Civil Procedure
Law 225

Winter Term 2024

Lecture Notes No. 15

IX. 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:**

- **there is a serious issue to be tried;**
- **they will suffer irreparable harm or harm not compensable by an award of damages, if the injunction is not granted; and,**
- **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.).** See Draft Order approved by the SCJ.

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.

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 (H.L.). 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**.
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> [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. See Draft Order approved by the SCJ.

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.**
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> 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.).
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> **[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.
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> [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.