

## INJUNCTIONS AND URGENT RELIEF

### I. Injunctions Generally

The injunction is perhaps the most flexible and speedy remedy available in our courts. Because an injunction can, and often is, sought immediately upon commencement of an action, the injunction has become virtually synonymous with urgent relief. Few other remedies are so readily available at the early stages of a proceeding.

An injunction can have a dramatic effect on the relationship between plaintiff and defendant. From the plaintiff's point of view, an injunction can put a halt to the actions of a defendant who is causing substantial harm in defiance of the plaintiff's rights. From the defendant's point of view, an injunction can be a form of litigious blackmail, which may effectively deprive the defendant of his or her rights and force the defendant into an improvident settlement. An injunction application is, therefore, always a balancing act for the court.

The power of the Supreme Court of British Columbia to grant injunctions is confirmed by s. 39(1) of the *Law and Equity Act*, R.S.B.C. 1996, c. 253:

An injunction or an order in the nature of *mandamus* may be granted or a receiver or receiver manager appointed by an interlocutory order of the court in all cases in which it appears to be just or convenient that the order should be made.

Rule 45 deals with certain procedural matters relating to injunction.

### II. Interlocutory Injunctions

An interlocutory injunction is an order which binds a defendant until trial or other disposition of the action. An interim injunction has similar effect, but applies only until a specified time or until a certain event has occurred. In some jurisdictions, it is the practice of the court on *ex parte* applications to grant only an interim injunction and require the plaintiff to reapply on notice to the defendant for a further injunction: see Sharpe, *Injunctions and Specific Performance* at para. 2.24, as well as Ontario Rule 40.02 and Federal Courts Rule 374(1), which require that an injunction granted *ex parte* be effective for no more than ten days (for Ontario) or 14 days (for the Federal Court). The general practice on *ex parte* applications in B.C. has traditionally been to grant an interlocutory injunction with leave to the defendant to apply on short notice to set it aside. However, our Court of Appeal has recently suggested that in some circumstances, *ex parte* applications are properly addressed by short-term interim injunctions that provide for reapplication with notice to the respondents: *Provincial Rental Housing Corporation v. Hall*, 2005 BCCA 36.

#### A. The Test

The test for most interlocutory or interim injunctions is the same. However, there are exceptions. Different tests apply to extraordinary forms of injunction such as the Mareva or Anton Piller orders. It is the ordinary interlocutory injunction that is discussed in this section.

There is some debate in the cases and texts as to whether the test for an interlocutory injunction is two or three-pronged. In any event, each formulation applies essentially the same factors—the only issue is whether they are applied in separate stages or all as part of one balancing exercise.

The leading B.C. case on interlocutory injunctions is *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 (C.A.), aff'd (1991), 53 B.C.L.R. (2d) 189 (S.C.C.), where McLachlin J. described the two-pronged test in the following terms:

First, the applicant must satisfy the court that there is a fair question to be tried as to the existence of the right which he alleges and a breach thereof, actual or reasonably apprehended. Second, he must establish that the balance of convenience favours the granting of an injunction.

The three-pronged test includes as an additional stage between the two stages of the *Wale* test a requirement that the plaintiff establish that it may suffer irreparable harm were the injunction not granted: *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385. The test is set out in that case as follows (at p. 334, S.C.R.):

First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

McLachlin J. in *Wale* considered the question of irreparable harm to be a part of determining the balance of convenience, as did Williamson J. of the Supreme Court of British Columbia more recently in *Law Society of British Columbia v. Canada Domain Name Exchange Corporation*, (2002) BCSC 1249. A plaintiff will, however, rarely if ever succeed in obtaining an injunction without being able to establish irreparable harm.

The applicability of the *Wale* test in British Columbia was confirmed in *Roxul (West) Inc v. 445162 BC Ltd* (2001), 89 B.C.L.R. (3d) 21 at para 13 (C.A.) and *Coburn v. Nagra* (2001), 10 C.P.C. (5<sup>th</sup>) 237 at 239 (B.C.C.A.). However, many British Columbia cases cite the three-prong test from *RJR MacDonald*.

### 1. The Merits of the Claim

The court will generally not require that a plaintiff establish that he will succeed at trial on the balance of probabilities. Rather, all that is required of the applicant is to establish that the claim is not frivolous or vexatious, and that there is a serious question to be tried: *American Cyanamid Co. v. Ethicon Ltd*, [1975] A.C. 396 (H.L.).

There are exceptions. If the result of the interlocutory motion will in effect amount to a final determination of the action, then the Court will more closely examine the merits of the case: *Prince Rupert Grain Ltd v. GSU, Local 333*, 2002 BCCA 641, 27 C.P.C. 205. In constitutional cases, where the court is faced with a simple question of law alone, then it may also more carefully examine the merits of the case. As well, there is some suggestion in the cases that, where the facts are not substantially in dispute, the court should require a strong prima facie case before acting. These exceptions are discussed in the *RJR-MacDonald* case (pp. 338-340, S.C.R.).

### 2. Irreparable Harm

Irreparable harm is the key to most interlocutory injunction applications. The Supreme Court of Canada, in the *RJR-MacDonald* case, described it as follows (p. 341, SCR):

At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

"Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid, supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

Where it is clear that the appropriate remedy at trial would be damages, interlocutory injunctive relief will not normally be granted: *Expert Travel Financial Security (E.T.F.S.) Inc. v. BMS Harris & Dixon Insurance Brokers Ltd.* 2005 BCCA 5.

However, the question of what exactly is required to establish irreparable harm is not clear on the cases. In the *Wale* case, *supra*, McLachlin J.A. asserted (at paras. 47, 50) that:

In most cases, an interlocutory injunction should not be granted unless there is doubt whether damages would be an adequate remedy in the event the applicant succeeds at trial. In other words, it must be shown that the applicant may suffer irreparable harm in the sense that "the remedy of damages is not such a compensation as will in effect, though not in specie, place the parties in the position in which they formerly stood:" *Kerr On Injunctions*, 6th ed., at pp. 17 - 18, applied in *MacMillan-Bloedel Limited v. Mullin et al.*, [1985] 3 W.W.R. 577 (B.C.C.A.), per Seaton J.A. The requirement that there be doubt as to whether damages will be an adequate remedy is basically a matter of common sense. If damages will be an adequate remedy, and if it appears that the alleged offender can pay them, the court is generally not justified in giving one party his remedy to the detriment of the other before the issues have been tried. . . . It is important to note that clear proof of irreparable harm is not required. Doubt as to the adequacy of damages as a remedy may support an injunction: *American Cyanamid Company v. Ethicon Limited, supra*.

A separate line of cases take a stricter approach and require that there be clear proof of irreparable harm. These cases follow the judgment of the Federal Court of Appeal in an intellectual property case, *Syntex Inc. v. Novopharm Ltd* (1991), 36 C.P.R. (3d) 129 at 135. Recent British Columbia cases adopting this approach include *Bennett v. Rudek*, 2003 BCSC 1035, *Cimolai v. Children's and Women's Health Centre of British Columbia*, 2001 BCSC 1537, and *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*, 2000 BCSC 1750.

Obtaining the best possible evidence of irreparable harm will be key to every injunction application. There will obviously be cases in which irreparable harm can be inferred from the circumstances, including the nature of the harm that flows from the impugned conduct. In those cases, the court may have sufficient doubt as to the adequacy of damages as a remedy to grant an injunction. Where the court is of the view, however, that inferences should not be drawn, or that evidence of irreparable harm should be but is not available, then failure to tender such evidence may well be fatal to the injunction application.

Where a plaintiff sues to enforce a negative covenant, there is authority to the effect that irreparable harm is not required: *Coast Hotels Ltd v. Northwest Hotels Inc.* (2001), 11 C.P.C. (5<sup>th</sup>) 189 (B.C.C.A.); *Montreal Trust Co. v. Montreal Trust Co. of Canada* (1988), 24 B.C.L.R. (2d) 238 (C.A.). In such cases, however, the balance of convenience remains a factor: *Consumers' Automart Ltd v. Hyundai Auto Canada Inc.* (1991), 8 B.C.L.R. (3d) 37 (C.A.).

### 3. Balance of Convenience

This factor, sometimes referred to as the balance of inconvenience, encompasses the many remaining factors that affect a court's discretion. It was described in the following terms in the *RJR MacDonald* case (at 342):

The third test to be applied in an application for interlocutory relief was described by Beetz J. in *[Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.]*, [1987] 1 S.C.R. 110] at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in Charter cases, many interlocutory proceedings will be determined at this stage.

The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. In *American Cyanamid*, Lord Diplock cautioned, at p. 408, that:

[i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

Notwithstanding Lord Diplock's caution, there have been various attempts to create at least partial lists of matters to consider on the question of balance of convenience. One such list is found in the judgment of Lambert J.A. in *Canadian Broadcasting Corp. v. CKPG Television Ltd.* (1992), 42 C.P.R. (3d) 526 at 546 (B.C.C.A.):

I would summarize that approach in this way; in assessing the balance of convenience a judge should consider these points—the adequacy of damages as a remedy for the applicant if the injunction is not granted, and for the respondent if an injunction is granted; the likelihood that if damages are finally awarded they will be paid; the preservation of contested property; other facts affecting whether harm from the granting or refusal of the injunction would be irreparable; which of the parties has acted to alter the balance of their relationship and so affect the *status quo*; the strength of the applicant's case; any factors affecting the public interest; and any other factors affecting the balance of justice and convenience.

It should be noted that the strength of the applicant's case is a separate factor, which should be considered under the second prong of the test, quite apart from the question under the first prong of the test of whether the applicant has established a fair question to be tried. But the assessment of the relative strength of the parties' cases must recognize the degree to which those cases have not yet been revealed because of the nature of the evidence and the way it has been presented on the injunction application, which may be markedly different from the way it would be presented at trial.

All of the traditional doctrines of equity, including the requirement that the applicant come to court with clean hands, apply to interlocutory injunctions: *Tejani v. Jiwa*, 2001 BCSC 571.

#### B. Undertaking as to Damages

Except in exceptional circumstances, the courts will require that a successful applicant give an undertaking to the court to abide by any order which the court may make as to damages arising from the injunction should it later be determined that the injunction should not have been granted: Rule 45(6). It is incumbent on counsel to review this rule and its consequences with their clients before any application for an injunction is made.

The undertaking is to pay damages that flow from the granting of the injunction, should it later be determined that the injunction should not have been granted. The effect of the undertaking is that the applicant is liable for damages which are the natural consequence of the injunction:

*Village Gate Resorts Ltd v. Moore* (1999), 29 C.P.C. (4<sup>th</sup>) 118 (BCSC), aff'd (22 October 1999),

No. CA025509 (BCCA). Damages flowing from a wrongly granted injunction may be payable even if the applicant is ultimately successful on the merits of the case. However, the court retains a discretion to refuse to enforce the undertaking if there are special circumstances:

*A.G.B.C. v. Infomap Services Inc.* (1992), 8 C.P.C. (3d) 35 (BCSC).

The court has a discretion to order that an applicant post security to support the undertaking that it has given. The court will determine whether to exercise that discretion based upon any concerns it has as to the ability of the party seeking the injunction to satisfy an order made on the undertaking, as well as the extent of the damages that might flow from the granting of the injunction: *Cranewood Financial Corp. v. Mutsumi Enterprises Canada Ltd* (2000), 7 BLR (3d) 80 (BCSC).

### **C. Mandatory Interlocutory Injunctions**

A mandatory interlocutory injunction may be granted by the court in appropriate circumstances. There has been much dispute over the years as to the appropriate test in such cases. Some have suggested that, in order to grant a mandatory interlocutory injunction, the court must have a high degree of assurance that after the trial it will appear that the injunction was rightly granted, or that the case is unusually sharp and clear.

These approaches were recently considered and rejected by Macaulay J. in *Hedstrom v.*

*Manufacturers Life Insurance Co* (2002), 26 C.P.C. (5<sup>th</sup>) 55 (B.C.S.C.), who concluded that:

The mandatory nature of the injunction is a factor to be considered in determining whether the granting of an injunction is just and equitable in all the circumstances of the case. This approach avoids the danger of imposing a higher threshold test than the circumstances justify. I find partial support for my approach in a further decision not referred to by counsel.

He cited with approval the words of Hoffman J. in *Films Rover International Ltd v. Cannon Film Sales Ltd.*, [1987] 1 W.L.R. 670 at 681 (Ch. D.):

The question of substance is whether the granting of the injunction would carry that higher risk of injustice which is normally associated with the grant of a mandatory injunction. The second point is that in cases in which there can be no dispute about the use of the term "mandatory" to describe the injunction, the same question of substance will determine whether the case is "normal" and therefore within the guideline of "exceptional" and therefore requiring special treatment. If it appears to the court that, exceptionally, the case is one in which withholding a mandatory injunction would in fact carry a greater risk of injustice than granting it even though the court does not feel a "high degree of assurance" about the plaintiff's chances of establishing his right, there cannot be any rational basis for withholding the injunction.

The test is therefore effectively the same in British Columbia for mandatory as for prohibitory injunctions. The fact that the order sought is mandatory in nature is simply one factor to be considered in the context of the balance of convenience: *Pasnak v. Chura*, [1999] B.C.J. No. 2851 (B.C.S.C.); *Coast Hotels Ltd v. Northwest Hotels Inc.*, 2001 BCSC 1331, aff'd 2001 BCCA 623.

### **D. Ex Parte Orders**

An injunction may be granted *ex parte* in cases of urgency. Generally speaking, circumstances must be such that the delay necessary to give notice might give rise to irreparable harm to the plaintiff: *Gulf Islands Navigation Ltd v. Seafarers International Union of North America* (1959), 18 D.L.R. (2d) 216 (B.C.S.C.), aff'd 18 D.L.R. (2d) 625 (B.C.C.A.); *Scarr v. Gower* (1956), 2 D.L.R. (2d) 402 (B.C.C.A.).

There are important consequences to obtaining an injunction *ex parte*. On an *ex parte* application there is an obligation on counsel to make full and frank disclosure of all material facts. Thus, counsel must advise the court of matters that favour the defendant as well as those that favour the plaintiff. Generally speaking, material non-disclosure by the applicant will result in the injunction being set aside as a matter of course: *Monocrest Kitchens Ltd. v. Evans* (1967), 63 D.L.R. (2d) 553; *472900 B.C. Ltd. v. Thrifty Canada Ltd.*, [1997] B.C.J. No. 99 (S.C.). The material non-disclosure need not be intentional or malicious. There is, however, discretion in the court to maintain the injunction notwithstanding material non-disclosure, and errors in the affidavit evidence that are merely technical or trivial will not be grounds to set it aside: *Mooney v. Orr*; *USA v. Friedland* (5 November 1996), Toronto No 97-CU-109731 (Gen. Div.); *Bank of Credit and Commerce International (Overseas) Ltd. (Liquidator of) v. Akbar*, [2000] B.C.J. No. 620 (C.A.).

Even where it is appropriate to set aside the *ex parte* relief because of a lack of full, fair, balanced and frank disclosure, a fresh application for similar relief may be made and considered on notice. A fresh application for the same relief may be heard concurrently with the application to set aside the earlier order. However, there may be circumstances where the extent of non-disclosure on the *ex parte* application is so great that it would be inappropriate to grant fresh equitable relief: *Vancouver v. Imperial Ventures Construction Ltd.* (1985), 60 B.C.L.R. 265 (B.C.S.C.); *Central Minera Corp v Lavarack* (5 August 1999), No. C992548, Vancouver (B.C.S.C.); *Bank of Credit and Commerce International (Overseas) Ltd. (Liquidator of) v. Akbar*, 2001 BCCA 204.

The courts may sanction in costs a party who obtained an *ex parte* injunction in circumstances when it was not appropriate to do so: *Leung v. Leung* (1993), 15 C.P.C. (3d) 42 (B.C.S.C.). Given these consequences, counsel should consider seriously whether it is feasible in a particular case to give at least some notice to the opposing party before seeking an injunction. Where an order has been granted *ex parte*, the parties should attempt to have an application to set it aside heard by the same judge unless he or she is not reasonably available: *Gulf Islands Navigation, supra*.

## **E. Preservation Orders**

Rule 46(1) provides that:

The court may make an order for the detention, custody, or preservation of any property that is the subject matter of a proceeding or as to which a question may arise . . .

This rule codifies a long-standing equitable jurisdiction: *Aetna Financial Services Ltd. v. Feigelman* (1985), 15 D.L.R. (4th) 161 (S.C.C.).

### **1. Distinguished from a Mareva Injunction**

The effect of a preservation order is very similar to that of a Mareva injunction: the defendant is prevented from disposing of or dealing with an asset. However, the juridical basis for the order is quite different. A preservation order applies only to property that is the subject matter of a proceeding or as to which a question may arise. Thus, for this rule to be applicable the plaintiff must be seeking by virtue of the action a determination as to rights with respect to the property to which the injunction is to apply.

## 2. The Test

As with interlocutory injunctions, “if the real subject matter of the litigation is the recoverability of damages, a preservation order is not appropriate.” (*Sutton*, supra, at para. 10) However, if the case is one in which the ownership of or rights to property are in issue, then a preservation order may be available.

The test applied on a Rule 46 application has evolved significantly in recent years. Prior to the mid-1990’s, the cases suggested that a preservation order would follow as a matter of course from a finding that the property is linked to the subject matter of the action. However, by 1997 a two-part test had been established: (1) whether the plaintiff has raised a fair question to be tried; and (2) whether the balance of convenience favours the granting of the order: *Sutton Resources Ltd. v. Sinclair* (1997), 37 B.C.L.R. (3d) 381 (S.C.); *BMF Trading v. Abraxis Holdings Ltd.*, 2001 BCCA 288 at para. 15.

Then, in 1998, Satohe J. in *Chiu v. Jao*, [1998] BCJ No. 2360 (S.C.), added an additional test (at para. 10): that on such an application “there must still be some evidence to render reasonable the belief of the plaintiffs that the property which is the subject of the litigation is threatened with disposal or transfer outside the jurisdiction”.

This requirement was adopted by Gray J. in two judgments: *Kashani v. Dhalla*, 2002 BCSC 1353, and *Osooli-Talesti v. Enami*, 2003 BCSC 1924, where the requirements of a Rule 46 preservation order were summarized as follows (*Osooli* para. 43):

- (a) Is there a claim on the evidence and not just on the pleadings to a proprietary interest in property?
- (b) Is there some evidence to render reasonable the belief of the plaintiff that the property is threatened with disposition or transfer outside the jurisdiction?
- (c) Is there a substantial question to be decided as to the plaintiff’s entitlement to the property?
- (d) Does the balance of convenience favour the granting of the order?

In her judgment in *Kashani*, Gray J. specifically noted the judgment of the Court of Appeal in the *BMF Trading* case as authority for the proposition that the plaintiff need not establish a prima facie case. She did not make any reference to its assertion of two-part test for a preservation order. However, it may be open to a party in a future case to argue that the inclusion of part (b) in the four part test is inconsistent with the test adopted in *BMF Trading*. The four part test, arguably, makes the preservation order no different than any other injunction. If that is the case, then why is a separate rule required for such an order?

Rule 46(1) refers to both “property which is the subject matter of a proceeding” and to property “as to which a question may arise”. There is very little law as to the latter phrase. The courts have been clear that these words do not allow an order to be made where the real issue is one of damages. The case of *Culos Development Corp v. High Street Developments Ltd.* (1995), 26 C.L.R. (2d) 87 (B.C.S.C.) is one of the few in which the latter phrase has been applied.

The Court in *Sutton* noted that it was arguable that an undertaking as to damages is not required under Rule 46(1) (*Sutton*, supra, at para. 20). However, the plaintiff in that case had agreed to provide one so the question was not considered further.

## 3. A Specific Fund

Rule 46(2) extends the scope of Rule 46 to cases “where the right of a party to a specific fund is in dispute”. The ability to obtain an injunction to protect rights to a “fund” of money is somewhat incongruous, given that the right to payment of money would normally not be the subject of an injunction. However, such an order can be made in appropriate cases.

The claim must be for a proprietary right to a specific fund. A claim for damages, which might be satisfied from that fund, is insufficient to found a Rule 46(2) order: *e-Scotia Acquisition Inc v. Motivus Software Ltd*, 2004 BCSC 614.

#### **4. Recovery of Specific Property**

Rule 46(4) authorizes the court to order that specific property, claimed by the plaintiff, be given up to the plaintiff either unconditionally or upon terms, pending the outcome of the proceeding. This jurisdiction is sparingly exercised, and usually only upon stringent terms: *Byers v. Camfew Boats Ltd* (1988), 30 B.C.L.R. (2d) 157 (S.C.); *Minge v. JW Oak Furniture Imports Ltd.* (26 February 1998), No. S043041, New Westminster (S.C.).

#### **F. Certificate of Pending Litigation**

When the property in question in a case is land, the procedural steps required to preserve the property are administrative in nature and no court appearance is required.

The *Land Title Act* permits a certificate of pending litigation to be filed by a plaintiff in an action who is (a) claiming an estate or interest in land, or (b) given by another enactment a right of action in respect of land: s. 215. A certificate can be obtained from the court registry and filed in the Land Title Office, without the need for any application in chambers, and without the need for any affidavit evidence, provided that a claim is made in the pleadings with respect to the land. The registration of the certificate of pending litigation can be cancelled if the action is dismissed (s. 254) or discontinued (s. 253), if no steps are taken in the action for one year (s. 252), or if the registered owner is able to demonstrate that hardship and inconvenience are being experienced or are likely to be experienced (s. 256). On an application under s. 256, the court may order the posting of security—by the plaintiff if the certificate is to be maintained, or by the defendant if the certificate is to be cancelled (s. 257).

Thus, the certificate of pending litigation is a powerful remedy when preservation of real property is urgently required.

#### **G. Land Title Act, section 284 Orders**

Section 284 of the *Land Title Act*, R.S.B.C. 1996, c.250 provides that:

- (1) In this section, “order” includes injunction.
- (2) The Supreme Court may,
  - (a) on the application of a person interested in land, or
  - (b) on application made on behalf of the owner of a future or contingent interest,
 make an order prohibiting dealing with that land.

This section permits an order to be made to preserve land, even when a certificate of pending litigation is not available. Gray J. in *Osooli-Talesh* noted that there was an absence of case law on this section (at para. 41) and formulated the test for s. 284 orders as follows (para. 55):

- (a) Is there a fair question to be tried, on the evidence and not just on the pleadings, as to the plaintiff’s entitlement to a proprietary interest in property?
- (b) Is there a fair or serious question to be tried, on the evidence and not just on the pleadings, that the property is threatened with disposition or transfer outside the jurisdiction?
- (c) Does the balance of convenience favour the granting of the injunction?



She ordered that the defendant be restrained any dealings with the applicant's interest in the lands other than those necessary to refinance a first mortgage on the property. She required, as a condition of the order, that the plaintiff give an undertaking as to damages.

### III. Mareva Injunctions

The general rule in the Canadian common law systems is as follows:

... the court will not grant an injunction to restrain the defendant from parting with his assets so that they may preserved in case the plaintiff's claim succeeds. The plaintiff, like other creditors of the defendant, must obtain his judgment and then enforce it. He cannot prevent the defendant from disposing of his assets *pendente lite* merely because he fears that by the time he obtains judgment in his favour the defendant will have no assets against which the judgment can be enforced. Were the law otherwise, the way would like open to any claimant to paralyse the activities of any person or firm against whom he makes his claim by obtaining an injunction freezing their assets.

*Barclay-Johnson v. Yuill*, [1980] 3 All E.R. 190 at 193 (Ch.), per Megarry V.C., quoted with approval in *Aetna*, *supra*, at 166.

This flows from the more general principal stated by Huddart J. in *Mooney v. Orr*, [1995] 3 W.W.R. 116 at 135 (B.C.S.C.):

Privacy and freedom to deal with one's property as one wishes are cherished rights in our free enterprise system of living and doing business. Courts have long accepted that they should interfere as little as possible with those rights where not directed to do so by statute.

An important exception to this rule is the Mareva injunction, by which a court will restrain a defendant from disposing of his assets before trial—whether or not the assets are related to the claim. The Mareva injunction is an exceptional remedy. It has been described (along with the Anton Piller order) as one of the two “nuclear weapons” of the law (Gee, *Mareva Injunctions and Anton Piller Relief*, 3rd ed., 1985, p. 98, citing Donaldson L.J.) In *Aetna*, Estey J. cautioned against the inherent unfairness in such an order:

There is still, as in the days of *Lister*, a profound unfairness in a rule which sees one's assets tied up indefinitely pending trial of an action which may not succeed, and even if it does succeed, which may result in an award of far less than the caged assets. . . .

This subrule or exception can lead to serious abuse. A plaintiff with an apparent claim, without ultimate substance, may, by the Mareva exception to the *Lister* rule, tie up the assets of the defendant, not for the purpose of their preservation until judgment, but to force, by litigious blackmail, a settlement on the defendant who, for any one of many reasons, cannot afford to await the ultimate vindication after trial.

Our Court of Appeal has cautioned more recently that:

... interlocutory injunctions affecting substantive rights are not, and must not be allowed to become, run of the mill orders made as a matter of course.

*Investors First Financial Inc. v. Lawton* (8 November 1996), Vancouver No. CA022424 (B.C.C.A.) at para. 10

#### A. The Test

The Mareva injunction rose to prominence in England in the mid-1970s. It was recognized in B.C. by at least 1982 (*Sekisui House Kabushiki Kaisha v. Nagashima* (1982), 42 B.C.L.R. 1 (C.A.)). For several years, the courts applied a relatively strict checklist to the granting of Mareva injunctions. More recently, however, the courts have adopted a more “relaxed” approach to Mareva injunction (*Mooney v. Orr*, *supra*; *Silver Standard Resources Inc. v. Joint Stock Co. Geolog* (1998), 59 B.C.L.R. (3d) 196 (C.A.)).

The requirements of a Mareva injunction, in light of this relaxed approach, can be stated as follows:

- (a) the plaintiff must demonstrate the existence of a strong *prima facie* case against each defendant against which it seeks Mareva relief;
- (b) the plaintiff must establish that the balance of convenience favours granting an injunction; important factors in this determination include:
  - (i) the existence of a real risk that the assets of the defendant will be removed from the jurisdiction or dissipated before any judgment or award is satisfied;
  - (ii) the existence of a scheme to avoid judgment creditors;
  - (iii) the extent to which the proposed order would restrict parties from carrying on in the ordinary course of business; and
  - (iv) the extent to which the interests of third parties may be affected by the order; and
- (c) the plaintiff must give an undertaking in damages, supported in suitable cases by a bond or security.

### 1. Strength of the Case

British Columbia courts generally require that a Mareva applicant demonstrate a strong *prima facie* case: *Aetna, supra*; *Stovicek v. Napier International Technologies Inc.* (1995), 39 C.P.C. (3d) 351 (B.C.S.C.). A few cases have suggested that a lower threshold may apply: *Mooney v. Orr*; *Silver Standard Resources Ltd. v. Joint Stock Co. Geolog* (1998), 59 B.C.L.R. (3d) 196; *Gudaitis v. Abacus Systems* (1995), 35 C.P.C. (3d) 266.

### 2. Balance of Convenience

As noted by Estey J. in *Aetna*, referring to the English cases on Mareva injunctions, at 176:

The general rule requiring that the balance of convenience must favour the issuance of the order still exists.

Thus, the factors applicable to determining balance of convenience in interlocutory injunction cases are relevant to the balance of convenience in an interlocutory injunction case. Chief among these will be the impact of the proposed injunction upon third parties. Mareva injunctions granted in respect of ongoing business operations will almost always impact upon third parties, and it will be important for the court, should it determine that an injunction should be issued, to craft the injunction as much as possible to minimize the impact on third parties.

The relative strength of the cases may sometimes be a factor—particularly on an application to set aside a Mareva injunction granted *ex parte*. A Mareva injunction will often have a devastating impact upon a defendant, so defendants regularly assemble the best possible defence case they are able to in support of an application to set the injunction aside. The court may find that it has extensive and detailed evidence and argument from both sides on the application, and it may be appropriate to give some consideration to the relative merits of the case.

The nature of the case may be an important factor. Where the court has concluded there is a strong *prima facie* case of fraud, it will be substantially more willing to find that the balance of convenience favours granting an injunction than it will in a case of, for example, breach of contract. An example of this is the reasoning of Goldie J.A. in *Imperial Oil v. Gibson* (1992), 72 B.C.L.R. (2d) 195 at 199 (C.A.):

This is not to say that a Mareva-type injunction cannot be granted in the appropriate circumstances even in a federal system or where the element of threatened removal is

unclear or missing. In the case at bar the magnitude of the shortfall and the *prima facie* case of fraud warrant the court's assistance.

**(a) Intent to Dispose of Assets/Frustrate Judgment**

Prior to the *Silver Standard* cases there were differences between various decisions of the B.C. Supreme Court as to whether a plaintiff must demonstrate that a defendant is willfully disposing of assets so as to frustrate any judgment. Newbury J.A. concluded that the existence of such an intent was a factor to be considered, but not a hard and fast rule (paras. 20-21):

Thus I would be reluctant to adopt a hard and fast rule, as counsel for the defendant urged upon us, that a Mareva injunction may never be made or continued unless there was a fraudulent intent on the part of the debtor; or where the payment in question is one proposed to be made in the ordinary course of business; or where it would materially and adversely affect an innocent third party. . . . The overarching consideration in each case is the balance of justice and convenience between the parties, and those concepts can embrace many factors that do not fit easily into the "rules" or "conditions" advanced by the defendants.

Having said that, however, it is clear that in most cases, it will not be just or convenient to tie up a defendant's assets or funds simply to give the plaintiff security for a judgment he may never obtain. Courts will be reluctant to interfere with the parties' normal business arrangements, and affect the rights of other creditors, merely on the speculation that the plaintiff will ultimately succeed in its claim and have difficulty collecting on its judgment if the injunction is not granted.

**(b) Ordinary Course of Business**

A Mareva injunction will generally contain an exception allowing the business defendant to continue making payments in the ordinary course of business, or the individual defendant to pay ordinary living costs. It is a rare case in which such an order is not made. In *Silver Standard*, Newbury J.A. quoted (at para. 17) from the judgment of Lord Donaldson M.R. in the *Polly Peck* case in England:

- (2) It is not the purpose of a Mareva injunction to prevent a defendant acting as he would have acted in the absence of a claim against him. Whilst a defendant who is a natural person can and should be enjoined from indulging in a spending spree undertaken with the intention of dissipating or reducing his assets before the day of judgment, he cannot be required to reduce his ordinary standards of living with the view to putting by sums to satisfy a judgment which may or may not be given in the future. Equally no defendant, whether a natural or a juridical person, can be enjoined in terms which will prevent him from carrying on his business in the ordinary way or for meeting his debts or other obligations as they become due prior to the judgment being given in the action . . .

While she concluded that these were not "hard and fast rules," Madam Justice Newbury recognized these as important considerations for a court that should be ignored only in the most unusual of circumstances.

It is generally, although not always, appropriate for the court to permit a Mareva defendant to pay his lawyers: *Grenzservice Speditions Ges. mbH v. Jans* (1995), 15 B.C.L.R. (3d) 370 (S.C.). The courts will generally allow payment to criminal defence lawyers in related criminal proceedings.

With respect to defence costs in civil proceedings, a court in determining whether such payment is appropriate will consider the strength of the plaintiff's cases as well as the extent to which it appears that it is the plaintiff's money which is being used to fund the retainer: *Grenzservice Speditions GmbH v. Jans* (10 April 1996), Vancouver No. CA021624 (B.C.C.A.) Southin J.A. at paras. 8-9; *British Columbia Buildings Corporation v. Saggu* (19 November 1999), Vancouver No. C984175 (B.C.S.C.), (10 January 2000), Vancouver No. C984175 (B.C.S.C.), (9 February

2000), 2000 BCCA 84 (C.A.); *Shenzhen City Luoho Industrial Development Company v. Yao* (21 December 1999), Vancouver No. C975823 (B.C.S.C.).

Other cases have been less willing to allow a party to use frozen funds to pay legal fees. In *Peel Financial Holdings v. Western Delta Lands Partnership*, 2003 BCCA 469, Newbury J.A. (in chambers) ordered that the defendants be restrained from dealing with funds available pursuant to a letter of credit. The defendants emphasized their need to access those funds in order to fund their legal representation in an upcoming trial; however, Newbury J.A. commented that:

The fact that the defendants are in dire need of funds is irrelevant to the analysis. Many defendants are in need of funds but that cannot justify an order that would be prejudicial to the applicant insofar as the funds are concerned.

See, to similar effect, *Central Minera Corp v. Lavarack* (5 August 1999), No. C992548, Vancouver (B.C.S.C.), at para 58. It may be significant that both of these judgments were rendered in cases involving preservation orders, rather than Mareva injunctions.

A recent judgment of Groberman J. seeks to set out a process for determining whether funds under a Mareva injunction can be applied to the defendant's legal fees:

- (i) Has the defendant established on the evidence that he has no other assets available to pay his expenses other than those frozen by the injunction?
- (ii) If so, has the defendant shown on the evidence that there are assets caught by the injunction that are from a source other than the plaintiff, i.e. assets that are subject to a Mareva injunction, but not a proprietary claim?
- (iii) The defendant is entitled to the use of non-proprietary assets frozen by the Mareva injunction to pay his reasonable living expenses, debts and legal costs. Those assets must be exhausted before the defendant is entitled to look to the assets subject to the proprietary claim.
- (iv) If the defendant has met the previous three tests and still requires funds for legitimate living expenses and to fund his defence, the court must balance the competing interests of the plaintiff in not permitting the defendant to use the plaintiff's money for his own purposes and of the defendant in ensuring that he has a proper opportunity to present his defence before assets in his name are removed from him without a trial. In weighing the interests of the parties, it is relevant for the court to consider the strength of the plaintiff's case, as well as the extent to which the defendant has put forward an arguable case to rebut the plaintiff's claim.

*Insurance Corporation of British Columbia v. Dragon Driving School Canada Ltd.*, 2004 BCSC 1580, at para. 7, citing *Canadian Imperial Bank of Commerce v. Credit Valley Institute of Business & Technology*, [2003] O.J. No. 40, at para. 26 (Ont. S.C.J.).

### **(c) Notice to Third Parties**

It is common practice to give notice of a Mareva injunction to third parties such as financial institutions and brokerage houses with whom the Mareva defendant deals. This makes it more difficult for the defendant who chooses to act in violation of the injunction to dispose of his assets. An injunction which restrains disposition of assets but allows for the payment of expenses in the ordinary course gives rise to significant practical difficulties with such third parties. Institutions will freeze or unfreeze an account if so directed by a court. They are not, however, willing to monitor ordinary business expenses or assume any responsibility for determining which transactions should be processed.

### **(d) Undertaking**

As with any interlocutory injunction, it is customary that the plaintiff seeking Mareva relief would be required to give an undertaking as to damages. If there is doubt as to the ability of the plaintiff to satisfy an undertaking, the court should require the posting of security.

**(e) Worldwide Mareva Orders**

Initially, the courts of England and Canada considered the Mareva jurisdiction to be restricted to assets within the jurisdiction. However, a line of cases originating in England in the late 1980s were adopted in B.C. in 1995, when Newbury J. concluded that it was open to B.C. courts to grant Mareva injunctions against assets both within and outside of the jurisdiction:

The reasons for extending Mareva injunctions to apply to foreign assets are valid in British Columbia no less than in England and Australia—the notion that a court should not permit a defendant to take action designed to frustrate existing or subsequent orders of the court, and the practical consideration that in this day of instant communication and paperless cross-border transfers, the courts must, in order to preserve the effectiveness of their judgments, adapt to new circumstances. Such adaptability has always been, and continues to be, the genius of the common law. . . .

On the question of jurisdiction, then, I regard this Court as having the authority, in an appropriate case, to restrain a party who is properly subject to the jurisdiction of the Court, from transferring or dealing with assets, including assets *ex juris*, where necessary to prevent his frustrating an order or possible future order of this Court.

*Mooney v. Orr* (1995), 98 B.C.L.R. (2d) 318 (S.C.)

The reasoning of Newbury J. was applied by Huddart J. in granting a worldwide Mareva injunction was granted in *Grenzservice Spedition GmbH v. Jans* (1996), 15 B.C.L.R. (3d) 370 (S.C.).

Before it will grant a worldwide Mareva injunction, the court must have jurisdiction over the defendant against whom the order is sought. Generally speaking, that will require the establishment of a real and substantial connection between this jurisdiction and either that defendant or the cause of action asserted against that defendant. Once the court has determined it should assume jurisdiction over that party, it considers itself to have unlimited jurisdiction *in personam* over that person, extending to assets of that person wherever they may be located.

The jurisdiction to grant Mareva injunctions in respect of assets within the jurisdiction is not so limited. Generally speaking, the court has jurisdiction over and will grant relief over assets within the jurisdiction, even if it is exercising this jurisdiction only in aid of a foreign proceeding: *United States v. Friedland* (1996), 13 C.P.C. (4th) 296 at 301-2 (B.C.S.C.); *Re Adler Coleman Estate* (1996), 28 B.C.L.R. (3d) 181 (S.C.).

The plaintiff seeking a worldwide Mareva order will be required to undertake (a) not to seek to enforce the order in a foreign court and (b) not to use any information obtained as a result of the Mareva order in any foreign proceedings without leave of the court granting the Mareva:

*Mooney v. Orr*, Newbury J.

There should be evidence of foreign assets in order to found a worldwide Mareva injunction. As well, the greater the defendants' assets in B.C., the less likely it is that a Mareva injunction will be granted.

In *Reynolds v. Harmanis* (1995), 35 C.P.C. (3d) 364 (B.C.S.C.), Esson C.J. expressed serious reservations about the misuse of the Mareva order and particularly the use of the worldwide Mareva order:

. . . in view of the frequency with which applications of this general kind are being presented to the court on *ex parte* applications supported by masses of carefully prepared and persuasively worded material, I propose to set out my concerns for whatever use they may be to other judges faced with similar application.

I question whether the court can grant an order which is entirely extraterritorial in its effect. In *Mooney v. Orr* (*supra*) the assets sought to be tied up were outside the jurisdiction but the plaintiff against whom the injunction was sought was in the

jurisdiction and indeed was actively participating in the trial . . . So there was a basis for making an *in personam* order.

Next, I query whether it would be appropriate to make an order in so broad, general and sweeping terms as sought in this action. . . . this defendant, living in Western Australia and said to have very extensive business interest in various parts of the world, does not even know that the plaintiff asserts a claim against him. Upon being notified in Perth or some other distant place of the fact of the order he would, unless he wished to risk a finding of contempt, be forced to immediately cease any dealings with any of his property and devote all his efforts to setting in motion the complex series of steps which would be required in order to mount an attack on the order . . .

Clearly, the Mareva order (and particularly the worldwide Mareva) is susceptible to abuse, and the jurisdiction to make such orders must be exercised by the court only with care.

## **B. Ancillary Orders**

The courts of England and Canada have assumed a broad discretion, in cases where a Mareva injunction is found to be appropriate, to grant ancillary remedies in aid of the Mareva injunction. In *Bekhor Ltd. v. Bilton*, [1981] Q.B. 923 (C.A.) Ackner L.J. accepted (at 942) the proposition that “where the power exists to grant the remedy [i.e., the Mareva order], there must also be inherent in that power the power to make ancillary orders to make that remedy effective.” In the case before him, the plaintiff sought an order compelling the defendant to make disclosure of assets. Ackner J. concluded that such an order was not appropriate in the case before him, and commented (at 942) that:

The courts must be vigilant to ensure that the Mareva defendant is not treated like a judgment debtor.

Stephenson L.J., who concurred, recognized that it was:

. . . as important that it should not exceed its powers to interfere in the lives of private citizens and to compel them to make public what they may wish to keep private, as that it should use them to the full to protect and enforce private and public rights and restrain their destruction or infringement. Injustice comes from abuse of power, judicial power included, as well as from failure to exercise it.

Thus, a court must be persuaded of the necessity of any ancillary relief sought. Ancillary orders will not be granted as a matter of course, and an order when granted will be limited to the minimum necessary to accomplish the purpose for which it was sought.

## **1. Disclosure Orders**

The most common ancillary order is an order compelling the Mareva defendant to make disclosure of assets. In *Sekisui House, supra*, Nemetz C.J. commented at 6-7:

The plaintiff has an injunction granted by McLachlin J., *supra*. This has little value if one does not know either the amounts or whereabouts of these assets. It is an untenable situation for a litigant to have a court order yet find it impossible to enforce. It is also an untenable situation to have prospective third parties, e.g., financial institutions, put in the position of breaking the order because of lack of specificity, i.e., identification of the fund as part of the general order. What, then, can be done in these particular circumstances? In my view, to order a general examination at this time would be premature. However, in order to breathe some life into the injunction, I would order that a list of assets and their location as of the date of the injunction be set out in affidavit form by the defendants and delivered to counsel for the plaintiff forthwith.

See also *Mooney v. Orr, supra*.

The nature of the jurisdiction to make disclosure orders ancillary to Mareva injunctions was considered in a case cited by Chief Justice Nemetz in *Sekisui, A J Bekhor & Co. v. Bilton*, [1981]

2 All E.R. 565 (C.A.). The Court concluded that the jurisdiction to make such an order came not from the discovery provisions of the Rules of Court, but from the English equivalent of s. 39(1) of the *Law and Equity Act, supra*.

In *A v. C*, [1980] 2 All E.R. 347 (Q.B.D.), the plaintiffs claimed to be the victims of a fraud which was allegedly master-minded by the first defendant, but which implicated the second through fifth defendants. They claimed in fraud and conspiracy to defraud, and sought to trace a particular payment which was thought to be in the hands of a sixth defendant. The defendants sought to set aside a Mareva injunction as well as an ancillary order requiring them to disclose, with respect to the payment, “all facts within their knowledge as [its] the present whereabouts.” Robert Goff J., as he then was, concluded that there was (at 351):

... ample authority that, in an action in which the plaintiff seeks to trace property which in equity belongs to him, the court not only has jurisdiction to grant an injunction restraining the disposal of that property; it may in addition, at the interlocutory stages of the action, make orders designed to ascertain the whereabouts of that property.

Robert Goff J. cited *London and County Securities Ltd. v. Caplan* (26 May 1978), unreported, a fraud and tracing claim, in which Templeman J. ordered that a bank make disclosure with respect to accounts of the defendants, commenting that the case was:

... a case of interlocutory relief granted to preserve the assets which are the subject of the litigation and are the subject of criminal proceedings. It is a case where, unless effective relief is granted, justice may well become impossible because the evidence and the fruits of crime and fraud may disappear.

Robert Goff J. also cited *Mediterranea Refineria Siciliana Petroli SpA v. Mahanaft GmbH*, [1978] Court of Appeal Transcripts 816, in which the plaintiff sought to trace the proceeds of a cargo of oil, and obtained an order requiring the defendants to disclose what had happened to the proceeds thereof. Templeman L.J. is quoted as stating:

It is a strong order but the plaintiff's case is that there is a trust fund of \$3,500,000. This has disappeared; and the gentlemen against whom orders are sought may be able to give information as to where it is and who is in charge of it. A court of equity has never hesitated to use the strongest powers to protect and preserve a trust fund in interlocutory proceedings on the basis that, if the trust fund disappears by the time the action comes to trial, equity will have been invoked in vain. That is why orders of this sort were made long before the recent orders for discovery, and they are at the heart of the Chancery Division's concern, and it is the concern of any court of equity, to see that the stable door is locked before the horse has gone.

The approach taken by Robert Goff J. in *A v. C* was approved in *Bankers Trust Co. v. Shapira*, [1980] 3 All E.R. 353 (C.A.), in which a bank was ordered to make disclosure of information for purposes of allowing the funds to be traced. The case involved tracing the proceeds of two fraudulent cheques which had been honoured by the bank. Waller L.J. noted (at 358) that, although several months had passed by since the fraud was allegedly committed:

... in my opinion, where you have a fraud of this nature, although it may be late, and although much or perhaps all of the money may be gone, the sooner that steps are taken to try and trace where it is the better.

Thus, the courts will also, on occasion, order a third party to make disclosure with respect to the assets of a defendant.

A disclosure order was made in a tracing case by the Saskatchewan courts in *First Choice Capital Fund Ltd. v. First Canadian Capital Corp.*, [1997] 9 W.W.R. 177 (Sask. Q.B.). A group of immigrant investors claimed against a fund manager for breach of fiduciary duty and other causes of action. Baynton J. continued the Mareva injunction, and granted collateral orders requiring the defendants to disclose information which included particulars of all assets acquired directly or indirectly from dealing with the plaintiffs, as well as of any disposition of any such assets.

## 2. Appointment of a Receiver

The courts will from time to time appoint a receiver pre-judgment. In *Mooney v. Orr*, [1995] 1 W.W.R. 517 at 532 (B.C.S.C.), Newbury J. appointed a receiver of all of Mooney's assets. This portion of the order was vacated by Huddart J. when the *ex parte* order of Newbury J. was challenged. Huddart J. noted, at 74, that the appointment of a receiver would have a devastating effect on Mooney's business, and concluded that it was not appropriate in the circumstances. See also *Derby & Co. v. Weldon (Nos. 3 & 4)*, [1990] Ch. 65.

Generally speaking, in order to obtain the appointment of a receiver prior to judgment, it will be necessary to show not only that it is appropriate for the court to exercise its equitable jurisdiction (i.e., that a Mareva injunction is appropriate), but also that circumstances are such that a receiver is necessary—for example, it may be that a receiver could exercise voting rights so as to secure underlying assets, or it may be that a defendant if left in possession of assets will act so as to frustrate enforcement of an eventual judgment.

## 3. Surrender of Passport

The English courts have on occasion granted orders restraining a defendant from leaving the country, and requiring the defendant to surrender his passport, pending a particular event. In *Bayer AG v. Winger*, [1986] 1 W.L.R. 497 (C.A.), the Court ordered that the defendant—a foreigner against whom litigation commenced while he was temporarily in England—be restrained from leaving England until he had satisfied the disclosure requirements of the Mareva order made against him. In the course of his reasons, Fox L.J. made the following comment:

Bearing in mind we are exercising a jurisdiction which is statutory, and which is expressed in terms of considerable width, it seems to me that the court should not shrink, if it is of opinion that an injunction is necessary for the proper protection of a party to the action, from granting relief, notwithstanding it may, in its terms be of a novel character.

In *Re Oriental Credit Ltd.*, [1988] 1 All E.R. 892 (Ch.), the director of a corporation in liquidation was ordered to remain within the jurisdiction until completion of his examination by the liquidators. In *Morris v. Murjani*, [1996] 2 All E.R. 384 (C.A.), the bankrupt was restrained from leaving England until the Court had disposed of an application brought by the trustee to commit him to prison for contempt.

In all of these cases, there was evidence of fraudulent conduct and a risk that the defendant would leave the jurisdiction. It is noteworthy that in all of these cases the order was to last not until trial but rather until some specific event that was soon to pass.

## IV. Anton Piller Orders

An Anton Piller order is an injunction which compels the defendant to consent to give the plaintiff's representatives access to the defendant's premises to inspect documents and to remove specified items. The Anton Piller order arose from intellectual property cases, and was initially aimed at copyright and patent "pirates." It has gradually expanded in scope to the point that it is available generally against those who the court believes to be rogues who will flout the ordinary processes of the court, destroy evidence, and effectively deprive the plaintiff of a remedy.

Although Anton Piller orders are occasionally referred to as "civil search warrants," the description is not really apt. The distinction was described by Lord Denning M.R. as follows:

Let me say at once that no court in this land has any power to issue a search warrant to enter a man's house so as to see if there are papers or documents there which are of an incriminating nature, whether libels or infringements of copyright or anything else of



the kind. No constable or bailiff can knock at the door and demand entry so as to inspect papers or documents. The householder can shut the door in his face and say "Get out." That was established in the leading case of *Entick v. Carrington* (1765), 19 State Tr. 1029. None of us would wish to whittle down that principle in the slightest. But the order sought in this case is not a search warrant. It does not authorize the plaintiff's solicitors or anyone else to enter the defendants' premises against their will. It does not authorize the breaking down of any doors, nor the slipping in by a back door, nor getting in by an open door or window. It only authorizes entry and inspection by the permission of the defendants. The plaintiffs must get the defendants' permission. But it does do this: it brings pressure on the defendants to give permission. It does more. It actually orders them to give permission—with, I suppose, the result that if they do not give permission they are guilty of contempt of court.

## A. British Columbia Practice

### 1. The Test

The leading case in B.C. concerning the test for the granting of an Anton Piller order is *Grenzservice Speditiones Ges.m.b.H. v. Jans* (1995), 129 D.L.R. (4th) 733 (B.C.S.C.). In that case, Huddart J. (as she then was) cited with approval the decision of Ormrod L.J. in *Anton Piller KG v. Manufacturing Processes Ltd.*, [1976] 1 All E.R. 779 (C.A.) that there were three essential preconditions for the granting of such an order (at 742-3):

First, there must be an extremely strong *prima facie* case. Secondly, the damage, potential or actual, must be very serious for the plaintiff. Thirdly, there must be clear evidence that the defendants have in their possession incriminating documents or things, and that there is a real possibility that they may destroy such material before any application *inter partes* can be made.

Huddart J. noted that "the order should be drawn so as to extend no further than the minimum extent necessary to achieve its purpose, that is the preservation of documents or articles that might otherwise be destroyed or concealed" (at 746). She cited at length from the judgment of Scott J. in *Columbia Picture Industries Inc. v. Robinson*, [1986] 3 All E.R. 338 (Ch. D.), who concluded that in the English courts Anton Piller orders had been granted too readily and with insufficient safeguards.

In *DIRECTV v. Gray*, 2003 BCSC 1509, Brenner CJ dismissed an application to set aside an Anton Piller order in a case involving the sale of satellite television access cards. The defendant argued that it had not been established that an Anton Piller order was necessary. Brenner CJ concluded, at paras. 67-69:

In my view, the answer to the urgency submission lies in the nature of the information at issue in this case. The information that was the subject of the Anton Piller order is information that can be moved or eliminated with a keystroke.

For example Mr. Gray says that he did eliminate the IP addresses of certain individuals when he became concerned that DIRECTV would commence litigation.

Ultimately, the Anton Piller order is an order that the court issues to protect its own process. Here, I am of the view that the nature of the information in the evidence put before the court on June 24 justified that order.

### 2. Protective Safeguards

The *Grenzservice* case is an unfortunate example of the many things that could go wrong in the execution of an Anton Piller order. It should be required reading for every lawyer who is to take part in the execution of an Anton Piller order. It prompted Huddart J. to consider carefully the

types of procedural safeguards that should be put in place in order to limit the extent to which the rights of a defendant upon whom such an order is served are affected.

The following summarizes the protective safeguards that Huddart J. concluded (at 754) were essential to the exercise of the jurisdiction:

- (a) the defendants must be advised of their right to consult counsel before permitting entry;
- (b) the search must be conducted during regular business hours to permit such consultation;
- (c) the defendants must be advised of the right to assert solicitor-client privilege and the privilege against self-incrimination;
- (d) the items sought should be specified;
- (e) the material filed in support should be served with the order;
- (f) the order should specify the persons who may conduct the search and seize items;
- (g) the plaintiff must provide undertakings as to the limited use to which the material seized will be put;
- (h) the plaintiff must make a detailed list of the items seized, have that list approved by the defendant, and must provide a receipt to the defendant;
- (i) the search must be supervised by a solicitor, who acts as an independent officer of the court. The solicitor should not be connected with the firm acting for the plaintiff, and should be an experienced solicitor;
- (j) the supervising solicitor must provide a report for delivery to the defendant and filing with the court within a short time after the execution of the order.

One term that is often granted as part of an Anton Piller order is a “gag order”, which restrains the party on whom it is served from advising any other person of the existence of the order. In *DIRECTV, supra*, , Brenner C.J. noted that his original order included a gag and sealing order for a 30 day period. He concluded that a 14 day period was more appropriate, and modified his order to that effect.

The recent judgment in *Neumeyer v. Neumeyer*, 2005 BCSC 163, is a somewhat unusual application of the Anton Piller jurisdiction. Groberman J. granted an Anton Piller order to compel the husband in a matrimonial case to permit his wife to search the house of which both were joint owners, in order to locate information with respect to undisclosed assets. A copy of the order granted is appended to the Reasons for Judgment.

### **3. Execution of the Order**

The execution of an Anton Piller order requires careful and detailed planning and the coordination of a number of different people. In addition to the independent supervising solicitor, a representative of the solicitors for the plaintiff would also normally participate in the execution of the order. Others who may participate, depending on the nature of the case and the items sought, are a bailiff, a private investigator, an accountant, an expert (if expertise is required to identify the items sought), or possibly a representative of the plaintiff.

It is very rare for police officers to be involved in the execution of an Anton Piller order, and if they are to be involved their involvement must be limited to keeping the peace. They have no role in compelling a defendant to consent to the search.

All of those who participate in the execution of the Anton Piller order should be briefed beforehand on the rules governing the search and the limitations on the order.

Generally speaking, either the plaintiff's solicitor or perhaps a bailiff should begin by serving the order on the defendant. The supervising solicitor should then take time to carefully explain the order to the defendant, emphasizing the right of the defendant to seek legal advice. The search cannot begin until the defendant has consented.

If the defendant will not consent, or if there is nobody at the subject premises, then there is little that can be done. An Anton Piller order does not authorize anyone to make a forced entry into premises.

In the *Grenzservice* case, as a result of numerous transgressions by Plaintiff's counsel, including reviewing privileged documents, the firm was barred from acting further for the Plaintiff. In *Celanese Canada Inc. v. Murray Demolition Corp.* (2004), 244 D.L.R. (4th) 33 (Ont. C.A.), members of a law firm inadvertently obtained certain privileged documents in the course of the execution of an Anton Pillar order. The Ontario Court of Appeal allowed the appeal of an order to disqualify the law firm and remitted the matter back to the trial judge, noting an absence of "two critical findings of fact": (i) whether the privileged documents were reviewed and the extent of such review, and (ii) whether a firewall was placed around the reviewers to prevent others from being tainted with knowledge of the content of the privileged documents. While the ultimate result in this case has yet to be determined, this judgment – like that in *Grenzservice* – underscores the importance of strict adherence to the terms of Anton Pillar orders and the maintenance of procedural safeguards to protect against misuse of such orders.

## **B. Federal Court Practice**

The Federal Court has concurrent jurisdiction with the provincial superior courts in matters of copyright, trade-mark and patent infringement. As noted above, Anton Piller orders originated in intellectual property cases, and many applications for Anton Piller orders have been brought in the Federal Court, which has developed some unique approaches to these cases. The Federal Court is able to grant orders that are effective across the country.

### **1. The Test**

The Federal Court applies the same basic tests: extremely strong prima facie case, very serious damage, and clear evidence that the defendants have in their possession incriminating documents or things, and a real risk that they will destroy such material: *Nintendo of America Inc v. Coinex Video Games Inc.* (1982), 69 C.P.R. (2d) 122 (Fed. C.A.)

"Rolling Anton Piller orders" or "John Doe orders" are Anton Piller orders granted against an infringer, whose identity is unknown at the time of the granting of the order, to compel the infringer to allow the plaintiff's representatives to search his premises and seize evidence of infringement of the plaintiff's intellectual property rights. The orders are particularly valuable against flea market vendors, who can be served with the order and evidence against them secured as soon as they are identified. There is also, however, great risk for abuse of such orders. For a detailed analysis of these orders, see D.S. Drapeau & M.W. Drapeau, *The Taming of John Doe Orders by the Federal Court of Canada* (2001), 17 C.I.P.R. 545.

In order to obtain a rolling Anton Piller order, the plaintiff must show that the infringement problem it faces is widespread. If it is confined to a single-site, or to a localized area, then the Anton Piller order will generally be limited accordingly: *Club Monaco Inc. v. Woody World Discounts* (1999), 2 C.P.R. (4<sup>th</sup>) 436 (F.C.T.D.); *Nike Canada Ltd v. Jane Doe* (1999), 2 C.P.R. (4<sup>th</sup>) 501 (F.C.T.D.).

The likelihood that evidence will be destroyed is key to an Anton Piller application. If a representative item could be purchased by an investigator, and evidence secured in that manner, then an Anton Piller order may not be required: *Fila Canada Inc. v. Doe*, [1996] 3 F.C. 493. However, as noted by Richard A.C.J. in *Adobe Systems Inc. v. KLJ Computer Solutions Inc.*, [1999] 3 F.C. 621 (T.D.), at paras. 36-39:

The third condition, likelihood that an infringer will dispose of important evidence, is normally the crucial element of proof required to obtain an Anton Piller order.

It is difficult to prove with tangible evidence that an infringer has a history of destroying evidence or will dispose of important evidence. Applicants have therefore focused on the dishonest character of the infringer and the easily disposable nature of the infringing articles to invite the Court to draw an inference that evidence will disappear if notice is given.

The Court has examined market-place realities and has been prepared to draw such an inference in cases involving vendors of counterfeit goods in situations such as flea markets, street stalls or concerts, given the temporary nature of their business, and their propensity to flee at the first hint of enforcement and to warn each other of execution of the orders.

An order may be extended to defendants who have not yet been identified, the John Doe defendant. The Court infers that future members of these groups will act in the same manner.

The Federal Court has also recognized that, depending on the circumstances, small retailers may also be likely to destroy evidence of infringement: *Viacom Ha! Holding Co. v. Jane Doe* (2000), 6 C.P.R. (4<sup>th</sup>) 36 at 50 (F.C.T.D.).

## 2. Protective Safeguards

Safeguards traditionally required by the Federal Court in the case of an Anton Piller order include:

- (a) the Federal Court normally requires that an application be filed at least two clear days before the motion is to be heard: Rule 362(1) and *Fila Canada Inc.*, *supra*.
- (b) the plaintiff will be required to file a specific written undertaking, and may in appropriate cases be required to deposit security with the court.
- (c) the order will normally require the plaintiff's solicitor to serve a copy of the order on the infringer, explain the order in plain language, and advise the infringer of his right to consult counsel;
- (d) the plaintiff's solicitor will be required to attend the execution of the Anton Piller order.

A solicitor attends on the execution of these orders in two capacities: as counsel for the plaintiff and as an officer of the Court. It is the plaintiff's solicitor who attends. I accept that this may not be ideal. In the United Kingdom a practice has developed of having licensed Anton Piller officers, independent of the plaintiff, attend and supervise the execution of these orders. This may be a practice that is worth adopting. We do not have it at present, however, and I prefer to have a solicitor present at the execution of these orders, albeit the plaintiff's solicitor, rather than no solicitor at all.

A solicitor, as an officer of the Court, owes duties to the Court as well as to his or her client. Solicitors attend and supervise the execution of these orders to ensure that their boundaries are not exceeded and to be in a position to give the Court an accurate and complete description of what occurred. They have legal expertise and are expected to be able to explain to those enforcing the order and to those against whom it is being executed what is and what is not allowed thereunder. This gives some assurance that the boundaries of the order will not be exceeded. Counsel understand that a misstep or mischaracterization of a situation can lead not only to the particular execution of the order being invalid but also to the vacating of the Anton Piller order itself.

*Fila Canada Inc.*, *supra*, at paras. 15-16

- (e) the order will normally limit the number of persons who can attend the execution of the order, and limit the time of day during which execution can occur;
- (f) the order will normally require that a detailed list of items seized be made, and copies given to all parties and filed with the court;
- (g) while the order may contemplate the assistance of law enforcement officials to maintain the peace, the order will not authorize its execution in conjunction with a search and seizure by police pursuant to a criminal proceeding: *Nike Canada Ltd., supra*;
- (h) although the court has noted the practice in England (and in British Columbia) of having an independent solicitor attend the execution of the Anton Piller order, it does not at this time require that as a condition of granting the Anton Piller order – although it will consider an offer by the plaintiff to arrange for such a person: *Nike Canada Ltd. v. Jane Doe* (1999), 1 C.P.R. (4<sup>th</sup>) 289 (F.C.T.D.), see also sample Order at Appendix 2;
- (i) the order will normally require the plaintiff to seek review of its execution within 14 days of service, at which time any “John Doe” on whom the order was served should be added as a party. The review hearing proceeds as an application de novo, and the court may consider additional evidence of infringement obtained through execution of the Anton Piller order. *Adobe Systems Inc., supra*; *Viacom Ha! Holdings, supra*.

The Federal Court expects that plaintiffs who seek the benefit of Anton Piller orders will strictly comply with all orders made. In *Louis Vuitton Malletier SA v. Bags O’Fun Inc.* (2000), 8 CPR (4th) 348 (FCTD), the plaintiff had failed to effect proper service on the infringers, and had failed to apply for review of the order within 14 days. The order was set aside, and all items seized were ordered returned. In *Universal Foods Inv. v. Hermes Food Importers Ltd*, 2004 FCA 53, the plaintiff had discontinued the proceeding and agreed to an order that all goods seized be returned. The goods were not returned for over a month, and the court found the plaintiff in contempt. While the plaintiff had not deliberately flaunted the order, but instead was simply “nonchalant” about it, the court concluded that a \$4,000 fine was appropriate.

### C. Forms of Order

The English courts have developed a standard form of Anton Piller orders, which is set out in a practice directive: *Gee, Mareva Injunctions and Anton Piller Relief, supra*, at 362-68. It contains among other things a plain-language explanation of the order and its effect at the beginning of the order.

A form similar to this has been used in at least one B.C. case—see Appendix 1. For another B.C. form of Order, see the Reasons for Judgment in the *Neumeyer* case, *supra*.

The Federal Court has its practice as to forms of Order. The Federal Court registry requests that an electronic version of the draft order be submitted to them. They will ensure that it is stated in their preferred form, and print the final version on Federal Court stationery. A form of single-site Anton Piller order is attached to this paper as Appendix 2. For a form of rolling Anton Piller order, see the Drapeau article cited above.

## V. Permanent Injunctions

Given the length of the previous portions of this paper, we will not deal with permanent injunctions. A detailed review of the law on permanent injunctions can be found in Sharpe, *Injunctions and Specific Performance* (Canada Law Book, looseleaf), chapters 3-5 and 9.