the defendant's privacy where there is strong evidence of an intent to flout the ordinary process and effectively deprive the plaintiff of rights but quite another to grant such drastic relief where there is no more than a possibility that the defendant might destroy evidence which might assist the plaintiff in making out his or her case.

[49] **It is not and cannot be the case that courts grant intrusive orders akin to a criminal search warrant with nothing more than evidence that there has been a breach of contract, and it is not and cannot be the case that courts grant intrusive orders akin to a criminal search warrant against a non-party, even a non-party who may be the means by which a contract has been breached, with nothing more than evidence that there has been a breach of contract.**

[50] Anton Pillar orders and Norwich orders are not a dime a dozen remedies; they are rare and precious remedies. With the light of a contested fully argued motion, in my opinion, the Anton Piller Order granted in this case should not be continued, and it should rather be set aside.

[51] I do not know why the Respondents did not move to have the order set aside, since it besmirches their reputation, and it may be that they have a grievance against Jeremy Diamond and are content to have the order go against him and Mr. Ragozzino. But, be that as it may, an Anton Pillar order or a Norwich order is not justified in the case at bar and the order should be set aside in its entirety.

[52] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Messrs. Diamond and Ragozzino within 20 days of the release of these reasons followed by the Applicants' submissions within a further 20 days.

[53] Order accordingly.

Question

A new client tells you that he wants to fire his sales manager for copying confidential information respecting products in development in express violation of his contract. He advises that he had been contacted earlier that day on an informal basis by an employment recruiter to sound him out about the employee who evidently provided a CV and assured the recruiter that he would be an "invaluable asset" to a competitor of your client. Your client advises that he checked the computer logs and noted that the employee had downloaded a huge amount of confidential information to his laptop (company property) which was missing. Assuming there are valid grounds to fire the employee, what considerations are important in deciding whether to apply for an Anton Piller Order?

'NORWICH' ORDERS

A 'Norwich' or 'Norwich Pharmacal' Order is an equitable order of the court - an 'equitable bill of discovery' to be precise - which allows a party to obtain pre-action discovery; for example, access to businesses files held by a third party to obtain the identity and address of the party to be sued or the location of assets.

The use of such orders can be traced to an English case, *Norwich Pharmacal Co. v. Customs and Excise Commissioners*, [1974] A.C. 133 . The rationale for the rule was set out in that case by Lord Reid:

> On the whole I think they favour the appellants, and I am particularly impressed by the views expressed by Lord Romilly M.R. and Lord Hatherley L.C. in *Upmann v. Elkan* (1871) L.R. 12 Eq. 140; 7 Ch.App. 130. They seem to me to point to a very reasonable principle that **if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers.** I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. **It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.**

The utility of such an order is quite obvious in the age of the Internet; equally, that context well points out the problem, intrusion on a legitimate expectation of privacy.

Autopoietic Telemetric Solutions Limited v. Loughlin
2012 ONSC 2305 (Ont. S.C.J.)

Quigley J.:

[1] The plaintiff Autopoietic Telemetric Solutions Limited ("ATS"), moves ex parte under Rule 37.12.1(1) based on allegations of fraud for Mareva Injunction and other related orders freezing the bank accounts in Canada held at TD Canada Trust by the defendant Michael Loughlin, trading as Eurologix Security. The related relief sought includes an order preventing the dissipation of assets owned by the defendant in Canada or elsewhere, an order preventing the sale or other disposition of the real estate located at 5 Hesham Dr., Whitby, Ontario, and finally, a Norwich Order requiring the Toronto Dominion Bank, or TD Canada Trust to provide access and information to ATS regarding the bank account to which the it transferred U.S. $1,873,070.28 to or for the credit of the defendants.

[2] ATS is a company registered in the United Kingdom with a registered address at 18 Hartman Lane, South Shields, Tyne & Wear, England, NE34 0EF, and it carries on business as a supplier of telemetric products and counterterrorism consultancy and equipment. It was formed in 2010 with contacts in the Nigerian government. It has websites that can be found on the Internet at www.autopoietic.com and www.ATS – guickby.com.

[3] The individual defendant is a director of a registered company in the United Kingdom by the name of Eurologix Security Limited. In Ontario, however, the defendant does not carry on business through a corporate entity, but rather, as a sole proprietorship with the registered business name of "Eurologix Security." Its business registration number of 190118562 is attributed to that business at a registered place of business, which is reflected in the business registration records as being located at 15 Heaver Dr., Whitby, Ontario L1N 9K4.

[4] In support of the injunctive relief sought by the plaintiff in this motion, an affidavit is filed by one Nkiruka Ochei, an assistant to Mr. Christian Chijindu, the solicitor for the plaintiff, ATS. That affidavit is largely based upon an affidavit filed by Mr. Philip Tann, Director and Chief Technical Officer of ATS, which was filed in the High Court of Justice, Queen's Bench Division in the United Kingdom in support of a Mareva Injunction and similar relief that has been granted there freezing the assets of Mr. Loughlin and Eurologix Security Limited in the similar action commenced by ATS in the United Kingdom. Particulars of that claim, the affidavit of Dr. Tann, and the Order of the Hon. Mr. Justice Eder of the High Court of Justice, Queen's Bench Division issued on December 29, 2011 and filed on December 30, 2011 in the Queen's Bench Listing of the High Court of Justice, were attached as Exhibit 2 to Mr. Ochei's affidavit.

[5] **The specific claims of the plaintiff relate to three purchase orders under which the defendant is alleged to have agreed to supply certain detection equipment upon receipt of funds in its Canadian bank account in Whitby, Ontario in the sums of $1,534,995.06, $214,845.12, and $123,230.10, for a total of $1,873,070.28, all in United States dollars. ATS transferred those amounts electronically into a TD Canada Trust account that is under the sole and absolute control of the defendant at the TD Canada Trust branch located at 110 Taunton Rd., Whitby, Ontario. The last transfer of funds is alleged to have taken place on October 17, 2011. Notwithstanding the transfer of funds, however, no**

goods were ever delivered to the consignment address in Nigeria.

[6] **Then, in November of 2011 and after allegedly receiving all of the monies paid for the supply of the contracted goods, Mr. Loughlin advised the plaintiff that Eurologix Security Canada had met its demise, that he had been laid off and that the company had "gone bankrupt." As a result, Mr. Loughlin indicated to the UK purchasers that the equipment would not be supplied. He told them that the money might not be refunded in light of the alleged bankruptcy of Eurologix Security Canada. He told them not to contact him further.**

[7] Based on its investigations and these assertions of fact, however, ATS contends that there is no such company as "Eurologix Security Limited" or "Eurologix Canada" registered in any province in Canada. Contrary to John Loughlin's claims as reflected in e-mail exchanges between himself and Dr. Philip Tann and which were included as exhibits in the application record, "Eurologix Security Canada" does not actually exist. It is not a bankrupt company. Eurologix Security Canada is not an incorporated entity reflected in the files of bankrupt corporations. Rather, as noted, that name appears merely to be a trade name used by Mr. Loughlin for the purposes of operating his "business."

[8] Rather, **ATS contends that Michael Loughlin, the defendant, is the sole owner and proprietor of Eurologix Security and, accordingly, that he is individually liable and responsible for the defalcation and fraud that is alleged to have been perpetrated by him against ATS as set out in its Statement of Claim dated April 3, 2012, and in the similar claims it has commenced in the United Kingdom. ATS contends that the defendant is singularly responsible for the operation and running of the accounts to which ATS deposited its monies in respect of contracts entered into for the purchase of the goods which were to be supplied to addresses in Nigeria. ATS claims that those contracts have been breached by the defendants by their failure to deliver the goods to the purchaser as agreed. It claims that the failure of these contracts is due to fraudulent conduct and that the defendant is the commanding mind behind the frauds that are alleged to have been perpetrated against it by the individual defendant in his own right, and under Eurologix Security's trade name.**

[9] The position of the plaintiff is that the defendant misrepresented these matters as part of a deliberate effort to embezzle funds belonging to ATS with the intention of unjustly enriching himself with the plaintiff's money. ATS says that its investigations have disclosed that Mr. Loughlin bought a house in Whitby, Ontario for $369,500 in cash and without a mortgage in December 2011. Further, it is claimed that Mr. Loughlin has paid off all of his debt and his mortgage in the United Kingdom, relative to the UK residential addresses reflected in the UK court documentation, and it is believed that he has been embezzling the funds continuously since they have been received.

[10] It is for these reasons that the plaintiff seeks not only a Mareva Injunction and non-dissipation orders relative to the assets of the defendant, but also a Norwich Order requiring the Toronto Dominion Bank to disclose

the receipt and disbursement of funds relative to this account in order to assist the plaintiff to trace the allegedly embezzled funds.

Analysis

[11] ATS seeks this interim injunctive relief under Rule 40 of the Rules of Civil Procedure and section 101 of the Courts of Justice Act. The injunction is requested on an interlocutory or interim basis in order to prevent the defendant from dissipating assets allegedly wrongly received by him. To succeed in obtaining the injunction it seeks, the applicant must establish that there is either a prima facie case or that the claim is not frivolous or vexatious. In a case such as this, where it is an interim injunction that is sought without notice in an effort to restrain the respondent from disposing of his assets until the disposition of the case or further order of the court, it is the higher prima facie threshold that applies. The applicant must demonstrate the existence of a serious question to be tried.

[12] Secondly, ATS must show that it would suffer irreparable harm if the injunction were to be refused. In assessing that question, the court is to determine whether the harm caused is of such a nature that it is not compensable by damages. Irreparable harm may be also be found where one party will suffer permanent market loss or irrevocable damage to its business reputation which is not capable of being calculated: see R.J.R. MacDonald Inc. v. Canada (Attorney General), 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311 (S.C.C.) at para. 64, and Canpages Inc. v. Québecor Media Inc., (2008) reflex, CarswellOnt 3193 (Ont. Sup. Ct.) at para. 14.

[13] Finally, the applicant must show that it will suffer the greater harm from the refusal of the injunction to be granted them the respondent will likely suffer from the granting of the injunction: see R.J.R. MacDonald, above, at paragraph 48. Reduced to its essence, however, the law requires that these three conditions must be considered simultaneously to determine if it is appropriate that the Mareva Injunction be granted, and the central question in that determination is whether it is just and equitable in the circumstances of the case to grant the injunctive relief: 2645 Skymark Investments Inc. v. Canadian Neher Holdings Corp., reflex, 2000 CarswellOnt 23 (Ont. Sup. Ct.)

[14] **As for the Norwich Order, the test set out in Isophoton S.A. v. Toronto Dominion Bank, 2007 CanLII 14626 (ON SC), 2007 CanLII 14626 (ONSC), requires that five separate elements be considered before the order is granted. First, there should be evidence of a valid bona fide claim or a reasonable claim and the standard required is that the claim not be frivolous or vexatious. This test is essentially the same as that established under the Mareva Injunction requirements. Secondly, the applicant must establish that the bank from which the information is sought is somehow connected in the wrongful act, albeit innocently. Thus, in a case such as this one, when the bank is allegedly unknowingly in receipt of allegedly fraudulent funds, it will be considered to be an "innocently involved" third party.**

[15] Third, the bank must be the only practicable source of information in light of the inability of the victim to approach the alleged wrongdoer for the information. The case law shows that financial institutions are often the only real source of the information required to prove a claim and permit the wronged party to locate fraudulently transferred assets or funds. Fourth, the victim is required to indemnify the third party for any costs associated with complying with the order, but in Isophoton, the court rejected the argument that an undertaking as to damages was required, stating that it was difficult to envisage a situation in which a financial institution that is subject to a Norwich Order would be subjected to liability and a damages award for disclosing financial information pursuant to a court order. The court advised there that should a concern materialize for the financial institution in the facts of a specific case, the financial institution in question could seek the additive protection of being able to retain legal counsel and return to court for further directions if necessary.

[16] **Finally, a Norwich Order will only be issued after the court has considered all the respective interests and weighed the benefits of revealing the information against the interest of maintaining confidentiality. This follows since there is serious prejudice to an alleged wrongdoer in releasing confidential financial records without their knowledge or consent, but on the other hand, our courts are reluctant to protect the rights of wrongdoers if maintaining confidentiality in essence protects fraudulent conduct, or acts.**

[17] I agree that the plaintiff, ATS has established a prima facie case as against the defendant, based on the affidavit evidence and exhibits set out in their ex parte motions materials. As such, their application will succeed and they will be granted the orders they seek freezing the bank accounts at Toronto Dominion and TD Canada Trust and to trace and preserve the assets of the defendant with the account held at TD Canada Trust on the authority of the R.J.R. MacDonald and Isophoton decisions. It is of considerable support and relevance to my conclusion that asset-freezing and non-dissipation orders have already been obtained by the ATS from the High Court of Justice - Court of Queen's Bench Division in the United Kingdom based on the thorough and detailed affidavit of Dr. Philip Tann, dated December 29, 2011. Moreover, having regard to the almost U.S. $2 million value of the claim made by the plaintiff as against the defendant, Michael Loughlin, with respect to funds allegedly transferred to the TD Canada Trust bank account in Whitby, Ontario, it seems clear to me that the balance of convenience in a circumstance such as this unquestionably favors the plaintiff.

[18] The prima facie evidence presented on this motion for an ex parte Mareva Injunction and Norwich Order satisfies me that justice demands that the freezing order sought by the plaintiff be granted on an interim without prejudice basis for at least such time until the matter can return after the orders have been implemented and a return date is established for the return of the motion. Obviously it will be up to the motions judge on the return date

to determine whether the injunctive relief ought to be continued beyond that date and if so, on what terms. In light of the fact that the injunction is being issued on April 12, 2012, it strikes me that the motion should be initially returnable in two weeks for the purposes of the matter to at least be spoken to at that time, and to enable the court to obtain an update on what the circumstances are and what the fallout has been from the granting of its order freezing Mr. Loughlin's Canadian assets, and requiring the Toronto Dominion Bank to produce the information sought by the plaintiffs pursuant to the Norwich Order granted hereunder.

[19] Orders are to go as follows:

(a) an order of interlocutory or interim injunction against the defendant from the moving of any of his assets in Canada; in particular, his bank accounts held at the TD Canada Trust into which the plaintiff claims to have made payments;

(b) an order freezing the bank accounts or any account held at TD Canada Trust by the defendant, in his personal capacity, or his capacity trading as Eurologix Security;

(c) an order preventing the defendant Michael Loughlin, on his own or carrying on business as Eurologix Security, from disposing of, dealing with or diminishing the value of any assets owned by him in Canada or elsewhere;

(d) an order preventing the defendant, Michael Loughlin from selling or otherwise disposing of the real estate known as 5 Hesham Dr., Whitby, Ontario; and

(e) an order requiring the Toronto Dominion Bank or TD Canada Trust to provide access and information to the plaintiff regarding the bank account to which the plaintiff transferred the sum of $1,873,070.28 in United States dollars to or for the credit of the defendant.

[20] In light of the circumstances, costs of this ex parte order are reserved to the motions return judge on April 26, 2012.

MAREVA INJUNCTION

Bennett Estate v. Islamic Republic of Iran

In *Bennett v Islamic Republic of Iran*, a default judgment was granted against the Islamic Republic of Iran and its Ministry of Information and Security on grounds of providing material support to terrorist organization that carried out an attack in Israel harming the claimants. Writs of attachment were sought against Iranian diplomatic property and, on appeal, refused; 618 F.3d 19 (2010, D.C.). The claimants sought to enforce their judgment in Canada.

A Canadian plaintiff commenced an action in British Columbia against the Islamic Republic of Iran and the Iranian Ministry of Information and Security for damages as a result of personal injury incurred in a terrorist attack under the *Justice for Victims of Terrorism Act*, S.C. 2012, c. 1, s. 2. That statute provides in part:

> 4. (1) Any person that has suffered loss or damage in or outside Canada on or after January 1, 1985 as a result of an act or omission that is, or had it been committed in Canada would be, punishable under Part II.1 of the Criminal Code, may, in any court of competent jurisdiction, bring an action to recover an amount equal to the loss or damage proved to have been suffered by the person and obtain any additional amount that the court may allow, from any of the following:
>
> > (a) any listed entity, or foreign state whose immunity is lifted under section 6.1 of the State Immunity Act, or other person that committed the act or omission that resulted in the loss or damage; or
> >
> > (b) a foreign state whose immunity is lifted under section 6.1 of the State Immunity Act, or listed entity or other person that — for the benefit of or otherwise in relation to the listed entity referred to in paragraph (a) — committed an act or omission that is, or had it been committed in Canada would be, punishable under any of sections 83.02 to 83.04 and 83.18 to 83.23 of the Criminal Code.
>
> (2) A court may hear and determine the action referred to in subsection (1) only if the action has a real and substantial connection to Canada or the plaintiff is a Canadian citizen or a permanent resident as defined in subsection 2(1) of the Immigration and Refugee Protection Act.
>
> (2.1) In an action under subsection (1), the defendant is presumed to have committed the act or omission that resulted in the loss or damage to the plaintiff if the court finds that
>
> > (a) a listed entity caused or contributed to the loss or damage by committing an act or omission that is, or had it been committed in Canada would be, punishable under Part II.1 of the Criminal Code; and
> >
> > (b) the defendant — for the benefit of or otherwise in relation to

> the listed entity referred to in paragraph (a) — committed an act or omission that is, or had it been committed in Canada would be, punishable under any of sections 83.02 to 83.04 and 83.18 to 83.23 of the Criminal Code.
>
> (3) A limitation or prescription period in respect of an action brought under subsection (1) does not begin before the day on which this section comes into force and is suspended during any period in which the person that suffered the loss or damage
>
> (a) is incapable of beginning the action because of any physical, mental or psychological condition; or
>
> (b) is unable to ascertain the identity of the listed entity, person or foreign state referred to in paragraph (1)(a) or (b).
>
> (4) The court may refuse to hear a claim against a foreign state under subsection (1) if the loss or damage to the plaintiff occurred in the foreign state and the plaintiff has not given the foreign state a reasonable opportunity to submit the dispute to arbitration in accordance with accepted international rules of arbitration.
>
> (5) A court of competent jurisdiction must recognize a judgment of a foreign court that, in addition to meeting the criteria under Canadian law for being recognized in Canada, is in favour of a person that has suffered loss or damage referred to in subsection (1). However, if the judgment is against a foreign state, that state must be set out on the list referred to in subsection 6.1(2) of the State Immunity Act for the judgment to be recognized.

On that basis she sought to intervene in these proceedings. She was refused at trial, but her appeal was allowed.

2013 ONCA 623

By the Court:

> [1] The appellant, Dr. Sherri Wise, appeals the motion judge's dismissal of her motion pursuant to Rule 13.01(1) for leave to intervene as an added party in an action to recognize a foreign judgment pursuant to s. 4(4) of the Justice for Victims of Terrorism Act, S.C. 201, c. 1, s. 2 (the "JVTA").
>
> **The Background**
>
> [2] The background, briefly, is as follows.
>
> [3] The appellant is a Canadian citizen and the victim of a 1997 terrorist bombing in Israel. In 2012, the JVTA was enacted, allowing victims of terrorism to sue perpetrators of terrorism and their supporters, and the

appellant commenced an action in British Columbia against the Islamic Republic of Iran and the Iranian Ministry of Information and Security ("MOIS") for the damages that she sustained in that terrorist bombing.

[4] The respondents are American citizens and obtained a significant judgment in the United States in 2007 against Iran and MOIS under American legislation permitting its citizens to recover damages for state-sponsored terrorist attacks for damages suffered as a result of a different terrorist attack. The American legislation was enacted before the JVTA: the respondents were in a position to secure a judgment before the appellant.

[5] The appellant learned that the respondents were seeking to have their American judgment recognized in Canada pursuant to s. 4(5) of the JVTA. Neither Iran nor the MOIS defended the respondents' action for recognition of their American judgment, and have been noted in default. The Attorney General of Canada was, however, granted intervener status on consent.

[6] The appellant fears that the American judgment is so significant that if recognized and enforced against Iran's assets in Canada no funds will remain to satisfy her judgment, or the judgments of other Canadians, and the JVTA will not provide what she submits is the intended, meaningful remedy for Canadian victims of terrorism sponsored by Iran. At the outset of the September 30, 2013 hearing of the respondents' motion to recognize their American judgment, she accordingly sought leave to intervene as a party on, and an adjournment of, the respondents' motion. She seeks to make an argument not advanced by the Attorney General, namely that, properly interpreted, the JVTA does not suspend the limitation period normally applicable to an action to recognize a foreign judgment and the respondents' action to enforce their American judgment is accordingly statute-barred.

[7] The motion judge dismissed her motion, with reasons to follow, and proceeded to hear the motion to recognize the American judgment. The motion judge ordered that the hearing of that motion continue on October 31, 2013 on two discrete issues, with the parties to file factums on those issues by October 25, 2013.

[8] In his reasons for dismissing the appellant's motion, released on October 1, 2013, he determined that the appellant had not met any of the three criteria enumerated in Rule 13.01(1). He wrote further, as follows:

Although I have directed that the motion continue on October 31, 2013 to hear further submissions on two discrete issues, most issues raised by the motion already have been canvassed in the written and oral submissions. With the greatest respect to Dr. Wise and her counsel, I do not see what "value added" she could have brought to the hearing. Accordingly, her lack of any legal interest in the issues raised by the [American action], when coupled with the lack of assistance she could give to the Court, made any further delay of the hearing of this motion unacceptable.

…

[14] With respect, until such time as the respondents succeed in having their American judgment recognized in Canada, they are not judgment creditors in Canada. Their interest is more akin to the contingent interest of the appellant. Moreover, the appellant does not seek a stay of the respondents' action.

[15] A person only needs to satisfy one of the criteria in Rule 13.01(1) in order to be able to move for leave to intervene. In our view, the appellant satisfied two. She both has a contingent interest in the subject matter of the proceeding (s. 13.01(1)(a)) and may be adversely affected by a judgment recognizing the American judgment (s. 13.01(1)(b)). The appellant provided evidence from the Canadian government suggesting that Iran's assets in Canada may not be sufficient to satisfy any judgment other than the respondents.

[16] As the respondents argue, if one of the criteria in Rule 13.01(1) entitling a person who is not a party to a proceeding to intervene as an added party is made out, the motion judge then has the discretion to grant intervener status, and the motion judge's decision to deny intervener status is entitled to deference. In *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd*. 1990 CanLII 6886 (ON CA), 74 O.R. (2d) 164 (C.A.), at para. 10, Dubin C.J.O. indicated that "the nature of the case, the issues which arise and likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties" are considerations in determining whether intervener status should be granted. Respectfully, in this instance, deference is displaced because the motion judge mischaracterized the nature of the case as a private commercial one between a judgment creditor and a contingent creditor. In this case, important public issues are at play.

[17] We do not agree that the respondents will not make a useful contribution to the resolution of the motion before the motion judge for recognition of the American judgment. The JVTA is new legislation, enacted with the important public objective of impairing the functioning of terrorist groups. Its interpretation is a matter of first instance. No other party seeks to make the arguments that the appellant advances, especially the limitation period argument. If the appellant is not granted intervener status, either those arguments will not be made, or, if considered and disposed of by the motion judge on his own initiative, there will be no avenue of appeal if the motion judge determination that the American judgment should be recognized.

[18] We are not persuaded that the limitation or public policy arguments that the appellant seeks to advance will necessitate the filing of further evidence by the respondent and result in further delay.

[19] Accordingly, this appeal is allowed. The appellant shall be entitled to file a factum, not exceeding 20 pages. Her factum shall be filed by October 25, 2013. The time allocated to counsel for the appellant for argument on October 30, 2013 shall be as determined by the motion judge.

Amongst the various issues in the main litigation were whether the American judgment was good in Canada, and, whether the Canadian plaintiff could obtain *Mareva* injunctions where the American claimants could not in similar circumstances.

2012 ONSC 5886 (Ont. S.C.J.)

Allen J.:

> [1] The Estate of Marla Bennett and her family ("the Plaintiffs") bring a motion on a without notice basis for a Mareva injunction to restrain Iran and the Iranian Ministry of Information and Security ("the Defendants") from disposing of, encumbering or otherwise dealing with any of its assets in Canada. The Plaintiffs have identified three assets which are real property situate in Ontario.
>
> [2] The Court's authority to grant a Mareva injunction arises under s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.-34. That provision allows the grant of an interlocutory injunction where it appears to the court to be just or convenient to do so.
>
> …
>
> [15] The Plaintiffs have identified three real property assets they assert are either legally or beneficially owned by Iran.
>
> [16] The first property is that occupied by the Iranian Embassy which was used by the Iranian government until the Canadian government ordered its closure on September 7, 2012. This property is located in Ottawa at 245 Metcalfe Street. The Parcel Register indicates it is owned by Iran.
>
> [17] The second property is at 290 Sheppard Avenue in Toronto, the legal title to which is held by a corporation called Farhangeiran Inc. That facility is purportedly used as a centre for Iranian studies. Through an affidavit on October 5, 2012 by a student-at-law at the Plaintiffs' counsel's firm, Lauren Radkwski, the Plaintiffs have disclosed the following information obtained from corporate and computer searches and stories in the media that suggest that Farhangeiran Inc. is an "alter ego" of Iran used as a front to avoid sanctions.
>
> > (a) The Director and President of Farangheiran Inc. is Fazel Larijani, one of five Larijani siblings prominent in the Iranian government. Fazel Larijani was once an Iranian cultural attaché to Canada, one of his brothers, a Speaker of Iran's Parliament, and another brother, the current head of Iran's judiciary.
> >
> > (b) An article in MacLean's magazine in April 2010 concluded the Centre was a front for and controlled by the Iranian government.
> >
> > (c) The Toronto Star published an article at about the same time in which one of the original three Directors of Farangheiran Inc.

> said that if the Centre was continuing to do business it was “an abuse”.
>
> (d) A local Iranian-Canadian academic was quoted by the Toronto Star as saying that the Centre was a “front for the Iranian government”.

[18] The third property is located at 2 Robinson Avenue in Ottawa. That property is legally owned by the Mobin Foundation which acquired title from Fatima Cultural Activities Inc. Land transfer documents indicate the property was held in trust for the Mobin Foundation.

…

[22] The five factors set down by courts for consideration on a motion for a Mareva injunction are well known. The plaintiff is required to:

> (a) make full and frank disclosure of all material facts within its knowledge;
>
> (b) provide particulars of the claim, stating the grounds of the claim and the amount thereof, and the points that could be fairly made against it by the defendant;
>
> (c) give some grounds for believing that there are assets in the jurisdiction;
>
> (d) give some grounds for believing that there is a real risk that the assets will be removed from the jurisdiction, disposed of within the jurisdiction or otherwise dissipated so that the moving party will be unable to satisfy a judgment awarded to him or her; and
>
> (e) provide an undertaking as to damages.

[Sibley & Associates LP v. Ross, 2011 ONSC 2951 (CanLII), at para. 11, (Ont. S.C.J.) and Chitel v. Robart (1983), 1982 CanLII 1956 (ON CA), 39 O.R. (2d) 513 (Ont. C.A.)]

Full and Frank Disclosure

[23] Because a motion for an interim Mareva injunction is made on a without notice basis a defendant is foreclosed from making a case against the injunction. The plaintiff is therefore required to make full and frank disclosure to the court of its claim and any available defences.

[24] The materials on this motion, the affidavits and attached exhibits I find fully set out the basis for the claim against Iran.

[25] In addressing possible defences, the Plaintiffs acknowledge that their evidence with respect to Iran’s ownership of property in Ontario, particularly the Sheppard Avenue West property in Toronto and the

Robinson Avenue property in Ottawa is not direct evidence or conclusive of Iran's ownership. I will address this more fully below.

[26] The Plaintiffs have also disclosed a potential defence with respect to possible barriers to attaching the property at the former Iranian Embassy at 245 Metcalfe Street in Ottawa. This defence will be addressed when I deal with grounds to conclude Iran has property in Ontario.

[27] The Plaintiffs also address other the possible defences to Ontario recognizing the U.S. Judgment — whether the foreign judgment is against public policy in Canada, was made in breach of natural justice, or was obtained by a fraud on the foreign court. These defences too are dealt with below.

Strong Prima Facie Case

[28] The plaintiffs are required to show they have a strong prima facie case on the merits with respect to their request that Ontario recognize the foreign judgment. The Plaintiffs point to the following factors as favouring Ontario recognizing the U.S. Judgment.

[29] Foreign states generally enjoy immunity from law suits in Canada under the State Immunity Act, R.S.C. 1985, c. S-18, s. 6.1, with exceptions, one of which applies to Iran. **Because Iran is listed under the State Immunity Act as a sponsor of state terrorism and the claims arising from the U.S. Judgment arise out of a claim of state terrorism, Iran does not enjoy this immunity. Immunity therefore does not stand as a bar to Ontario recognizing the U.S. Judgment.**

…

Some Grounds for Concluding Iran has Assets in Ontario

[38] Although, as the Plaintiffs acknowledge, their evidence on this factor is not conclusive, I find the Plaintiffs have managed to adduce evidence sufficient to establish a strong prima facie case that Iran has title either legally or beneficially to three real property assets in Ontario.

245 Metcalfe Street

[39] The 245 Metcalfe Street property easily meets the "grounds to believe test" since it is legally owned by Iran. But there are some special considerations the Plaintiffs raise with respect to that property that could provide a possible defence to the Plaintiffs' position.

[40] There is a possible argument that the 245 Metcalf Street property, as the former Iranian Embassy, could be immune from attachment.

[41] The Plaintiffs referred the Court to a Canadian Government order cited in the Canada Gazette, Vol. 146, No. 20, September 26, 2012 entitled

"Order Establishing a List of Foreign State Supporters of Terrorism." The Canadian Government's analysis in that document concludes that while some property of states listed as state supporters of terrorism no longer enjoy immunity, an exception was made for diplomatic and consular property of the listed states. According to the Canada Gazette, the consular property of the listed state is to maintain its inviolability and the protection of the Foreign Missions and International Organizations Act, S.C. 1991, c. 41, as amended (the "FMIO Act") and the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.

[42] The Plaintiffs make the submission that such orders made by the Canadian government in the Canada Gazette are not law and therefore are not legally binding. It is the Plaintiffs' submission that the legal effect of the Canadian government ordering the closure of the Iranian Embassy on September 7, 2012 can be found in the statutory intent expressed in s. 3(1) of the FMIO Act.

[43] In respect to foreign diplomatic missions and consular posts in Canada, section 3(1) of the FMIO Act cites the provisions of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations that have the force of law in Canada. This section states:

> 3. (1) Articles 1, 22 to 24 and 27 to 40 of the Vienna Convention on Diplomatic Relations, and Articles 1, 5, 15, 17, 31 to 33, 35, 39 and 40, paragraphs 1 and 2 of Article 41, Articles 43 to 45 and 48 to 54, paragraphs 2 and 3 of Article 55, paragraph 2 of Article 57, paragraphs 1 to 3 of Article 58, Articles 59 to 62, 64, 66 and 67, paragraphs 1, 2 and 4 of Article 70 and Article 71 of the Vienna Convention on Consular Relations, have the force of law in Canada in respect of all foreign states, regardless of whether those states are parties to those Conventions.

[44] Article 22 of the Vienna Convention on Diplomatic Relations expresses the general principle that the premises of the mission shall be inviolable and the receiving State has a special duty to protect the premises of the mission against any intrusion or damage and to prevent the disturbance of the peace of the mission. Article 45 addresses the effect on that principle if diplomatic relations were severed between two States. The receiving State must, even in the case of armed conflict, respect and protect the premises of the mission, together with its property and archives.

[45] While Article 22 of the Vienna Convention on Diplomatic Relations is cited in s. 3(1) of the FMIO Act, Article 45 is not cited. Hence, the Plaintiffs submit, Article 45 does not have the force of law in Canada.

[46] Article 27 of the Vienna Convention on Consular Relations also deals with severed relations between States. It provides in the event of the severing of consular relations between two States, even in the case of armed conflict, the receiving State shall respect and protect the consular premises, together with the property and the archives of the consular post. Article 31 provides that the consular premises are inviolable and that the receiving

State is under a special duty to protect the consular post against any intrusion or damage.

[47] Neither Article 27 nor Article 31 of the Vienna Convention on Consular Relations is cited in s. 3(1) of the FMIO Act as having the force of law in Canada.

[48] The Plaintiffs submit the omission from s. 3(1) of the FMIO Act of Article 45 of the Vienna Convention on Diplomatic Relations and Articles 27 and 31 of the Vienna Convention on Consular Relations expresses Parliament's intent that those provisions not have the force of law in Canada. The combined effect of the omission of those Articles, according to the Plaintiffs, is that once the Iranian Embassy was closed on September 7, 2012 and diplomatic relations severed, the premises were no longer inviolable and Canada no longer had the to duty protect the mission premises and property from intrusion or disturbance. Thus, the Vienna Conventions do not in the Plaintiffs' view preclude the attachment of 245 Metcalfe Street for the purpose of enforcing the U.S. Judgment.

[49] The Plaintiffs addressed a potential defence to that argument. It might be argued that a custom prevails in the international community that could arguably take priority over domestic law — a custom that provides even with the severance of diplomatic relations the receiving State maintains its obligation to respect the inviolability and immunity of diplomatic missions and to protect the premises and property from intrusion or damage.

[50] The Plaintiffs acknowledge that while Canadian courts have held that customary international law can have direct legal effect without being given force of law through domestic statute, Canadian courts have also applied the principle of legislative supremacy which provides that legislatures may override customary international law by clearly demonstrating the intent to do so.

[51] I am satisfied the Plaintiffs have presented a strong prima facie case that the enforcement of the U.S. Judgment against 245 Metcalfe Street may not be precluded by the Vienna Conventions. That asset could therefore be an asset against which enforcement might potentially be effected.

[52] The injunction I have ordered is temporary and of course the Defendants will have an opportunity to raise defences and seek to vary the Order or have it set aside at the expiry of ten the days.

290 Sheppard Avenue West and 2 Robinson Avenue

[53] The facts as to title to these two properties are not so clear.

[54] In connecting the other two properties to Iran, the Plaintiffs relied on the experience of U.S. attorney Mr. Fay, decisions from U.S. courts and the expert opinion of Professor Zandi. The Plaintiffs ask this Court to draw certain inferences from Mr. Fay's experience with Iran's practices in avoiding the economic sanctions and from his involvement in multiple actions in the

U.S. against Iran. The Plaintiffs further ask this Court to consider the findings of U.S. courts in claims against Iran as to how Iran operates in the U.S. by setting up alter egos or façade entities to evade international sanctions, in particular, how Iran uses cultural centres in this manner to hide its identity.

[55] With the inferences the Plaintiffs say may be drawn from the experiences in the U.S., the Plaintiffs ask this Court to consider the results of the various searches and the news articles in conjunction with Professor Zandi's strongly stated opinion. Land title searches were done on the two properties, each turning up the names of entities that appear from computer and corporate searches and news articles to be linked to the Iranian government and Iranian authorities. Because of the apparent connection between the entities on title and the prominent Iranian authorities connected to these entities as discussed above, the Plaintiffs submit it is reasonable to conclude there is more than a passing suggestion that if Iran is not the legal owner of the two properties, they could reasonably be found to be the beneficial owners.

[56] To be sure news articles, computer searches and evidence from the experiences in another jurisdiction may not be the most conclusive or probative sources of evidence. Injunctive relief however is not required to be sought on a standard of certainty. Establishing a strong prima facie case is not so onerous. I am satisfied based on the information from the Plaintiffs' sources, combined with the expert opinion of Professor Zandi and evidence of the U.S experience, that the Plaintiffs have established a strong prima facie case that Iran has assets in the two properties that could possibly be used to enforce the U.S Judgment. This conclusion of course can be challenged by the Defendants on the return of the motion.

The Risk Iran Will Dissipate Assets

[57] The test for this criterion is stated by the Court of Appeal in *Chitel v. Robart*, supra:

> The applicant must persuade the Court by his material that the defendant is removing or there is a real risk that he is about to remove his assets from the jurisdiction to avoid the possibility of a judgment, or that the defendant is otherwise dissipating his assets, in a manner … so as to render the possibility of future tracing of the assets remote, if not impossible in law.

[Chitel v. Robarts, supra, para. 58]

[58] The Plaintiffs ask the court to draw inferences from the experience with Iran in U.S. courts and Iran's practices in evading the international sanctions. As noted earlier, Mr. Fay furnishes examples of Iran's conduct in relation to the enforcement of U.S. judgments against its assets in the U.S. Mr. Fay has observed from direct experience in litigation against Iran that Iran declines to participate in U.S. court proceedings until enforcement efforts are made. Then Iran gets involved for the purpose of doing whatever it can to avoid enforcement.

…

[62] The Plaintiffs seek non-dissipation orders with respect to the three real properties and also against the entities on title that the Plaintiffs argue are likely agents or alter egos of Iran. The Plaintiffs seek to restrain any assets held by the entities currently on title and an entity previously on title to the Robinson Avenue property and connected to the current title-holder — Farhangeiran Inc., in relation to 290 Sheppard Avenue West, Toronto and the Mobin Foundation and Fatima Cultural Activities Inc., in relation to 2 Robinson Avenue, Ottawa. As noted earlier, Mobin Foundation is currently on title. Fatima Cultural Activities Inc. purchased 2 Robinson Avenue from the National Capital Commission, held it in trust for the Mobin Foundation for a period and subsequently transferred it to the Mobin Foundation.

[63] In view of recent U.S. experience with Iran dissipating its U.S. assets, and in light of evidence of Iran's covert use of cultural centres and Professor Zandi's unreserved, but admittedly inconclusive, opinion that the Iranian government ultimately controls the Iranian cultural centres at 290 Sheppard Avenue West, Toronto and 2 Robinson Avenue, Ottawa, I am satisfied that a non-dissipation order of the scope requested by the Plaintiffs is appropriate in the circumstances. I am satisfied the Plaintiffs have shown there is a real risk of Iran dissipating its assets in Canada if a freezing order is not imposed.

[64] Again, the Court is open to hearing any challenges the Defendants might raise against this conclusion.

Undertaking as to Damages

[65] The Plaintiffs have given an undertaking as to damages in the form prescribed by the Rules.

2013 ONSC 1376 (Ont. S.C.J.)

Macdonald J.:

> [1] The Plaintiffs seek their partial indemnity costs on a joint and several basis against the Defendants in respect of the motions heard on October 11, October 18, and October 31, 2012.
>
> [2] The factual background of this matter is set out in the costs submissions provided by Mr. Adair. I agree that there is no reason in this case to depart from the general rule that costs follow the event. The matters at issue in the October 2012 motions were complex. I accept that it was necessary for the Plaintiffs to complete detailed investigations into property and assets held by the Defendants in Canada. There are also issues that involved consideration of recent amendments to the State Immunity Act, R.S.C. 1985 s-18, relating to State support for terrorism. In order to prepare for the motion, plaintiffs' counsel had to consult with experts on Iran. U.S. counsel for the Plaintiffs swore detailed affidavits in support of the relief being sought in the October 2012 motions.
>
> [3] The conduct of the defendants favours the awarding of costs against them.
>
> [4] I agree that the hourly rates set out by Mr. Adair and others who assisted him are fair and reasonable. I do not overlook the fact that the Defendants concealed assets with the apparent objective of shielding themselves from the claims of the plaintiff. For these reasons, I am in agreement that the Plaintiffs' partial indemnity costs inclusive of taxes and disbursements are payable jointly and severely by all of the defendants in the total amount of $62,068.37.

2013 ONSC 5662 (Ont. S.C.J.)
[footnotes omitted]

D.M. Brown J.:

> [11] **The AG Canada seeks to vary the Mareva Order to set aside those portions that affect assets which the Government of Canada has certified as the diplomatic property of Iran. The main argument advanced by the AG Canada was that the plaintiff failed to make full and frank disclosure of material facts on the motions which resulted in the orders of Allen J. and the later Mareva Order.**
>
> …
>
> [14] At the hearing the AG Canada contended that the plaintiffs had failed to put before Allen J. and E. MacDonald J. the following material information:

> (i) The fact that after obtaining the 2007 U.S. Judgment the plaintiffs had obtained writs of attachment against five of Iran's former diplomatic properties in Washington, D.C., but those writs had been quashed by the U.S. District Court, a decision affirmed on appeal in 2010 by the United States Court of Appeals for the District of Columbia Circuit;[6]
>
> (ii) The reasoning of the Federal Court of Appeal in its 2003 decision in *Copello v. Canada (Minister of Foreign Affairs)*[7] was not explained fully to the motions judges. If it had been, argued the AG Canada, the judges would have understood that notwithstanding the failure of section 3(1) of the Foreign Missions and International Organizations Act to declare that Article 45 of the Vienna Convention on Diplomatic Relations had "the force of law in Canada in respect of all foreign states", the issue of the availability of diplomatic property for attachment under domestic law when Canada had suspended relations with a foreign state remained "in the sphere of the Crown prerogative in the conduct of foreign affairs by Canada and immune from judicial review"; and,
>
> (iii) The fact of the subsequent issuance of the Certificate issued under the FMIOA identifying properties in Ottawa as diplomatic property.

[15] Before considering these allegations, let me first turn to the applicable law.

IV. The governing legal principles

[16] The basic obligation of full and frank disclosure on a motion without notice was articulated by the Court of Appeal in *Chitel v. Rothbart*:

> There is no necessity for citation of any authority to state the obvious that the plaintiff must, in securing ex parte interim injunction, make full and frank disclosure of the relevant facts, including facts which may explain the defendant's position if known to the plaintiff. If there is less than this full and accurate disclosure in a material way or if there is a misleading of the court on material facts in the original application, the court will not exercise its discretion in favour of the plaintiff and continue the injunction.[8]

[17] That principle finds expression 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 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.

[18] Master Egan, in Euro United Corp. (Interim Receiver of) v. Rehani,[9] discussed in detail the application of those general principles to the practical preparation and argument of ex parte motions. Let me summarize that discussion:

(i) Material facts are those of which the court must be made aware in arriving at a decision, non-disclosure of which may have affected the court's approach to the motion, made the decision doubtful, or affected the outcome of the motion;

(ii) This duty of a balanced presentation of facts and law extends not only to absent parties, but also to those who may be affected by the order;

(iii) In making full and frank disclosure of the relevant facts, the plaintiff must include facts which may explain the defendant's position, if known to the plaintiff. The onus on the plaintiff to make full and complete disclosure is not discharged by disclosing only what is the most limited basis of information that may be relevant. Full disclosure may and often will require a plaintiff to advise the court of matters of both fact and of law which form the position of the other side;

(iv) It is insufficient for a plaintiff to simply append a document as an exhibit without highlighting in the body of the affidavit itself any important clauses or portions of the exhibits;

(v) The test of materiality is an objective one. In the United States of America v. Friedland[10] the court quoted the following passage from the English text, Gee, Mareva Injunctions and Anton Piller Relief (3d Edition 1995 at p. 97):

... The duty extends to placing before the court all matters which are relevant to the court's assessment of the application, and it is no answer to a complaint of non-disclosure that if the relevant matters had been placed before the court, the decision would have been the same. The test as to materiality is an objective one, and it is not for the applicant or his advisers to decide the question; hence it is no excuse for the applicant subsequently to say that he was genuinely unaware, or did not believe, that the facts were relevant or important. All matters which are relevant to the 'weighing operation' that the court has to make in deciding whether or not to grant the order must be disclosed.

(vi) If a finding is made of material misrepresentation or material non-disclosure the court is not stripped of all of its discretion but, generally speaking, the ex parte order will be set aside.

V. Analysis

A. Did the obligation to make full and frank disclosure which applies to ex parte motions arise on the motion of October 31, 2012?

[19] The plaintiff's initial motion for a Mareva order was made without notice. As a result, Allen J. provided that her order of October 11, 2012 only ran for 10 days. In her October 17, 2012 Reasons, Allen J. acknowledged that the plaintiff had raised some "special considerations" which arguably could render the diplomatic property at 245 Metcalf Street immune from attachment, but concluded that the plaintiffs had presented "a strong prima facie case that the enforcement of the U.S. Judgment against 245 Metcalfe Street may not be precluded by the Vienna Conventions. That asset could therefore be an asset against which enforcement might potentially be effected."

[20] On October 18, 2012, the plaintiff attended before Lederman J. to seek an extension of the initial Mareva. That continuation motion was made without notice. Lederman J. extended the Mareva injunction for an additional 10 days. In his endorsement Lederman J. wrote:

> I am satisfied that a) the Plaintiffs have made out a strong prima facie case on the merits and have a good arguable case that the Embassy property and the former residence of the Iranian Ambassador are available for execution even after Canadian/Iran relations have been severed…

Lederman J. set a date for the hearing of "the plaintiff's motion, on notice, to continue the injunctive relief granted by the October 11, 2012 Order and this Order…" and directed that Iran be given notice of the continuation motion by the procedure specified by section 9(2) of the State Immunity Act[11] and by delivering the materials to a Toronto counsel who previously had acted for Iran in a 2010 proceeding involving the Steen Estate.

[21] On October 31, 2012, the matter came back before the Court. No one appeared on behalf of the defendants. E. MacDonald J. granted a further Mareva Order, the main terms of which I set out above. In support of that order E. MacDonald J. wrote the following endorsement:

> Order to go in the form signed by me today. The court is satisfied that the Plaintiffs have made reasonable efforts to notify or serve the parties affected by this Order. This order is appropriate given the previous orders of Justices Lederman and Allen, and their reasons for making their orders.

[22] Although a form of notice had been given to Iran of the motion returnable before E. MacDonald J., I conclude that on the return of that motion the moving party plaintiffs were obliged to make full and frank disclosure of all materials facts to the motion judge of the same kind and degree as they would have been obliged to make under the jurisprudence concerning ex parte motions.

[23] The identity of the responding party – a foreign state – drives that conclusion. In an ordinary commercial case where a court grants an ex parte Mareva and notice has been given to the responding party of the continuation hearing, yet the party fails to appear at the hearing, a court usually takes the view that the ex parte full and frank disclosure standard no longer applies. That conclusion flows from the following line of reasoning: since the responding party has had the opportunity to review the motion materials, but has elected not to attend, then the court reasonably can infer that the fact of non-attendance signals that the evidence filed on the ex parte motion can be treated as accurate and reliable. If that evidence had omitted or mis-stated material facts, the court would expect the responding party to attend at the continuation hearing and draw the omission or mis-statement to the attention of the court.

[24] When one moves into the world of litigation against foreign states, that line of reasoning is not open to a court. Section 3 of the State Immunity Act provides:

> 3(1) Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada.
>
> (2) In any proceedings before a court, the court shall give effect to the immunity conferred on a foreign state by subsection (1) notwithstanding that the state has failed to take any step in the proceedings.

[25] Given that a court must give effect to any immunity conferred by the SIA on a foreign state, even if "the state has failed to take any step in the proceedings", then if a foreign state fails to attend at the hearing of a motion, the court must consider whether any recognized immunity would prevent it from issuing the order sought against the foreign state. Since Canadian courts operate on the principle that under an adversarial system it is the obligation of the parties to bring to the court's attention all material facts, it follows, in my view, that when an order is sought by a party against a foreign state, but the foreign state fails to attend at the court hearing, the party seeking the order must make full and frank disclosure of all material facts to the court to the same extent as the party would be required to do on an ex parte motion before the court. Put another way, the effect of SIA s. 3(2) is to place an obligation of full and frank disclosure on a party seeking an order against a foreign state where the state does not appear at the hearing, even if notice has been given to the state. The obligation to make full and frank disclosure of all materials facts results from the importance accorded by our system of law to the principle of state immunity.

[26] As can be seen from the endorsements of each of three judges who granted or continued a Mareva order, in discharging their duties under SIA s. 3(2) they relied only on the plaintiffs' evidence and submissions; they could look to no other party for assistance in determining the issues before them. The initial Mareva order granted by Allen J. was an ex parte one, and she gave extensive reasons. Lederman J. relied primarily "on the evidence before Allen J." in making his continuation order. In turn, E. MacDonald J.

made clear her reliance on the reasoning of the two judges who had presided at ex parte hearings in granting her order: “This order is appropriate given the previous orders of Justices Lederman and Allen and their reasons for making their orders”.

[27] The question then becomes, did the plaintiffs make full and frank disclosure of all material facts on the motion before E. MacDonald J. which resulted in the making of the Mareva Order which currently is in force?

B. Did the plaintiffs fail to make full and frank disclosure of material facts on the motion which resulted in the granting of the Mareva Order?

[28] Let me deal first with the third argument advanced by the AG Canada, which was that once the plaintiffs became aware of the February, 2013 Certificate issued under the FMIOA designating properties as diplomatic property, they were under an obligation to go back to Court and draw that information to the Court’s attention. I do not regard that argument as a strong one. First, the reasons of Allen J. indicated that she proceeded on the basis that some of the assets of Iran which might be caught by a Mareva order might be diplomatic property, and she made specific reference to the Iranian Embassy at 245 Metcalfe Street. So, the plaintiffs fairly drew to the court’s attention the prospect that the injunction sought could well capture diplomatic property. Second, once the AG Canada moved for intervenor status, which was not long after the issuance of the Certificate, the plaintiffs co-operated in putting in place a process in which the AG Canada could advance its argument that the scope of the Mareva Order should be reduced. In so doing the plaintiffs acted quite properly.

[29] That brings me back, then, to the first and second grounds advanced by the AG Canada – i.e. the plaintiffs failed to disclose to the Ontario court their failed effort to attach Iranian diplomatic property in the United States and failed to explain fully the reasoning of the Federal Court of Appeal in the Copello case.

[30] None of the three affidavits which were before Allen J. or Lederman J. disclosed the plaintiffs’ unsuccessful efforts or the U.S. Court of Appeals decision, nor did an additional affidavit from a U.S. national security expert which was placed before E. MacDonald J., together with the others. Included in the first set of affidavits was one from a U.S. attorney, Thomas Fay, who had acted for the Bennetts in their U.S. action. In his affidavit Mr. Fay spent some time describing the history of the Bennetts’ U.S. action. Although in his description of another U.S. suit in which he had been involved Mr. Fay disclosed that a writ of attachment issued against Iran had been quashed, in respect of the Bennett action he simply deposed: “I further confirm that the plaintiffs have not been able to enforce the U.S. Judgment against Iranian assets in the United States.” In the reported decision of the U.S. Court of Appeals in the Bennett action, Mr. Fay was listed as one of their counsel of record.

[31] **At the hearing before me plaintiffs' counsel candidly acknowledged that the plaintiffs did not disclose to Allen J., Lederman J. or E. MacDonald J. their unsuccessful efforts to attach Iranian diplomatic property in the United States or the U.S. Court of Appeals decision. Plaintiffs' counsel contended that the U.S. case had been decided under a different legislative regime and counsel had concluded the decision was not material to the proceedings before the Ontario courts to obtain a Mareva injunction. I accept that plaintiffs' counsel made that decision in good faith.**

[32] Nevertheless, for the reasons set out below, I conclude that the decision not to disclose the information about the plaintiffs' unsuccessful efforts in the U.S. to attach Iranian diplomatic property resulted in the plaintiffs failing to make full and frank disclosure of a very material fact to the judges who granted the Mareva orders. Let me explain why.

[33] Simply put, had the plaintiffs disclosed that information to any of the judges who made the initial, continuing or final Mareva Orders, no doubt a conversation along the following lines would have taken place:

The Court: Counsel, I see from your materials that about two years ago your clients sought to enforce the U.S. Judgment in the States. They issued writs of attachment against Iranian diplomatic property in D.C., but the U.S. District and Appeals Court quashed those writs. Is that correct?

Counsel: Yes.

The Court: Well, if the U.S. courts quashed your clients' attempt to attach Iranian diplomatic property down there, and given the provisions about diplomatic property in the Vienna Convention to which Canada is also a party, how is it that Iranian diplomatic property in Canada would be available for attachment? Wouldn't diplomatic property here receive the same protection as in the States?

Counsel: Your Honour, there are important differences between the legal treatment of diplomatic property in the States and in Canada which would give rise to a different result here.

The Court: Please demonstrate to me why that would be the case.

And the conversation would go on from there.

[34] None of the judges from whom a Mareva order was requested had the opportunity to pose that question or to engage in that conversation because the plaintiffs did not disclose the existence of their unsuccessful attempts to attach Iranian diplomatic property in the United States.

[35] Had disclosure of the U.S. Court of Appeals decision been made, how would that conversation likely have gone? Well, from the materials filed, I expect it would have been along the following lines. Both Canada and the

United States share a common starting point on the treatment of the diplomatic property of foreign states in each country – the Vienna Convention on Diplomatic Relations. Article 22 of the Convention provides that "the premises of the mission shall be inviolable", and there is no dispute that inviolability means, in part, that the host state cannot exercise law enforcement rights against diplomatic premises. However, if diplomatic relations are broken off between two states or if a mission is permanently or temporarily recalled, then one moves to Article 45 of the Convention which states that "the receiving State must…respect and protect the premises of the mission…"

[36] On September 7, 2012, Canada suspended its relations with Iran and gave Iranian diplomats five days to leave Canada. The United States had cut diplomatic ties with Iran in 1980 following the take-over of the American Embassy in Tehran.

[37] From the common starting point of the Vienna Convention, Canada and the United States have established legislative regimes to deal with issues concerning diplomatic property. As set out in the 2010 decision of the U.S. Court of Appeals in the plaintiffs' case, U.S. federal statute establishes the general principle that diplomatic properties are immune from attachment, and the Foreign Missions Act authorizes the Secretary of State to protect and preserve the property of a foreign mission that has ceased conducting diplomatic activities in the United States. However, the federal Terrorism Risk Insurance Act carves out an exception to the principle of immunity from attachment, authorizing the attachment of "blocked assets" of state sponsors of terrorism to satisfy judgments for compensatory damages for acts of terrorism. Nevertheless, "blocked assets" do not include "property subject to the Vienna Convention on Diplomatic Relations" that "is being used exclusively for diplomatic or consular purposes". In the plaintiffs' case, the U.S. Court of Appeals held that the five properties they had sought to attach had been held and used by the U.S. in fulfillment of its obligation under section 45 of the Vienna Convention to respect and protect the premises of a former mission and therefore did not constitute "blocked assets" available for attachment.

[38] In Canada, the legislative regime starts with the State Immunity Act, section 12(1) of which enacts the general principle that "property of a foreign state that is located in Canada is immune from attachment and execution", but the section then goes on to create several exceptions to that principle. Section 12(1)(d) creates an exception to the general principle of immunity from attachment where:

> (d) the foreign state is set out on the list referred to in subsection 6.1(2) and the attachment or execution relates to a judgment rendered in an action brought against it for its support of terrorism or its terrorist activity and to property other than property that has cultural or historical value.

[39] Does that mean where judgment is granted against a state supporter of terrorism, such as Iran, "in an action brought against it for its

support of terrorism", diplomatic property then becomes available for attachment unless it has "cultural or historical value"? Section 16 of the SIA states:

> 16. If, in any proceeding or other matter to which a provision of this Act and a provision of the… the Foreign Missions and International Organizations Act apply, there is a conflict between those provisions, the provision of this Act does not apply in the proceeding or other matter to the extent of the conflict.

Does the FMIOA contain a provision which applies and might be in conflict?

[40] Section 3(1) of the FMIOA provides that several articles of the Vienna Convention on Diplomatic Relations "have the force of law in Canada in respect of all foreign states, regardless of whether those states are parties to those Conventions". Article 22 of the Vienna Convention is mentioned in FMIOA s. 3(1); Article 45 is not. So, does that mean, as the plaintiffs contended before me, and obviously contended before Allen J. for her reasons so disclose, that since Article 45 is not mentioned, then upon the suspension of diplomatic relations the diplomatic property of a foreign state no longer is "inviolable", but becomes subject to attachment to satisfy a judgment of a Canadian court? Allen J. accepted that argument advanced by the plaintiffs:

[48] The Plaintiffs submit the omission from s. 3(1) of the FMIO Act of Article 45 of the Vienna Convention on Diplomatic Relations and Articles 27 and 31 of the Vienna Convention on Consular Relations expresses Parliament's intent that those provisions not have the force of law in Canada. The combined effect of the omission of those Articles, according to the Plaintiffs, is that once the Iranian Embassy was closed on September 7, 2012 and diplomatic relations severed, the premises were no longer inviolable and Canada no longer had the to duty protect the mission premises and property from intrusion or disturbance. Thus, the Vienna Conventions do not in the Plaintiffs' view preclude the attachment of 245 Metcalfe Street for the purpose of enforcing the U.S. Judgment.

[49] The Plaintiffs addressed a potential defence to that argument. It might be argued that a custom prevails in the international community that could arguably take priority over domestic law — a custom that provides even with the severance of diplomatic relations the receiving State maintains its obligation to respect the inviolability and immunity of diplomatic missions and to protect the premises and property from intrusion or damage.

[50] The Plaintiffs acknowledge that while Canadian courts have held that customary international law can have direct legal effect without being given force of law through domestic statute, Canadian courts have also applied the principle of legislative supremacy which provides that legislatures may override customary international law by clearly demonstrating the intent to do so.

[51] I am satisfied the Plaintiffs have presented a strong prima facie case that the enforcement of the U.S. Judgment against 245 Metcalfe Street may not be precluded by the Vienna Conventions. That asset could therefore be an asset against which enforcement might potentially be effected.

And Lederman J., based on the same record, concluded that the plaintiffs "have a good arguable case that the Embassy property and the former residence of the Iranian Ambassador are available for execution even after Canadian/Iran relations have been severed…"

[41] That then leads to the Copello decision, which plaintiffs' counsel admitted was not in the factum before Allen J. or Lederman J., but was referred to in their factum before E. MacDonald J. The Copello case involved an application by an Italian diplomat for judicial review to quash the decision of the Minister of Foreign Affairs requesting that he leave Canada. Both the Federal Court and the Federal Court of Appeal considered the issue as one involving the declaration of a diplomat as persona non grata. Article 9 of the Vienna Convention deals with declarations of embassy staff as persona non grata. Section 3(1) of the FMIOA does not include Article 9 within its ambit. Did that mean that Article 9 did not have the force of law in Canada, just as the plaintiffs in this case had argued before Allen J. that Article 45 did not have the force of law because FMIOA s. 3(1) did not refer to it? That was not the conclusion reached by the Federal Court of Appeal in Copello:

[20] However, while portions of the Vienna Convention have been given force of law in Canada by way of the Foreign Missions and International Organizations Act, S.C. 1991, c. 41, this Act does not specifically refer to Article 9. Nevertheless, even though Article 9 has not been specifically enacted in Canadian legislation, it accurately describes the customary international law on this question. Article 9 was therefore relevant to the Motions Judge's analysis in the sense that Canadian courts generally recognize international legal norms irrespective of whether they are binding on Canada (see: Baker v. Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817 at para. 70).

[21] The Motions Judge made the following determination at paragraph 71:

> In the absence of legislative implementation by Canada, Article 9 does not form part of the domestic law. The exclusion of this article can only mean that Parliament intended that the expulsion of diplomats remain in the sphere of the Crown prerogative in the conduct of foreign affairs by Canada, and immune from judicial review. In my opinion, a declaration of persona non grata is not a legal issue and remains in the political arena. The decision is not justiciable.

I agree with this conclusion.

[42] Copello therefore was decided on the basis that if an article in the Vienna Convention on Diplomatic Relations was not referred to in FMIOA s.

3(1), nevertheless the subject-matter of the article might well fall within the sphere of Crown prerogative, with the result that the subject-matter would not fall within the jurisdiction of domestic courts or their process. By failing to include the Copello case in their factum before Allen J. and Lederman J., the plaintiffs prevented those judges from considering, in a full manner, the significance of the omission of a reference to Article 45 of the Vienna Convention in FMIOA s. 3(1).

[43] Plaintiffs' counsel advised that the Copello case only came to the plaintiffs' attention following the first two attendances. The plaintiffs did refer to the Copello decision in their factum on the hearing before E. MacDonald J. in the section entitled, "Status of Diplomatic Property". Copello was cited in paragraph 67 of their Factum which read, in part:

> Canadian courts have not had much occasion to consider the effect of the exclusion of certain Vienna Convention provisions from the Foreign Missions Act, but where that issue has been considered, they have held that the Convention provisions that are not listed in s. 3 of the Foreign Missions Act do not have force of law in Canada.

Unfortunately, that passage was not an accurate summary of the holding in Copello. To the contrary, Copello held that issues dealing with persona non grata fell within the sphere of Crown prerogative and were not justiciable, quite a different legal result from that suggested by the plaintiffs' factum.

[44] The decision of the U.S. Court of Appeals quashing the writs of attachment issued by the Bennett plaintiffs against Iranian diplomatic property and the proper description of the ratio of the Federal Court of Appeal in Copello were both very material pieces of information which should have been disclosed and accurately described to all three judges who dealt with the requests for a Mareva order against Iranian diplomatic property. I have no doubt that had the unfavourable U.S. Court of Appeals decision been disclosed, the motions judges would have approached the plaintiffs' request with a much higher degree of scrutiny and skepticism. Further, had an accurate description of the reasoning in Copello been placed before any of the judges, they would have possessed a judicial view about the legal consequences of the omission of a Vienna Convention article from the language of FMIOA s. 3(1).

[45] Armed with that information, I strongly suspect that the Court would not have described the plaintiffs' claim against Iranian diplomatic property as "a strong prima facie case" or "a good arguable case". Instead, that information would have disclosed that the argument in favour of the exigibility of Iranian diplomatic assets at best was highly contestable or, in the lingo of interlocutory injunctions, merely a serious question to be tried. Since the granting of a Mareva injunction requires that the moving party demonstrate a strong prima facie case, not just a serious question to be tried, I strongly doubt that a Mareva injunction over diplomatic property would have issued had such information been disclosed. Accordingly, I conclude

that the plaintiffs failed to make full and frank disclosure of very material facts on the motions before Allen J., Lederman J. and E. MacDonald J.

[46] The parties both argued that they would suffer irreparable harm were the Court to set aside, or not set aside, the Mareva Order in respect of Iran's diplomatic property in Canada. The plaintiffs contended that Iran would try to realize on and remove those assets from Canada should the Mareva be set aside. From the submissions of counsel for the AG Canada, it is apparent that the Government of Canada, at present, would not take any steps to prevent such realization or removal of assets, so the plaintiffs have reason for concern. On the other hand, improper interference by the courts in areas of Crown prerogative can cause the Crown to suffer an irreparable harm.[12]

[47] More important than either of those considerations, however, in the case of the obligation to make full and frank disclosure to the court, is the preservation of the integrity of the court process. One important aspect of the rule of law is that Canadian courts are independent and impartial. Judicial impartiality rests, in part, upon the effect workings of an adversarial litigation system. Where a party appears before the court and asks for an order affecting the rights of a person who is not present in court, the imposition of a heavy onus on the requesting party to place before the court not only facts or arguments that support its case, but also facts and arguments that might hurt its case, works to ensure an impartial adjudication of the request. In a very real sense, the duty to disclose attempts to re-create the dynamics of an adversarial argument. It is that need to preserve the integrity of the judicial system by ensuring the impartial adjudication of cases which prompts the severe result which most usually follows the failure of a party to make full and frank disclosure in ex parte situations – i.e. the setting aside of the order.

[48] Consequently, I conclude that the appropriate remedy for the want of full and frank disclosure in this case is to vary the Mareva Order made on October 31, 2012 so that it does not extend to the assets of Iran which the Minister has certified as constituting diplomatic property.

[49] I would observe that such a result would align the scope of the Mareva Order in this case with that granted by the Nova Scotia Supreme Court in Tracy v. The Iranian Ministry of Information and Security and the Islamic Republic of Iran, a proceeding seeking the recognition of a United States judgment pursuant to JVTA s. 4(5) which, in turn, was recognized by this Court by the order of Chapnik J. made May 22, 2013.[13] The Nova Scotia recognition judgment exempted from enforcement the three Ottawa properties identified by the Minister in his Certificates of February 1 and August 15, 2013.

VI. Conclusion

[50] For the reasons set out above, I grant the motion of the AG Canada, and I vary the order of E. MacDonald J. made October 31, 2012 in two respects:

(i) Paragraph 1(a) of the Mareva Order is amended to read as follows:

"(a) Selling, removing, dissipating, alienating, transferring, assigning, encumbering or similarly dealing with any of the assets located in Canada, except such assets as may be certified as diplomatic property by the Department of Foreign Affairs, Trade and Development, (the "Subject Assets") including, but not limited to, the assets listed in Schedule "A" hereto";

(ii) Schedule "A" to the Mareva Order is amended by deleting the properties located at 245 Metcalfe St., Ottawa and 524 Acacia Avenue, Ottawa.

[51] In addition, I suspend the operation of this Order until 12:01 a.m. on Friday, November 15, 2013, in the event the plaintiffs decide to exercise any rights of appeal.

[52] Finally, this is not an appropriate case for a costs order. First, as I observed above, the failure of the AG Canada to deliver a formal notice of motion unnecessarily complicated this motion. Second, the JVTA only came into effect in September, 2012, as a result of which the extent to which assets of a foreign state are available to satisfy a judgment under it constitutes a novel issue. Therefore, there shall be no order as to costs.

[53] As to the outstanding motions for default judgments to recognize the U.S. Judgments, as I endorsed on October 31, 2013, the parties need to develop a final game plan for a one-day hearing of all arguments for and against the granting of default judgments. I will only devote one more day to these default judgment proceedings. Once the parties have developed that game plan, they should book a 9:30 appointment before me to discuss the plan and set a hearing date.

QUESTIONS

Are there any problems using Mareva injunctions in this way?

Why would it make a difference if the American proceedings respecting the unsuccessful bid to obtain a "writ of attachment" was disclosed or not?

What lessons are to be learned for conventional litigation?