Civil Procedure
Law 225

Winter Term 2023

Lecture Notes No. 13

EXTRA-ORDINARY MOTIONS

Injunctive relief is an "extraordinary remedy". It will only be granted in the clearest of cases.

The basic test for an interlocutory injunction was set out by the Supreme Court of Canada in ***R.J.R.- MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311, at paras. 41-43, 49-50 (S.C.C.)**. **The moving party must establish that:**

(a) **there is a serious issue to be tried;**

(b) **they will suffer irreparable harm or harm not compensable by an award of damages, if the injunction is not granted; and,**

(c) **the balance of convenience favours the moving party, in the sense that the harm to the moving party if the injunction is not granted must exceed the harm to the defendant if the injunction is granted.**

The **Courts of Justice Act** provides the jurisdiction of the court:

> **Injunctions and receivers**
> **101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.**
>
> Terms
> (2) An order under subsection (1) may include such terms as are considered just.

The Rules provide the procedure to be followed, subject to modification by the court:

> **RULE 40**
>
> **40.01 An interlocutory injunction or mandatory order under section 101 or 102 of the Courts of Justice Act may be obtained on motion to a judge by a party to a pending or intended proceeding.**

40.02 (1) An interlocutory injunction or mandatory order may be granted on motion without notice for a period not exceeding ten days.

(2) Where an interlocutory injunction or mandatory order is granted on a motion without notice, a motion to extend the injunction or mandatory order may be made only on notice to every party affected by the order, unless the judge is satisfied that because a party has been evading service or because there are other exceptional circumstances, the injunction or mandatory order ought to be extended without notice to the party.

(3) An extension may be granted on a motion without notice for a further period not exceeding ten days.

(4) Subrules (1) to (3) do not apply to a motion for an injunction in a labour dispute under section 102 of the Courts of Justice Act.

40.03 On a motion for an interlocutory injunction or mandatory order, the moving party shall, unless the court orders otherwise, undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party.

40.04 (1) On a motion under rule 40.01, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party.

(2) The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing.

(3) The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing.

One must also consult both provincial and regional **Practice Directions** respecting procedures for injunctive relief.

A. ANTON PILLER ORDERS

An *Anton Piller* Order is essentially a civil search warrant; it is granted *ex parte* (without notice). 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.

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

An Anton Piller order was executed. A dispute arose with respect to documents in digital form that may have contained privileged documents and which were copied by the plaintiff outside the procedures agreed by the parties and the Supervising Solicitor. The documents were in the possession of the Plaintiff's Canadian and American counsel. The Defendant moved to disqualify counsel from continuing to act for the Plaintiff. The issue became the correct balancing of interests between privilege / confidentiality and counsel of choice.

Binnie J.:

1 **An *Anton Piller* order bears an uncomfortable resemblance to a private search warrant. No notice is given to the party against whom it is issued. Indeed, defendants usually first learn of them when they are served and executed, without having had an opportunity to challenge them or the evidence on which they were granted. The defendant may have no idea a claim is even pending. The order is not placed in the hands of a public authority for execution, but authorizes a private party to insist on entrance to the premises of its opponent to conduct a surprise search, the purpose of which is to seize and preserve evidence to further its claim in a private dispute. The only justification for such an extraordinary remedy is that the plaintiff has a strong *prima facie* case and can demonstrate that on the facts, absent such an order, there is a real possibility relevant evidence will be destroyed or otherwise made to disappear. The protection of the party against whom an *Anton Piller* order is issued ought to be threefold: a carefully drawn order which identifies the material to be seized and sets out safeguards to deal, amongst other things, with privileged documents; a vigilant court-appointed supervising solicitor who is independent of the parties; and a sense of responsible self-restraint on the part of those executing the order.** In this case, unfortunately, none of these protections proved to be adequate to protect against the disclosure of relevant solicitor-client confidences. Inadequate protections had been

written into the order. Those which had been provided were not properly respected. The vigilance of the supervising solicitor appears to have fallen short. Celanese's solicitors in the aftermath of the search seem to have lost sight of the fact that the limited purpose of the order was to *preserve* evidence not to rush to exploit it. In the result, the party searched (Canadian Bearings) now seeks the removal of Celanese's solicitors (Cassels Brock & Blackwell LLP ("Cassels Brock")) and to bar Celanese from making further use of their U.S. counsel (Kasowitz, Benson, Torres & Friedman LLP ("Kasowitz")).

2 This appeal thus presents a clash between two competing values — solicitor-client privilege and the right to select counsel of one's choice. The conflict must be resolved, it seems to me, on the basis that no one has the right to be represented by counsel who has had access to relevant solicitor-client confidences in circumstances where such access ought to have been anticipated and, without great difficulty, avoided and where such counsel has failed to rebut the presumption of a resulting risk of prejudice to the party against whom the *Anton Piller* order was made.

3 This Court's decision in *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 (S.C.C.), makes it clear that prejudice will be presumed to flow from an opponent's access to relevant solicitor-client confidences. The major difference between the minority and majority in that case is that while the majority considered the presumption of risk of prejudice open to rebuttal in some circumstances (pp. 1260-61), the minority would not have permitted even the opportunity of rebuttal (p. 1266). In the *MacDonald Estate v. Martin* situation, the difficulty of dealing with the moving solicitor was compounded by the fact the precise extent of solicitor-client confidences she acquired over a period of years, was unknown, possibly unknowable, and in any event not something that in fairness to her former client should be revealed. Thus Sopinka J. wrote that "once it is shown by the client that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. This will be a difficult burden to discharge" (p. 1260).

4 **The *Anton Piller* situation is somewhat different because the searching solicitors ought to have a record of exactly what was seized and what material, for which confidentiality is claimed, they subsequently looked at. Here again, rebuttal should be permitted, but the rebuttal evidence should require the party who obtained access to disclose to the court what has been learned and the measures taken to avoid the presumed resulting prejudice. While all solicitor confidences are not of the same order of importance, the party who obtained the wrongful access is not entitled to have the court assume in its favour that such disclosure carried no risk of prejudice to its opponent, and therefore does not justify the removal of the solicitors. For the reasons that follow, I conclude, contrary to the view taken by the Court of Appeal, with respect, that Celanese and its lawyers *did* have the onus to rebut the presumption of a risk of prejudice and they failed to do so. Accordingly, the appeal is allowed, the order of the Ontario Court of Appeal is set aside and the order of the Divisional Court is restored**

removing Cassels Brock as solicitors for Celanese and precluding the latter from continuing to seek the advice of Kasowitz, in connection with any Canadian litigation arising out of the facts alleged in the amended statement of claim.

...

III. Analysis

28 *Anton Piller* orders have been available in Canada for close to 30 years. Unlike a search warrant they do not authorize forcible entry, but expose the target to contempt proceedings unless permission to enter is given. To the ordinary citizen faced on his or her doorstep with an *Anton Piller* order this may be seen as a distinction without a meaningful difference.

29 Originally developed as an "exceptional remedy" in the context of trade secrets and intellectual property disputes, such orders are now fairly routinely issued in ordinary civil disputes, *Grenzservice Speditions GmbH v. Jans* (1995), 15 B.C.L.R. (3d) 370 (B.C. S.C.), in employment law, *Ridgewood Electric Ltd. (1990) v. Robbie* (2005), 74 O.R. (3d) 514 (Ont. S.C.J.), and *Netbored Inc. v. Avery Holdings Inc.*, [2005] F.C.J. No. 1723, 2005 FC 1405 (F.C.), and even in matrimonial litigation, *Neumeyer v. Neumeyer* (2005), 47 B.C.L.R. (4th) 162, 2005 BCSC 1259 (B.C. S.C. [In Chambers]). In one egregious case, a designated search team attempted to execute an *Anton Piller* order on the 10-year-old son of the defendant at a time when his parents were not at home: *Ridgewood Electric*.

30 With easier access to such orders, there has emerged a tendency on the part of some counsel to take too lightly the very serious responsibilities imposed by such a draconian order. It should truly be exceptional for a court to authorize the massive intrusion, without advance notice, of a privately orchestrated search on the privacy of a business competitor or other target party. As it was put by Lord Denning, M.R., in the original *Anton Piller* case:

> **We are prepared, therefore, to sanction its continuance [i.e. of the order], but only in an extreme case where there is grave danger of property being smuggled away or of vital evidence being destroyed. [Emphasis added.]**
>
> **(*Anton Piller KG v. Manufacturing Process Ltd.* (1975), [1976] 1 Ch. 55 (Eng. C.A.), at p. 61)**

***Anton Piller* orders, obtained *ex parte*, now regularly permit searches and seizures not only from places of business but from residential premises. While most *Anton Piller* orders are executed properly, they are capable of giving rise to serious abuse, as in *Ridgewood Electric*, mentioned earlier, where Corbett J. of the Ontario Superior Court of Justice protested the unacceptable conduct of those executing the order:**

> **Nigel Robbie arrived home on April 14, 2004, to find a neighbour barricading**

> **his front door. His ten-year-old son had been taken to another neighbour's house, distraught. The neighbourhood was in an uproar. A cadre in suits stood at the front of his house brandishing a thick wad of papers, demanding to be let in.**
>
> **. . . . .**
>
> **While everyone is taken to know the law, the Robbies and their neighbours might be excused for not knowing about *Anton Piller* orders. And so the Robbies and their neighbours were left to wonder what kind of country we live in, where one's former employer, acting secretly, may obtain a court order and then enter and search one's private residence. [paras. 1 and 4]**

As Sharpe J.A., writing in a scholarly mode, has pointed out, "excessive zeal in this area is apt to attract criticism which will impair the ability of the courts to use injunctions in innovative ways in other areas" (R. J. Sharpe, *Injunctions and Specific Performance* (looseleaf ed.), at para. 2:1300).

31 The search in the present case was conducted by reputable and responsible people, under the supervision of a senior member of the Ontario bar. The disclosure of solicitor-client confidences came about not by egregious misconduct, but through a combination of carelessness, overzealousness, a lack of appreciation of the potential dangers of an *Anton Piller* order and a failure to focus on its limited purpose, namely the *preservation* of relevant evidence.

32 Experience has shown that despite their draconian nature, there is a proper role for *Anton Piller* orders to ensure that unscrupulous defendants are not able to circumvent the court's processes by, on being forewarned, making relevant evidence disappear. Their usefulness is especially important in the modern era of heavy dependence on computer technology, where documents are easily deleted, moved or destroyed. The utility of this equitable tool in the correct circumstances should not be diminished. However, such orders should only be granted in the clear recognition of their exceptional and highly intrusive character and, where granted, the terms should be carefully spelled out and limited to what the circumstances show to be necessary. Those responsible for their implementation should conform to a very high standard of professional diligence. Otherwise, the moving party, not its target, may have to shoulder the consequences of a botched search.

33 Much of the argument before us about privileged documents turned on a supposed "spectrum" of situations. At one end of the spectrum, it was said, lie the "inadvertent disclosure" cases, where one party's counsel receives a privileged document due to an error of opposing counsel, for example a letter is faxed or e-mailed to the wrong party. In such cases, the remedy is often limited to an order requiring the document, which is clearly identified, to be deleted or returned and a direction that no use is to be made of it. At the other end of the spectrum is said to be the "moving solicitor" or "merging firm" cases, where counsel who has acted for a client ends up at a law firm that is acting for an opposing party — as in *MacDonald Estate* itself. In the latter cases, the precise confidences seen or heard by the moving solicitor may not be readily determined. Unless

adequate measures have been taken (usually in advance) to avoid "tainting" the new firm, the remedy is frequently disqualification. I agree with the intervener Advocates' Society that the emphasis on "inadvertence" is overly simplistic. As the Society submits:

> The notion of "inadvertence" is also analytically unhelpful because it conflates two questions that should be distinct: (a) how did the documents come into the possession of [Celanese] or its counsel; and (b) what did [Celanese] and its counsel do upon recognition that the documents were potentially subject to solicitor-client privilege?

34 Whether through advertence or inadvertence the problem is that solicitor-client information has wound up in the wrong hands. Even granting that solicitor-client privilege is an umbrella that covers confidences of differing centrality and importance, such possession by the opposing party affects the integrity of the administration of justice. Parties should be free to litigate their disputes without fear that their opponent has obtained an unfair insight into secrets disclosed in confidence to their legal advisors. The defendant's witnesses ought not to have to worry in the course of being cross-examined that the cross-examiner's questions are prompted by information that had earlier been passed in confidence to the defendant's solicitors. Such a possibility destroys the level playing field and creates a serious risk to the integrity of the administration of justice. To prevent such a danger from arising, the courts must act "swiftly and decisively" as the Divisional Court emphasized. Remedial action in cases such as this is intended to be curative not punitive.

A. Requirements for an Anton Piller Order

35 There are four essential conditions for the making of an *Anton Piller* order. First, the plaintiff must demonstrate a strong *prima facie* case. Second, the damage to the plaintiff of the defendant's alleged misconduct, potential or actual, must be very serious. Third, there must be convincing evidence that the defendant has in its possession incriminating documents or things, and fourthly it must be shown that there is a real possibility that the defendant may destroy such material before the discovery process can do its work: *Nintendo of America Inc. v. Coinex Video Games Inc.* (1982), [1983] 2 F.C. 189 (Fed. C.A.), at pp. 197-99; *Indian Manufacturing Ltd. v. Lo* (1997), 75 C.P.R. (3d) 338 (Fed. C.A.), at pp. 341-42; *Netsmart Inc. v. Poelzer* (2002), [2003] 1 W.W.R. 698, 2002 ABQB 800 (Alta. Q.B.), at para. 16; *Anton Piller KG*, at pp. 58-61; *Ridgewood Electric*, at para. 27; *Grenzservice*, at para. 39; *Pulse Microsystems Ltd. v. SafeSoft Systems Inc.* (1996), 67 C.P.R. (3d) 202 (Man. C.A.), at p. 208; *Ontario Realty Corp. v. P. Gabriele & Sons Ltd.* (2000), 50 O.R. (3d) 539 (Ont. S.C.J. [Commercial List]), at para. 9; *Proctor & Gamble Inc. v. John Doe*, [2000] F.C.J. No. 61 (Fed. T.D.), at para. 45; *Netbored Inc.*, at para. 39; *Adobe Systems Inc. v. KLJ Computer Solutions Inc.*, [1999] 3 F.C. 621 (Fed. T.D.), at para. 35.

36 Both the strength and the weakness of an *Anton Piller* order is that it is made *ex parte* and interlocutory: there is thus no cross-examination on the supporting

affidavits. The motions judge necessarily reposes faith in the candour and complete disclosure of the affiants, and as much or more so on the professional responsibility of the lawyers participating in carrying out its terms. We are advised that such orders are not available in the United States (Transcript, at p. 70).

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B. Terms of the Anton Piller Order

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40 *Anton Piller* orders are often conceived of, obtained and implemented in circumstances of urgency. They are generally time-limited (e.g., 10 days in Ontario under Rule 40.02 (*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194) and 14 days in the Federal Court, under Rule 374(1) (*Federal Court Rules, 1998*, SOR/98-106)). Despite the urgency, the more detailed and standardized the terms of the order the less opportunity there will be for misunderstandings or mischief. As noted by Lamer J. in *Descôteaux c. Mierzwinski*, [1982] 1 S.C.R. 860 (S.C.C.), at p. 889:

> **Searches are an exception to the oldest and most fundamental principles of the common law, and as such the power to search should be strictly controlled.**

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

(1) Basic Protection for the Rights of the Parties

(i) The order should appoint a supervising solicitor who is independent of the plaintiff or its solicitors and is to be present at the search to ensure its integrity. The key role of the independent supervising solicitor was noted by the motions judge in this case "to ensure that the execution of the Anton Piller order and everything that flowed from it, was undertaken as carefully as possible and with due consideration for the rights and interests of all involved". He or she is "an officer of the court charged with a very important responsibility regarding this extraordinary remedy". See also *Grenzservice*, at para. 85.

(ii) Absent unusual circumstances the plaintiff should be required to provide an undertaking and/or security to pay damages in the event that the order turns out to be unwarranted or wrongfully executed. See *Ontario Realty Corp.*, at para. 40; *Adobe Systems*, at para. 43; *Nintendo of America*, at pp. 201-02; *Grenzservice*, at para. 85; *Havana House Cigar & Tobacco Merchants Ltd. v. Jane Doe* (2000), 199 F.T.R. 12 (Fed. T.D.), aff'd (2002), 288 N.R. 198, 2002 FCA 75 (Fed. C.A.).

(iii) The scope of the order should be no wider than necessary and no material shall be removed from the site unless clearly covered by the terms of the order. See *Columbia Picture Industries Inc. v. Robinson* (1985), [1987] Ch. 38 (Eng. Ch.

Div.).

(iv) A term setting out the procedure for dealing with solicitor-client privilege or other confidential material should be included with a view to enabling defendants to advance claims of confidentiality over documents before they come into the possession of the plaintiff or its counsel, or to deal with disputes that arise. See *Grenzservice*, at para. 85; *Ontario Realty Corp.*, at para. 40. Procedures developed for use in connection with search warrants under the *Criminal Code*, R.S.C. 1985, c. C-46, may provide helpful guidance. The UK practice direction on this point provides as follows:

> Before permitting entry to the premises by any person other than the Supervising Solicitor, the Respondent may, for a short time (not to exceed two hours, unless the Supervising Solicitor agrees to a longer period) - (a) gather together any documents he [or she] believes may be ... privileged; and (b) hand them to the Supervising Solicitor for [an assessment of] whether they are ... privileged as claimed.
>
> If the Supervising Solicitor decides that ... any of the documents [may be] privileged or [is in any doubt as to their status, he or she] will exclude them from the search ... and retain [them] pending further order of the court [(if in doubt as to whether they are privileged), or return them to the respondent and retain a list of the documents (if the documents are privileged)].
>
> [A] Respondent [wishing] to take legal advice and gather documents as permitted ... must first inform the Supervising Solicitor and keep him [or her] informed of the steps being taken.
>
> Experience has shown that in general this is a workable procedure. Counsel supporting the appellants suggested the basic “two-hour” collection period permitted in the U.K. is too short. This is a matter to be determined by the judge making the order, but it must be kept in mind that unnecessary delay may open the door to mischief. In general, the search should proceed as expeditiously as circumstances permit.

(v) The order should contain a limited use clause (i.e., items seized may only be used for the purposes of the pending litigation). See *Ontario Realty Corp.*, at para. 40; *Adobe Systems*, at para. 43; *Grenzservice*, at para. 85.

(vi) The order should state explicitly that the defendant is entitled to return to court on short notice to (a) discharge the order; or (b) vary the amount of security. See *Adobe Systems*, at para. 43; *Grenzservice*, at para. 85; *Nintendo of America*, at pp. 201-02.

(vii) The order should provide that the materials seized be returned to the defendants or their counsel as soon as practicable.

(2) The Conduct of the Search

(i) In general the order should provide that the search should be commenced during normal business hours when counsel for the party about to be searched is more likely to be available for consultation. See *Grenzservice*, at para. 85; *Universal Thermosensors Ltd. v. Hibben*, [1992] 1 W.L.R. 840 (Ch. D.).

(ii) The premises should not be searched or items removed except in the presence of the defendant or a person who appears to be a responsible employee of the defendant.

(iii) The persons who may conduct the search and seize evidence should be specified in the order or should specifically be limited in number. See *Adobe Systems*, at para. 43; *Grenzservice*, at para. 85; *Nintendo of America*, at pp. 201-02.

(iv) On attending at the site of the authorised search, plaintiff's counsel (or the supervising solicitor), acting as officers of the court should serve a copy of the statement of claim and the order and supporting affidavits and explain to the defendant or responsible corporate officer or employee in plain language the nature and effect of the order. See *Ontario Realty Corp.*, at para. 40.

(v) The defendant or its representatives should be given a reasonable time to consult with counsel prior to permitting entry to the premises. See *Ontario Realty Corp*, at para. 40; *Adobe Systems*, at para. 43; *Grenzservice*, at para. 85; *Sulphur Experts Inc. v. O'Connell* (2000), 279 A.R. 246, 2000 ABQB 875 (Alta. Q.B.).

(vi) A detailed list of all evidence seized should be made and the supervising solicitor should provide this list to the defendant for inspection and verification at the end of the search and before materials are removed from the site. See *Adobe Systems*, at para. 43; *Grenzservice*, at para. 85; *Ridgewood Electric*, at para. 25.

(vii) Where this is not practicable, documents seized should be placed in the custody of the independent supervising solicitor, and defendant's counsel should be given a reasonable opportunity to review them to advance solicitor-client privilege claims prior to release of the documents to the plaintiff.

(viii) Where ownership of material is disputed, it should be provided for safekeeping to the supervising solicitor or to the defendant's solicitors.

(3) Procedure Following the Search

(i) The order should make it clear that the responsibilities of the supervising solicitor continue beyond the search itself to deal with matters arising out of the search, subject of course to any party wishing to take a matter back to the court for resolution.

(ii) The supervising solicitor should be required to file a report with the court within a set time limit describing the execution, who was present and what was seized. See *Grenzservice*, at para. 85.

> (iii) The court may wish to require the plaintiff to file and serve a motion for review of the execution of the search returnable within a set time limit such as 14 days to ensure that the court automatically reviews the supervising solicitor's report and the implementation of its order even if the defendant does not request such a review. See *Grenszervice*, at para. 85.

See also *Civil Procedure Act 1997* (U.K.), c. 12, s. 7; *Civil Procedure Rules 1998* (U.K.), SI 1998/3132 r. 25.1(1)(h); *CPR Part 25 — Practice Direction — Interim Injunctions* (U.K.); Sharpe, at para. 2:1100 and following.

41 It is evident that the draft order placed before the motions judge in this case was deficient in many respects. At issue here is the absence of any provision to deal with solicitor-client confidences. The absence of specific terms in the *Anton Piller* order does not relieve the searching solicitors from the consequences of gaining inappropriate access. Such consequences may include removal. A precisely drawn and clearly thought out order therefore will not only protect the defendant's right to solicitor-client privilege, but also protect the plaintiff's right to continue to be represented by counsel of choice by helping to ensure that such counsel do not stumble into possession of privileged information.

...

53 It is quite possible that if Cassels Brock and Kasowitz had been able to show the court what privileged material they had seen, such material might on the face of it have appeared to the court mundane or insignificant. A privileged document, for example, could be a lawyer's letter to his or her own client simply enclosing a draft contract in terms virtually the same as a contract subsequently executed and publicly available. Disclosure of the lawyer's communication, while privileged, would in that case not likely be capable of creating prejudice. Where the significance of the privileged documents accessed by the searching solicitors is more difficult to evaluate, the motions judge might properly call on the defendant (in the absence of the lawyers for the searching party if appropriate) to explain why such material could lead to significant prejudice. That cannot be done, of course, unless the searching solicitors can indicate with some precision what they have looked at. Because of the way the search was conducted in this case, Celanese's solicitors could not do so and that stage was never reached.

54 In my view, the present proceeding should not be seen as punitive in any way. I accept, as did the courts below, that neither Cassels Brock nor Kasowitz set out to obtain access to, or to gain some advantage from privileged material. Their problem stems from carelessness and an excessively adversarial approach in circumstances that called for careful restraint in recognition of the exceptional position of responsibility imposed by the unilateral and intrusive nature of an *Anton Piller* order. The protection of solicitor-client confidences is a matter of high importance. On the present state of the record, Canadian Bearings can have no confidence that the privileged material to which Cassels Brock and Kasowitz obtained access will not be used to their prejudice.

55 In summary, I agree with the Divisional Court that lawyers who undertake a search under the authority of an *Anton Piller* order and thereby take possession of relevant confidential information attributable to a solicitor-client relationship, bear the onus of showing there is no real risk such confidences will be used to the prejudice of the defendant. Difficulties of proof compounded by errors in the conduct of the search and its aftermath should fall on the heads of those responsible for the search, not of the party being searched. The onus was not met by the respondents in this case.

E. The Appropriate Remedy

56 I agree with the courts below that if a remedy short of removing the searching solicitors will cure the problem, it should be considered. As the intervener Canadian Bar Association ("CBA") puts it in its factum, the task "is to determine whether the integrity of the justice system, viewed objectively, requires removal of counsel in order to address the violation of privilege, or whether a less drastic remedy would be effective". The right of the plaintiff to continue to be represented by counsel of its choice is an important element of our adversarial system of litigation. In modern commercial litigation, mountains of paper are sometimes exchanged. Mistakes will be made. There is no such thing, in these circumstances, as automatic disqualification.

…

59 In helpful submissions, the interveners Advocates' Society and the CBA suggest a number of factors to be considered in determining whether solicitors should be removed: (i) how the documents came into the possession of the plaintiff or its counsel; (ii) what the plaintiff and its counsel did upon recognition that the documents were potentially subject to solicitor-client privilege; (iii) the extent of review made of the privileged material; (iv) the contents of the solicitor-client communications and the degree to which they are prejudicial; (v) the stage of the litigation; (vi) the potential effectiveness of a firewall or other precautionary steps to avoid mischief. Other factors may, of course, present themselves in different cases, but I agree that the foregoing list of factors is appropriate and seems to me sufficient to dispose of the present appeal.

60 As to the first factor, the privileged documents came into the hands of Cassels Brock and Kasowitz under the exceptional *Anton Piller* order in a way that was unintended but avoidable. Inadequate precautions were taken. Those who fail to take precautions must bear the responsibility. As mentioned earlier, Mr. Colvard testified that quite apart from the as yet unclassified electronic documents he segregated into a "Privileged" file, he found other potentially privileged documents in reviewing material earlier classified as "Relevant". Those, at least, Mr. Colvard agreed he "reviewed in some detail in order to decide where to put them". We do not know the contents of even these documents.

61 As to the second factor, Cassels Brock failed to have the electronic documents listed at the search site as required by the order and thereafter ignored the obvious significance of BLG's initials on the sealed envelope containing the electronic documents and then declined to return the material over which privilege was claimed to BLG "whether in print form or electronic" as requested. Cassels Brock did take steps, as did Kasowitz, to contain the resulting damage, but as a result of their errors the Court does not know (and Canadian Bearings cannot know) the potential scale of that damage.

62 As to the third factor, the CBA submits that the plaintiff's counsel should not only promptly return the inadvertently disclosed privileged materials, but also "advise the adversary of the extent to which those materials have been reviewed". I agree. Here, Cassels Brock and Kasowitz deny any "substantive review", but the review must have been sufficiently thorough to classify documents as "Relevant, Irrelevant, Proprietary, and Hot". How could anyone classify a document as "Hot" or "Relevant" without reading it? And, to repeat, some of the documents initially read and classified as "Relevant" turned out (on a second reading) to be potentially subject to a claim of privilege. In the absence of knowing what Celanese's solicitors and counsel looked at we are left in the dilemma anticipated by Sopinka J. in *MacDonald Estate*, at p. 1263:

> ...conclusory statements in affidavits without more are not acceptable. These can be expected in every case of this kind that comes before the court. It is no more than the lawyer saying "trust me". This puts the court in the invidious position of deciding which lawyers are to be trusted and which are not.

63 As to the fourth factor, Cassels Brock and Kasowitz failed to discharge the onus of identifying the contents of the solicitor-client communications which they accessed in the course of classifying the material. It is therefore not possible to determine "the degree to which they are prejudicial". As stated, Celanese's solicitors and counsel created this problem by their failure to proceed with prudence and they and Celanese will now have to shoulder the consequences.

64 As to the fifth factor, the litigation is at an early stage. At advanced stages of complex litigation, an order removing counsel can be "extreme" and may have a "devastating" effect on the party whose counsel is removed (*Michel v. Lafrentz* (1992), 12 C.P.C. (3d) 119 (Alta. C.A.), at para. 4). That is not the case here. No doubt substantial costs have been incurred by all parties, but BLG advised Cassels Brock by letter dated July 15, 2003, i.e. within less than a month after commencement of the litigation, and a few days after learning of the privilege controversy, that "[t]his is a most serious matter and we intend to bring it to the attention of the Court at the earliest opportunity". The removal motion was launched July 24, 2003. There was therefore ample early notice that removal was being sought.

65 Sixth, and finally, with respect to "the potential effectiveness of a firewall or other precautionary steps", Cassels Brock advised the court of a number of measures taken (although, in the defendant's view, too little and too late). The motions judge held that "an affidavit from the attorney in charge of this matter for the Kasowitz firm ought to have

been filed confirming that such [privileged] material had been deleted and that no one at that firm had accessed the information prior to such deletion (with the obvious exception of Mr. Colvard who has been isolated from the case)". I agree. In a matter of such sensitivity the court and the defendant are entitled to the best available evidence. It seems apparent that appropriate firewalls were not in place prior to the occurrence of the mischief.

66 In view of all the circumstances, I agree with the Divisional Court that Cassels Brock and Kasowitz have not produced sufficient evidence to satisfy the *MacDonald Estate* test, namely "that the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur" (p. 1260).

67 I also agree with the Divisional Court that the right of Celanese to choose counsel yields to what occurred in the execution of the *Anton Piller* order in this case and its aftermath, and that "[t]he reasonable perception of the integrity of the administration of justice would be adversely affected were Cassels Brock ... permitted to remain solicitors of record for [Celanese]". As to future role of Kasowitz however, I think the Divisional Court went too far in holding that "[Celanese] should be precluded in this litigation *or any related proceeding* from receiving advice or information directly and/or indirectly from the firm" (emphasis added). Celanese has worldwide interests and Kasowitz is its primary legal advisor. As the vinyl acetate plant is to be built in Iran, there may well be related litigation outside Canada. I think Canadian Bearings will be sufficiently protected if Celanese is ordered not to seek or receive advice or information directly or indirectly from Kasowitz in connection with any litigation *in Canada* arising out of the matters referred to in the amended statement of claim, or related thereto, provided Kasowitz files affidavit(s) satisfactory to the case management judge confirming that the firewalls it had undertaken to install were and are in place, and sworn confirmation that all of the material for which privilege is claimed that came into Kasowitz's possession as a result of the *Anton Piller* order has been returned or destroyed.

IV. Disposition

68 The appeal is allowed with costs in this Court. Cassels Brock are removed as solicitors of record for the respondents in these proceedings. They are not to act for or advise the respondents, directly or indirectly, with respect to this proceeding or with respect to any related proceedings arising out of the facts pleaded in the amended statement of claim.

69 Neither the respondents or anyone on their behalf is to communicate with or receive advice or information directly or indirectly, from Kasowitz with respect to this proceeding or any related proceedings in Canada arising out of or related to the facts pleaded in the amended statement of claim.

70 Any and all materials subject to the claim of privilege still in the possession of the respondents, Cassels Brock or Kasowitz seized from the premises of Canadian Bearings on June 20 and 21, 2003, pursuant to the *Anton Piller* order shall be returned forthwith to

Canadian Bearings without retention of copies whether printed, electronic or of any other type.

71 Kasowitz is to file affidavits satisfactory to the case management judge confirming the existence of adequate firewalls and the destruction or return of all allegedly privileged material that came into its possession as a result of the *Anton Piller* order made in this case.

B. '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. It is most often used in the context of fraud.

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.

Isofoton S.A. v. Toronto Dominion Bank
2007 CanLII 14626 (Ont. S.C.J.)

Isofoton made photovoltaic cells used in collecting solar energy. It made an agreement with a company called Alternate Energy Solutions for supply of silicon in 2006. The value of the contract was US$27M, with US$3.2M being paid upfront. AES never supplied the silicon and refused to refund the upfront payment. Isofoton sought a Norwich Order and produced evidence of the following:

- A.E.S. has a fleeting, internet-based presence and its only physical facilities are located in residential homes;

- A.E.S. has twice failed to deliver on contracts for the supply of silicon raw materials. Each time, A.E.S. has given several different and changing explanations, blamed its own supplier and delayed disclosing to Isofoton the failure of delivery;

- A.E.S. had agreed to disclose the producer and location of the silicon upon payment of the deposit but later refused to do so;

- Prior to the failure of delivery in each instance, A.E.S. assured Isofoton that the product was available. In negotiations leading to the September 2006 Sales Contract, A.E.S. represented to Isofoton that the product was in the United States and ready for inspection;

- A.E.S. has refused to return the US$3,240,000 deposit that Isofoton paid in respect of the Sales Contract despite having previously admitted that this money is held in trust for Isofoton.

Spence J.:

> [2] Requests for Norwich relief are largely unfamiliar to Canadian courts. **A Norwich order essentially compels a third party to provide the applicant with information where the applicant believes it has been wronged and needs the third party's assistance to determine the circumstances of the wrongdoing and allow the applicant to pursue its legal remedies**.
>
> [3] In this case, Isofoton believes it was defrauded of US$3,240,000 by A.C.H. Ltd., which appears to have been doing business as Alternate Energy Solutions ("A.E.S."). The alleged fraud arises out of a transaction for the supply of silicon. Isofoton seeks the Norwich order to compel third party banks to provide it with access to the bank records for various accounts related to A.E.S. in order that Isofoton may determine the circumstances of the alleged fraud and trace and preserve the funds it believes have been misappropriated.
>
> …
>
> **The test for a Norwich order**
>
> [30] As Norwich orders are relatively unfamiliar to Canadian courts, a review of the authorities and principles is warranted. The fundamental principle underlying such relief is that the third party against whom the order is sought has an equitable duty to assist the applicant in pursuing its rights.
>
> …
>
> [33] Norwich Pharmacal [*Norwich Pharmacal Co. v. Customs and Excise Commissioners*, [1974] A.C. 133, [1973] 2 All E.R. 943 (H.L.)] has given its

name to what had been called an equitable bill of discovery and renewed interest in this type of relief has developed…

[34] The English authorities also reveal another situation giving rise to requests for Norwich relief that is more directly relevant here. The English courts have granted Norwich relief where the applicant believes it has been defrauded and seeks access to bank records to prove the fraud and recover the wrongfully-obtained property. The courts have been compelled by the possibility that the money or property will be dissipated if the court's equitable jurisdiction is not invoked.

…

[39] **Thorough consideration was given to Norwich orders in *Alberta (Treasury Branches) v. Leahy*, 2000 ABQB 575 (CanLII), [2000] A.J. No. 993, 270 A.R. 1 (Q.B.), affd 2002 ABCA 101 (CanLII), [2002] A.J. No. 524, 51 Alta. L.R. (4th) 94 (C.A.), application for leave to appeal dismissed [2002] S.C.C.A. No. 235.** In that case, the applicant Treasury Branch believed that Leahy, a former senior executive, had accepted bribes in return for the authorization of loans. The Treasury Branch obtained a series of ex parte orders granting Norwich relief to access bank records related to Leahy and trace the funds that it believed had been paid as bribes. The case arose from the defendant Leahy's challenge to the ex parte orders and his effort to exclude the evidence obtained from the banks.

[40] Mason J. reviewed the leading English and Canadian authorities dealing with Norwich orders, the principles laid down and the tests that had been proposed. Mason J. then distilled the authorities to identify both the circumstances in which Norwich orders have been granted and the considerations that should guide a court faced with a request for a Norwich order in the exercise of its equitable jurisdiction as follows (at para. 106):

> The foregoing review demonstrates that:
>
> **a. Norwich-type relief has been granted in varied situations:**
>
> (i) where the information sought is necessary to identify wrongdoers;
>
> (ii) to find and preserve evidence that may substantiate or support an action against either known or unknown wrongdoers, or even determine whether an action exists; and
>
> (iii) to trace and preserve assets.
>
> **b. The court will consider the following factors on an application for Norwich relief: [page789]**

(i) Whether the applicant has provided evidence sufficient to raise a valid, bona fide or reasonable claim;

(ii) Whether the applicant has established a relationship with the third party from whom the information is sought such that it establishes that the third party is somehow involved in the acts complained of;

(iii) Whether the third party is the only practicable source of the information available;

(iv) Whether the third party can be indemnified for costs to which the third party may be exposed because of the disclosure, some [authorities] refer to the associated expenses of complying with the orders, while others speak of damages; and

(v) Whether the interests of justice favour the obtaining of disclosure.

[41] The applicant in this case seeks the Norwich order for the purposes of determining what has become of the deposit money and tracing and preserving those funds. These are acceptable purposes according to the authorities as summarized in Leahy, supra. Each of the factors which Mason J. identified must now be considered against the facts of this application.

C. MAREVA INJUNCTIONS

A Mareva injunction is a freezing order, most often in relation to a bank account.

Sibley & Associates LP v. Ross
2011 ONSC 2951 (Ont. S.C.J.)

Strathy J.:

Requirements of a Mareva Injunction

> **[11] There are five requirements for a Mareva injunction:**
>
> **(a) the plaintiff must make full and frank disclosure of all material matters within his or her knowledge;**
>
> **(b) the plaintiff must give particulars of the claim against the defendant, stating the grounds of the claim and the amount thereof, and the points that could be fairly made against it by the defendant;**
>
> **(c) the plaintiff must give grounds for believing that the defendant has assets in the jurisdiction;**
>
> **(d) the plaintiff must give grounds for believing that there is a real risk of the assets being removed out of the jurisdiction, or disposed of within the jurisdiction or otherwise dealt with so that the plaintiff will be unable to satisfy a judgment awarded to him or her; and**
>
> **(e) the plaintiff must give an undertaking as to damages.**
>
> See Chitel v. Rothbart (1982), 1982 CanLII 1956 (ON CA), 39 O.R. (2d) 513, [1982] O.J. No. 3540, 141 D.L.R. (3d) 268 (C.A.), referred to C.A. by Andersen J. in (1982), 1982 CanLII 2031 (ON SC), 36 O.R. (2d) 124, [1982] O.J. No. 3197 (H.C.J.); Third Chandris Shipping Corp. v. Unimarine S.A., [1979] 1 Q.B. 645, [1979] 2 All E.R. 972 (C.A.).
>
> **[12] It is a condition-precedent to the order that the plaintiff demonstrate a strong prima facie case**: Aetna Financial Services Ltd. v. Feigelman, 1985 CanLII 55 (SCC), [1985] 1 S.C.R. 2, [1985] S.C.J. No. 1, 15 D.L.R. (4th) 161, at p. 27 S.C.R.
>
> [13] When this matter initially came before me, I was satisfied that the plaintiff had made out a very strong prima facie case. I also concluded that the plaintiff had satisfied items (a), (b) and (e), which are requirements of the standard injunction test, as noted at p. 532 O.R. of Chitel v. Rothbart, above.

> [14] I was also reasonably satisfied that the plaintiff had met the requirement of item (c) as there is evidence that the defendants have assets, in the form of bank accounts, in this jurisdiction.

Strathy J. then considered whether allegations of fraud changed the nature of the approach to the granting of a Mareva injunction. After a near comprehensive analysis of the cases, he held there was no such exception but the nature of the allegations coloured the application of the test:

> **[62] From Chitel v. Rothbart to the present day, the law has sought to draw a fair balance between leaving the plaintiff with a "paper judgment" and the entitlement of the defendant to deal with his or her property until judgment has issued after a trial. In my respectful view, a plaintiff with a strong prima facie case of fraud should be in no more favoured position than, say, a plaintiff with a claim for libel, battery or spousal support. On the other hand, there may be circumstances of a particular fraud that give rise to a reasonable inference that the perpetrator will attempt to perfect the deception by making it impossible for the plaintiff to trace or recover the embezzled property. To this extent, it seems to me that cases of fraud may merit the special treatment they have received in the case law.**
>
> **[63] Rather than carve out an "exception" for fraud, however, it seems to me that in cases of fraud, as in any case, the Mareva requirement that there be risk of removal or dissipation can be established by inference, as opposed to direct evidence, and that inference can arise from the circumstances of the fraud itself, taken in the context of all the surrounding circumstances. It is not necessary to show that the defendant has bought an air ticket to Switzerland, has sold his house and has cleared out his bank accounts. It should be sufficient to show that all the circumstances, including the circumstances of the fraud itself, demonstrate a serious risk that the defendant will attempt to dissipate assets or put them beyond the reach of the plaintiff.**

Shaw Communications Inc. v. Young
2021 ONSC 7918 (Ont. S.C.J.)

Akbarali J.:

Brief Background

[2] On March 13, 2019, the plaintiff was the victim of an armed robbery, at which about $8 million in locked cellphones were stolen from a FedEx truck that was intended to deliver the phones from a warehouse where they were being stored to various retailers.

[3] The four defendants to this action were charged in connection with the robbery around September 2019. The charges against the defendant, Mr. Mornan, were withdrawn by the Crown on June 18, 2020.

[4] The plaintiff brought an ex parte application in writing for a Mareva injunction. As I have noted, the application was granted by Myers J. on December 14, 2020. The evidence in support of the Mareva injunction was found primarily in the affidavit of a junior lawyer of the plaintiff's counsel's office, sworn October 20, 2020. I refer to the affiant as X, because, having in mind their junior role on the file, I cannot be certain how much control X had over the content of the affidavit and I do not wish to unfairly create a public record criticizing X for matters that may have been beyond their practical control.

[5] Various procedural issues resulted in the return of the motion being brought before me nearly a year later, on November 30, 2021.

[6] Mr. Mornan has brought a cross-motion seeking to have the Mareva injunction lifted as against him, arguing that (i) the plaintiff did not make full and fair disclosure as it relates to him before Myers J.; (ii) the plaintiff does not have a strong prima facie case against him; (iii) there is no evidence that Mr. Mornan will dissipate his assets for the purpose of hindering the plaintiff's ability to collect on any judgment granted, and (iv) there is no evidence that the plaintiff would be irreparably harmed if the injunction is not continued.

[7] There are issues with service of the motion materials on the other defendants. At the end of these reasons I address the timetabling of the return of the motion as it relates to the other defendants. At this stage, I consider the Mareva injunction only as it relates to Mr. Mornan.

Conclusion

[8] For the reasons below, I set aside the Mareva injunction as it

applies to Mr. Mornan, and award him costs on a full indemnity scale, in the amount of $55,863.26.

Test for a Mareva Injunction

[9] A Mareva injunction is an extraordinary remedy. As Estey J. explained in Aetna Financial Services v. Geifelman, 1985 CanLII 55 (S.C.C.), in our jurisprudence, execution cannot be obtained prior to judgment and judgment cannot be recovered before trial. A party should not be restrained by an interlocutory injunction unless some irreparable harm is likely to result to the plaintiff. The court must be particularly cautious about granting such extraordinary relief where there is a serious question as to whether the plaintiff would succeed in the action: at paras. 7, 8.

[10] The parties agree on the test to be applied when a plaintiff seeks a Mareva injunction. The test is set out in, for example, Chitel v. Rothbart, 1982 CanLII 1956 (Ont. C.A.) and Sibley and Associates LP v. Ross, 2011 ONSC 2951, at para. 10.

a. The plaintiff must make full and frank disclosure of all material matters within its knowledge;

b. The plaintiff must give particulars of the claim against the defendant stating the grounds of the claim and the amount thereof, and the points fairly made against it by the defendant;

c. The plaintiff must give grounds for believing that the defendant has assets in the jurisdiction;

d. The plaintiff must give grounds for believing that there is a real risk of assets being removed out of the jurisdiction or disposed of within the jurisdiction or otherwise dealt with so that the plaintiff will be unable to satisfy a judgment awarded to him or her; and

e. The plaintiff must give an undertaking as to damages.

[11] It is a condition precedent to the order that the plaintiff demonstrate a strong prima facie case on the merits: Aetna Financial, at p. 27.

[12] Here, Mr. Mornan argues that, as it relates to him, (i) the plaintiff did not make full and frank disclosure before Myers J.; (ii) the plaintiff cannot establish a strong prima facie case; (iii) there are no grounds for believing that there is a risk of dissipation of assets.

Did the plaintiff make full and frank disclosure before Myers J.?

[13] The requirement to make full and frank disclosure (sometimes called full and fair disclosure) is an important one, and is designed to ensure the integrity of the court's process on an ex parte application.

[14] In Moses v. Metro Hardware, 2020 ONSC 6684, beginning at para. 20, Myers J. addressed the duty to make full and frank disclosure. He noted the importance of each party challenging the other's cases in our adversarial system of civil justice. When a matter proceeds ex parte, the usual assurances of mutual self-interest and mutual advocacy of competing parties is missing. Thus, r. 39.06 of the Rules of Civil Procedure, W.W.O. 1990, Reg. 194, "imposes vital, extra burdens on parties who seek relief before the court without notice to their adversary." They must make full and frank disclosure of all material facts. As Myers J. explained, the duty to make full and frank disclosure replaces the usual checks and balances of the adversarial system.

[15] "Material facts" are those of which the non-disclosure may affect the outcome of the motion: Girsberger v. Kresz, [1998] O.J. No. 911, at para. 28. Materiality is assessed objectively, and all matters relevant to the weighing operation the court has to undertake in deciding whether to grant the order must be disclosed: Moses, at para. 30, citing United States v. Friedland, [1996] O.J. No. 4399 (Ont. Gen. Div.).

[16] The duty of full and frank disclosure extends to any points of fact or law known to the plaintiff which favours the other side: Friedland at para. 27, cited by Myers J. in Moses, at para. 27.

[17] A party may fail to meet the duty of full and frank disclosure by failing to disclose material facts in support of the defendant's position; misstating the then current state of affairs and law; overstating the position in support of the moving party; and selective exclusion of relevant information, among others: United States of America v. Yemec, 2003 CanLII 23436 (ON SC), [2003] O.J. No. 3863, (S.C.J.) at para. 35, aff'd, 2005 CanLII 8709 (ON SCDC), [2005] O.J. No. 1165 (Div. Ct.).

[18] The duty to make full and frank disclosure extends to a party's factum: Yemec, S.C.J., at para. 36.

[19] A party who fails to make full and frank disclosure risks having the order set aside regardless of the merits of the request for

relief: Moses, at para. 29, r. 39.01(6), Rules of Civil Procedure. As the court put it in Friedland, at para. 28:

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

[20] The question before me is whether the plaintiff made full and frank disclosure as it was required to do. At this juncture, I turn to review some aspects of the plaintiff's evidence and written argument that are concerning.

[21] X's affidavit begins with a description of the robbery the plaintiff suffered. It is all hearsay. X does not identify the source of their information or indicate that they believe it to be true. Rather, they purport to describe the robbery, including that the phones were to be shipped to Bali and the Caribbean, that the robbery took place at a vulnerable time in the transportation of the goods, and they describe how the robbery took place. They do not explain how they know what they depose to; there is no evidence or even indication that they were present during the robbery.

[22] Hearsay evidence is a common feature of X's affidavit. For example, they rely on reports prepared by others, including an insurance adjuster, an accounting firm retained by the insurance adjuster, and a private investigator. None of these individuals filed affidavits; rather, X deposes as to the content of their reports. While X is able to depose to the information contained in those reports, as X's affidavit includes the generic statement at the outset that, where they do not have personal knowledge of the matters to which they depose, they identify the source of the information and they believe it to be true, that takes care only of the admissibility issue. It does not address the issue of the weight that ought to be attached to evidence of third parties adduced in this manner. I am concerned about some of the statements that come into the record in this manner, insulated from cross-examination, and yet very important to the issues on the motion, and highly prejudicial to Mr. Mornan. I address some of these in greater detail below. Here, I note that I am disinclined to place significant weight on key assertions that are conclusions of others based on X's evidence.

[23] There are troubling omissions and overstatements in X's affidavit. By way of example only:

a. The affidavit in support of the plaintiff's original request for the Mareva injunction states that Mr. Mornan "has been charged" with certain criminal

offences. In fact, by the time X's affidavit was sworn, the charges against Mr. Mornan had been withdrawn for some four months. Although the plaintiff argues it was unable to access this information, I note that (i) it did not, in the affidavit, qualify to what point its knowledge was current, or explain any difficulties in accessing up-to-date information; and (ii) when eventually advised by Mr. Mornan's counsel that the charges had been withdrawn, it was able to confirm that information with the Crown very quickly. It seems the plaintiff simply did not bother to try to update its information before swearing the affidavit in support of its request for extraordinary relief, and did not bother to disclose that fact to Myers J.;

b. At times, the affidavit does not accurately report the charges that were laid against Mr. Mornan. For example, although X deposes that Mr. Mornan was charged with possession of stolen property, that was not true. Neither was Mr. Mornan charged with robbery using a firearm, as X deposes; Mr. Mornan was charged with robbery. Mr. Mornan was not charged with use of a firearm during a criminal act and kidnapping, as the affidavit states; he was charged with using an imitation firearm while committing a robbery and kidnapping. The correct charges are identified elsewhere in Z's affidavit. This inconsistency evidences a lack of care in the accuracy of the affidavit, as the charges were obviously known to the plaintiff at the time the affidavit was sworn.

c. X deposes that Mr. Mornan owned or controlled the warehouse where the stolen merchandise was shipped, and that stolen cell phones were found in Mr. Mornan's warehouse. The insinuation in X's affidavit is that all, or a lot of, the stolen merchandise was stored in Mr. Mornan's warehouse. The evidence before me indicates that Mr. Mornan came into possession of stolen phones in a quantity small enough to be carried in a single box. At the same time, the boxes of phones that were stolen took over an hour to load into the FedEx truck. X had, at best, no knowledge as to how many phones were found in Mr. Mornan's warehouse, but their affidavit implied that very many of them were.

d. X deposes that an insurance adjuster authored a report dated September 24, 2019, which X summarizes in their affidavit. In doing so, X deposes that the insurance adjuster "has been made aware that the persons who executed the robbery are part of a gang from Toronto who have been involved in several other armed robberies." This statement can fairly be said to implicate Mr. Mornan, because X deposes that Mr. Mornan was charged with robbery. In fact, the insurance adjuster was provided this information by a "risk manager," named Amanda Pazarka. The affidavit does not indicate who Ms. Pazarka is, how she came into possession of this information, or whether there is any basis to believe it to be true. Thus, X, in summarizing the insurance adjuster's report, relies on hearsay in the report to depose to Mr. Mornan being part of a "gang" involved in "several

other armed robberies." This allegation is highly prejudicial to Mr. Mornan, and there was no evidentiary foundation for X to make it.

e. X deposes that cell phone records placed Mr. Mornan at the scene of the robbery. That was false. The Crown synopsis of its theory, contained in the record, alleges that, at different times, the defendants' phones were registering at a cell tower close to Mr. Mornan's warehouse, not the scene of the robbery.

f. X also deposes that another robbery occurred on June 22, 2019, and that the "same suspects" – which again, can fairly be understood to include Mr. Mornan – were involved. There is absolutely no evidence that Mr. Mornan was implicated in any other robbery. Mr. Mornan was never charged in connection with any other robbery to which X refers (and, for clarity, no other robbery of which I am aware).

g. A heading in X's affidavit reads "ZTGH [the plaintiff's counsel's firm] follows all criminal proceedings." X deposes that they "attended every court appearance related to the first robbery," and relays a number of dates that continue until the court shut down at the outset of the COVID-19 pandemic. This leaves the reader with the false impression that X attended relevant court appearances relating to Mr. Mornan, when in fact, they only ever attended one court appearance related to Mr. Mornan, an assignment court appearance on November 25, 2019.

h. X's affidavit relies heavily on statements made in the bail hearings of the other accused to describe the allegations against Mr. Mornan. For the most part, X's affidavit does not describe these statements as what they were - submissions, or the synopsis read into a bail hearing, setting out what the police think occurred. Rather, X concludes that the "evidence" – of which they had none – supported the civil liability of all defendants, and X made reference to the defendants' "criminal involvement in a robbery and the severity of charges against them" as if it were a fact.

[24] The plaintiff's factum filed on the original motion is equally, if not more, problematic. For example:

a. The factum alleges that the "defendants" carried out a violent robbery, and that Mr. Mornan "hid the stolen goods in his warehouse." By the time the factum was drafted, the charges against Mr. Mornan had been withdrawn, the plaintiff had no other basis on which to assert that Mr. Mornan "carried out a violent robbery," and there was never any basis to say Mr. Mornan hid "the" stolen goods in his warehouse, as that statement implies Mr. Mornan actively concealed all the stolen property, when at most one can say that stolen property that fit inside one box was found inside his property.

b. The factum alleges that "all the defendants were present during the armed robbery and were found in possession of a robbery kit and/or items stolen from the Fed/Ex truck." This statement is problematic because it lumps Mr. Mornan in with the other defendants. The plaintiff has not identified any evidence, or even any information, that Mr. Mornan was ever found in possession of a robbery kit. He was found in possession of some items that were stolen from the truck, but the wording of the sentence is vague, and implicates Mr. Mornan in the possession of a robbery kit.

c. The factum alleges that the defendants were "caught red-handed." There is no evidence Mr. Mornan was "caught red-handed." Other defendants were arrested when they were allegedly in process of committing another robbery. Mr. Mornan was never implicated in that subsequent robbery.

d. The factum alleges that the "defendants were attempting a third similar robbery when arrested." That is simply not true as it relates to Mr. Mornan. There is no evidence, and the plaintiff never had any reason to believe, that Mr. Mornan was arrested while attempting a robbery.

e. Most egregiously, the factum states that X's affidavit "details the evidence to be presented at the trial of the defendants." It did no such thing. It set out the Crown's theory of the case as had been disclosed at the bail hearing of Mr. Mornan's co-defendant. The factum goes on to say that "the particulars known to date are sufficient to support a civil finding of fact in favour of the plaintiff on a balance of probabilities." But no "particulars" were "known" by the plaintiff. The plaintiff had heard the Crown's theory of the case. That's it. Yet the factum confidently predicts the result of the civil case based on unsworn statements made in another defendant's bail hearing.

[25] Neither the affidavit nor the factum accurately disclose what the plaintiff knew, or did not know. By indiscriminately lumping Mr. Mornan in with other defendants, and by describing matters about which the plaintiff had no current information as if the information was then-current, the documents both, overstate the plaintiff's case, and misstate Mr. Mornan's involvement – and even his suspected involvement – in the robbery. The plaintiff makes no effort in either document to disclose, or even wonder, what Mr. Mornan might have said if the motion was not proceeding ex parte. The documents are drafted as if the plaintiff was fully engaging in the adversarial process, not an ex parte hearing where the plaintiff has the duty of full and frank disclosure because the normal checks and balances of the adversarial system were not present. Moreover, the obfuscation in the affidavit and factum were material to the issues before Myers J., and highly prejudicial to Mr. Mornan. In my view, had full and frank disclosure

been made about what the plaintiff actually knew and did not know about Mr. Mornan, the Mareva injunction would not have been granted in the first place.

[26] I am not making a finding that X, the plaintiff, or anyone on behalf of the plaintiff, lied. The plaintiff's counsel states the affidavit records the facts as they knew them. For purposes of this hearing, I need not go further than determining that the affidavit and factum were over-zealous, and that the plaintiff did not discharge its duty to the court.

[27] That conclusion is a sufficient basis on which to set the Mareva injunction aside, and on that basis alone, I set it aside.

[28] However, for the sake of completeness of the record, I briefly comment on certain other aspects of the Mareva injunction test with which Mr. Mornan has joined issue.