Civil Procedure
Fall Term 2024

LECTURE NOTES NO. 15

2. INTERLOCUTORY INJUNCTIVE RELIEF

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).

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.

GEA Group AG v. Ventra Group Co.
2009 ONCA 619 (Ont.C.A.)

Cronk J.A.:

> 44 However, following Norwich Pharmacal, the reach of the equitable action for discovery in England was significantly expanded. In subsequent cases, pre-action discovery was granted where a cause of action against the respondent from whom discovery was sought was asserted on the basis of the respondent's own alleged wrongdoing (see British Steel Corp. v. Granada Television Ltd., [1981] A.C. 1096 (Eng. Ch. Div.)), as well as where the object of the relief was to permit the tracing and freezing of assets (see Bankers Trust Co. v. Shapira, [1980] 3 All E.R. 353 (Eng. C.A.); A v. C, [1980] 2 All E.R. 347 (Eng. Q.B.)). In addition, in P. v. T. Ltd., [1997] 4 All E.R. 200 (Eng. Ch. Div.), Norwich relief was granted to permit an applicant to determine if, in fact, he had a cause of action against a suspected wrongdoer.
>
> 45 Moreover, in Ashworth Security Hospital v. MGN Ltd., [2002] 4 All E.R. 193 (U.K. H.L.), it was held at para. 44 that the "Norwich jurisdiction" was not linked "to any requirement that the information should be available to the individual who had been wronged only for the purpose of enabling him to vindicate that wrong by bringing proceedings". In other words, the court in Ashworth accepted that a

Norwich order could be obtained in the absence of a settled intention to sue the alleged wrongdoer or the person from whom discovery is sought. See also Norwich Pharmacal, at p. 175, per Lord Reid. The rationale for this expansive approach to Norwich relief was explained by Lord Woolf C.J. in Ashworth at para. 57:

New situations are inevitably going to arise where it will be appropriate for the jurisdiction to be exercised where it has not been exercised previously. The limits which applied to its use in its infancy should not be allowed to stultify its use now that it has become a valuable and mature remedy.

46 The availability of pre-action discovery has also been codified in the applicable rules of court in England. For example, Rule 31.16 of the Civil Procedure Rules 1998 (U.K.), SI 1998 No. 3132 (L. 17), provides that a court may order disclosure against a respondent who is "likely to be a party to subsequent proceedings" under certain circumstances in order to: "(i) dispose fairly of the anticipated proceedings; (ii) assist the dispute to be resolved without proceedings; or (iii) save costs". Further, under Rule 31.17, an order for disclosure by a person who is not a party to proceedings may be made by a court where: "(a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and (b) disclosure is necessary in order to dispose fairly of the claim or to save costs". Finally, Rule 31.18 provides that Rules 31.16 and 31.17 "do not limit any other power which the court may have to order - (a) disclosure before proceedings have started; and (b) disclosure against a person who is not a party to proceedings".

47 In contrast, as in most provinces in Canada, the Ontario Rules of Civil Procedure make no provision for equitable relief in the nature of a Norwich order Moreover, Norwich orders have been considered in only a limited number of cases in Canada to date.

48 In Glaxo Wellcome plc v. Minister of National Revenue, [1998] 4 F.C. 439 (Fed. C.A.), leave to appeal refused (S.C.C.), on facts similar to those in Norwich Pharmacal, a pharmaceutical patent holder applied to the Minister of National Revenue under the Customs Act, R.S.C. 1985, c. 1, (2nd Supp.) for disclosure of the names of various drug importers who were said to have infringed the applicant's intellectual property rights. As in Norwich Pharmacal, disclosure of the requested information was denied on the ground of confidentiality. The drug company then applied to the Federal Court of Canada for judicial review of that denial and for an order permitting it to examine the Minister on discovery to obtain the importers' identities. Both applications were dismissed. On appeal to the Federal Court of Appeal, the appeal from the dismissal of the judicial review application was dismissed but the appeal from the dismissal of the application for an equitable bill of discovery was allowed.

49 Following a detailed review of the decision in Norwich Pharmacal, Stone J.A. held at p. 461 that there are two threshold requirements for obtaining the discretionary remedy of an equitable bill of discovery: (i) the applicant must have a bona fide claim against the alleged wrongdoers; and (ii) the applicant must share some sort of relationship with the respondents. Justice Stone explained that the first requirement is intended to ensure "that actions for a bill of discovery are not brought frivolously or without any justification", while the second requirement reflects the principle that "a bill of discovery may not be issued against a mere witness or disinterested bystander to the alleged misconduct". Justice Stone then identified two additional requirements for granting a bill of discovery: (iii) the person from whom discovery is sought must be the only practicable source of information available to the applicant; and (iv) the public interests both in favour and against disclosure must be taken into account.

50 A similar approach to Norwich orders has been adopted in Alberta. In Alberta Treasury Branches v. Leahy (2000), 270 A.R. 1 (Alta. Q.B.), aff'd, (2002), 303 A.R. 63 (Alta. C.A.), leave to appeal refused (S.C.C.), after an extensive review of the relevant authorities in England and Canada, Mason J. described the variety of situations in which Norwich relief has been granted by the courts (at para. 106):

(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.

51 Justice Mason then offered the following formulation of the test for a Norwich order (at para. 106):

The court will consider the following factors on an application for Norwich relief:

(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 the disclosure.

52 In Ontario, this court has held that the equitable action for discovery lies in this jurisdiction and that it co-exists with the Rules of Civil Procedure: Straka v. Humber River Regional Hospital (2000), 51 O.R. (3d) 1 (Ont. C.A.), at paras. 27 and 32. In Straka, Morden A.C.J.O. observed at para. 36: "The real question with respect to an action for discovery is: in what circumstances does it properly lie? We are concerned with an equitable remedy and, accordingly, the exercise of a discretion is involved." Justice Morden went on to accept Stone J.A.'s analysis in Glaxo of the prerequisites to the obtaining of an order for pre-action discovery.2

53 The holding in Straka that the equitable remedy of a bill of discovery is preserved in Ontario law and that it operates in concert with the Rules of Civil Procedure was reaffirmed by this court in Meuwissen (Litigation Guardian of) v. Strathroy Middlesex General Hospital, 40 C.P.C. (6th) 6 (Ont. C.A.), at paras. 3-4 and 9. The remedy was also recently considered in Isofoton S.A. v. Toronto Dominion Bank (2007), 85 O.R. (3d) 780 (Ont. S.C.J.), in which the court expressly adopted the Leahy test for the granting of Norwich relief.

54 Thus, many of the general principles applicable in Ontario to the granting of Norwich relief are well developed. That said, the following observation by Morden A.C.J.O. in Straka at para. 51 remains apposite: "[t]he nature and scope of the Norwich Pharmacal principle is far from settled."

C. MAREVA INJUNCTIONS

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

Chitel et al. v. Rothbart
1982 CanLII 1956 (Ont. C.A.)

MacKinnon A.C.J.O.:

> 20 Because of the failure to make full disclosure with the resulting incomplete and misleading picture of the relationship between the parties, I would not exercise my discretion to order continuance of the injunction until the trial of the action. I hold this opinion whatever view may be taken of the Mareva form of interlocutory injunction.
>
> **The Mareva Injunction**
>
> 21 This conclusion would be sufficient to dispose of this application but, as I noted earlier, the matter comes before us because Mr. Justice Anderson was of the opinion that earlier cases dealing with Mareva injunctions, particularly *Mills & Mills v. Petrovic* (1980), 30 O.R. (2d) 238, 18 C.P.C. 38, 12 B.L.R. 224, 118 D.L.R. (3d) 367 (H.C.), if followed, would mandate a continuation of the injunction. He was of the view that the law of this province with respect to interlocutory injunctions exhibits some confusion. He went on to say "[t]here is a dearth of authority at the appellate level. It appears to me that authoritative guidance is much needed". I have made it clear that because of the nature of the material in support of the application and its serious deficiencies, which were not apparent at the time of the granting of the interim injunction, I would not continue the injunction. Accordingly, anything I may have to say as to Mareva injunctions is not necessary to my decision. However, out of deference to Mr. Justice Anderson's request and in view of the fact that the matter only came before us because he felt that some extended form of Mareva injunction might apply, I shall deal with that issue.
>
> …
>
> 27 In dealing generally with interlocutory injunctions, I note that, until recently, it was accepted that the applicant had to first establish a prima facie case before the Court looked to and considered the other factors. In 1975, the House of Lords in *Amer. Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, [1975] 1 All E.R. 504, rejected the "prima facie" test and held that the applicant need only satisfy the Court that "the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried" (p. 510 All E.R.) before the Court turned to a consideration of the other relevant

factors. The House of Lords' concern was that Courts were trying cases (at length) at this early stage on incomplete evidence and were undertaking "what is in effect a preliminary trial of the action on evidential material different from that on which the actual trial will be conducted..." (p. 509). Lord Diplock, speaking for the Court, also noted that the interlocutory injunction is given on affidavits that have not been "tested by oral cross-examination" (p. 509). The significance of the word "oral" was not explained.

28 Although the *Amer. Cyanamid* case has been followed in this province, it has been properly emphasized by Cory J., speaking for the Divisional Court in *Yule Inc. v. Atl. Pizza Delight Franchise (1968) Ltd.* (1977), 17 O.R. (2d) 505, 35 C.P.R. (2d) 273, 80 D.L.R. (3d) 725, that the remedy must remain flexible and that the *Amer. Cyanamid* test may not be a suitable test in all situations. That there are exceptions to or qualifications of the test is noted by Lord Diplock himself in *N W L Ltd. v. Woods; N W L Ltd. v. Nelson*, [1979] 1 W.L.R. 1294, [1979] 3 All E.R. 614 at 625:

My Lords, when properly understood, there is in my view nothing in the decision of this House in *American Cyanamid Co v Ethicon Ltd*, [1975] A.C. 396, [1975] 1 All E.R. 504, to suggest that in considering whether or not to grant an interlocutory injunction the judge ought not to give full weight to all the practical realities of the situation to which the injunction will apply. *American Cyanamid Co v Ethicon Ltd*, which enjoins the judge on an application for an interlocutory injunction to direct his attention to the balance of convenience as soon as he has satisfied himself that there is a serious question to be tried, was not dealing with a case in which the grant or refusal of an injunction at that stage would, in effect, dispose of the action finally in favour of whichever party was successful in the application, because there would be nothing left on which it was in the unsuccessful party's interest to proceed to trial.

29 It is my view, without stating any final opinion on the subject, that the availability of the cross-examination transcript makes more legitimate a preliminary consideration by the motions Judge of the merits of the case. Whatever the test may be regarding the granting of interlocutory injunctions generally, in my view, the granting of a Mareva injunction, under special and limited circumstances, requires that the applicant establish a strong prima facie case.

30 The almost exponential growth of the Mareva injunction and the extension of the grounds for such injunctions, seemingly without regard to long-established principles, has raised questions, and caused critics to describe them (as indeed did the Motions Court Judge in the Court below), as being "tantamount to execution before judgment". That, strictly speaking, is not so. What such orders do is tie up the assets of the defendant, specific or general, pending any judgment adverse to the defendant so that they

would then be available for execution in satisfaction of that judgment. It is certainly ordering security before judgment.

31 The cases dealing with Mareva injunctions have been much canvassed and I do not propose to run through them all again. It had been the traditional view in England, as well as in this province, that an interlocutory injunction would not be granted to restrain a defendant from disposing of his assets or removing them from the jurisdiction prior to judgment. However, the modern departure from that view has its genesis in a trilogy of cases: *Nippon Yusen Kaisha v. Karageorgis*, [1975] 1 W.L.R. 1093, [1975] 3 All E.R. 282, [1975] 2 Lloyd's Rep. 137 (C.A.), heard May 22, 1975; *Mareva Compania Naviera S.A. v. Int. Bulkcarriers S.A.; The Mareva*, [1980] 1 All E.R. 213, [1975] 2 Lloyd's Rep. 509 (C.A.), although reported in 1980 was heard June 23, 1975; and *Rasu Maritima S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina)*, [1978] Q.B. 644, [1977] 3 All E.R. 324 , [1977] 2 Lloyd's Rep. 397 (C.A.), heard March 2 to 9, 1977.

32 These cases and those which follow them establish that, in a proper case, a Mareva injunction may be granted as an exception to the general rule. Such an injunction is not now restricted to foreign defendants, but rather is extended to defendants within the jurisdiction under special and limited conditions formulated in these cases.

…

42 In a later case, *Third Chandris Shipping Corp. v. Unimarine S.A.; The Pythis*, [1979] Q.B. 645, [1979] 2 All E.R. 972, [1979] 2 Lloyd's Rep. 184 (C.A.), Lord Denning M.R. purported to set out "guidelines" for the granting of Mareva injunctions. Once again the case concerned a charter contract with a foreign defendant. Mustill J., who heard the application in the Court of first instance in the course of discussing Mareva injunctions, said (pp. 976-77 All E.R.):

At present, applications are being made at the rate of about 20 per month. Almost all are granted. Applications to discharge the injunctions are very rare, whether because the order is not regarded as producing substantial injustice or because it is cheaper and less trouble to lift the injunction by providing bank guarantees rather than by proceedings in court is impossible to say. A very simple procedure has now been evolved. The plaintiff's affidavit to lead the application usually sets out the nature of the claim; and states that the defendant is abroad and asserts that, if the plaintiff is successful in the action, judgment will be unsatisfied if the injunction is refused. Sometimes, but not always, the plaintiff is able to identify specific balances among the accounts and gives reasons for his assertion that the judgment will go unsatisfied.

. . . . .

The matter was however complicated by a rather surprising development. At a late state of the argument counsel (who argued the matter very forcefully for the charterers) asserted that their bank account in question in fact contained no funds at the time the injunctions were granted but was in a position of overdraft. It seemed to me that this assertion raised a serious issue which went to the heart of the present dispute. I therefore invited further argument. The *MBPXL* case [[1975] Court of Appeal Transcript 411] is authority binding on this court that the plaintiff must demonstrate the existence of assets within the jurisdiction if Mareva relief is to be granted. If the only assets whose existence is asserted by the plaintiff consists of a credit balance and if in fact it is shown that no such balance exists, the requirements of the *MBPXL* case are not satisfied.

43 In my view, Mustill J. succinctly put the original purpose and point of Mareva injunctions when he states (p. 978) “[t]he whole point of Mareva jurisdiction is that the plaintiff proceeds by stealth, so as to pre-empt any action by the defendant to remove his assets from the jurisdiction”.

44 At the commencement of the outline of his guidelines in this case, Lord Denning issued an uncharacteristic caveat: “Much as I am in favour of the Mareva injunction it must not be stretched too far lest it be endangered.” He then stated his guidelines summarized as follows (pp. 984-85):

(i) The plaintiff should make full and frank disclosure of all matters in his knowledge which are material for the judge to know.

(ii) The plaintiff should give particulars of his claim against the defendant, stating the ground of his claim and the amount thereof, and fairly stating the points made against it by the defendant.

(iii) The plaintiff should give some grounds for believing that the defendants have assets here.

(iv) The plaintiff should give some grounds for believing that there is risk of the assets being removed before the judgment or award is satisfied.

(v) The plaintiffs must give an undertaking as to damages.

Items (i), (ii) and (v) are standard guidelines in this province in considering whether to grant an interlocutory injunction in the ordinary case.

…

51 I have dealt extensively with the English authorities because the principle they expound has been imported into this province, possibly in some cases without sufficient regard to the limitations which the English

authorities themselves have placed on its application.

52 The principle applicable to Mareva injunctions has now been given statutory force in England in s. 37(3) of the Supreme Court Act, 1981 (U.K.), c. 54 which states:

The power of the High Court... to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, *or otherwise dealing with, assets* located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction. (The italics are mine.)

Although there is no similar legislation at present in this province, in my view, under certain limited and special conditions, it is a legitimate exercise of the discretion given a Court under s. 19(1) of the Judicature Act, R.S.O. 1980, c. 223 to grant a Mareva injunction. This jurisdiction is not limited by the nature of the proceedings. However, like Sir Robert Megarry, I regard the *Lister* principle as remaining the rule "with the Mareva doctrine as constituting a limited exception".

53 Section 19(1) is the Ontario counterpart to s. 45(1) of the Supreme Court of Judicature (Consolidation) Act, 1925, the section upon which Lord Denning placed much reliance. The opening words of s. 19(1) are identical to those of s. 45(1) and state: "A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the court in all cases in which it appears to the court to be *just or convenient* that the order should be made. ..." (The italics are mine.) Those words, of course, must not be construed so broadly as to permit the Court to grant the injunction, as Jessel M.R. put it in *Aslatt v. Southampton*, supra, "simply because the Court thought it convenient."

54 I do not propose to canvass all the recent Ontario cases which have dealt with the granting of a Mareva injunction. Saunders J., in a helpful judgment in *Bank of Montreal v. James Main Holdings Ltd.; Re Main and Bank of Montreal* (1982), 26 C.P.C. 266, 23 R.P.R. 180, affirmed 28 C.P.C. 157 (Ont. Div. Ct.), released March 1, 1982, attempted to rationalize a number of the judgments here and in England and he pointed out that in almost all of the decided cases there was some unusual circumstance related to the risk of removal or disposition of the property or assets.

55 In the instant case the motions Court Judge referred to *OSF Indust. Ltd. v. Marc-Jay Invts. Inc.* (1978), 20 O.R. (2d) 566, 7 C.P.C. 57, 88 D.L.R. (3d) 446. In that case the Court, in effect, refused to follow *Nippon Yusen Kaisha v. Karageorgis*, supra, and held that "it was not for the Court to interfere *quia timet* and restrain the defendant from dealing with his property until the rights of the litigants are ascertained". (p. 448 D.L.R.) Lerner J. held

that there was in this province at that time no basis in law for the remedy of Mareva injunction. With deference, I am of the opinion that the learned Judge was in error in this conclusion and the case cannot be used to stand in the way of the granting of a Mareva injunction in a proper case.

56 As I mentioned earlier, items (i), (ii) and (v) of Lord Denning's guidelines are standard considerations for the Courts of this province when considering the usual application for an interlocutory injunction. However, when an application for a Mareva injunction is before the Court, the material under items (i) and (ii) of the guidelines must be such, as I have already said, as persuades the Court that the plaintiff has a strong prima facie case on the merits.

57 Guidelines (iii) and (iv) cover areas that are unique to the Mareva injunction. The material under item (iii), which deals with the assets of the defendant within the jurisdiction, should establish those assets with as much precision as possible so that, if a Mareva injunction is warranted, it is directed towards specific assets or bank accounts. It would be unusual and in a sense punitive to tie up all the assets and income of a defendant who is a citizen and resident within the jurisdiction. Damages, covered by an undertaking as to damages, might be far from compensating for the ramifications and destructive effect of such an order. In the instant case, this was the order sought and initially secured without any attempted identification of assets to which the order would be directed. It may well be that a plaintiff may have no knowledge of any of the defendant's assets or their location, but that was not stated to be the case in the instant application.

58 Turning finally to item (iv) of Lord Denning's guidelines — the risk of removal of these assets before judgment — once again the material must be persuasive to the Court. 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 or disposing of his assets, in a manner clearly distinct from his usual or ordinary course of business or living, so as to render the possibility of future tracing of the assets remote, if not impossible in fact or in law.

59 Earlier, in another connection, I pointed out that our practice in interlocutory injunctions generally is somewhat different from what occurs in England. My understanding is that it is rare in England for a deponent to be cross-examined on his affidavit in such cases. Here, cross-examination is the rule rather than the exception. Although the ex parte order is made without the benefit of such cross-examination, on the hearing for the continuation of the order the Court usually has the cross-examination on the affidavits that have been filed, including any filed by the defendant. At that

time the Ontario Court is in a better position than it would be without such cross-examination to assess the respective merits of the parties both with regard to whether a strong prima facie case has been established on the claim and with regard to whether the "guidelines" have been satisfied.

60 The instant application illustrates what can take place between the ex parte hearing of the original application and the hearing on the application to continue. Mr. Justice Galligan cannot be faulted for granting the original ex parte injunction. On the material before him it appeared that, as a result of a professional medical relationship, the defendant had secured the trust of a woman inexperienced in financial matters who relied on him for financial advice. He then, in abuse of that trust, secured shares from her by fraud or theft. When she commenced asking for their return he made arrangements to leave Canada and indeed was in the process of leaving and removing all his assets from Canada. She secured the injunction the day before he was to leave Canada for good.

61 On those facts, this appeared to be a classic case for the remedy of a Mareva injunction. However, as a result of the material filed by the defendant and, in particular, the cross-examination of the plaintiff on her affidavit, the facts took on a different hue as I have already described. As I have stated before, the failure of the plaintiff to fully and accurately set out the facts on which her claim was based was sufficient to deny the application to continue the interlocutory injunction. The more "complete" facts, as they are now understood, if they had been fully and correctly stated originally would not have warranted the granting of a Mareva injunction.

62 The Courts must be careful to ensure that the "new" Mareva injunction is not used as and does not become a weapon in the hands of plaintiffs to force inequitable settlements from defendants who cannot afford to risk ruin by having an asset or assets completely tied up for a lengthy period of time awaiting trial. I would respectfully adopt what Grange J. said in *C.P. Airlines Ltd. v. Hind* (1981), 32 O.R. (2d) 591, 22 C.P.C. 179, 14 B.L.R. 233, 122 D.L.R. (3d) 498 at 503:

The adoption of the *Mareva* principle can lead to some sorry abuse. I would hate to see a defendant's assets tied up merely because he was involved in litigation. I do not think the *American Cyanamid* injunction rule can possibly apply ...

63 Mr. Justice Anderson in the instant case said [p. 96 C.P.C.], "I can see no reason why the plaintiff with a cause of action for fraud should be given assurance of recovery under such a judgment and not if the judgment stemmed from some other cause". I agree with this view and I have sought to point out the conditions that must be satisfied before a Mareva injunction can be granted. However, I do not have the pessimistic view taken by the

Motions Court Judge that all the former criteria for the granting of interlocutory injunctions are now to be disregarded. I do not believe that to be so. The Mareva injunction is here and here to stay and properly so, but it is not the rule — it is the exception to the rule.

64 The application is dismissed with costs, including the costs of the appearance before Mr. Justice Anderson, in any event of the cause.