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GETTING THE PRE-TRIAL INJUNCTION

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I. *Introduction*

It is always cheering as a litigator when one can offer a client in distress a remedy that can promptly and cheaply eradicate the very cause of the problem. That is what an interlocutory injunction can do.

At the same time as the writ is served, notice of motion, returnable in three days' time,[1] may be given, together with supporting affidavit material. Such an approach makes evident the seriousness of the matter for your client and transmits an important message to the other party. Even if the motion is not finally dealt with for a period of some weeks, the other party has been served with very clear notice of your client's position as to the acts in dispute. This, in and of itself, may achieve much of the desired effect.

Further, in an urgent case, an injunction can be obtained on an *ex parte* motion with as little notice as the court itself requires.[2] In the proper case, this can provide an immediate solution to your client's woes.

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[1] See R.R.O., 1980, Reg. 540, Rule 217. See also B.C. Supreme Court Rules, Rule 44(10); Alta Reg. 390/68, Rule 386. Because of its original audience, this article is largely based upon the Ontario Rules of Practice and oriented toward practice in that province. However, applicable rules of practice in other jurisdictions (particularly British Columbia and Alberta) will be referred to as well.

[2] *Ibid.*, Rule 218. See also B.C. Supreme Court Rules, Rule 45(2); Alta Reg. 390/68, Rule 387.

The injunction is an equitable remedy preserved in the merger of courts of equity and common law. Section 19 of the Judicature Act[3] deals with the remedy, and subsection 19(1) states, in part:

> . . . an injunction may be granted . . . 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, and any such order may be made either unconditionally or upon such terms and conditions as the court deems just . . . .

Because the remedy is an equitable and discretionary one, much depends on the facts of the case. As with all equitable remedies, the applicant must come to court with "clean hands", clearly deserving the extraordinary relief being sought. Similarly, any improper account of the facts that misleads the court will be met with a dismissal of the motion or its subsequent rescission. The presentation of the facts is the single most important element in succeeding on a motion for an injunction.

Once the right facts exist, an injunction can be used in a wide variety of situations to prevent unlawful acts, such as improper competition by a former employee, trespass, nuisance, incursion on patents or copyrights, secondary picketing, and so on. Its versatility is enhanced by the recent tendency of courts to emphasize the balance of convenience in awarding injunctions, so that it is increasingly determined on the particular circumstances of the case.

However, there is a real risk in getting an injunction, and this risk serves to deter those with problematic cases. An essential requirement in awarding an injunction is an undertaking as to damages by the applicant;[4] this means that a trial judge in dismissing a case can award the successful defendant any damages suffered by him as a result of the injunction. This can be a particularly effective deterrent where the stakes are high and the law murky.

This article will limit its discussion to interlocutory proceedings. It will not deal, except inferentially, with injunctions granted pursuant to particular statutory authority. In addition, injunctions obtained in respect to labour disputes will not be discussed. A special body of case law has developed with respect to such disputes, and in Ontario, section 20 of the Judicature Act provides for a special procedure and requirements to be applied in those cases.

The intent of this article is to provide a brief overview of the procedure and tests to be applied in obtaining, and acting upon, an injunction prior to trial. In addition, a discussion of a new form of an interlocutory injunction, the Mareva injunction, will be included.

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[3] R.S.O., 1980, c. 223. See also Law and Equity Act, R.S.B.C., 1979, c. 224, s. 36; Judicature Act, R.S.A., 1980, c. J-1, s. 13(2); Judicature Act, S.N.S., 1972, c. J-3, s. 39(9).

[4] See, for example, B.C. Supreme Court Rules, Rule 45(6).

II. *What?*

There has been much confusion in the use of the terms, "interim" and "interlocutory", when applied to injunctions. They are now used interchangeably, but have traditionally been distinguished.

An interim injunction is one which applies for a specific period of time to prevent the unwanted act until a particular date. At that date, the injunction must be continued by court order for an additional period, or it will expire. An interim injunction may be obtained on interlocutory proceedings, but it may also be sought under specific legislative authority on an originating notice of motion.

"Interlocutory injunction" is a more general term. Such an injunction is sought in the course of an ongoing lawsuit, on an interlocutory motion, and usually applies until the conclusion of the trial in the main action. It serves to hold matters in *status quo* until the trial.

Injunctions are generally negative, or restraining, orders aimed at stopping something from going on. However, there are also mandatory injunctions by which someone can be compelled to carry out an action, similar to the remedy of specific performance or the prerogative writ of *mandamus*. Mandatory injunctions are rather rare, and more restrictions are imposed on their availability than on restraining orders since they compel a positive act. For a mandatory order, particularly on an interlocutory application, the available evidence must clearly show that only performance, not damages, will suffice and that an express agreement or statutory duty is being breached by the respondent.[5]

Similarly difficult to obtain are injunctions *quia timet*, where the act in dispute has not yet occurred and damages are merely apprehended. Such injunctions are not so much a distinct class of remedy as a particular application of the tests for injunctive relief and a question of timing. Not surprisingly, clear proof is required that the expected mischief is very likely to occur and will result in substantial, or "irreparable", harm. In addition, one should be able to show that only an injunction would stop the impending mischief. Where it appears that a threat of injury will be carried out, an injunction may be granted.[6] It should be noted, however, that one need only show that a

[5] *Sutton* v. *Vanderburg*, [1946] O.R. 497 (H. Ct); *Cyprus Anvil Mining Corp.* v. *White Pass and Yukon Corp. Ltd*, [1980] 6 W.W.R. 526 (B.C.S.C.), aff'd for different reasons, at p. 536 (B.C.C.A.); *Prairie Hospitality Consultants Ltd* v. *Renard International Hospitality Consultants Ltd* (1980), 118 D.L.R. (3d) 121 (B.C.S.C.); *International Forecasting Corp.* v. *Stoll et al.* (1981), 8 A.C.W.S. (2d) 299 (Ont. H. Ct); *Hastings Minor Hockey Association et al.* v. *Pacific National Exhibition*, [1981] 6 W.W.R. 514 (B.C.S.C.).

[6] See *Cheeseworth* v. *City of Toronto* (1921), 49 O.L.R. 68 (H. Ct); *S. J. Kernaghan Adjusters Ltd* v. *Grantham* (1979), 12 B.C.L.R. 198 (S.C.).

clear legal right will be violated. Damages need not be proven, although the spectre of "irreparable injury" must be raised, as shall be seen below.[7]

In addition, there may be injunctions granted under particular statutory authority. The test for awarding such an injunction may well be very different from that imposed on a motion for an interlocutory injunction. A recent example occurred when provisions of the Canada Business Corporations Act[8] were relied upon by Royal Trustco Limited in an application for an injunction to prevent Campeau Corporation's takeover bid for Royal Trustco. Although accompanied by a parallel interlocutory motion for an injunction in a separate action, the CBCA motion was made by originating notice of motion and was not subject to the usual tests for interlocutory injunctions.[9]

III. *How?*

An application for an interlocutory injunction is made like any other interlocutory motion. The main difference that may arise is that the interlocutory relief can be sought right at the start of the action, and, of course, it may achieve at this early stage most of the results sought in the action itself.

As a first step, careful consideration must be given to who should be made a party to the action and the motion for an injunction. Generally, all those who may be affected by a judgment should be made a party. A judgment will then be directly enforceable against those persons, and better scope for discovery will be provided. Further, an injunction will not ordinarily be granted where it would injuriously affect the right of a person or body not before the court.[10] Aside from any concern that all those affected have an opportunity to be heard, any damages suffered by such persons would not otherwise be within the scope of the plaintiff's undertaking as to damages. As already noted, such an undertaking is required for any award of interlocutory injunctive relief.

However, it is to be noted that an order may be enforced against those who are not parties.[11] In *Canada Metal Co. Ltd et al.* v.

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[7] See *Rolston et al.* v. *Lapa Cadillac Gold Mines (1937) Ltd et al.*, [1950] O.R. 103 (H. Ct), [1950] O.W.N. 525 (C.A.).

[8] S.C., 1974-75, c. 33, as am.; hereinafter cited as CBCA.

[9] See *Royal Trustco Ltd et al.* v. *Campeau Corp. et al.* (1980), 31 O.R. (2d) 75 (H. Ct); at p. 130 (C.A.). Also *Alexander et al.* v. *Westeel-Rosco Ltd et al.* (1978), 22 O.R. (2d) 211 (H. Ct); *Calgary Power Ltd* v. *Atco Ltd et al.* (1980), 12 Bus. L.R. 16 (Alta. Q.B.).

[10] See *Matthew* v. *Guardian Assurance Co.* (1918), 58 S.C.R. 47, per Anglin J., at p. 61; *The Hartlepool Gas & Water Co.* v. *The West Hartlepool Harbour and Railway Co.* (1865), 12 L.T. (N.S.) 366 (V-C).

[11] Se R.R.O. 1980, Reg. 540, Rule 578. See also Alta Reg. 390/68, Rule 357(2).

Canadian Broadcasting Corp. et al. (No. 2),[12] it was held that "persons who are not parties to an action and who are, therefore, not named as being bound by the injunction still must abide by it if they know of the substance of nature of the injunction".[13] It would then appear that only those with a direct interest need be made parties to an injunction application; the order can be more generally enforced by ensuring its publication to all those who might be affected by it.[14]

It should also be noted that an injunction against a corporation must be obeyed by its officers, directors and agents,[15] and any such officer, director or agent may be personally cited for contempt of an order disobeyed by him.[16] Nevertheless, specific language to include officers, directors, servants, employees and agents of a corporate defendant should be inserted in the injunction order.

In a Supreme Court of Ontario action, an interlocutory injunction should be sought by motion returnable before a judge of the court, in Motions Court, on two clear days' notice.[17] Since the motion is an interlocutory one, proceedings must have been commenced, but the notice of motion may be served with the writ of summons. It is also preferable to have served the statement of claim prior to the hearing date for the motion as a means of setting out more fully the basis for the plaintiff's claim; indeed, where there are contested or incomplete facts, a failure to have done so can be counted against you.[18]

Except on an urgent, *ex parte* basis, an injunction application cannot be heard by a local judge.[19] However, it has been recently held in Ontario[20] that a County Court may issue an injunction, even where

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[12] (1974), 4 O.R. (2d) 585 (H. Ct), aff'd (1975), 11 O.R. (2d) 164 (C.A.).

[13] *Ibid.*, per O'Leary J., at p. 603 (H. Ct).

[14] Enforcement against those who are not parties requires evidence that such persons aided and abetted the named parties in breaching the order. While those who are not parties should not be named and directly restrained in the order, it may be advisable to phrase that part of the order in the following manner: "the defendant by himself, his employees, servants, agents and anyone having knowledge of this order". *Marengo* v. *Daily Sketch & Sunday Graphic Ltd*, [1948] 1 All E.R. 406 (H.L.); *Mitchell Bros. Truck Lines* v. *General Truck Drivers' & Helpers' Union Local 31 et al.*, [1974] 4 W.W.R. 446 (B.C.S.C.). See also *infra*, section VIII.

[15] See *Re Bolton and County of Wentworth* (1911), 23 O.L.R. 390 (H. Ct).

[16] See *City of Toronto* v. *Toronto R. W. Co.* (1917), 39 O.L.R. 310 (C.A.).

[17] See R.R.O., 1980, Reg. 540, Rules 207 and 217. See also B.C. Supreme Court Rules, Rule 44.

[18] *Forefront Consolidated Explorations Ltd* v. *The Lumsden Building Corporation Inc.*, [1979] 1 A.C.W.S. 9 (Ont. H. Ct).

[19] See R.R.O., 1980, Reg. 540, Rule 213; *Eaton Yale Ltd* v. *Alliett et al.* (1979), 24 O.R. (2d) 663 (Co. Ct).

[20] *Queensway Iron Works Ltd* v. *Barlin Construction Ltd et al.* (1980), 29 O.R. (2d) 586 (C.A.), overruling *Matthews* v. *Dickson et al.* (1979), 24 O.R. (2d) 351 (H. Ct).

it is the sole remedy sought, provided that primary jurisdiction for the action may be found in section 14 of the County Courts Act.[21]

An interim injunction may be obtained *ex parte* where "serious mischief" could be caused by the delay in giving notice of the motion.[22] In fact, in such circumstances, the injunction can be sought in respect to an intended action, before a writ has been issued.[23] Often, some element of fraud or bad faith is needed, as well as urgency, to persuade the court that mischief could otherwise arise. It has recently been suggested that an *ex parte* injunction should only be granted where it is impossible to give notice of the motion without defeating the purpose of the order.[24] Certainly, judges have become increasingly hesitant about granting *ex parte* injunctions; they are loath to interfere unless the law and evidence is very clear.

An *ex parte* injunction will usually be only an "interim" order, expiring on a specific date unless previously continued. The period for such an order by a Supreme Court judge in Ontario is not specified. Although an order by a local judge is limited to eight days[25] and this is usually adopted by a Supreme Court judge, it appears that an interlocutory injunction, effective until trial, may be granted on an *ex parte* motion.[26] A party affected by an *ex parte* order may move to rescind the order.[27] Such an application can be made as a cross-motion to a motion to continue the order. There remains an obligation to obey such an order until rescinded, even if wrongly granted, provided that the court had jurisdiction to make the order.[28]

Absolutely critical to obtaining an *ex parte* order and to having it continued is full and frank disclosure of the facts of the case. There even appears to be a duty to make inquiries that would reveal material facts. Certainly, an *ex parte* order will be set aside if all available material facts were not presented, even though the facts might otherwise warrant an injunction.[29]

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[21] R.S.O., 1980, c. 100.

[22] See R.R.O., 1980, Reg. 540, Rule 218. See also B.C. Supreme Court Rules, Rule 45(2); Alta Reg. 390/68, Rule 387.

[23] See R.R.O., 1980, Reg. 540, Rule 4. See also B.C. Supreme Court Rules, Rule 45(3). But see *Brown* v. *United British Insurance Co.* (1951), 1 W.W.R. (N.S.) 767 (Alta. C.A.).

[24] *Launch! Research & Development Inc. et al.* v. *Essex Distributing Co. et al.*(1977), 4 C.P.C. 261 (H. Ct).

[25] R.R.O., 1980, Reg. 540, Rule 213.

[26] *Canadian Pacific Airlines Ltd* v. *Hind* (1981), 32 O.R. (2d) 591 (H. Ct). But see B.C. Supreme Court Rules, Rule 45(2), referring to an "interim injunction".

[27] R.R.O., 1980, Reg. 540, Rule 219.

[28] *Canada Metal Co. Ltd* v. *Canadian Broadcasting Corp. et al. (No. 2), supra,* footnote 12.

[29] *Capital Manufacturing Co.* v. *Buffalo Specialty Co.* (1912), 3 O.W.N. 553 (H. Ct); *Herman* v. *Klig,* [1938] O.W.N. 270 (H. Ct); *Scarr* v. *Gower et al.* (1956), 18

As in the case of other interlocutory proceedings, evidence is usually given by affidavit[30] although *viva voce* testimony may be presented with leave of the court.[31] Leave will be refused unless the testimony is relevant and the examinations will not be vexatious to the respondents or an unwarranted imposition on the proposed witnesses.[32] Witnesses may also be examined before a special examiner in order to use their evidence on a pending motion; a subpoena may be issued to require attendance of the witness.[33] Provided the questions and evidence sought are relevant to the motion, such a subpoena will not be set aside unless it amounts to an abuse of process.[34]

In interlocutory proceedings, statements in affidavit material as to the deponent's belief, rather than his knowledge, may be admitted by the court.[35] However, the grounds for the belief must be included so as to show the source of the information, or the offending paragraphs will be disregarded.[36] The court may refuse to admit such affidavit material if there is better evidence readily available or the party appears to be deliberately limiting the scope of potential cross-examination on the affidavits.[37] In the case of corporations, any officer, employee or agent may make an affidavit on its behalf, deposing to facts within his knowledge.[38]

All relevant information, including any documents to be attached as exhibits, should be included in the affidavit material. Unless helpful admissions are made on cross-examination of the opposite party's deponents, this will be the only source for the evidence necessary to your case. For that reason, it is essential to have a clear

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W.W.R. 184 (B.C.C.A.); *Launch! Research & Development Inc. et al.* v. *Essex Distributing Co. et al., supra,* footnote 24.

[30] See R.R.O., 1980, Reg. 540, Rule 228. See also B.C. Supreme Court Rules, Rule 44(4); Alta Reg. 390/68, Rule 261(3).

[31] See *ibid.,* Rule 231. See also Alta Reg. 390/68, Rule 261(2).

[32] *Re Canada Metal Co. Ltd and Heap* (1975), 7 O.R. (2d) 185 (C.A.).

[33] See R.R.O., 1980, Reg. 540, Rule 230. See also Alta Reg. 390/68, Rule 266.

[34] *Re Dominion Stores Ltd and United Trust Co. et al.,* [1972] 3 O.R. (H. Ct); *Re Canada Metal Co. Ltd and Heap, supra,* footnote 32; *Hamilton Harbour Commissioners* v. *J.P. Porter Co. Ltd* (1976), 13 O.R. (2d) 199 (H. Ct).

[35] See R.R.O. 1980, Reg. 540, Rule 292. See also B.C. Supreme Court Rules, Rule 51(9); Alta Reg. 390/68, Rule 305(3).

[36] *Scarr* v. *Gower et al., supra,* footnote 29; *Inducon Construction (Eastern) Ltd* v. *Vampere,* [1967] 1 O.R. 245 (H. Ct); *Canada Metal Co. Ltd et al.* v. *Canadian Broadcasting Corporation et al.* (1974), 3 O.R. (2d) 65 (H. Ct); *R.* v. *Maligne Building Ltd et al.* (1980), 54 C.P.R. (2d) 11 (Fed. C.A.).

[37] *Wiley, Lowe & Co.* v. *Gould,* [1958] O.W.N. 316 (H. Ct); *Bongard* v. *Town of Parry Sound,* [1968] 2 O.R. 137 (H. Ct).

[38] R.R.O., 1980, Reg. 540, Rule 293(1). See also Alta Reg. 390/68, Rule 305(2).

understanding of your client's position at law before drafting the affidavits.

An applicant should serve his affidavit material at the same time as the notice of motion, although leave may be sought at the hearing of the motion to use affidavits served later.[39] The affidavit material of the respondent may be filed and served at any time prior to the time of the hearing.

Any deponent of an affidavit may be cross-examined,[40] and such cross-examination is not limited to the contents of the affidavit but may range over any matter relevant to the motion for which the affidavit was filed.[41] As well, there is an obligation for a deponent to inform himself in order to answer relevant questions where the affidavit has been sworn on information and belief.[42] Thus, the scope for cross-examination is extremely broad, much broader than discovery, and this may be a factor in determining the proper deponents for affidavit material in a motion for an interlocutory injunction.

A demand for cross-examination is usually ample justification for an adjournment.[43] This can mean a delay in the proceedings and is open to potential abuse. However, an appointment for cross-examination can be served on the solicitor who has filed the affidavit with only two days' notice, thereby reducing the possibility of delay.[44] Further, this period can be abridged by order of the court in the proper circumstances.[45]

An applicant may, however, find himself forced to decide whether to proceed immediately and forego cross-examination in order to expedite the matter. In a case that is somewhat urgent, this choice can be made more difficult by a choked motions list, although a truly urgent matter can usually be dealt with. An assessment must be made of what a cross-examination is likely to achieve. At times, a cross-examination may only serve to provide an opportunity for your opponent to recognize a problem with his case and to expand upon the affidavit material to your own disadvantage.

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[39] See *ibid.*, Rule 297. See also B.C. Supreme Court Rules, Rule 44(5); Alta Reg. 390/68, Rule 310.

[40] See R.R.O., 1980, Reg. 540, Rule 229(1). See also Alta Reg. 390/68, Rule 314. In some jurisdictions, an order is required: see, for example, B.C. Supreme Court Rules, Rule 52(8).

[41] *Thomson* v. *Thomson et al.*, [1948] O.W.N. 137 (H. Ct); *Grinnell Co. of Canada Ltd* v. *Retail, Wholesale and Department Store Union, Local 535, et al.* (1956), 18 W.W.R. 263 (B.C.C.A.); *J. & H. Singer Investments (No. 1) Ltd et al.* v. *Sigma Realty Ltd et al.* (1957), 24 W.W.R. 235 (Alta S.C.).

[42] *Rabbiah* v. *Deak & Co.*, [1961] O.W.N. 280 (H. Ct).

[43] *Re Botiuk and Hurowitz* (1975), 9 O.R. (2d) 299 (Div. Ct).

[44] See *supra*, footnote 40.

[45] See R.R.O., 1980, Reg. 540, Rule 178. See also Alta Reg. 390/68, Rule 548.

IV. *The Test.*

Until the decision of the House of Lords in *American Cyanamid Co.* v. *Ethicon Ltd*,[46] case law concerning injunctions had kept to the same steady course since the nineteenth century. While *American Cyanamid* marks a turning point in the development of the law, it remains unclear as to how much of a departure from the previous law the case really offers, and the breadth of its application, in Canada, is a matter of some doubt.

Prior to *American Cyanamid*, there existed a check-list applied by the judiciary in varying ways. Sometimes certain factors were described as being essential to awarding an injunction, and at other times all the various factors appeared to have been weighed as an undifferentiated mélange.[47] These factors were:

(a) strong *prima facie* case,

(b) need to preserve the *status quo* prior to trial,

(c) irreparable harm to applicant if no injunction,

(d) irreparable harm to respondent if injunction granted,

(e) balance of convenience, and

(f) equitable considerations—

  (i) conduct of parties,

  (ii) alternative remedies,

  (iii) acquiescence or delay and

  (iv) effectiveness of order.

A. *Prima Facie Case and the American Cyanamid Test.*

Some courts have made the first factor—a strong *prima facie* case—into an initial, or threshold, test, denying the injunction on that basis alone if the test was not met. One such court was the English Court of Appeal in the *American Cyanamid* case, and the House of Lords made its disagreement with such an approach very clear.

American Cyanamid concerned a *quia timet* action for an injunction over a threatened infringement of a patent; proceedings for an interlocutory injunction were initiated at the same time as the action was commenced. Cyanamid held a patent for absorbable surgical

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[46] [1975] 2 W.L.R. 316, [1975] 1 All E.R. 504 (H.L.).

[47] See, for example, *Hubbard* v. *Vosper*, [1972] 2 Q.B. 84, [1972] 1 All E.R. 1023 (C.A.), where Megaw L.J. said at pp. 98 (Q.B.), 1031 (All E.R.): "To my mind it is impossible and unworkable to lay down different standards in relation to different issues which fail to be considered in an application for an interlocutory injunction. Each case must be decided on a basis of fairness, justice and common sense in relation to the whole of the issues of fact and law which are relevant to the particular case."

sutures made out of synthetic polyester and had successfully cut into the United Kingdom market for such sutures wholly dominated by Ethicon. Ethicon's product, with eighty per cent of the market, was made from animal tissues, commonly called "catgut", but in an effort to block further encroachment by Cyanamid, Ethicon had developed a synthetic suture using a somewhat different form of polyester. At stake was Cyanamid's chance to develop the market in synthetic sutures before Ethicon had an opportunity to use its overwhelming market power.

Prior to the House of Lords, the central issue in the case was a factual one—whether Ethicon's new product was sufficiently different from that of Cyanamid so as to avoid infringement of the latter's patent. This question, in turn, centred on the chemical composition of the two polyester fibres used by the competing companies. This proved to be a very complex issue, and the hearing before the Court of Appeal took eight days. In the end, that court disagreed with the judge of first instance, an experienced patents judge, and found that Cyanamid had not satisfied its onus to show a *prima facie* case of patent infringement. The court held against Cyanamid on the factual issue and legal test, and therefore set aside the interlocutory injunction without even considering the questions of irreparable harm and balance of convenience.

In England, cross-examination of a deponent on his affidavit is not a matter of right and is rarely undertaken. Therefore, the Court of Appeal had to make its decision solely on conflicting affidavit material, resulting in a form of "trial" by affidavit. On behalf of all the Lords, Lord Diplock was extremely critical of this approach and set out the following account of the principles for granting interlocutory injunctions:

> My Lords, when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when *ex hypothesi* the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. It was to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction; but since the middle of the 19th century this has been made subject to his undertaking to pay damages to the defendant for any loss sustained by reason of the injunction if it should be held at the trial that the plaintiff had not been entitled to restrain the defendant from doing what he was threatening to do. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were

> resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where 'the balance of convenience' lies.
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> In those cases where the legal rights of the parties depend upon facts that are in dispute between them, the evidence available to the court at the hearing of the application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination. The purpose sought to be achieved by giving to the court discretion to grant such injunctions would be stultified if the discretion were clogged by a technical rule forbidding its exercise if upon that incomplete untested evidence the court evaluated the chances of the plaintiff's ultimate success in the action at 50 per cent or less, but permitting its exercise if the court evaluated his chances at more than 50 per cent.[48]

He then went on to throw out any notion of a rule requiring an applicant to show "a *prima facie* case" and established a "new" approach, based on the same factors as before but stressing the balance of convenience. The applicant must first satisfy the court that the claim is "not frivolous or vexatious", that there is a "serious issue to be tried" and some "real prospect of succeeding" in the claim for a permanent injunction at trial.[49] Once that hurdle is past, Lord Diplock prescribed a rather precise order for considering the traditional factors:

(a) can the plaintiff be adequately compensated by damages at trial if no injunction is granted; if so and the defendant will be able to pay them, then no injunction should normally be granted;

(b) if damages will not be adequate compensation for the plaintiff, will they be for the defendant, based on the plaintiff's undertaking as to damages, should the plaintiff lose at trial; if so and the plaintiff will be able to pay them, then an injunction should be granted; and

(c) where there is doubt as to the adequacy of damages for either party, the balance of convenience must be considered, and the following factors, not intended to be an exhaustive list, should be considered:

   (i) the *status quo* should be preserved if other factors appear to be evenly balanced;

   (ii) which determination would give rise to the least uncompensatable disadvantages for the parties;

   (iii) based on facts about which there is no credible dispute, is the strength of one party's case disproportionate to that of the other; and

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[48] *American Cyanamid Co.* v. *Ethicon Ltd*, *supra*, footnote 46, at pp. 321-322 (W.L.R.), p. 509 (All E.R.).

[49] *Ibid.*, at p. 323 (W.L.R.).

(iv) are there any other special factors to be considered in the particular circumstances of the case.[50]

Lord Diplock made it clear that the factors and the relative weight to be given to them in determining the balance of convenience would vary from case to case. Further, in that case, he went on directly to consider the balance of convenience after deciding the initial legal hurdle had been passed. He did not examine each party's irreparable injuries separately but discussed all the factors together, ignoring his own prescription. In this light, the *American Cyanamid* test is not the rigid formula some counsel seem to think it is. Indeed, it was the rigidity of the traditional test, as applied by the Court of Appeal, that the House of Lords sought to do away with.

However, it is rare that the factual issues of a case will be as complicated as those in *American Cyanamid*. In addition, in Ontario, unlike England, cross-examination of a deponent on his affidavit is a right, and one that is frequently exercised.[51] Where such cross-examination has been carried out and sufficient evidence exists, much of the rationale behind the *American Cyanamid* test is undermined.

Particularly where the decision on an interlocutory injuction is likely to resolve the matter between the parties, a failure to consider carefully the legal position of the parties may create inequitable results.[52] Since the interlocutory motion may be all that ever comes before the court, it would be a serious error to rely only on the balance of convenience without assessing who should win the lawsuit on the merits. This has been recognized in cases involving mandatory injunctions where a strong *prima facie* case appears to remain an essential requirement.[53] In a later case, *N.W.L. Ltd* v. *Woods*,[54] Lord Diplock expanded on his original judgment and held that where an interlocutory injunction may effectively bring a matter to an end the relative adequacy of damages for each party should be measured against the chances of each for success at trial.[55]

[50] *Ibid.*, at pp. 323-324 (W.L.R.), p. 510 (All E.R.).

[51] See *supra*, footnote 40. As in British Columbia, leave is required in England: United Kingdom Rules of the Supreme Court 1965, ord. 38, r. 2(3).

[52] *Bryanston Finance Ltd* v. *de Vries (No. 2)*, [1976] Ch. D. 63, [1976] 1 All E.R. 25 (C.A.).

[53] See *International Forecasting Corp.* v. *Stoll et al.*, *supra*, footnote 5.

[54] [1979] 1 W.L.R. 1294, [1979] 3 All E.R. 614 (H.L.).

[55] *Ibid.*, at pp. 1306-1307 (W.L.R.), 625-626 (All E.R.): "Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other."

American Cyanamid has met with much discussion in the literature[56] and has not been greeted with universal acclaim by the courts.[57] No determination has yet been made on it by the Supreme Court of Canada. The Manitoba Court of Appeal has rejected it, preferring a more amorphous traditional approach but without the threshold test of a *prima facie* case.[58] However, most jurisdictions in Canada have favoured it.

In Alberta, the Court of Appeal has explicitly adopted *American Cyanamid* in *Erickson et al.* v. *Wiggins Adjustments Ltd.*[59] While there has not yet been an appellate decision, the British Columbia courts have widely adopted *American Cyanamid*,[60] as have most judges in Nova Scotia.[61]

In Ontario, the *American Cyanamid* test has not yet been adopted, or rejected, by the Court of Appeal. However, the Divisional Court has given it qualified acceptance in *Yule Inc.* v. *Atlantic Pizza Delight Franchise (1968) Ltd et al.*[62] in upholding a decision of Evans C.J.H.C. That case involved a breach of contract with considerable conflicting evidence in affidavits and cross-examinations. In oral reasons, Cory J. considered the various approaches used in injunction motions and explicitly overruled any requirement of a strong *prima facie* case as an essential prerequisite to granting an interlocutory injunction. He commented that:[63]

> Injunction is a vitally important remedy that must be invoked to protect rights that are considered basic and essential. As a remedy it should remain flexible so as to

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[56] See, for example, Robert J. Sharpe, Interlocutory Injunctions, The Post-*American Cyanamid* Position, in Studies in Civil Procedure (ed. by E. Gertner, 1979), at p. 185; R. Grant Hammond, Interlocutory Injunctions; Time for a New Model (1980), 30 U. of T. L. J. 240; Paul S.A. Lamek, Q.C., Equitable Remedies, in New Developments in the Law of Remedies, Law Society of Upper Canada Special Lectures (1981), p. 125.

[57] See, for example, the judgments of Lord Denning M.R. in *Fellowes & Son* v. *Fisher*, [1976] 1 Q.B. 122, [1975] 3 W.L.R. 184, [1975] 2 All E.R. 829 (C.A.); and *Hubbard et al.* v. *Pitt et al.*, [1976] 1 Q.B. 142, [1975] 3 W.L.R. 201, 3 All E.R. 1 (C.A.). In Australia, it appears that the authority of *Beecham Group Ltd* v. *Bristol Laboratories Ltd* (1968), 118 C.L.R. 618 (H. Ct) continues to be preferred: *Firth Industries, Ltd et al.* v. *Polyglas Engineering Pty Ltd et al.*, [1977] R.P.C. 213, 6 A.L.R. 212; *Shercliffe* v. *Engadine Acceptance Corp.*, [1978] 1 N.S.W.L.R. 729.

[58] *Lambair Ltd* v. *Aero Trades (Western) Ltd*, [1978] 4 W.W.R. 397 (Man. C.A.).

[59] [1980] 6 W.W.R. 188 (Alta C.A.).

[60] See, for example, *Thomas Lindsay Ltd et al.* v. *Lindsay* (1975), 64 D.L.R. (3d) 761 (B.C.S.C.); *Greenpeace Foundation of British Columbia* v. *Minister of the Environment*, [1981] 4 W.W.R. 587 (B.C.S.C.).

[61] See *McFetridge* v. *Nova Scotia Barristers' Society* (1981), 122 D.L.R. (3d) 627 (N.S.S.C.). But see also *Mercator Enterprises Ltd* v. *Harris & Mainland Investments Ltd* (1978), 29 N.S.R. (2d) 691 (App. Div.).

[62] (1977), 17 O.R. (2d) 505 (Div. Ct).

[63] *Ibid.*, at p. 512.

be applicable to changing times and circumstances . . . . It must be remembered that the granting of an injunction is a discretionary remedy, subject to the imposition, for the protection of all parties, of appropriate conditions to the granting of the relief.

Clearly the court was seeking to avoid any undue fettering of its discretion. Further evidence of this insistence on flexibility is provided by its qualifications on the use of the *American Cyanamid* test. The court held that the test is appropriate where there is conflicting evidence and went on to say:[64]

> A consideration of the evidentiary problems facing the Courts on interim injunction motions leads to a conclusion that the *American Cyanamid* test is honest in its approach and should be applicable in most cases.
>
> However, it may not be a suitable one in all situations. For example, the highly specialized, technical and esoteric field of patent law has established a longstanding practice that might be offended by the application of the *American Cyanamid* test: see . . . *Teledyne Industries Inc. et al.* v. *Lido Industrial Products Ltd* ((1977), 17 O.R. (2d) 111 (H. Ct.); aff'd (1978), 19 O.R. (2d) 740 (C.A.)).

The flexibility sought by the court is further evidenced by a later decision[65] by Steele J., one of the members of the court in *Yule Inc.* He held that an applicant for an interlocutory injunction must show that he has enough of a case that he will have a "reasonable chance of success" at trial and went on to say:[66]

> The cases often refer to a *prima facie* case, a fair *prima facie* case, a strong *prima facie* case, not a frivolous or vexatious case, a chance of success, a probability of success, a serious question to be tried, a substantial issue to be tried. These are only some of the many phrases that have been used in dealing with this matter.
>
> While there are differences in degree in all of these phrases, I do not consider them to be substantially different. Each case must be considered on its own merits and then the discretion of the Court must be exercised . . . . The degree to which a Judge will consider the importance of the nature of the case in coming to his conclusion must be weighed with the knowledge of the other factors which he must consider, such as the question of harm to the parties and damages as an alternative, the balance of convenience to the parties and the need, if any, to maintain the *status quo*.

This commentary serves to illustrate how little *American Cyanamid* may have changed the law. It also offers a more realistic appraisal of what, in fact, most judges do when deciding on interlocutory injunctions. Courts will weigh in the balance all the factors, including questions of irreparable harm, and the relative strength of the parties' legal positions cannot be excuded from assessing the

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[64] *Ibid.*, at p. 513. It is interesting to note that the one area specifically excluded from the *American Cyanamid* test is that of patent law, the very type of case before the House of Lords in *American Cyanamid*. This may reflect a more realistic assessment of a patent's validity in Canada. See Hammond, *op. cit.*, footnote 56, at pp. 258-259 and 270-271.

[65] *Carlton Realty Co. Ltd et al.* v. *Maple Leaf Mills Ltd et al.* (1978), 22 O.R. (2d) 198 (H. Ct).

[66] *Ibid.*, at pp. 202-203.

overall balance of convenience. Obviously, where facts are disputed and the law is unclear, other factors must be relied upon, but no counsel can afford to concentrate on only one of the various factors to the exclusion of the others. Each of them may play a role in deciding the case, depending on the circumstances involved.[67]

The main contribution of *American Cyanamid,* then, has been to ensure that a court does not fail to consider all these factors merely because an applicant is unable at this early stage to put forward a strong case on the facts and law. The legal and factual weakness of a case alone should only serve to deny an applicant his remedy where the suit is bordering on the frivolous or where an interlocutory injunction would, in fact, dispose of the action.

B. *Special Factors.*

In *American Cyanamid,* Lord Diplock suggested that there may be "special factors" to be considered in the particular circumstances of the case.[68] He does not offer much elucidation as to what these factors might be.

One such special factor, already discussed above, might be that of the determinativeness of the interlocutory motion for the proceedings. This was seized upon by the English Court of Appeal[69] in its early search for ways around *American Cyanamid,* and then acknowledged by Lord Diplock.[70] He made it clear in *N.W.L. Ltd* v. *Woods*[71] that the practical effects of an injunction, including its capacity to bring the action to an end, should be taken into account on an interlocutory application.

Another special factor, or special category of cases, was suggested by the English Court of Appeal in *Fellowes & Son* v. *Fisher.*[72]

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[67] Robert J. Sharpe has suggested the following: "The central issue which should be explicitly recognized, and to which all factors should relate, is the relative risk of uncompensable harm. Is the risk of such harm to the defendant, inherent in granting an injunction before the merits can be fully explored, outweighed by the risk to the plaintiff that his rights will be so impaired by the time of trial that it will be too late to afford him adequate remedial relief?" *op. cit.*, footnote 56, at p. 207.

R. Grant Hammond, in turn, suggests: "The contemporary rationale for the remedy can be simply expressed as a vehicle for the preservation of litigation for effective later determination. . . . This would require a judge to ask three preliminary questions: (1) Is there a real dispute (in the sense of being non-frivolous)? (2) What is the nature of that dispute? (3) Assuming that question (1) is answered affirmatively and after the analysis required in question (2) is undertaken, what threshold test is appropriate for that kind of dispute?" *op. cit.*, footnote 56, at p. 278.

[68] See *supra*, footnote 46, at pp. 324 (W.L.R.), 511 (All E.R.).

[69] *Supra*, footnote 52.

[70] See *supra*, footnotes 54 and 55.

[71] *Supra*, footnote 54.

[72] *Supra*, footnote 57.

In that case a firm of solicitors sought to enforce a restrictive covenant against their former law clerk who had joined another firm in a neighbouring locality. Lord Denning M.R. decided that applications for an interlocutory injunction to enforce a covenant in restraint of trade should be excepted from the *American Cyanamid* approach.[73] In doing so, he relied on the "special factors" part of the test. He then went on to determine that the applicants had failed to make out a *prima facie* case that the restrictive covenant was enforceable and refused the application. The other members of the court reached the same conclusion based upon the balance of convenience.

This exception to *American Cyanamid* has had a warm reception in Ontario[74] and has been explicitly endorsed by the Divisional Court in *Drake International Inc.* v. *Wortmann et al.*[75]

In that case, the former employer was a temporary employment agency, and the employee had been manager of one of its small branch offices. She had signed an agreement with a wide restrictive covenant, and after being told by her lawyer that the covenant was unenforceable, she resigned and went into business for herself in competition with her former employer. At first instance, the application for an interlocutory injunction was refused,[76] and an appeal was made to the Divisional Court.

In dismissing the appeal, the court emphasized the lack of any improper acts such as stealing confidential material or customer lists and, in respect to *American Cyanamid*, held:[77]

> Whatever may be the situation when patents are in issue or the protection of undoubted trade or business secrets, we are not prepared to say that in a case where a restrictive covenant in an employment contract is at issue, the relatively modest standard adopted in *American Cyanamid* is appropriate. The Court turns its face against such a covenant in an employment contract, and it is incumbent upon the plaintiff to show that that there is at least a *prima facie* case that it will be

[73] *Ibid.*, at pp. 133-134 (Q.B.), 192-194 (W.L.R.), 836-838 (All E.R.). He also suggested a number of other cases possessing special factors: picketing and other industrial disputes, breaches of confidence and passing off. These are all cases where an interlocutory injunction is so potent a remedy that it virtually brings the action to an end.

[74] See, for example, *Creditel of Canada Ltd* v. *Faultless et al.* (1977), 18 O.R. (2d) 95 (H. Ct); *Cantol Ltd* v. *Brodi Chemicals et al.* (1978), 23 O.R. (2d) 37, 94 D.L.R. (3d) 265 (H. Ct); *W.R. Grace & Co. of Canada Ltd* v. *Sare et al.* (1980), 28 O.R. (2d) 612 (H. Ct). The position in Alberta is rather hazy but may in practice be of the same effect: *Erickson et al.* v. *Wiggins Adjustments Ltd*, *supra*, footnote 59. See also *Weight Watchers of Manitoba Ltd* v. *Peters* (1979), 6 Man. R. (2d) 44 (Man. Q.B.). However, in British Columbia it would appear that the usual *American Cyanamid* test prevails: *Thomas Lindsay Ltd et al.* v. *Lindsay*, *supra*, footnote 60; *Cascade Imperial Mills Ltd* v. *Kunsman et al.*, [1978] 4 W.W.R. 677 (B.C.S.C.).

[75] (1980), 27 O.R. (2d) 707 (Div. Ct).

[76] December 20th, 1979, S.C.O., Steele J., as yet unreported.

[77] *Supra*, footnote 75, per Osler J., at p. 710.

successful at trial before the Court will grant its aid by issuing an interim or temporary injunction.

The allusion to patent and trade secret cases is perhaps an ironical witticism in light of the *Yule Inc.*[78] and *Teledyne Industries Inc.*[79] decisions.[80] The court's attitude in restrictive covenant cases clearly stems from the traditional abhorrence of such agreements at common law.[81] This can only add to the legal onus that must be met by those enforcing such a covenant, whether at trial or in interlocutory proceedings. In addition, the defendants in such cases are often individuals who have little alternative in their employment. A court is especially reluctant to deprive someone of his livelihood on the quick assessment of facts and law permitted on an interlocutory motion. That may help to explain the greater ease with which non-solicitation clauses are enforced by interlocutory injunctions, since they are more generally enforced at law and rarely eradicate all sources of income.[82]

It is also true that such cases usually fall with in the special category of *Bryanston Finance Ltd* v. *De Vries (No. 2)*[83] and *N.W.L. Ltd.* v. *Woods.*[84] The granting of an interlocutory injunction will usually bring such proceedings to a quick end precisely because the person's income or new business venture is cut off. A number of other categories of cases that have been suggested, such as breach of confidential information and passing off,[85] also involve proceedings that are often determined on the granting of an interlocutory injunction.

The breadth of potential application of Lord Diplock's amended version of *American Cyanamid* has yet to be established, but it clearly offers a route for returning to the former reliance on the test of a strong *prima facie* case where the courts most want and need it.[86]

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[78] *Supra,* footnote 62.

[79] (1978), 17 O.R. (2d) 111, 79 D.L.R. (3d) 446 (Div. Ct & C.A.).

[80] Trade secret cases comprise one of the special categories cited by Lord Denning M.R. in *Fellowes & Son* v. *Fisher, supra,* footnote 73.

[81] *Elsley* v. *J.G. Collins Ins. Agencies Ltd,* [1978] 2 S.C.R. 916, at p. 923, 83 D.L.R. (3d) 1, at p. 5.

[82] See, for example, *Cascade Imperial Mills Ltd* v. *Kinsman et al., supra,* footnote 74; *W.R. Grace & Co. of Canada Ltd* v. *Sare et al., supra,* footnote 74; *O'Neil* v. *National Food Services et al.* (1981), 12 A.C.W.S. (2d) 278 (N.S.C.A.).

[83] *Supra,* footnote 52.

[84] *Supra,* footnote 54.

[85] See *supra,* footnote 73.

[86] Another form of exception provided by the "special factors" clause appears in *Smith et al.* v. *Inner London Education Authority,* [1978] 1 All E.R. 411 (C.A.). In that case, there was no dispute as to the facts, and the actions of a public authority were being challenged.

C. *Irreparable Harm and Balance of Convenience.*

Aside from the "special factors" of each case, once the legal merits of an interlocutory injunction application have been dealt with, the major question remaining is the balance of convenience. As we have seen above, Lord Diplock purported to separate into various steps consideration of the "uncompensatable disadvantages" for each party and of the various factors making up the balance of convenience. However, he himself did not follow his own prescribed pattern in *American Cyanamid*, and it is apparent from the cases that no such fixed order is adhered to by courts. All relevant factors, which must vary from case to case, are weighed, and a decision as to the balance of convenience emerges.

The most critical factor in this consideration, and one that is virtually always present, is that of the relative "irreparable harm" to the parties.[87] The plaintiff must establish that an injunction is essential to protect his interests, and the defendant can counter this with evidence of the disastrous and uncompensatable effects should an injunction be granted. An "irreparable injury" is one that cannot be adequately remedied by damages.[88] This notion is difficult to conceive when our courts constantly have to arrive at damage awards for non-pecuniary injuries with the aid of very little evidence.

Lord Diplock failed to throw any light on the term in *American Cyanamid*, although he was convinced that Cyanamid should be given the opportunity to develop a market for its new product for the patent period without meeting its sole and dominant rival head on. Presumably, the loss of such an opportunity would be an "uncompensatable disadvantage".

However, there are some factors which appear to have been accepted by the courts;

(1) the injuries being suffered, or the effect of an injunction, would put a party out of business or bring a new business to a halt, and not merely mean the loss of some of its trade and customers;[89]

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[87] But see *Terra Communications Ltd et al.* v. *Communicomp Data Ltd et al.* (1973), 1 O.R. (2d) 682 (H. Ct); *Thomas Lindsay Ltd et al.* v. *Lindsay, supra*, footnote 60.

[88] *Spooner Oils, Ltd et al.* v. *Turner Valley Gas Conservation Bd. et al.*, [1932] 4 D.L.R. 681 (Alta A.D.).

[89] *Yule Inc.* v. *Atlantic Pizza Delight Franchise (1968) Ltd et al., supra*, footnote 62; *Smart et al.* v. *McCartney et al.* (1977), 38 C.P.R. (2d) 211 (Ont. H. Ct); *Steel Art Co. Ltd et al.* v. *Hrivnak et al.* (1979), 27 O.R. (2d) 136 (H. Ct); *RoyNat Ltd* v. *Consumers' Gas Co.* (1980), 28 O.R. (2d) 97 (H. Ct); *Drake International Inc.* v. *Wortmann et al., supra*, footnote 75.

(2) an injunction would deprive the defendant of his means of livelihood;[90]

(3) the matter to be enjoined would irrevocably injure the reputation or professional standing of the plaintiff;[91] and

(4) without an injunction, the transaction in dispute would otherwise succeed since it could not be undone once completed, even if the plaintiff should succeed at trial.[92]

In the end, it becomes a "balance of inconvenience"[93] that involves a form of judicial cost-benefit analysis in which the relative costs and benefits are weighed in respect to both refusing and granting the injunction sought for. Counsel must carefully peruse the facts of their case in order to turn this analysis in the desired direction.[94]

D. *Equitable Considerations.*

An injunction is an equitable and discretionary remedy subject to all the traditional rules of equity. An interlocutory injunction is a particularly fragile remedy in the face of equitable considerations, since it is a drastic measure, although intended to be temporary, and is awarded on a very curtailed examination of the merits.

It is especially important, then, that the applicant come to the court "with clean hands" and present a full and frank account of the facts of the case.[95] Similarly, the *mala fides* of the respondent may affect the court's decision, if only on the question of the balance of convenience.

"Equity aids the vigilant, not the indolent", and any delay or acquiescence by the applicant will undermine its arguments for equitable relief. This is particularly true on an interlocutory application where some special degree of urgency and necessity must be demonstrated to justify the discretionary remedy.[96] Delay, of course, helps to

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[90] *Capitol Records—EMI of Canada Ltd* v. *Gosewich et al.* (1977), 17 O.R. (2d) 501 (H. Ct); *Empire Stevedores (1973) Ltd* v. *Sparringa et al.* (1978), 19 O.R. (2d) 610 (H. Ct); *Cantol Ltd* v. *Brodi Chemicals Ltd et al.* (1978), 23 O.R. (2d) 36 (H. Ct).

[91] *McFetridge* v. *Nova Scotia Barristers' Society, supra,* footnote 61.

[92] See *Carlton Realty Co. Ltd et al.* v. *Maple Leaf Mills Ltd et al., supra,* footnote 65.

[93] As suggested by Reid J. in *Steel Art Co. Ltd et al.* v. *Hrivnak et al., supra,* footnote 89.

[94] Cf. *Labelle et al.* v. *Ottawa Real Estate Board et al.* (1977), 16 O.R. (2d) 502 (H. Ct).

[95] *Massie and Renwick, Ltd* v. *Underwriters' Survey Bureau Limited et al.,* [1937] S.C.R. 265.

[96] See *Hogg* v. *Scott* (1874), L.R. 18 Eq. 444 (V.C.); *Erickson et al.* v. *Wiggins Adjustments Ltd, supra,* footnote 59.

defeat any arguments as to irreparable harm requiring immediate and complete cessation of the unwanted activity.[97] Acquiescence gives rise to counter-arguments akin to estoppel where the inaction of the applicant has come to be relied upon by the respondent.[98]

A court will only grant an injunction where it will be effectual and useful,[99] and no interlocutory injunction will be granted if there exists another adequate remedy, such as one established by statute.[100] This is particularly true where the alternative remedy is offered under a comprehensive statutory scheme administered by a specific tribunal.[101]

Similarly, the criminal law will not be enforced by a civil injunction since the remedies and penalties provided by the Criminal Code or other statutory authority are considered sufficient.[102] However, where a party is directly affected by some statutory breach and the penalty is clearly not effective, an injunction may be obtained to prevent this apparent flouting of the law and continuing injury to the applicant.[103]

V. *Evidence.*

As has been stated above, an effective presentation of the facts of the case is absolutely crucial in interlocutory injunction applications. The various means of putting evidence before the court have already been discussed. Where critical facts are exclusively in the knowledge of those opposed to your client, such persons may be examined,[104] and the transcripts used in respect of the motion. Otherwise, all evidence

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[97] *Hardee Farms International Ltd* v. *Cam & Crank Grinding Ltd et al.*, [1973] 2 O.R. 170 (H. Ct); *Ayerst, McKenna and Harrison, Inc.* v. *Apotex Inc.* (1981), 8 A.C.W.S. 298 (Ont. H. Ct).

[98] *Keewatin Power Co. Ltd* v. *Keewatin Flour Mills Ltd* (1927), 61 O.L.R. 363 (H. Ct), aff'd. 63 O.L.R. 667 (C.A.), aff'd [1930] A.C. 640 (P.C.); *Turney* v. *Lubin et al.*, [1980] 1 W.W.R. 35 (B.C.S.C.). Acquiescence may also buttress arguments that damages will suffice: *Sayers* v. *Collyer* (1884), 28 Ch. D. 103 (C.A.).

[99] *Law* v. *City of Ottawa Public School Board* (1928), 63 O.L.R. 1 (H. Ct).

[100] *City of Lethbridge* v. *Canadian Western Natural Gas, Light, Heat and Power Co. Ltd*, [1923] S.C.R. 652; *Tyrrell* v. *Consumers' Gas Co.*, [1964] 1 O.R. 68 (H. Ct); *First City Financial Corp. Ltd* v. *Genstar Corp. et al.* (1980), 33 O.R. (2d) 631 (H. Ct).

[101] *Forefront Consolidated Explorations Ltd* v. *The Lumsden Building Corp. Inc.*, *supra*, footnote 18; *Royal Trustco Ltd et al.* v. *Campeau Corp. et al.*, *supra*, footnote 9; *First City Financial Corp. Ltd* v. *Genstar Corp. et al.*, *supra*, footnote 100.

[102] *Robinson* v. *Adams* (1924), 56 O.L.R. 217 (C.A.); *Dallas* v. *Felek et al.*, [1934] O.W.N. 247 (C.A.); *Mid West Television Ltd* v. *S.E.D. Systems Inc. et al.*, [1981] 3 W.W.R. 560 (Sask. Q.B.); *Attorney General of Alberta* v. *Plantation Indoor Plants Ltd*, [1981] 3 W.W.R. 450 (Alta Q.B.).

[103] *Hamilton etc. Road Co.* v. *Raspberry* (1887), 13 O.R. 466 (Ch.); *Stafford Borough Council* v. *Elkenford Ltd*, [1977] 2 All E.R. 519 (C.A.).

[104] See R.R.O., 1980, Reg. 540, Rule 230. See also Alta Reg. 390/68, Rule 266.

should be presented in affidavit form.[105] Since affidavits can be on information and belief in interlocutory applications, it is possible to reduce the number of deponents and rely on those who are most credible and best able to withstand cross-examination.[106]

Once an initial impression of the facts is gained from your client, it is imperative to review the applicable law. Such a review can provide a framework for the facts and of what you must prove in order to win the case at trial. Whether or not the *American Cyanamid* test is applied, a strong legal case cannot but help persuade the court that an injunction is deserved. This framework for the facts will also help in organizing them and putting them in the best possible light. A checklist of the various relevant factors gleaned from the case law can also help to avoid the acute embarrassment of not having necessary and available evidence before the court.

As well as presenting a strong position at law on the merits through the evidence, it must be remembered that an injunction is an equitable and discretionary remedy. Thus, it is important to portray your client as the innocent party, unfairly wronged by the defendant. This goes beyond coming to court with "clean hands", an essential requirement, to include any facts that may cast your client in a particularly favourable light. Needless to say, any known facts about the other party that cast doubt on his integrity or innocence in the matter at hand should be brought out. The worse he appears, the greater his misconduct—particularly where there is any fraud, misappropriation of property or deceit—the more likely an injunction will appear necessary and deserved.

The factual flavour of the case, both on the legal and equitable merits, is critical to predisposing the court to your position. However, as we have seen above, it is also essential to convince the court that the balance of convenience lies with your client. Any and all injuries not adequately compensatable by damages should be brought out in the affidavit material. Further, the evident judicial preference for preserving the *status quo* can be used to your advantage by making the alternative appear unattractive or cumbersome.

At the same time, one must attempt to undercut the opposite party's claim to uncompensatable disadvantages. While this may be possible on affidavit material, it is more likely to be achieved on cross-examination and upon argument at court.

In any event, the applicant must include in its principal affidavit an undertaking to pay any damages suffered by the respondent if so

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[105] See *ibid.*, Rule 228. See also B.C. Supreme Court Rules, Rule 44; Alta Reg. 390/68, Rule 261(3).

[106] See *supra*, footnote 35.

ordered at trial. No interlocutory injunction will be awarded without such an undertaking.[107] In this respect, it may also become important to prove your client's ability to pay any such award of damages. While the court will usually assume an ability to pay, it may well be raised by the opposite party and should be anticipated. Alternatively, the defendant's inability to pay damages at trial may be used as a factor favouring injunctive relief, since an award of damages may never be realized.[108]

In the appropriate case, a defendant should include a form of undertaking as well. In *Cemasco Management Ltd* v. *Analysis Film Releasing Corp.*,[109] an injunction to prevent the distribution of a film in Canada was refused, and as a term for withholding the injunction, the court ordered that the defendant to file an undertaking "to make maintain and keep, until the trial or other final disposition of this action, full and complete records concerning any agreement for distribution in Canada of the. . .film. . .and of all fees, commissions or other revenue received by or on behalf of the defendant in any way arising from or related to such distribution".[110]

Clearly, such an undertaking is of great assistance where the defendant is in direct control of the information on which the estimate of damages at trial will be based.[111] Other undertakings may include payment of funds into court in lieu of the property being enjoined,[112] desisting from some of the acts complained of or limiting the scope of one's competition with the applicant.[113] Such undertakings may be very useful in persuading the court of the defendant's *bona fides* and avoid a full injunction.

It is particularly important where the deponent is a lay person to put the affidavit into clear and readable prose; and the words are meant to be his, and he should understand them. Further, each

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107 *Smith* v. *Day* (1882), 21 Ch. D. 421 (C.A.); *Bedell* v. *Gefaell et al. (No. 2)*, [1938] O.R. 726 (C.A.); B.C. Supreme Court Rules, Rule 45(6). Where the plaintiff is outside the jurisdiction, he may be obliged to post a bond or have a responsible resident join in the undertaking: *Delap* v. *Robinson* (1898), 18 P.R. 231.

108 The ability to pay an award of damages is explicitly mentioned by Lord Diplock in *American Cyanamid* as a factor in the balance of convenience. It is also of much greater importance, for both plaintiff and defendant, under the *American Cyanamid* approach: see P.S.A. Lamek, Q.C., *op. cit.*, footnote 56.

109 (1979), 24 O.R. (2d) 389 (H. Ct).

110 *Ibid.*, at p. 390.

111 See also *Lambair Ltd* v. *Aero Trades (Western) Ltd*, *supra*, footnote 58.

112 *International Chemalloy Corp.* v. *Kawecki Berylco Industries Inc. et al.* (1977), 3 C.P.C. 53 (Ont. H. Ct).

113 *Fastening House Ltd* v. *Fastway Supply House Ltd* (1974), 3 O.R. (2d) 385; 45 D.L.R. (3d) 505 (H. Ct); *Rapp et al.* v. *McClelland & Stewart Ltd et al.* (1981), 34 O.R. (2d) 452 (H. Ct).

affidavit should have a focus and direction that permits its story to be told in an effective manner. Since the affidavit material will be read by the judge before the hearing, it presents the first opportunity to put your case before him.

VI. *Risks.*

The major risk faced by a plaintiff seeking an interlocutory injunction stems from the possibility of failing in the action at trial. Then the undertaking as to damages will come into effect, and the damages suffered by the defendant as a result of the interlocutory injunction may be assessed by the trial judge, or an inquiry of them ordered. This follows from the determination at trial that the injunction should not have been granted in the first place.[114]

Such damages may also be awarded where an action is discontinued by the plaintiff.[115] However, there may be instances where the plaintiff fails at trial but is justified in its interlocutory injunction because of the defendant's conduct or its failure to deny the allegations of the plaintiff on the interlocutory motion.[116] A refusal to grant a successful defendant damages is a matter of judicial discretion, and it can be expected where the defendant has been properly made a party and where only trivial damages have been suffered.[117]

Further, such "damages ought to be confined to the immediate natural consequences of the injunction under the circumstances, which were within the knowledge of the parties obtaining the injunction".[118] Thus, where the defendants have misinterpreted the order for an injunction, damages arising from the misinterpretation will not be awarded.[119]

Nevertheless, particularly given the reduced legal test of *American Cyanamid,* the prospect of paying damages and costs to a defendant offers the only real deterrent to seeking an interlocutory injunction. In some instances, these damages may well be substantial, and if a plaintiff possesses questionable financial ability, an injunction might be refused on that ground alone.

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[114] *Vieweger Construction Co. Ltd* v. *Rush & Tompkins Construction Ltd,* [1965] S.C.R. 195.

[115] *Wm. Halliday Contracting Co. Ltd* v. *Nicols et al.,* [1952] O.W.N. 229 (H. Ct).

[116] *Montreal Street Railway Co.* v. *Ritchie* (1889), 16 S.C.R. 622; *Ireson* v. *Holt Timber Co.* (1913), 30 O.L.R. 209 (C.A.).

[117] *Douglass* v. *Bullen* (1912), 4 O.W.N. 1587 (H. Ct); *Board of Trustees of Wasaga Beach* v. *Fielding,* [1947] O.R. 321 (H. Ct).

[118] *Douglass* v. *Bullen, ibid.,* at p. 1590.

[119] *Merchants Gas Co. Ltd et al.* v. *Hall et al.,* [1956] O.W.N. 820 (H. Ct).

VII. *Appeals and Motions to Rescind.*

An order for an interlocutory injunction may be appealed in the same manner as any other interlocutory order.[120] In some jurisdictions, there are short time limits for launching an appeal,[121] and leave for appeal may be required.[122]

An interlocutory order for an injunction will not be stayed upon setting down an appeal of the order.[123] An application for a stay must be sought,[124] and factors to be considered are the *bona fides* and grounds for the appeal and the relative hardship to the respective parties.[125] Since the latter factor appears to repeat the balance of convenience already considered on the motion for the injunction, prospects for a stay of an interlocutory injunction are doubtful, at best.

In the case of a *ex parte* order, a motion to rescind or vary the injunction should be brought.[126] Again, there may be short time limits for bringing the motion.[127] On such a motion, fresh affidavit material and cross-examination on the original affidavits are permitted.[128] The motion is not an appeal, and the decision should be made on the facts as they are on the date of the motion to rescind.[129] Therefore, intervening circumstances may have removed the grounds for the injunc-

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[120] See Judicature Act. R.S.O., 1980, c. 223, s. 17(b) and R.R.O., 1980, Reg. 540, Rule 499. See also Court of Appeal Act, R.S.B.C., 1979, c. 74, s. 5; Alta Reg. 390/68, Rule 505(1).

[121] For example, it is one week in Ontario: R.R.O., 1980, Reg. 540, Rule 499(2); and 15 days in British Columbia: Court of Appeal Act, R.S.B.C., 1979. c. 74, s. 15(1)(b).

[122] See R.R.O., 1980, Reg. 540, Rule 499(1) & (3). Only decisions of the Supreme Court of Ontario are to be taken into account when determining whether there are conflicting decisions per Rule 499(3)(a): *Gage* v. *Reid* (1917), 39 O.L.R. 52 (H. Ct). Only additional evidence that is credible, important and previously unavailable may be admitted on a motion for leave to appeal: R.R.O., 1980, Reg. 540, Rule 234; *McCluckie* v. *MacMillan* (1973), 2 O.R. (2d) 56 (Div. Ct). There is no appeal from an order granting or denying leave to appeal: *Chesapeake & Ohio Railway Co.* v. *Ball*, [1953] O.R. 877 (C.A.).

[123] See R.R.O., 1980, Reg. 540, Rule 506. See also Alta Reg. 390/68, Rule 508. But see Court of Appeal Act, R.S.B.C., 1979, c. 74, s. 33.

[124] The application should be made to the judge appealed from or a judge of the appellate court: *ibid.*

[125] *Re Northern Capital Corp. Ltd et al. and City of Toronto et al.* (1973), 1 O.R. (2d) 160 (H. Ct).

[126] See R.R.O., 1980, Reg. 540, Rule 219. See also Alta Reg. 390/68, Rule 387(2), also Rules 389 & 390(1); B.C. Supreme Court Rules, Rule 44(8).

[127] See *ibid.* See also Alta Reg. 390/68, Rule 389.

[128] *Cairns* v. *Airth et al.* (1894), 16 P.R. 100 (Div. Ct); *Volckmar* v. *Krupp*, [1958] O.W.N. 303 (H. Ct).

[129] *Re Avery*, [1952] O.R. 192 (C.A.).

tion, even if there was proper disclosure of the facts at the *ex parte* hearing and the order was then properly granted.

In addition, where grounds for the original interlocutory order no longer exist or circumstances change, a motion may be brought to dissolve an injunction. One basis for such a dissolution is a failure by the plaintiff to proceed with the action with reasonable dispatch.[130]

VIII. *Enforcement.*

Where an order for an injunction is not obeyed, a motion should be brought to commit or attach the party in breach. In the case of a wilfully disobedient corporate party, a writ of sequestration may be sought against the corporation and a writ of attachment against its directors and officers.[131] In addition, any person who had knowledge of the injunction, including a party not yet served with the order, and who aided and abetted in its breach may also be subject to contempt proceedings.[132]

It is clear that a motion for contempt of an interlocutory order against a party in the action is also an interlocutory matter.[133] Although less certain, it has been held that those who are not parties to the action, such as an officer of a defendant corporation, may also be cited for contempt upon an interlocutory motion.[134]

A motion to commit is the proper remedy where the person has disobeyed a restraining order. In the case of a mandatory injunction, the motion should be for leave to issue a writ of attachment. These technical distinctions, arising from English practice, appear to remain, although one can seek the remedies in the alternative where there is doubt.[135] Where a mandatory injunction is being enforced, the court may also order that the required act be done by a person other

[130] *Bourganis* v. *Glarentzos et al.* (1978), 19 O.R. (2d) 327 (H. Ct).

[131] See R.R.O., 1980, Reg. 540, Rule 576; *Re Bolton and County of Wentworth* (1911), 23 O.L.R. 390 (H. Ct). Also see Alta Reg. 390/68, Rule 353. But see B.C. Supreme Court Rules, Rules 56(2) & (6).

[132] See R.R.O., 1980, Reg. 540, Rule 578; *Bassel's Lunch Ltd* v. *Kick et al.*, [1936] O.R. 445 (C.A.); *City of Winnipeg* v. *Wellington Crescent Bldg Co. Ltd*, [1971] 1 W.W.R. 625 (Man. Q.B.); *Canada Metal Co. Ltd* v. *Canadian Broadcasting Corp. et al (No. 2)*, *supra*, footnote 12. See also *supra*, footnote 14; Alta Reg. 390/68, Rule 357(2).

[133] *Cook* v. *Credit Valley Railway Co.* (1879), 8 P.R. 167 (V-C.).

[134] *Mackell* v. *Ottawa Separate School Trustees* (1917), 12 O.W.N. 401, 40 O.L.R. 272 (H. Ct). In that case, it was suggested that vis-à-vis such persons the notice of motion should be styled, in addition to the style of the action, "And in the matter of the above action" and then be directed to the persons being cited, who must be personally served.

[135] *Re Bolton and Wentworth* (1911), 23 O.L.R. 390 (H. Ct); *Link* v. *Thompson* (1917), 40 O.L.R. 222 (H. Ct). But see B.C. Supreme Court Rules, Rule 56.

than the defendant, such as the plaintiff himself.[136] The costs of performing the act shall be paid by the disobedient party in such circumstances. The court may fine a person or corporation found in contempt in addition to, or in lieu of, any other punishment.[137]

The decision of O'Leary J., in *Canada Metal Co. Ltd* v. *Canadian Broadcasting Corp. et al. (No. 2)*,[138] concerns a citation for contempt of an injunction and offers a thorough exposition of the law.[139] That case involved an *ex parte* injunction, subsequently dissolved,[140] which had been breached by a Canadian Broadcasting Corporation producer and story editor, acting on hurried legal advice, and by a *Globe and Mail* reporter. Because the three had not intended to show disrespect for the court and had tendered apologies, a modest fine was imposed on each.

The following points of law are set out in the judgment:

(a) an injunction order must be observed both in its letter and spirit, and every diligence must be exercised to carry it out;

(b) knowledge of the existence of the injunction, even before it is entered and issued, is sufficient to obligate persons to obey it;

(c) persons not named in the order as being bound by the injunction must still abide by it if they know of the substance or nature of the injunction;[141]

(d) proceedings for contempt are criminal or quasi-criminal in nature and must be proven beyond a reasonable doubt;[142]

(e) a director or officer of a corporation may be found in contempt even though his role was purely passive, but he will not be where he did all he could to ensure that the order would be obeyed;[143] and

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[136] See R.R.O., 1980, Reg. 540, Rule 579. See also B.C. Supreme Court Rules, Rule 42(7); Alta Reg. 390/68, Rule 354.

[137] See *ibid.*, Rule 577; *Canada Metal Co. Ltd* v. *Canadian Broadcasting Corp. et al (No. 2)*, *supra*, footnote 12. See also B.C. Supreme Court Rules, Rule 56(1) & (2); Alta Reg. 390/68, Rule 704.

[138] *Supra*, footnote 12.

[139] See also *Re Sheppard and Sheppard* (1976), 12 O.R. (2d) 4 (C.A.).

[140] *Canada Metal Co. Ltd et al.* v. *Canadian Broadcasting Corp. et al.* (1974), 3 O.R. (2d) 1 (H. Ct), aff'd (1975), 7 O.R. (2d) 261 (Div. Ct).

[141] *Re Tilco Plastics and Skurjat et al.*, [1966] 2 O.R. 547 (H. Ct); aff'd, [1967] 1 O.R. 609 (C.A.).

[142] *Re Bramblevale Ltd*, [1969] 3 All E.R. 1062 (C.A.).

[143] *Biba Ltd* v. *Stratford Investments Ltd*, [1972] 3 All E.R. 1041 (Ch. D.).

(f) even where no contempt was intended and the disobedient party was acting on legal advice, contempt may be found,[144] although such facts serve to mitigate the offence and are likely to reduce the punishment granted.

Following from the substantial onus of proof on an applicant for a contempt order, the material filed must show that the injunction itself was clear and unambiguous in its terms,[145] that the disobedient party had sufficient notice of the injunction,[146] that there are concrete facts specifying the particular acts which are charged[147] and that reasonable attempts to obtain satisfaction by methods other than committal have failed.[148] Similarly, the proceedings must be *strictissimi juris* in following proper procedure because of their seriousness.[149]

It should be noted that an undertaking given to the court by party or his counsel has the same force as an order and, thus, can be enforced by contempt proceedings.[150]

IX. *The Mareva Injunction.*

Until recently, there has been no question that an injunction could not be obtained to tie up a defendant's assets before judgment.[151] The few exceptions to this general rule included instances where assets had been fraudently transferred,[152] where statutory provisions, such as

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[144] *Stancomb* v. *Trowbridge Urban District Council*, [1910] 2 Ch. 190; *McDonald* v. *Lancaster Separate School Trustees* (1916), 35 O.L.R. 614 (H. Ct); *Re Tyre Manufacturers' Agreement*, [1966] 2 All E.R. 849 (R.P.C.).

[145] *P.A. Thomas & Co.* v. *Mould*, [1968] 1 All E.R. 963 (Q.B.).

[146] However, knowledge of the order, rather than service may suffice, *supra*, footnote 132.

[147] *Dare Foods (Biscuit Division) Ltd et al.* v. *Gill et al.*, [1973] 1 O.R. 637 (H. Ct).

[148] See *Leaseconcept Ltd* v. *French* (1976), 1 C.P.C. 160 (Ont. H. Ct).

[149] *Dare Foods (Biscuit Division) Ltd et al.* v. *Gill et al.*, *supra*, footnote 147.

[150] *Biba Ltd* v. *Stratford Investments Ltd*, *supra*, footnote 143; *Re Galvanized Tank Manufacturers' Association's Agreement*, [1965] 2 All E.R. 1003 (R.P.C.). Also see Alta Reg. 390/68, Rule 703(d).

[151] *Robinson* v. *Pickering* (1881), 16 L.R.Ch.D. 660 (C.A.); *Lister & Co.* v. *Stubbs* (1890), 45 L.R.Ch.D. 1 (C.A.); *Burdett* v. *Fader* (1903), 6 O.L.R. 532 (H. Ct); aff'd (1904), 7 O.L.R. 72 (Div. Ct); *Bedell* v. *Gefaell et al (No. 2)*, *supra*, footnote 107; *O.S.F. Industries Ltd* v. *Marc-Jay Investments Inc.* (1978), 20 O.R. (2d) 566, 88 D.L.R. (3d) 446 (H. Ct).

[152] See *Campbell* v. *Campbell* (1881), 29 Gr. 252 (Ch.); *C.D.N. Research & Development Ltd* v. *Bank of Nova Scotia* (1980), 18 C.P.C. 62 (Ont. H. Ct); *C.D.N. Research & Development Ltd* v. *Bank of Nova Scotia et al.* (1981), 32 O.R. (2d) 578 (H. Ct). This is an exception that has been expanded in recent cases to permit the restraint of a defendant's assets where there is evidence of prior fraudulent conduct by the defendant even though there is no actual, or even apprehended, transfer of assets: *Robert Reiser & Co., Inc.* v. *Nadore Food Processing Equipment Ltd et al.* (1977), 17 O.R. (2d) 717 (H. Ct); *Mills & Mills* v. *Petrovic et al.* (1980), 30 O.R. (2d) 238 (H. Ct). See also

those in the Absconding Debtors Act,[153] permitted and where the particular assets comprised the very subject-matter of the proceedings.[154] This traditional line of authority and its rationale have been well summarized by Sir Robert Megarry V-C. in a recent case:[155]

> In broad terms, this establishes the general proposition that the court will not grant an injunction to restrain a defendant from parting with his assets so that they may be 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 lie 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.[156]

However, in 1975, the English Court of Appeal, led by Lord Denning M.R., fashioned a new remedy named a "Mareva injunction" after an early case.[157] It was originally granted to enjoin a foreign defendant owing a debt in England from disposing of his assets so as to defeat any recovery of the debt. The early cases concerned debts owed as a result of international shipping arrangements.[158] However, the new remedy soon outgrew its humble origins, and no firm boundaries may yet be drawn on its availability.

Fraudulent Conveyances Act, R.S.O., 1980, c. 176, s. 2; *City of Toronto* v. *McIntosh et al.* (1977), 16 O.R. (2d) 257 (H. Ct); David T. Stockwood, Q.C., "Mareva" Injunctions (1981), 3 Advocates' Quarterly 85. Such an approach would appear to be in direct conflict with the classical authority, *Lister & Co.* v. *Stubbs, supra,* footnote 151.

[153] R.S.O., 1980, c. 2.

[154] See R.R.O., 1980, Reg. 540, Rules 369 & 372; *Polini* v. *Gray* (1879), 12 Ch. D. 438 (C.A.); *Wheatley* v. *Ellis,* [1944] 3 W.W.R. 462 (B.C.C.A.); *Rosen et al.* v. *Pullen et al.* (1981), 126 D.L.R. (3d) 62 (Ont. H. Ct). See also B.C. Supreme Court Rules, Rule 46(1) & (2); *Hoffman* v. *Hoffman* (1977), 5 B.C.L.R. 204 (S.C.); *Nicoll* v. *Oakes et al.* (1979), 17 B.C.L.R. 356 (S.C.); Alta Reg 390/68, Rules 467 & 468; Civil Procedure Rules (N.S.) 43.02; *Douglas, Rogers Ltd* v. *Henderson* (1972), 23 D.L.R. (3d) 106 (N.S.S.C.); *Carl B. Potter Ltd* v. *Anil Canada Ltd et al.* (1975), 65 D.L.R. (3d) 758 (N.S.S.C.). It should be noted that such an injunction should normally only be granted where specific performance of the property being sought, rather than damages, would be the proper remedy at trial: *Bradley* v. *Barber et al.* (1899), 30 O.R. 443 (Div. Ct). See also *Universal City Studios Inc. et al.* v. *Mukhtar & Sons Ltd*, [1976] 1 W.L.R. 658, 2 All E.R. 330 (Ch. D.); *Société pour l'Administration du Droit de Reproduction Mécanique des Auteurs* v. *Trans World Record Corp.* (1974), 17 C.P.R. (2d) 281 (Fed. Ct), aff'd, [1977] 2 F.C. 602, 39 C.P.R. (2d) 66 (C.A.).

[155] *Barclay-Johnson* v. *Yuill,* [1980] 3 All E.R. 190 (Ch. D.).

[156] *Ibid.*, at p. 193 (All E.R.).

[157] *Mareva Compania Naviera S.A.* v. *International Bulkcarriers S.A.* (1975), [1980] 1 All E.R. 213 (C.A.). However, the first case in which this remedy was permitted was actually *Nippon Yusen Kaisha* v. *Karageorgis,* [1975] 3 All E.R. 282 (C.A.).

[158] *Ibid.*, and *Rasu Maritima S.A.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) et al.*, [1977] 3 All E.R. 324 (C.A.); *Owners of cargo lately*

It is now clear that the plaintiff's claim need not be based upon a debt in order to obtain a Mareva injunction. It can be in tort, based upon personal injuries, or any other cause of action.[159] Nor need the defendant be foreign. Spurred perhaps by a comment of Lord Hailsham,[160] the English Court of Appeal finally took the step of explicitly granting a Mareva injunction against an English-based defendant.[161] The present position has been stated as follows by Lord Denning M.R.:[162]

> So I would hold that a Mareva injunction can be against a man even though he is based in this country if the circumstances are such that there is a danger of his absconding, or a danger of the assets being removed out of the jurisdiction or disposed of within the jurisdiction, or otherwise dealt with so that there is a danger that the plaintiff, if he gets judgment, will not be able to get it satisfied.

The usual order restrains the defendant from "removing from the jurisdiction or otherwise disposing of or dealing with any of his assets within the jurisdiction including and in particular (a certain specified asset) save in so far as such assets exceed in value the sum of (the plaintiff's claim)".[163] This permits assets in excess of the plaintiff's claim to be dealt with without restriction.

While liquid assets are usually involved, the disposition or removal of any type of asset may be enjoined.[164] In the event that the defendant wishes to dispose of a particular asset or to rearrange his affairs in order to meet his ordinary business debts or living expenses, an application may be made to vary the order; this may be on an expedited basis, if necessary.[165] It should be noted that a Mareva injunction does not convert the plaintiff into a secured creditor. As an equitable remedy *in personam*, an injunction is directed only at the

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laden on board the vessel Siskina et al. v. *Distos Compania Naviera S.A. (The Siskina)*, [1977] 3 All E.R. 803 (C.A. & H.L.).

[159] *Allen et al.* v. *Jambo Holdings Ltd et al.*, [1980] 2 All E.R. 502 (C.A.). A Mareva-type injunction has been applied in respect to an award of costs yet to be taxed: *Faith Panton Property Plan Ltd* v. *Hodgetts et al.*, [1981] 2 All E.R. 877 (C.A.).

[160] *The Siskina, supra,* footnote 158, at p. 829.

[161] *Prince Abdul Rahman Bin Turki Al Sudairy* v. *Abu-Taha et al.*, [1980] 3 All E.R. 409 (C.A.), leave to appeal to the House of Lords refused. See also *Chartered Bank* v. *Daklouche et al.*, [1980] 1 W.L.R. 107, [1980] 1 All E.R. 205 (C.A.); *Barclay-Johnson* v. *Yuill, supra,* footnote 155.

[162] *Ibid.*, at p. 412.

[163] See, for example, *Third Chandris Shipping Corp. et al.* v. *Unimarine S.A.*, [1979] Q.B. 645, 3 W.L.R. 122, [1979] 2 All E.R. 972 (C.A.).

[164] See, for example, *Rasu Maritima S.A.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) et al., supra,* footnote 158, which involved some equipment for a fertilizer plant; *Allen et al.* v. *Jambo Holdings Ltd et al., supra,* footnote 159, where an aircraft was detained.

[165] See *Iraqi Ministry of Defence et al.* v. *Arcepey Shipping Co. S.A. et al. (the Angel Bell)*, [1981] Q.B. 65, [1980] 1 All E.R. 480 (Q.B.); *A.J. Beckhor & Co. Ltd* v. *Bilton*, [1981] 2 All E.R. 565 (C.A.).

parties named in the order; the defendant is restrained from dealing with his assets pursuant to the order, but the assets themselves are not attached.[166]

A Mareva injunction serves to prevent the plaintiff obtaining a barren judgment, incapable of enforcement, and maintains the effective jurisdiction of the court over a defendant who is likely to dispose of his assets. The remedy matches that in civil law called a *saisie conservatoire*.[167] It is clearly a very potent remedy. In view of the concerns raised in the traditional line of cases and expressed by Sir Robert Megarry V-C.,[168] clear limits have been established on the granting of a Mareva injunction. It continues to be regarded only as an exception to the traditional rule, albeit one that is growing in use and dimensions.[169]

In *The Siskina*,[170] the House of Lords gave the new remedy tacit approval but held that it was purely an interlocutory order and could only be made in the course of proceedings for a substantive claim within the proper jurisdiction of the court. Since the Mareva injunction is normally obtained *ex parte* and *quia timet* because of the fear of assets being dispersed, the usual special rules applicable to such motions should apply.[171] Further, given the availability of contempt proceedings even where the order to be enforced should never have been granted,[172] a judge has an onerous burden ensuring that all requirements for the injunction have been met. Guidelines for use of the remedy have been established by Lord Denning M.R. in *Third Chandris Shipping Corp. et al.* v. *Unimarine S.A.*,[173] requiring the plaintiff to provide:

(a) full and frank disclosure of all material facts within his knowledge,

(b) particulars of his claim against the defendant, including the amount and the grounds and fairly stating the defendant's position against it,

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[166] See *Cretanor Maritime Co. Ltd* v. *Irish Marine Management Ltd*, [1979] 1 W.L.R. 966, [1978] 3 All E.R. 164 (C.A.).

[167] In some jurisdictions of the United States, a "writ of attachment" and interim restraining order may be obtained on an *ex parte* basis in similar circumstances. See *Ownbey* v. *Morgan* (1921), 256 U.S. 94 (S.C. Del.).

[168] See *supra*, footnote 155.

[169] In *A.J. Beckhor & Co.* v. *Bilton*, *supra*, footnote 165, at p. 573, Ackner L.J. states that the remedy has become "commonplace", with applications being made in 1979 at the rate of twenty per month.

[170] *Supra*, footnote 158.

[171] See *supra*, text at footnote 29.

[172] *Canada Metal Co. Ltd et al.* v. *Canadian Broadcasting Corp. et al. (No. 2)*, *supra*, footnote 12.

[173] *Supra*, footnote 163.

(c) grounds for believing that the defendant has assets within the jurisdiction,

(d) grounds for believing there is a risk that the assets will be removed before judgment is satisfied, and

(e) an undertaking in damages, if the claim fails or the injunction turns out to be unjustified.

Once all the guidelines have been met, the court must then apply *American Cyanamid.* Because of the extraordinary nature of the remedy, it would seem that the Mareva injunction cases belong to the "special factors" category referred to above; thus, a strong *prima facie* case of the plaintiff's claim would have to be shown. This was the original position in England. However, Lord Denning M.R. subsequently ventured to permit a Mareva injunction even where the plaintiff could only show a "good arguable case",[174] and this has been permitted even where the plaintiff's undertaking as to damages was of dubious value.[175] One begins to wonder what is left of the traditional rule to which the Mareva injunction is supposed to be the exception.

The key determinant, once a "good, arguable case" has been established, is the degree of risk that the assets will be dealt away. The balance of convenience, per *American Cyanamid,* is considered largely in that light since there is no issue as to the adequacy of damages as an alternative remedy. Any suspicion of dishonourable or untrustworthy behaviour on the part of the defendant may be seized by the court as evidence that his assets may soon disappear. Equitable considerations are paramount.[176]

At times, a Mareva injunction is used as a club to persuade the defendant to post security for damages that may be awarded at trial.[177] Certainly, the posting of security is the easiest means for a defendant to rid himself of a Mareva injunction.

The Achilles heel of the Mareva injunction from the plaintiff's point of view is the need for evidence of the defendant's assets and their risk of removal. This evidence is essential, but no examination for discovery of this evidence from the defendant for the motion is

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[174] *Rasu Maritima S.A.* v. *Perusahann Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) et al., supra,* footnote 158; *Third Chandris Shipping Corp. et al.* v. *Unimarine S.A., supra,* footnote 163.

[175] *Allen et al.* v. *Jambo Holdings Ltd et al., supra,* footnote 159, where a widow on legal aid was suing a Nigerian company for negligence in respect of the death of her husband.

[176] *Chartered Bank* v. *Daklouche et al., supra,* footnote 161; *Prince Abdul Rahman Bin Turki Al Sudairy* v. *Abu-Taha et al., supra,* footnote 161.

[177] *Allen et al.* v. *Jambo Holdings Ltd et al., supra,* footnote 159.

permitted, except where the plaintiff seeks the tracing of particular assets in this action.[178] That would smack too much of a pre-trial judgment debtor examination. The key element of surprise would also be lost. It may be possible in Ontario to use Rule 230[179] to examine a party for the purpose of acquiring the required evidence,[180] but again the examination would mean that surprise would be lost and proceedings would not be *ex parte*. However, once such evidence is acquired, by whatever means, the English Court of Appeal has held that the plaintiff can move for an examination of the defendant for further information as to his particular assets in order to ensure that the Mareva injunction takes proper effect.[181] Once the Mareva injunction is in place, the defendant obviously has a real interest in either having the order set aside or having it narrowed in effect. The affidavits and subsequent cross-examinations on a motion for such purposes should put all the relevant information before the court.

It is now clear that the Mareva injunction has won an accepted place in the law of remedies in England.[182] Its reception in Australia, however, has been mixed.[183] Its arrival in Canada has been slow and only in the past year has its acceptance become evident.[184]

It is worth noting that in Nova Scotia, a province more concerned than others with international shipping arrangements, a specific procedure is available to permit an *ex parte* order for attachment in

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[178] *A.* v. *C.*, [1980] 2 All E.R. 347 (Ch. D.); *A.J. Beckhor & Co.* v. *Bilton*, *supra*, footnote 160.

[179] See *supra*, footnote 33.

[180] For limitations on such examinations, see *supra*, footnote 34; *Wall* v. *Lalonde* (1974), 7 O.R. (2d) 129 (H. Ct).

[181] This was deemed to be properly ancillary to the court's jurisdiction over the Mareva injunction under the United Kingdom Supreme Court of Judicature (Consolidation) Act 1925, c. 49, s. 45(1), which is identical with subsection 19(1) of the Judicature Act (Ontario), *supra*, footnote 3. See *supra*, footnote 178.

[182] Shortly after the first Mareva injunction cases, the Court of Appeal, again led by Lord Denning M.R., fashioned another potent remedy known as an "Anton Piller order": an *ex parte* order enjoining a defendant to permit a plaintiff to enter the defendant's premises in order to inspect, remove or make copies of documents, or other evidence, belonging to the plaintiff. See *EMI Ltd* v. *Pandit*, [1975] 1 All E.R. 418 (Ch. D.); *Anton Piller K.G.* v. *Manufacturing Processes Ltd et al.*, [1976] 1 All E.R. 779 (C.A.). Both of these interlocutory orders have become important, and well used, remedies in England.

[183] *Praznovsky* v. *Sablyack*, [1977] V.R. 114 (S.C.); *J.D. Barry Pty Ltd* v. *M. & E. Constructions Pty Ltd*, [1978] V.R. 185 (S.C.); *Pivovaroff* v. *Chernabeff et al.* (1978), 16 S.A.S.R. 329 (S.C., Full Ct).

[184] For detailed accounts of the Mareva injunction's development and adoption in Canada, see Paul S.A. Lamek Q.C., *op. cit.*, footnote 56; David T. Stockwood, Q.C., *op. cit.*, footnote 152. It should be noted that the jurisdiction of the English courts for the Mareva injunction is based upon a provision matched identically in most Canadian jurisdictions: *supra*, footnote 181.

circumstances where a Mareva injunction might otherwise be appropriate.[185]

The first reported case in Canada to follow the Mareva cases was a British Columbia decision, *Manousakis* v. *Manousakis*.[186] An injunction was awarded prior to trial in the course of divorce proceedings in which the wife was seeking part of her husband's business interests. She feared her husband would sell his interests and leave the country. An interlocutory injunction was granted to restrain the husband from disposing of his business interests on the theory that if the husband did not intend to dispose of his assets he would not be inconvenienced by the order. *Nippon Yusen Kaisha* v. *Karageorgis*[187] was relied upon.

The next reported case was in the Northwest Territories, *B.P. Exploration Co. (Libya) Ltd* v. *Hunt*.[188] In that case, the guidelines of *Third Chandris Shipping* were followed, and a Mareva injunction was granted in the course of an action to enforce an English judgment in order to freeze various Arctic oil and gas exploration permits held by the defendent. Evidence showed that the defendant, Nelson Bunker Hunt, had suffered enormous losses on the silver market and was actively seeking bids for the permits in order to meet his debts. In the Federal Court, the Mareva injunction was approved in principle in *Elesguro Inc.* v. *Ssangyong Shipping Co. Ltd*,[189] but not granted because the plaintiff's claim in the action lacked any nexus with the territorial jurisdiction of the court.[190]

However, despite an initial set-back, it is in Ontario that the Mareva cases have found most favour, but only in the past year. The set-back came in June, 1978 in *OSF Industries Ltd* v. *Marc-Jay Investments Inc.*[191] That case concerned a non-resident defendant in default on a promissory note, and the plaintiff feared that the defendant would remove its assets from the jurisdiction once the writ was served. The facts are only barely outlined, but Lerner J. had little difficulty in rejecting the new Mareva cases and relying on the traditional authorities.

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[185] See Civil Procedure Rules (N.S.), Rule 49. Under the Rule, a plaintiff must post a bond as well as prove the required facts by affidavit; such a bond may also be posted by a defendant to regain possession of the property attached.

[186] (1979), 10 B.C.L.R. P-21 (S.C.).

[187] *Supra*, footnote 157.

[188] (1980), 114 D.L.R. (3d) 35, [1981] 1 W.W.R. 209, 16 C.P.C. 168 (S.C.N.W.T.).

[189] (1980), 117 D.L.R. (3d) 105 (Fed. Ct).

[190] In that respect, the decision reflected the House of Lord's decision in *The Siskina*, *supra*, footnote 158.

[191] *Supra*, footnote 151.

Not until February, 1981 was this traditional approach set aside in *Liberty National Bank & Trust Co.* v. *Atkin et al.*[192] The facts of the case assisted the court and illustrate the difficulty of ascertaining a defendant's assets and financial dealings for an *ex parte* application. A United States bank seeking to collect on a defaulted loan had found that the defendants had liquidated or transferred nearly all of the assets of which the bank was aware. Only a term deposit remained, and the respondents had even tried to remove those funds before its maturity date. The bank was only aware of the various assets because the defendant had been required to disclose them in order to obtain the loan originally. Rare is it that a plaintiff will have such a handy check-list of assets.

Montgomery J. rejected the previous Ontario authorities and adopted the Mareva cases, including the guidelines set out in *Third Chandris Shipping*. He stated:[193]

> In my view, the winds of change cry out for the new equitable remedy that Mareva provides. I adopt the test laid down by the Master of the Rolls in *Third Chandris Shipping*. I also adopt the proposition in *Prince Abdul Rahman* that, if there is a danger of the defendant absconding or of the assets being removed out of the jurisdiction or disposed of within the jurisdiction, or otherwise dealt with so that if the plaintiff obtains judgment he may not be able to have it satisfied, an injunction should issue if the safeguards in the test in *Third Chandris Shipping* are met.
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> I cannot believe that the equitable jurisdiction of this Court should be any less than that of the English Court. The statute affording jurisdiction is practically the same. The size of Ontario and the complexity of its geography invite the remedy. In my view, the doctrine should not be restricted to the threat of removal of assets from Ontario.

This attitude was shared by Grange J. in *Pacific Airlines Ltd* v. *Hind*.[194] This case serves to bridge the gap between the Mareva cases and another exception to the traditional rule, those cases where there has been a fraudulent disposition of assets, as recently extended by the Ontario courts.[195] Again, the facts were critical to the court's decision. The defendant, an experienced criminal, was being sued by the plaintiff for conversion of a gold bar stolen from it during transit and never recovered. The defendant had already pleaded guilty to the theft and was in jail.

The plaintiff's investigations revealed that the defendant's only known asset was a vested interest in part of his grandfather's estate, which was about to be distributed. An *ex parte* order granting a

[192] (1981), 31 O.R. (2d) 715 (H. Ct).

[193] *Ibid.*, at p. 723. See also *Quinn* v. *Marsta Cession Services Ltd et al.* (1981), 34 O.R. (2d) 659 (H. Ct).

[194] (1981), 32 O.R. (2d) 591, 122 D.L.R. (3d) 498 (H. Ct).

[195] See *supra*, footnote 152. See also *Rosen et al.* v. *Pullen et al.*, *supra*, footnote 154.

Mareva injunction was obtained, and the defendant sought to set it aside. The injunction was continued by Grange J., who stated:[196]

> However, I have now reached the conclusion that Mareva has crept so far into our law that it is now impossible to say that a case applying the principle is wrong. Not only are there the cases I have mentioned, but I am told there are any number of unreported cases applying the principle in our jurisdiction alone. There is also the decision of Galligan J. in *Mills and Mills* v. *Petrovic*, 20 O.R. (2d) 238, which without mentioning Mareva adopts the principle that there can be execution before judgment where there is substantial evidence of fraud. Perhaps fraud is only an element which will more readily bring about the Mareva injunction. In any event, one more certainty of the law appears to have been swept away. . . .
>
> 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. There must be a very strong case and a real danger of disposition of the only assets which will satisfy the judgement.

Grange J. ended with a plea for an authoritative ruling that has yet to be answered. However, prior to *Canadian Pacific Airlines Ltd* v. *Hind*, the Divisional Court did set aside a Mareva injunction where there was no evidence of a fraudulent transfer nor of any claim against the defendant possessing the asset in question.[197] Montgomery J. was a member of that court and concurred in its judgement, which was released only a few weeks after *Liberty National Bank & Trust Co.* v. *Atkin et al.* Even Lord Denning M.R. would have had difficulty upholding the order on the facts available to the court.[198]

It remains to be seen what role the Mareva injunction will be permitted in Canadian jurisdictions. Initial caution can only be expected in the rather different legislative and commercial setting.[199] After all, even the English Court of Appeal only gradually increased the remedy's scope over the past seven years. At this point, it would appear that a court in this country must be satisfied that there is a strong *prima facie* case in the action and a real risk of the defendant's assets disappearing, either by evidence of prior fraudulent conduct or recent disposal of assets. Only good luck or thorough investigation will provide the latter evidence and the key to opening the Mareva door.

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[196] *Supra*, footnote 194, at pp. 595-596.

[197] *Bank of Montreal* v. *Page Properties Ltd et al.* (1981), 32 O.R. (2d) 9 (Div. Ct). See also *Erie Manufacturing Co. (Canada) Ltd* v. *Rogers* (1981), 11 A.C.W.S. (2d) 392 (Ont. H. Ct).

[198] See *ibid.*, pp. 18-19.

[199] Absconding debtor's legislation (*supra*, footnote 153) may already provide for situations in which the Mareva injunction would otherwise be used: but see *BP Exploration Co. (Libya) Ltd* v. *Hunt*, *supra*, footnote 188. Certainly the slowness of Canadian courts to grant "Anton Piller" orders (*supra*, footnote 182) exemplifies the courts' caution. As at the time of writing, there have been no reported Ontario cases granting such an order.