

**INJUNCTIONS — THE ABILITY TO BIND
NON-PARTIES**

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A traditional rule of chancery practice has been that only parties to an action are bound to obey any injunction granted as a remedy in the proceedings. However, non-parties are required to obey a court order that they are made aware of on pain of being cited for contempt in that they have either aided or abetted a named defendant, or have interfered and impeded the administration of justice. In this respect, Canadian courts demonstrate a more willing propensity than their United Kingdom counterparts to hold non-parties liable for contempt. This results in the loss of many procedural safeguards normally granted named defendants in any proceedings. In this paper, the author argues for caution in moving directly to hold non-parties liable for contempt and that a better approach would be to regularize the position of non-parties by bringing them into the proceeding through the use of either a representative defendant action, or, incorporation within the John and Jane Doe style of cause.

Selon une règle de pratique traditionnelle des Cours de chancellerie, seules les parties à une action sont tenues d'obéir à une injonction quelconque prononcée dans des procédures. Toutefois, des personnes autres que les parties sont tenues, sous peine d'outrage au tribunal, d'obéir à un ordre de la cour dont elles ont connaissance quand elles aident ou encouragent un défendeur nommé dans le jugement à violer celui-ci, ou encore quand elles interfèrent avec ou font obstacle à l'administration de la justice. À cet égard, les tribunaux canadiens, comparativement aux tribunaux du Royaume-Uni, font preuve d'une plus grande propension à condamner pour outrage des personnes autres que les parties. En conséquence, elles perdent plusieurs mesures de protection au plan procédural dont bénéficient normalement les défendeurs nommés dans toute procédure. Dans cet article, l'auteur soutient qu'il faut être prudent dans la condamnation pour outrage de personnes autres que les parties; une meilleure approche consisterait

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à régulariser la situation de ces personnes en les introduisant dans la procédure soit au moyen d'un défendeur-représentant, soit en les incorporant dans la désignation des parties, comme Jean et Jeannette Bertrand.

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I. Introduction

It is axiomatic that an injunction cannot be made against the world at large, one that is *contra mundum*. The corollary of this axiom is that only a party to an injunctive order is bound by it. Nevertheless, there are situations in which an applicant believes it is desirable to cast an injunction in wider terms so that non-parties are caught within its parameters, for example, the actions of industrial picketers¹ or environmental protesters² who wish to disrupt and halt the commercial activities of a plaintiff. Or, the plaintiff may wish to seek an *Anton Piller* order to search and seize infringing intellectual property being sold by transient and itinerant flea-market and street vendors.³ Yet another example may be the plaintiff's desire to prevent the disclosure of confidential information by the news media and any others who might be disposed toward publishing the material.⁴ In all these examples the plaintiff may know the identity of some defendants, be they union or environmental leaders, street vendors or news media publishers, and may bring suit against them directly, but often, the plaintiff will not know the identity of many others who either arrive to support the picket or protest, sell infringing merchandise, or publish confidential material.

¹ *International Longshoremen's Association, Local 273 v. Maritime Employers' Association*, [1979] 1 S.C.R. 120.

² *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048.

³ *Montres Rolex S.A. v. Balshin*, [1993] 1 F.C. 236 (C.A.).

⁴ *Venables v. News Group Newspapers Ltd.*, [2001] 2 W.L.R. 1038 (Fam.Div.).

Courts have responded in essentially two ways to a plaintiff's requests for broader injunctive relief. One way has been to expand on who is actually captured as a defendant in proceedings. Examples of this approach are proceedings brought against a named defendant as representative of a class, and the use of the fictitious John and Jane Doe appellation. The second way has been to advance the notion that a person, although not named in a court order, is, nevertheless, bound to observe it on pain of being found guilty of contempt.

This article seeks to explore the development of the contempt proceeding against non-parties in Canada with passing reference to developments elsewhere, particularly in the United Kingdom. I argue that those Canadian developments, encouraged by the Supreme Court of Canada, have resulted in an appreciable loss of civil procedural rights by non-parties. This does not necessarily have to be so. Through the use of representative defendant actions, and the John and Jane Doe appellation, a balance can be maintained between litigants' interests without violating an important legal canon: that only parties to an action are bound by the injunction.

II. *English Historical Development of the Canon that only a Party to an Injunction Order is Bound by it*

The notion that only parties to an action are bound by the court's order has a long pedigree.⁵ At its root this rule embodies the principle that an individual has a right to be heard before being condemned, *audi alteram partem*. Historically, and with respect to injunctions, the rule is said to be derived from the judgment of Lord Eldon in *Iveson v. Harris*.⁶ That action arose for a committal for contempt of a prohibition order issued by the Chancery Court against proceedings brought in the Marshalsea Court. The alleged contempt was the continued proceeding to enforce a bail bond that had been issued to secure performance of a contract. While the initial contract had been the subject of the prohibition order, the order did not cover the rights under the bail bond. Lord Eldon held that no contempt had been made out. The link between being heard, and thus made subject to an order, is clear in the judgment:

...I have no conception, that it is competent to this Court to hold a man bound by an injunction, who is not a party in the cause for the purpose of the cause. The old practice, was that he must be brought into Court, so as according to the ancient laws and usages of the country be made a subject of the writ.⁷

⁵ See the comments of Stamp J. in *Re Wykeham Estate*, [1971] 1 Ch. 204 at 208, and the dissenting judgment of Wood J.A. in *MacMillan Bloedel Ltd. v. Simpson* (1994), 118 D.L.R. (4th) 1 (B.C.C.A.) at 31, aff'd *supra* note 2. A corollary in early Chancery practice was the rule that all parties who had an interest in proceedings had to be present or represented so as to effect complete justice. See G. Hazard, "Indispensable Party: The Historical Origin of a Procedural Phantom" (1961) 61 Columbia L. Rev. 1254.

⁶ (1802) 7 Ves. Jun. 252 (Ch.), 32 E.R. 102.

⁷ *Ibid.* at 256-7.

There were other reasons for the rule as well. Because equity acts only *in personam*, an injunction made against the world at large took on the indicia of an *in rem* order and thus exceeded equity's traditional jurisdictional boundaries. The reification of the *in personam* jurisdiction was an important distinction between judicial and legislative functions as well as between common law and chancery courts. Equity acted on the conscience of the individual alone to purge his wrongdoing. In addition, historically the role of injunctions was much more circumscribed than today. Prior to the *Judicature Acts* Snell suggested only two classes of injunction: those issued to prevent the continuance of inequitable judicial proceedings, and those issued to restrain wrongful acts, narrowly defined as being either breach of contract or a tort.⁸ This limited jurisdiction was unlikely to provide much opportunity to capture large numbers of non-parties within the terms of an order.

The rule that only those parties to the injunction were bound by it brought a quick response by some enterprising litigants who sought to have their agents or servants perform what they were forbidden to do by the injunction. Naturally, this brought an equally swift response from the courts. In *Lord Wellesley v. The Earl of Mornington*⁹ an injunction was granted restraining the defendant from cutting timber. The injunction had been in the name of the defendant exclusively, and he had instructed his agent to cut the timber instead. The plaintiff brought a motion for committal for contempt against the agent. This action was rejected by Lord Langdale M.R. on the basis that the injunction could not bind an unnamed party. However, Lord Langdale suggested that an action could be brought for contempt of court against one who, with knowledge, aided and assisted the named defendant to breach the injunction. In a subsequent action, the plaintiff brought such a motion against the servant who was then found guilty of contempt, although this time Lord Langdale used the verb 'intermeddling' to described the accused's conduct. It is important to note in the judgment that merely changing the terms of the injunction to include both the named defendant and his 'agents or servants' would not be enough to cure the defect in the plaintiff's original action. The only way the unnamed party could be held in contempt was for his aiding and abetting, and not for a violation of the injunction itself of which he was never a party.

The decision in *Lord Wellesley v. The Earl of Mornington*¹⁰ was later followed in *Seaward v. Paterson*.¹¹ The plaintiff had successfully gained an

⁸ See for example in E. Snell, *Principles of Equity*, 12th ed. (1898) at 642 *et. seq.*

⁹ (1848), 11 Beav. 180 (Ch.), 50 E.R. 786. See also *Avery v. Andrews* (1882), L.J. 51 N.S. (Ch.) 414. Injunction prohibiting trustees from disposing of certain assets. Three old trustees being replaced by three new trustees who claimed they were not bound by the injunction. Court held that the three new trustees had knowledge of the order and were thus guilty of contempt. And see *Lewes v. Morgan* (1818), 5 Price 518 (Exch.), 146 E.R. 681. Upon an order prohibiting the defendant from receiving rents, the defendant's solicitor then started to receive the rents in his place. The solicitor was held to be in contempt where he had notice of the injunction and knowledge that his activities violated the Court's order.

¹⁰ *Ibid.*

¹¹ [1897] 1 Ch 545 (C.A.).

injunction against the defendant Paterson, his agents and servants, requiring the defendant to refrain from creating a disturbance in premises abutting the plaintiff's premises. The defendant continued to run boxing fights in violation of the injunction. The plaintiff then brought committal proceedings against the defendant, his servant Sheppard, who had acted as 'master of ceremonies', and Murray, a spectator and collaborator in running the boxing bouts. The trial judge had found all three guilty of contempt. The defendant was guilty of direct breach of the injunction, while Sheppard and Murray were guilty of aiding and abetting the defendant. Murray appealed. The judges of the Court of Appeal were unanimous in seeing no merit in the appeal. Lindley L.J.:

A motion to commit a man for breach of an injunction, which is technically wrong unless he is bound by the injunction, is one thing; and a motion to commit a man for contempt of Court, not because he is bound by the injunction by being a party to the cause, but because he is conducting himself so as to obstruct the course of justice, is another and a totally different thing. The difference is very marked. In the one case the party who is bound by the injunction is proceeded against for the purpose of enforcing the order of the Court for the benefit of the person who got it. In the other case the Court will not allow its process to be set at naught and treated with contempt.... The distinction between the two kinds of contempt is perfectly well known, although in some cases there may be a little difficulty in saying on which side of the line a case falls.¹²

And by Rigby L.J.

It is quite right, no doubt, that when a prohibition or an injunction is granted the Court should be careful to see how far it extends; and that its meaning with reference to the injunction should not be overstepped, and people be brought in as though they were prohibited or enjoined, when the Court never dreamt of prohibiting or enjoining them.... That there is a jurisdiction to punish for contempt of Court is undoubted. It has been exercised for a very long time — for longer than any of us can remember — and it is a punitive jurisdiction founded upon this, that it is for the good, not of the plaintiff or of any party to the action, but of the public, that the orders of Court should not be disregarded, and that people should not be permitted to assist in the breach of those orders in what is properly called contempt of Court.¹³

A number of observations on these historical foundations can be made. First, the rule that only those named in an injunction are bound by it directly has an almost sacred quality. Including individuals within the terms of the order, as in agents or servants, did not make them directly liable under the injunction where they had not been parties to the dispute. The right to be heard before being made subject to an order was highly valued. Second, all these cases involved permanent injunctions or prohibitions and not interlocutory proceedings. The court had determined the substantive rights and thus there was no opportunity for a non-party to be added to the litigation. Third, any reticence in holding non-parties liable to obey the injunction directly was quickly compensated by a

¹² *Ibid.* at 553-54.

¹³ *Ibid.* at 558.

willingness to advance contempt proceedings against the same individual for aiding and abetting breach by a named party or, for varying degrees of intermeddling. Many of the reported cases deal with the extent to which the persons against whom the committal proceedings were brought had notice of the court's injunction.¹⁴ Finally, the dicta of Lindley and Rigby L.JJ. in *Seaward v. Paterson* alluded to a wider jurisdiction than aiding, abetting, or intermeddling, and that was obstructing the course of justice and bringing the court's authority into disrepute.

III. Recent Developments in the United Kingdom

The historical position had, until the last decade, remained remarkably stable in commonwealth common law jurisdictions. In the United Kingdom courts affirmed Lord Eldon's dicta on frequent occasions. In *Marengo v. Daily Sketch and Sunday Graphic Ltd.* Lord Uthwatt, for the House of Lords, spent some time explaining that an injunction granted against "the defendant's, their staff servants and agents" could not bind the staff, servants or agents directly because they were not parties to the action. Nevertheless, they could be found in contempt if they aided and abetted the defendant. Lord Uthwatt was critical of the wording of the order in suggesting the former where clearly no liability could lie. However, he also opined that it was "desirable to mark the amplitude of the order by including in it some reference" to those who could be caught by contempt indirectly for aiding and abetting. To this end he recommended adoption of alternative wording; "defendants, by their servants workmen agents or otherwise".¹⁵

In *Z Ltd. v. A-Z and AA-LL* the English Court of Appeal had to determine whether a Mareva injunction would bind third-party banks not named in the

¹⁴ For example, in *Seaward v. Paterson*, *ibid* Murray argued that he was a mere spectator and had not been present when the court issued its injunction, although he had been present when the proceedings commenced and was interested in their outcome. In *Lewes v. Morgan*, *supra* note 8, Baron Wood dissented from the other two judges on the point that the defendant accused of contempt had received insufficient notice of the injunction. In particular, Baron Wood considered a newspaper account of the proceedings for a prohibition insufficient notice of the court's order to hold the defendant liable for aiding and abetting in a breach of the order.

¹⁵ [1948] 1 All. E.R. 406 at 407 (H.L.), see also *Ranson v. Platt*, [1911] 1 K.B. 499. The corollary of this namely the liability of a corporate defendant for the actions of its agents and employees has been dealt with in *Re Supply of Ready Mixed Concrete (No.2)*, [1995] 1 A.C. 456 (H.L.). An order had been given by the Restrictive Practices Court restraining the defendant corporations from entering into price fixing agreements. In spite of instructions having been made to local managers to refrain from such activity, a number continued to do so. In contempt proceedings the corporate defendants were held liable for contempt. Direct infringement of the court's order did not require intention on part of the employer to disobey. The employer could be held vicariously liable for the actions of the employees where they were acting within the scope of their employment. And see C.J. Miller, *Contempt of Court*, 3rd ed. (Oxford: Oxford University Press, 2000) at 14.83.

original order but who had been given notice of the injunction restraining the removal of the defendant's assets away from the court's jurisdiction. This issue was compounded by the fact that at the time the banks were given notice of the order the defendant had not yet been served. The third-party banks argued that they could not be said to be aiding and abetting the defendant, and therefore not guilty of contempt of court, until such time as the defendant received notice of the injunction and was then enjoined. Lord Denning M.R. met this argument by suggesting that the Mareva jurisdiction operated *in rem* and thus bound the third-party from the moment the order was issued by the court.¹⁶ This argument had been previously refuted in *Cretanor Maritime Co. Ltd. v. Irish Marine Management Ltd.*¹⁷ However, Everleigh L.J., citing *Seaward v. Paterson*,¹⁸ met the argument by pointing out that the banks were liable for contempt in their own right for knowingly interfering with the course of justice rather than for aiding and abetting the defendant.

In 1992 the House of Lords was afforded an opportunity to address directly the liability of non-parties for contempt in *A.-G. v. Times Newspapers Ltd.*¹⁹ This case was one of many dealing with the publication by Mr. Peter Wright, a former British security service employee, of his book *Spycatcher*. The action was brought by the Attorney-General to restrain a number of newspapers from publishing serialisations of the book in the United Kingdom. The three main aspects of the case were press freedom and prior restraint, whether the law of confidences applied to government employees against a background of wide dissemination of the book in other jurisdictions, and under what circumstances an injunction could apply to non-parties. The first two aspects of the case have been widely discussed by others.²⁰ On the last issue the question before the court was whether non-parties who had knowledge of an injunction issued against other newspapers, and which enjoined them from publishing parts of Mr Wright's book until such time as the issue of the crown's claim for breach of confidentiality had been determined, were guilty of contempt of court when they subsequently published a serialisation of the book.

The appellants won in the trial court, although this was reversed on appeal. Before the House of Lords the appellants vigorously argued that a non-party could only be held in contempt of court where they had knowingly aided and abetted the named defendant in breaching the order and that there was no other contempt jurisdiction against non-parties. Thus, the court confronted the precise bounds of the contempt jurisdiction and what was covered in the notion

¹⁶ [1982] Q.B. 558 at 573 (C.A.).

¹⁷ [1978] 3 All E.R. 164 (C.A.).

¹⁸ *Supra* note 16 at 578-79.

¹⁹ [1992] 1 A.C. 191.

²⁰ See *A.-G. v. Guardian Newspapers (No.2)*, [1990] 1 A.C. 109 (H.L.), See R.G. Hammond, "The Wright Case — Wrong Answer?" (1989) 4 I.P.J. 87, and P. Birks, "A Lifelong Obligation of Confidence" (1989) 105 L.Q.R. 501. See also the case before the European Commission on Human Rights, *Times Newspapers Ltd. and Neil v. United Kingdom* (1991), 73 Eur. Comm. H.R.D.R. 41.

of 'impeding or prejudicing the administration of justice by the court' in proceedings brought between the named litigants. The appellants conceded that they were aware of the injunction, and that they had intended by their publication to impede the administration of justice. The effect of publication was to destroy the subject matter of the litigation and to render the Attorney-General's claim for confidentiality of the Wright information pointless. The Attorney-General had not alleged any linkage between the named defendants and the appellants who were competitors, as such, there was no issue of aiding and abetting. Thus, the appellants argued that they had not committed the *actus reus* of the contempt in that there was no contempt for impeding the administration of justice by a non-party. On this question the Lords were unanimous that the appellants were wrong and were indeed guilty of contempt.

All the Lords' judgments follow a similar pattern of reasoning. First, they recognize in the earlier English authorities a distinction between contempt for breaching an injunction as a named party and contempt by a non-party for aiding and abetting. Second, they recognize that in earlier decisions the courts found in contempt those who knowingly interfere with the administration of justice. However, there was little unanimity on when interference occurs. Lord Brandon stated:

It seems to me, as a matter of principle that, if C's conduct, in knowingly doing acts which would, if done by B, be a breach of the injunction against him, results in impedance to or interference with the administration of justice by the court in the action between A and B, then, so far as the question of C's conduct being contempt of court is concerned, it cannot make any difference whether such conduct takes the form of aiding and abetting B on the one hand or acting solely of his own volition on the other.²¹

This approach would tend to look only at results. If the net effect of C's conduct is to do what B was enjoined from doing, then C is guilty of contempt regardless of any legitimate right C may have for carrying out the very conduct that B cannot.²²

²¹ *Supra* note 19 at 206.

²² That this was the intended result of Lord Brandon can be assumed from comments made earlier in his judgment at, *ibid.* 206 where he gives the following example:

Suppose that there is an action between A and B in which B claims, but A disputes, that B is entitled to demolish A's house and that in that action the court grants A an interlocutory injunction restraining B from demolishing A's house pending the trial of the action. Suppose further that C, of his own volition and in no way aiding or abetting B, himself demolishes A's house while the action between A and B is still pending. On these facts C would, in my opinion, be committing a contempt of court, because he would be knowingly impeding or interfering with the administration of justice by the court in the action between A and B.

.....the test for deciding whether C has committed a contempt of court is whether C has by his conduct knowingly impeded or interfered with the administration of justice by the court in the action between A and B.

Lord Jauncey was more circumspect and acknowledged in the principle just given that there “may be cases where the perfectly legitimate pursuit of a purpose by a stranger has the incidental result of frustrating an order. It does not inevitably follow that such pursuit will constitute contempt.” He also suggested that it was likely only in a limited number of cases, “that independent action by a third party will have the effect of interfering with the operation of an order to which he is not a party.”²³

Lord Oliver saw little value in cataloguing hypothetical circumstances which showed when the line of interference in the administration of justice was crossed. Rather, he signalled the importance that the activity of the non-party, “frustrates, thwarts, or *subverts the purpose* of the court’s order and thereby interferes with the due administration of justice in the particular action” [emphasis in the original].²⁴ ‘Purpose’ here refers to the court’s objective in seeking to administer justice between the litigants, which, on the facts before the court, was to preserve in the interim the confidentiality of the crown’s information. However, Lord Oliver did go on to deal with some of the particular objections the appellants had raised. First, he acknowledged that a stranger to litigation could well be advancing his or her own interest but, nevertheless, destroy the substrata of the action between the named litigants; yet, this did not necessarily constitute the *actus reus* of contempt. Second, the appellant argued that the focus on ‘purpose’, as defined above, requires the non-party to be able to readily determine the ambit of the court’s order. An order which tells a named party to refrain from a certain act achieves that purpose when the named party complies. To require something of non-parties invites uncertainty, and, in matters of criminal liability for contempt, uncertainty should not be permitted. Lord Oliver saw merit in this argument to the extent that the purpose of the court in making the order could not be readily determined by a non-party. However, in that case, he opined, the non-party would escape liability because the necessary *mens rea* would not be proved. “...[F]or an intention to frustrate the purpose of the court would be difficult to establish if the purpose itself was not either known or obvious.”²⁵ Third, the appellant argued that a non-party who is held in contempt for interference with the administration of justice is deprived of any opportunity to argue before the court that he or she is free to carry out the enjoined conduct because they are not litigants in any proceeding. Lord Oliver registered disquiet over this particular aspect of the contempt jurisdiction but thought that the non-party, in the facts before the court, was largely author of his own misfortune. That is, the appellant could well have come to court prior to publishing the serialisation of Wright’s book and sought directions as to whether what it intended to do violated the court’s order. Lord Oliver analogised to the frequent actions of third-party banks who seek court directions to determine what is required to comply with a Mareva injunction.

²³ *Ibid.* at 231.

²⁴ *Ibid.* at 223, citing *A.G. v. Leveller Magazine Ltd.*, [1979] A.C. 440.

²⁵ *Ibid.* at 223.

As analysed in *A.-G. v. Times Newspaper Ltd.* the constituent elements of a contempt charge brought against a non-party requires both *mens rea* and *actus reus*. *Actus reus* requires that the non-party has done an act that, if performed by the named party would constitute a contempt of the court's order by that party, and which does interfere or impede the administration of justice in that it frustrates or renders futile the main *purpose* for which the court granted the injunction in the initial proceedings. In a subsequent case before the Court of Appeal, *A.-G. v. Newspapers Publishing Plc.*,²⁶ the court indicated that the adverse effect on the administration of justice had to be 'significant' and that a 'trivial or technical' breach could be ignored. With respect to the *mens rea* in *Times Newspapers*, that being conceded by the appellant in the House of Lords, their Lords had little to say, although, Lords Brandon and Jauncey both indicated it would be necessary to prove that the non-party 'knowingly' intended to interfere or impede the administration of justice. In the Court of Appeal, where this issue had been disputed, Lord Donaldson M.R. stated on the question of what type of intent was required:

....what is contemplated....is the power of the court to commit for contempt where the conduct complained of is specifically intended to impede or prejudice the administration of justice. Such an intent need not be expressly avowed or admitted, but can be inferred from all the circumstances, including the foreseeability of the consequences of the conduct. Nor need it be the sole intention of the contemnor. An intent is to be distinguished from motive or desire.²⁷

The *mens rea* requirement for this form of contempt is different from the requirement for contempt by a named party in disobeying the injunction. In the latter, all that is required is that the defendant acted intentionally to breach the court's order and liability is then strict.²⁸ This explanation of the *mens rea* requirement is similar to that applied in *Z Ltd. v. A-Z and AA-LL* to contempt by a non-party for aiding and abetting a named defendant.²⁹ In that case Eveleigh L.J. emphasised that the third-party bank had to 'knowingly' assist in the breach of the injunction in that it knew of the injunction and wilfully assisted the person to whom it was directed. Eveleigh L.J. also suggested that the bank could become liable for contempt if it acted carelessly or recklessly to such a degree that it could be said that it had acted with contumacious indifference.³⁰

²⁶ [1997] 1 W.L.R. 926 (C.A.).

²⁷ *A.G. v. Newspaper Publishing Plc.*, [1988] 1 Ch. 333 (C.A.), at 374-75. Lord Donaldson M.R.'s approach was itself endorsed in *A.-G. v. Newspapers Publishing Plc.*, *ibid.* at 936 per Lord Bingham C.J.

²⁸ See Miller, *The Law of Contempt*, *supra* note 14 at 4.52. The spectre of contempt for impeding or interfering with the administration of justice has created the possibility that a party could be held liable for contempt in advance of any order being granted on the basis that the non-party's actions have prejudiced the rights of a named party in potential litigation and have thus impeded the administration of justice. This was argued in *Harrow London Borough Council v. Johnstone*, [1997] 1 W.L.R. 429 (H.L.) where the court rejected such a submission.

²⁹ *Supra* note 16 at 581-82 and 583.

³⁰ *Ibid.* at 583, and see Miller *supra* note 15 at 14.65.

Recently, in a case that is remarkably similar to the *Spycatcher* saga, the English Court of Appeal further expanded on what constitutes the *actus reus* and *mens rea*. In *Steen v. A.-G.*³¹ the appellant, editor of *Punch* magazine, published a series of columns written by David Shayler, a former employee of the English Secret Service. Prior to the publication of the columns the Attorney-General had successfully obtained an interlocutory injunction restraining both Shayler and Associated Newspapers from publishing any material of a confidential nature which Shayler had acquired while in the employ of the Secret Service. The columns published in *Punch* contained previously published material and also new material which up until its publication had been confidential. The Attorney-General brought contempt proceedings against Steen on the basis that the publication of this material impeded and interfered with the administration of justice. Steen, who was unsuccessful in the trial court, defended against the charge on the basis that the Attorney-General had failed to prove that he had the requisite *actus reus* or *mens rea*.

After an extensive review of the *Spycatcher* cases the Court of Appeal held that the requisite *actus reus* was met when the Attorney-General proved that Steen had published the columns so as to defeat the purpose of the injunction which was: "to preserve until trial the confidentiality of material whose disclosure 'arguably posed a risk of damaging national security'".³² Turning to the *mens rea*, a majority of the court held that it had not been met because the Attorney-General had failed to prove that the appellant had the requisite knowledge "that publication would interfere with the course of justice by defeating the purpose underlying the injunction." The evidence showed that Steen was anxious not to publish material that would impact upon national security. He argued, and the majority accepted, that the inclusion of a proviso in the original injunction, which had purported to exclude from the injunction's ambit subsequent material in which the Attorney-General made a statement indicating that no confidentiality would be claimed, made the purpose of the order difficult to discern. In particular, was the order's purpose to restrain any and all statements from Shayler, or, only those that threatened national security? In addition, Steen had corresponded with the Treasury Solicitor, the appropriate government officer, to determine the parameters of the injunction and whether the material he was about to publish was a threat to national security. The correspondence with the Treasury Solicitor never clarified these areas and, with respect to the particular column that had precipitated the contempt charge, the appellant had reasonable grounds to believe that the Treasury Solicitor had delayed in replying so as to save the government from embarrassment. It was

³¹ [2001] 2 W.L.R. 1713 (C.A.), leave granted [2001] 1 W.L.R. 2111.

³² *Ibid.* at para. 129, per Simon Brown L.J., dissenting. The purpose of the injunction is described as including the preservation of confidentiality whose disclosure poses a risk of damaging national security, which recognizes the different approach to confidentiality applied to government as against a citizen. The government has no particular right to confidence based on privacy but can only argue confidentiality if it advances some public interest such as the maintenance of national security.

not sufficient for the Attorney-General to prove that Steen alone had knowledge of the injunction and intended to publish to satisfy the *mens rea* requirement. This judgment is further evidence of just how narrow the jurisdiction is on bringing suits for contempt against third parties based on impeding or interfering with the administration of justice.

The English approach to the liability of a non-party to obey a court order has witnessed a slow incremental growth in the type of conduct which will make a non-party liable for contempt. The English courts have consistently affirmed the position that only parties to an action are bound by the court's order. The extension of contempt beyond aiders, abettors and intermeddlers has been cautiously approved where the non-party intentionally sets out to impede or interfere with the administration of justice. Unfortunately it is difficult to give much precision as to when the actions of a non-party will impede the administration of justice, however, the English courts do require actual proof of an intent to interfere or impede the administration of justice. The vast majority of English cases appear to arise from the protection of confidentiality or the identity of witnesses.³³ In these cases it is relatively easy to see how any subsequent violation of a court order will impede the administration of justice where it will destroy the very substrata of the action and the rights protected by the court in upholding the confidentiality or secrecy. Even in these cases, proving the necessary *mens rea* may be very problematic. Nevertheless, there have been a number of instances where English courts have developed a true exception to the notion that only parties to an action can be bound by a court's order and have created an injunction that issues against the world at large, or *contra mundum*. The instances where this type of order has been made are varied, however, they have in common the element that the enjoined action, usually that of the press, if it went ahead unabated, would reveal the identity or current location of the plaintiff, and to the plaintiff's alleged detriment. For example, in *Re X (A Minor) (Wardship: Injunction)*³⁴ Mary Bell was found guilty of manslaughter of two boys when she was aged eleven. She was later released as part of her rehabilitation and had given birth to a child after her release. The News of the World newspaper became aware of Mary Bell's circumstances and proposed to run a feature story. The local council then brought an action to seek an order preventing publication of material which might lead to revealing the name Mary Bell now used and thus to identifying her daughter who had been made a ward of the court. Balcombe J. granted the injunction pursuant to the court's inherent jurisdiction to act in the best interest of wards of the court.³⁵ (The injunction was granted to protect Mary Bell's child and not Mary Bell herself.) However, the

³³ See also *A.-G. v. Leveller Magazine*, *supra* note 24.

³⁴ [1984] 1 W.L.R. 1422 (Fam.Div.)

³⁵ *Ibid.* at 1425: Balcombe J. (as he then was) doubted whether he had jurisdiction to grant such an order beyond a person who was a ward of the court. In *A.-G. v. Newspaper Publishing Plc.*, *supra* note 27 at 369, Lord Donaldson M.R. doubted the validity of Balcombe J's judgment, however, Balcombe L.J. at 388 affirmed the correctness of his earlier ruling.

injunction would only be effective against those who had notice of it. This jurisdiction to award an injunction against all the world to protect wards and others who fall within the court's inherent *parens patriae* jurisdiction has been followed in numerous other cases.³⁶

A more novel application has recently arisen in *Venables v. News Group Newspapers Ltd.*³⁷ In 1993 the two claimants had killed a toddler. Following their trials they were placed in detention homes run by a local authority. At the time of the trial an injunction had been granted preventing the publication of information about the claimants following their trial so that they would be given an opportunity to rehabilitate themselves free from constant media attention. Upon attaining the age of 18 (the age of majority) the claimants sought extension of the publication ban issued in 1993. The claimants were motivated to make this request after a number of newspapers and media groups applied to have clarification of the original injunction once the claimants gained the age of majority. In particular, the claimants wanted the news media to be restrained from publishing any current pictures, the location of their current detention homes, and details about their future placements in the community. This case differed from that of a minor or ward of the court in that the material sought to be enjoined related to the period when the claimants were of the age of majority. The claimants, although parties in unique circumstance, were not appreciably different from other infamous people who are subject to media attention. It is for this reason that they argued they were entitled to protect confidential information. The defendant then argued that under the appropriate common law doctrines of confidentiality, the court was required to consider the public interest in allowing disclosure and that since the enactment of the *Human Rights Act (U.K.) 1998* and *European Convention on Human Rights*, the court was required to give press freedom paramount importance. To this submission the claimants argued that in balancing the public interest, they were also entitled to protection under the *Human Rights* and *Convention* where the evidence showed that publication of the material, and thus identification of the claimants, would result in a real risk of their being harmed by those who wished to avenge the murder of the toddler. Butler-Sloss P. accepted that the law of confidentiality, in light of the direction of the human rights legislation, could cover the unique circumstances of the claimants and that the court had jurisdiction to grant an injunction. The right to press freedom of expression had to be construed consistently with other rights in the legislation, and, in particular, the claimants' rights to life, prohibition of torture, and respect for private and family life (articles 2, 3, & 8 of the *European Convention*). Turning to the scope of the injunction, Butler-Sloss P. recognized that an order made against the lone defendant would be ineffective if other newspapers were then free to publish what the *News of the World* had been prevented. Although an order made against a named defendant could give rise to contempt proceedings if subsequent actions of a non-party could be found to

³⁶ The cases are full covered in Miller, *supra* note 15 at 10.174-10-189.

³⁷ *Supra* note 4.

be an interference with the administration of justice, Butler-Sloss P. believed it was inappropriate to do through the back door what she could not do through the front door. Relying upon a broad requirement to act in a manner compatible with the *European Convention*, she declined to follow the dictum of Lord Eldon in *Iveson v. Harris*³⁸ and granted the injunction against the world at large. The terms of the injunction were to ensure that any information that would lead to the future identification and location of the claimants was not published, including photographs, and interviews with co-detainees and care-givers. Information on the workings of the secure units where they had been detained before being paroled could be published after a period of 12 months had elapsed, provided it would not lead to the identification and current location of the claimants. The injunction was to operate for the future, presumably for the natural life of the claimants, and it prohibited all publication by any form of media. Anticipating the fact that because the injunction could only be effective in England and Wales, and that material that is once placed in the public domain can no longer be considered confidential, Butler-Sloss P. also prohibited the wider circulation of material which may have entered the public domain through the internet or other foreign media outlets.

In the English context the effect of making the order against the world at large will subject a non-party who violates the terms of the injunction guilty of civil contempt rather than criminal contempt, the appropriate charge when the non-party interferes with or impedes the administration of justice.³⁹ This would effectively alter the *mens rea* requirement, the former requiring an intentional act to breach the order which is not 'casual or accidental and unintentional'.⁴⁰ The latter, requires proof of an actual intent to impede or interfere with the administration of justice. However, in both cases actual knowledge of the injunction would still be a prerequisite to any committal proceeding of a non-party for contempt.

The tendency in the United Kingdom is to eschew distinctions between civil and criminal contempt. The safeguards normally associated with criminal proceedings, i.e. higher burden and standard of proof and protection against self-incrimination, have been assimilated into civil proceedings for contempt of court for both civil and criminal contempt where both pursue punishment and deterrence as goals.⁴¹ Nevertheless, there may still be some residual distinctions. For example, it is more likely that an action based on impeding and interfering in the administration of justice will be brought by the Attorney-General rather than by the plaintiff. The former is charged with maintaining public order, and

³⁸ *Supra* note 6.

³⁹ Miller, *supra* note 15 at 14.61. Note that in *Scott v. Scott*, [1913] A.C. 417 at 458-59, Lord Atkinson described as absurd the notion that a named person who violates an injunction is liable only for civil contempt, whereas, a non-party who impedes the administration of justice is guilty of criminal contempt.

⁴⁰ *Heatons Transport (St Helens) Ltd. v. Transport and General Workers' Union*, [1973] A.C. 15 (H.L.) at 109-10, and see Miller, *ibid.* at 14.51.

⁴¹ Miller, *ibid.* at chapter 2.

it is that which is jeopardised by interference with the administration of justice. It is also difficult to escape a populist view that some contempts are more odious than others and that this should be reflected not only in the quantity of punishment imposed but in the characterisation of the contempt charge itself.⁴²

IV. *Developments in Canada of the Canon that Only a Party to an Injunction Order is Bound by it*

In Canada there are a couple of early reported cases which simply cite and follow the early English precedents⁴³ with little, if any, discussion on whether the order can be made against non-parties. Another group of cases involves injunctions which have been granted between named parties, but which have an unintended result of appearing to restrict the activities of a third party.⁴⁴ By far the largest number of cases in Canada in which the plaintiff has purported to make non-parties subject to an injunction arise in the context of labour picketing.

In *Bassel's Lunch Ltd. v. Kick et. al.*⁴⁵ the plaintiff successfully obtained an injunction enjoining named defendants, all members of the Hotel and Restaurant Employees International Alliance, from picketing outside the plaintiff's premises. In place of the named defendants, other members of the union commenced picketing. The plaintiff then brought proceedings for contempt against the non-parties. In the trial court, Kingstone J. held against the plaintiff. The evidence did not prove that the non-parties had aided and abetted the named defendants to breach the injunction where the named defendants had been found to be in full compliance with the court's original order. The trial judge was reversed on appeal. Riddell J.A., for the court, saw the acts of the non-parties as intermeddlers and thus within the terms of Lord Langdale M.R.'s enunciation of the law in *Lord Wellesley v. The Earl of Mornington*.⁴⁶

⁴² In *A.-G. v. Newspaper Publishing Plc.*, *supra* note 27 at 362, Donaldson M.R. suggested that criminal and civil contempt should be reclassified into conduct which involves a breach, or assisting a breach, of a court order, and, conduct which involves an interference with the administration of justice. In the former, it is left to the parties to raise whereas in the latter, it is the function of the Attorney-General as guardian of the public interest.

⁴³ See *Hynes v. Fisher* (1883), 4 O.R. 78 (Q.B.) at 86-87 citing *Lord Wellesley v. The Earl of Mornington*, *supra* note 9, and *Union Natural Gas Co. v. Chatham Gas Co.* (1918), 56 S.C.R. 253 per Anglin J. (dissenting) at 280, citing *Seaward v. Paterson* *supra* note 10.

⁴⁴ See for example *Standal Estate v. Swecan International* (1989), 99 N.R. 1 (Fed. C.A.) on whether a Mareva injunction can bind *bona fide* purchaser from named defendant. *Gunn v. McInnes*, [1923] 1 W.W.R. 353 (Man.K.B.) In a dispute over property claimed by a party through adverse possession, an injunction granted against a subsequent purchaser of land was not binding on original vendor when the subsequent purchaser reassigned the land to the original vendor.

⁴⁵ [1936] O.R. 445 (C.A.).

⁴⁶ *Supra* note 9.

The key difference between Kingstone J.'s and Riddell J.A.'s judgment is the latitude encompassed within the notion of aiding and abetting. Kingstone J. chose to narrowly define the term. Before a person could be found guilty of aiding and abetting another party, that other party must also be guilty of undertaking the enjoined activity. The backdrop to Kingstone J.'s ruling was the view that the non-named defendants should really have been charged under the criminal law and that the plaintiff should not have sought to use the civil law to enhance punishment of criminal offences. Riddell J.A.'s approach more widely defined aiding and abetting to encompass a person who, with knowledge of the order, acts in a way that achieves the conduct that has been enjoined. In a subsequent case arising from the same labour dispute, and citing additional non-parties for contempt, Macdonnell J.A., for the Court of Appeal, summarised the law as follows:

An injunction restraining A from doing some act is not an injunction restraining B or C from doing it. In many instances, also, the fact that B or C do the act prohibited to A, does not amount to any assisting or aiding of A by B or C; the latter may be acting quite independently of A. On the other hand it is sophistry to argue that, because A refrains from doing the act, therefore B or C's doing it in his place is not assisting or aiding him. Where B and C act not independently but because of their interest in A, it may well be held that they are assisting or aiding him; at least they are inter-meddling and so may be found guilty.⁴⁷

The distinction between aiding and abetting an enjoined party and interfering with the administration of justice emerges in *Re Tilco Plastics Ltd. v. Skurjat*.⁴⁸ The Attorney-General for Ontario brought committal for contempt proceedings against 27 unionists who had been picketing outside the plaintiff's factory. Prior to the Attorney-General's intervention the plaintiff had obtained an interlocutory injunction restricting the number of picketers to 12. As a result of this injunction, other trade unionists mounted a campaign against the use of injunctions in labour disputes and commenced an orchestrated campaign to defy the injunction. As a result of this activity the 27 unionists, five of whom were instrumental in leading the campaign, were committed for contempt, although none of them had been named defendants in the original injunction proceedings. In this sense the primary motivation of those committed for contempt was not to aid and abet the initial strikers of the plaintiff — i.e. the named parties' purpose, although it did effect that result as well, but was to bring pressure to bear on both court and legislature concerning the use of injunctions in labour disputes — i.e. the non-parties' purpose. Gale C.J.H.C. held those committed for contempt guilty of criminal contempt. Following *Seaward v. Paterson* Gale C.J.H.C. stressed that a person was liable for contempt where they had knowledge of the court's order and set out to defy it, though not a party to the proceedings.⁴⁹ Most of the

⁴⁷ *Ibid.* at 456.

⁴⁸ (1966), 57 D.L.R. (2d) 596 (Ont. H.C.), (1967), 61 D.L.R. (2d) 664. Appeal to the Court of Appeal dismissed and leave to Supreme Court of Canada refused.

⁴⁹ *Supra* note 47.

argument in the case centred on whether the respondents had sufficient notice of the court's earlier injunction. The evidence before the court was that some had been given direct notice of the injunction after it had been issued while others were only made aware of its existence through newspapers, radio, and the posting of the injunction outside the plaintiff's premises. Gale C.J.H.C. was prepared to hold that the respondents had sufficient actual notice of the injunction such that they must have been aware of its existence and that their activities would have constituted an infringement of the injunction had they been named parties. Unlike developments in the United Kingdom there is little discussion by Gale C.J.H.C. on what are the constituent elements of a contempt charge for 'openly defying' a court order.

In *Re Tilco Plastics Ltd. v. Skurjat* Gale C.J.H.C. recognized the form of contempt as being criminal contempt. This conclusion necessarily followed the Supreme Court of Canada's ruling in *Poje v. A.G. for B.C.*⁵⁰ In that case the plaintiff successfully sought an injunction against the Woodworkers Union restraining its members from picketing the plaintiff's ship. The union's actions prevented longshoremen from loading the ship, as they would not cross the picket line. After the injunction was granted the union continued its picketing and the plaintiff commenced proceedings to commit the members of the union for contempt. Prior to the committal proceedings coming before the court the plaintiff settled its dispute with the union and agreed to discontinue the committal action. However, the Chief Justice for British Columbia, on his own motion continued the committal proceedings on the basis that the open defiance of the earlier court's order amounted to criminal contempt. After hearing the evidence of what had happened when the sheriff had tried to execute the original injunction, the Chief Justice found the union members guilty of criminal contempt.⁵¹ The appellant unionists appealed. They argued that the line between civil and criminal contempt drawn from cases such as *Seaward v. Paterson* distinguished between non-compliance with an injunction by a named party, and the actions of a non-party. Civil contempt is one of procedure only in that the plaintiff is seeking to gain compliance against the party directly responsible for violating the plaintiff's rights. In criminal contempt the actions of the non-party are in open defiance of the court's order and amount to an interference with the administration of justice. The Supreme Court rejected this analysis to differentiate the forms of contempt. Both forms of contempt could amount to either civil or criminal contempt, however, criminal contempt is distinguished by the fact that the harm done is a 'public' injury, which is more than just disobedience of the court's order. Although dealing only with a named defendant, in passing, Kellock J. suggested that in matters of contempt of court, a non-party is on the same footing as a named party.⁵²

⁵⁰ [1953] 1 S.C.R. 516.

⁵¹ *Canadian Transport Co. v. Alsbury et al.*, [1952] 6 W.W.R. (N.S.) 473 (B.C.S.C.) aff'd [1952] 7 W.W.R. (N.S.) 49 (B.C.C.A.).

⁵² *Poje*, supra note 50 at 522.

The decision in *Catkey Construction Ltd. v. Moran*⁵³ goes the furthest in holding a non-party liable for his or her own independent actions which are neither aiding, abetting nor intermeddling, but, which are seen as defiance of the court. The plaintiff gained an injunction against named defendants, all members of the Trades Council, enjoining them from picketing outside the plaintiff's construction site. The plaintiff refused to employ the defendants' members and insisted on using non-union labour. The non-party defendant, who was neither a member of the Trades Council, nor had been encouraged by the named defendants to join the picket, acted on his own volition to picket the plaintiff's premises. The evidence proved that the non-party defendant had been given notice of the injunction. Pennell J. held the non-party defendant liable for contempt on the basis that a person who was aware of a court order and then knowingly contravened it, acted in defiance of the court and was guilty of contempt. This judgment, although of a relatively low level, started a trend in the Canadian cases to hold non-parties liable for civil contempt⁵⁴ where they simply have notice of the injunction and are carrying out the enjoined acts albeit not as aiders, abettors or inter-meddlers.

In another series of cases, Canadian courts have dealt with whether an injunction against a named union includes all members of the union, and whether the terminology of the order which specifically enjoins all persons acting with knowledge of the order can, in law, have that affect. In *Evergreen Press Ltd. v. Vancouver Typographical Union*⁵⁵ Macfarlane J. held that he had found no authority to include amongst the parties enjoined all persons acting with knowledge of the order who were not parties to the order.⁵⁶ In *Bartle & Gibson Co. Ltd. v. Retail, Wholesale and Department Store Union*,⁵⁷ the British Columbia Court of Appeal took a more accommodating position. The injunction was expressed in similar language to that in *Evergreen Press*⁵⁸ in that it purported to directly enjoin any person having knowledge of the order. Tysoe J.A., speaking for the court, saw no error in the order's terminology holding that persons who, with knowledge of the order, took steps to assist in contravening it, were also liable for contempt. The terminology of the order was considered appropriate given the state of labour relations in British Columbia at the time, and where there was a high propensity for intermeddlers to become involved in labour disputes. Tysoe J.A.'s judgment appears to eschew differences in contempt by a named party directly and of a non-party who aids, abets or intermeddles.⁵⁹

⁵³ (1969), 8 D.L.R. (3d) 413 (Ont. H.C.).

⁵⁴ The form of contempt is not discussed in the judgment. Presumably the court was dealing with civil contempt as the action was brought by the plaintiff rather than Attorney-General and the fine imposed was rather small. There was no evidence of public defiance other than the actual picketing action alone.

⁵⁵ (1959), 18 D.L.R. (2d) 401 (B.C.S.C.).

⁵⁶ A similar argument was accepted in *C.P.R. Co. v. Brady* (1960), 26 D.L.R. (2d) 104 (B.C.S.C.) per Collins J..

⁵⁷ (1971), 18 D.L.R. (3d) 232 (B.C.C.A.).

⁵⁸ *Supra* note 55 at 402.

⁵⁹ *Bartle, supra* note 57 at 238.

The apparent contradictory approaches in *Evergreen Press* and *Bartle & Gibson* were confronted by Hutcheon Co.Ct.J. in *Mitchell Bros. Truck Lines v. General Truck Drivers' & Helpers' Union*.⁶⁰ Hutcheon Co.Ct.J. was asked to rule directly on whether an interlocutory injunction order aimed at preventing the defendants from encouraging firms not to deal with the plaintiff while the plaintiff was embroiled in a labour dispute with a brother local of the same union in Oregon, U.S.A, could include the term "anyone having knowledge of this order". Hutcheon Co.Ct.J. ruled in the plaintiff's favour provided the wording followed the suggestion of Lord Uthwatt in *Marengo*⁶¹ and made it clear that non-parties were only caught by contempt for aiding and abetting.⁶²

In *Griffin Steel Foundries Ltd. v. Canadian Association of Industrial, Mechanical and Allied Workers*⁶³ the Manitoba Court of Appeal, without hearing argument from counsel, held that it was inappropriate in the case to include a provision in the injunction purporting to bind "any person having notice of this order." The injunction application had been made by an employer seeking to restrain the union, which represented the employees, from obstructing access to the applicant's plant.

Finally, in *International Longshoremen v. Maritime Employers*⁶⁴ the Supreme Court of Canada approved of the dicta of Lord Uthwatt in *Marengo*. The respondent employer, plaintiff at trial, had sought an interlocutory injunction against the appellants, three trade unions, to enjoin them from refusing to work in contravention of a term not to strike contained in their respective collective agreements. The appellants had refused to work because they were honouring another union's picket line. Estey J., speaking for the court, opined that it did not invalidate an order to include reference to 'officers, members and servants' since the appellant unions could only act through those representatives. In addition, the terminology of the order had been widely used in Canada.

...such language has, for many years, been adopted in these injunctions,....no doubt for the good reason that it makes the impact and sense of the order clear to all that those likely to be affected thereby and, in any event, such wording can hardly be said to harm any of the persons in law affected by the order.⁶⁵

A number of observations can be made on these Canadian cases. One, the presence of the phrase "anyone having knowledge of the order", or similar variation is immaterial to whether a person can be held liable for contempt of

⁶⁰ (1974), 57 D.L.R. (3d) 540 (B.C.S.C.).

⁶¹ *Supra* note 15 at 407.

⁶² Counsel before Hutcheon Co.Ct.J. had also been counsel in *Bartle & Gibson*, *supra* note 57, and submitted that the Court of Appeal in that case had not been aware of the decision in *Marengo*. In addition, the same Court of Appeal had in an unreported decision (*Cunningham Drug Stores Ltd. et. al v. Haynes et. al.* (7 August 1973)) deleted the words "and anyone having knowledge of this Order".

⁶³ (1977), 80 D.L.R. (3d) 634 (Man. C.A.).

⁶⁴ *Supra* note 1.

⁶⁵ *Ibid.* at 144.

court. The order cannot be made to extend directly to non-parties by dint of changes in terminology. However, the practice of including this type of phrase has been encouraged so as to forewarn non-parties of potential exposure to contempt where their activities aid, abet, intermeddle or defy the court's order or authority. Unlike English courts, which have expressed grave doubts as to the propriety of this terminology, senior Canadian appellate courts, with one exception, have endorsed it. Two, the majority of the Canadian cases are interlocutory proceedings where it is arguable that there is still an opportunity to add parties to the litigation or to challenge the basis of the court's original order. Three, a majority of the cases involve picketing or protest where the injunction is truly ancillary and collateral to the substance of the dispute between the named parties.⁶⁶ Four, there is a wide latitude in how the courts define the egregious conduct of the non-party. A narrow view is to require the non-party's actions to specifically aid and abet the named parties to undertake the enjoined conduct. In this sense, the non-party is acting in collusion with the named party to achieve the same objective. A wider view is to simply require the non-party's actions to intermeddle with the named parties enjoined conduct. In this sense, the non-party's intent and objective in participating may not be the same as the named party, yet the non-party is aware that his or her actions will further the named party's goal in some respect. The widest position is simply to require the non-party's actions to have the same effect as the enjoined conduct regardless of how that may advance the interests of the named party. In this sense, even totally independent action by the non-party will give rise to contempt if it violates the terms of the injunction.⁶⁷ In this position, the primary function of the contempt proceeding is to maintain authority and respect for the court in the face of defiance. However, the courts have expressed ambivalence on whether the defiance has to be 'public' so as to amount to an 'open' and very public display of defiance, or whether merely participating in carrying out the enjoined activity is enough to comprise defiance of the court's authority. Five, even a non-party acting in open defiance of the court may only be liable for civil contempt rather than the English practice of holding the person guilty of criminal contempt.

⁶⁶ For some recent examples outside the area of picketing and protest see *Chicago Blower Co. v. 141209 Canada Ltd.* (1987), 44 Man. R. (2d) 241 (C.A.), leave to appeal refused (1987), 50 Man.R. (2d) 80. Non-party corporate officers held subject to contempt where they aided and abetted a corporate defendant to breach an injunction. *Royal Bank of Canada v. Merchants Consolidated Ltd.* (1988), 55 D.L.R. (4th) 370 (Man. C.A.) court order appointing receiver and making order purporting to restrain all dealers from collecting funds directly from retailers. Order not binding directly on non-parties to receivership.

⁶⁷ Ambivalence by Canadian courts on this last point has led courts in other jurisdictions to conclude that the Canadian jurisprudence is confused. See the comments of Browne-Wilkinson V.C., and Balcombe L.J. in the lower courts decision in *A-G. v. Newspaper Publishing Plc.*, *supra* note 27 (Ch.D. & C.A.) at 344-45 and 386 respectively, and *Maritime Union v. Patrick Stevedores Operations*, [1998] 4 V.R. 143 at 161 (Victoria C.A.).

*V. The Supreme Court of Canada Decision in MacMillan
Bloedel v. Simpson*

In *MacMillan Bloedel v. Simpson*⁶⁸ the Supreme Court of Canada confronted directly the liability of a non-party for contempt of court in failing to abide by an injunction. The action arose out of the continuing protests against milling old growth forests in British Columbia. In numerous proceedings the plaintiffs successfully obtained a series of interlocutory injunctions aimed at preventing protesters from blocking logging operations. The orders had named defendants followed by a general description addressed to "John and Jane Doe and Persons Unknown", and, "all persons having notice of the order." The defendant in the proceedings before the Supreme Court fell into the latter category. After the orders had been issued the police arrested over 800 individuals during 1993 for violating the interlocutory orders. The orders specifically authorised police involvement to both supervise the orders and to prevent breaches of the peace. 625 people were convicted of criminal contempt of court and sanctioned by fines up to \$3000 and jail terms up to 60 days. MacMillan Bloedel never brought civil proceedings against the individual defendants, and by the time the appeals to the interlocutory injunctions were heard, they had long since lapsed.

There were essentially three grounds of appeal. The first ground related to the jurisdiction of the court to grant an injunction against the public in a civil matter preventing conduct which properly fell within the criminal law and that was amenable to criminal prosecution by the Attorney-General. At the time of the action the Attorney-General had taken the decision not to lodge criminal charges against the protesters, preferring to leave it to the individual affected property owners through the civil courts. Owing to the Attorney-General's decision not to act, MacMillan Bloedel had in fact advanced their injunction applications. The Supreme Court characterised the dispute as one between public rights to protest and dissent, and the maintenance of private rights of land holders to use their land. However, the simple decision of the Attorney-General not to take criminal proceedings did not leave the plaintiff without remedy. Where a private litigant's own property rights were affected by criminal conduct the litigant had standing to invoke the court's jurisdiction without the need to seek prior approval of the Attorney-General. This was a simple affirmation by the Supreme Court of the principles applicable where a private party wishes to bring an action for a public nuisance, and who is individually and specifically affected over other members of the public.

The second ground related to the ability of a court to grant an order against non-parties. The appellants argued that a court could only make an

⁶⁸ *Supra* note 2.

order against a party to the proceedings, and lacked jurisdiction to do otherwise. In the British Columbia Court of Appeal, Wood J.A., in dissent, found this argument compelling.⁶⁹ McLachlin J., for the court, considered this argument from the grounds of existing precedents and from the policy implications that adherence to it would have for the rule of law in Canada.

McLachlin J. recognized the difference between being bound *by* the injunction as a named party, and being bound to *obey* an injunction because one becomes aware of its terms. McLachlin J. did not seek to change this distinction. McLachlin J. then rightly asserted that the English courts have held a non-party liable for contempt for obstruction of justice where they have acted independently, and not just for aiding and abetting the named defendant. After analysing the Canadian and English precedents McLachlin J. concluded as follows:

It may be confidently asserted, therefore, that both English and Canadian authorities support the view that non-parties are bound by injunctions: if non-parties violate injunctions, they are subject to conviction and punishment for contempt of court. The courts have jurisdiction to grant interim injunctions which all people, on pain of contempt, must obey. The only issue — and one which has preoccupied courts both in England and, to a lesser extent, here — is whether the wording of the injunction should warn non-parties that they, too, may be affected by including language enjoining the public, or classes of the public, from committing the prohibited acts. On this point I share the view of Tysoe J.A. in *Bartle & Gibson*, and Estey J. in *International Longshoremen Association*: if members of the public may be bound to respect court orders in private suits on pain of being held in contempt, it seems appropriate that the order apprise them of that fact.⁷⁰

On the issue of what relevant policy implications informed the court's decision, McLachlin J. asked rhetorically, "what are the dangers of empowering the courts to make orders to protect private interests which all must obey on pain of contempt?"⁷¹ To this, McLachlin J. answered, that while maintenance of the rule of law necessitated such jurisdiction and orders, they can only be made where the public has been apprised of the order and given an opportunity to comply. In addition, circumspection must be exercised so that the orders are not drafted in unduly broad terms. Whereas Wood J.A., in the Court of Appeal, had concluded that the court should not exercise jurisdiction but insist that the Attorney-General act instead, McLachlin J. opined that the court's equitable jurisdiction to grant injunctions was designed to fill the very gap that the Attorney-General's actions in this case had made necessary.

The third ground of appeal raised the issue of whether an action could be launched against unnamed persons using the appellation, John and Jane

⁶⁹ *Supra* note 5 at 30-43.

⁷⁰ *Supra* note 2 at 1064-65.

⁷¹ *Ibid.* at 1067.

Doe and Persons Unknown. On this point McLachlin J. held that the court did not have to answer the issue based on its findings that even a non-party was duty bound to comply with a court order. However, she did observe that the argument really raised a matter of pleadings and that no authority had been given which suggested the appeal as invalidating the proceedings or order.

VI. Analysis and Observations of *MacMillan Bloedel v. Simpson*

McLachlin J.'s judgment is open to a number of observations. First, it is an over simplification of the English position to suggest that a non-party would be treated in a similar fashion in that jurisdiction. As discussed earlier, the English position is far more circumspect on finding contempt where it is alleged that the contemnor has acted to interfere or impede the administration of justice, and even then it must be criminal contempt. In addition, the constituent elements of the criminal contempt require an actual *mens rea* of intending to impede the administration of justice, and the *actus reus* of actually having that effect. The approach in *MacMillan Bloedel* does not specifically discuss the constituent elements of the alleged contempt but suggests that mere knowledge of the injunction and the carrying out of the enjoined act are sufficient. Indeed, although in the lower courts the non-parties had all been convicted of criminal contempt, it would appear from McLachlin J.'s judgment that the actions of a non-party in failing to comply with an injunction once they have notice of it, does not necessarily result in a charge of criminal contempt exclusively. In some cases subsequent to *MacMillan Bloedel* the courts have been willing to hold a non-party guilty of civil contempt alone.⁷² If criminal contempt is the appropriate charge for non-parties who fail to obey a court injunction then, presumably, the requisite *mens rea* and *actus reus* requirements enunciated in *United Nurses of Alberta v. Alberta (A.G.)*⁷³ would be applicable. In that case the Alberta nurses, who were embroiled in a labour dispute, openly defied a Labour Board order which had been filed in court requiring them to return to work. In that case the majority established that for criminal contempt:

...the Crown must prove that the accused defied or disobeyed a court order in a public way (the *actus reus*), with intent, knowledge or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court (the *mens rea*). The Crown must prove these elements beyond a reasonable doubt. As

⁷² See *Merck & Co. v. Nu-Pharm Inc.* (2000), 9 C.P.R. (4th) 379 (F.C.T.D.) court refusing to strike out pleadings which raised the issue of whether a non-party could be held liable for civil contempt. In *International Forest Products Ltd. v. Kern* (2000), 144 B.C.A.C. 141, non-parties plead guilty to civil contempt. Appeal on appropriateness of sentences imposed.

⁷³ [1992] 1 S.C.R. 901.

in other criminal offences, however, the necessary *mens rea* may be inferred from the circumstances. An open and public defiance of a court order will tend to depreciate the authority of the court. Therefore when it is clear the accused must have known his or her act of defiance will be public, it may be inferred that he or she was at least reckless as to whether the authority of the court would be brought into contempt.⁷⁴

A minority opinion delivered by Cory J., differed in that the *actus reus* required the crown to prove that the contemnor's conduct "must be conduct which causes a serious public injury".⁷⁵ Cory J. found that the actions of the nurses did not constitute a serious public injury in that their actions, while amounting to civil contempt, raised no threat of public violence nor did they flaunt their disobedience publicly. Cory J.'s demand for actual proof of a 'serious public injury' is closer to the English requirement, in the context of a criminal contempt allegation for impeding the administration of justice, that the contemnor's actions must frustrate the main purpose for which the court granted the injunction in the initial proceedings. Both require proof of actual resultant harm (i.e. either serious public harm or frustrated main purpose), whereas the majority's opinion requires only open public defiance regardless of whether the contemnor's actions have had, or are likely to have, any effect on the administration of justice.

It is difficult to compare the English decisions involving breach of confidentiality to Canadian decisions involving civil disobedience. However, in *Maritime Union v. Patrick Stevedores Operations*⁷⁶, The Victoria Court of Appeal was asked to rule on the propriety of an interlocutory injunction issued against both named and unnamed parties who were engaged in picketing the plaintiff's wharf during an extremely acrimonious labour confrontation. The court, after reviewing both English and Canadian authorities (although not *MacMillan Bloedel*), and finding the latter confusing, concluded that there was no jurisdiction to issue an injunction against non-parties and that they could only be held liable where they aided and abetted the named parties in breaching the injunction. The Victoria Court's decision does not specifically address the issue of when a non-party who violates an injunction can be held in contempt for impeding the administration of justice, but it is further evidence of judicial restraint and grave concern over rushing headstrong into holding non-parties subject to injunctions, particularly, in the context of mass civil disobedience.

A second observation concerns the Supreme Court of Canada's belief that the rule of law is imperilled if such jurisdiction against non-parties is not exercised. In comparable situations in other jurisdictions, notably England and Australia, courts have not felt a similar compulsion to act. A subsidiary issue is the appropriateness of resorting to contempt of court

⁷⁴ *Ibid* at 933 per McLachlin J.

⁷⁵ *Ibid.* at 913.

⁷⁶ *Supra* note 67.

when other possible avenues to deal with the plaintiff's circumstances exist. In *MacMillan Bloedel* McLachlin J. commented upon the lack of response by the Attorney General to resort to criminal prosecutions, but said that this fact alone did not deprive the private individual of resort to seek relief from a civil court. In a subsequent article written by Amir Attaran⁷⁷ on *MacMillan Bloedel* the suggestion was made that a better response would be for the plaintiff to seek mandamus against both the Attorney General and the police to do their duty and criminally prosecute the protesters.⁷⁸ This suggestion has itself generated an unusual amount of judicial commentary. The idea was rejected by the British Columbia Court of Appeal in *International Forest Products Ltd. v. Kern*⁷⁹ largely on the basis that the court accepted the assertions by the Attorney General that the civil injunction and contempt process was more effective in that it was expeditious and avoided the technicalities of rarely used Criminal Code provisions. However, at least two lower court decisions have found merit in the proposal.⁸⁰ Indeed, the judgment of McEwan J. in *Slocan Forest Products Ltd. v. John Doe*⁸¹ raises a disturbing picture of how the use of the civil injunction and commensurate contempt proceedings has become the preferred method of handling all protesters and civil disobedience in the West Coast lumber disputes. The invidious position of the court is that it is forced to sacrifice its own public esteem and authority to preserve the Attorney General's in what is an extremely heated and politically sensitive climate.⁸² The repeated frequency of this form of action threatens to lower the public's perception of the courts as independent dispensers of law and turn them into a pseudo-legislative arm of the forestry industry. It was largely similar arguments that lead Cory J. to exercise extreme caution in deciding whether to hold the Alberta nurses for criminal contempt in their labour dispute — namely a fear that public perception of courts in labour disputes would be to see the court as an arm of government to impose crushing penalties on trade unions. The lack of involvement of the Attorney General also has other interesting ramifications. As pointed out by Julia Lawn in her article, because the dispute is kept at the level of private civil

⁷⁷ "Mandamus in the Enforcement of the Criminal Law: Ending the Anti-Protest Injunction Habit — Issues arising from *MacMillan Bloedel v. Simpson*" (1999) 33 U.B.C.L. Rev. 181.

⁷⁸ See also the suggestion of Southin J.A. in *Everywoman's Health Centre Society v. Bridges* (1990), 54 B.C.L.R. (2d) 273 (C.A.) at 285.

⁷⁹ *Supra* note 72.

⁸⁰ See *Alliford Bay Logging (Nanaimo) Ltd. v. Mychajlowycz* (2001), 85 B.C.L.R. (3d) 154 (S.C.) and *Slocan Forest Products Ltd. v. John Doe*, [2000] B.C.J. No. 1592 (S.C.) (Q.L.).

⁸¹ *Ibid.* at paras. 47-49.

⁸² The irony that the Attorney General who initially washed his hands of the fray in deciding not to prosecute criminally protesters, but then returned to lead the charge where a charge of criminal contempt is laid (see (2001) B.C.J. No. 2362 (S.C.) (Q.L.)), has not been lost on some. See J. Lawn, "The John Doe Injunction in Mass Protest Cases" (1998) 56 U. of T. Fac. L. Rev. 101 at 108.

litigation, the ability to raise *Charter* arguments is lost. Yet, these same arguments may have a real bearing on the granting and breadth of the injunction where it impacts upon rights of protest and speech.⁸³

One of the arguments in favour of the civil injunction and contempt proceedings is that it is expeditious because it dispenses with many of the procedural requirements of *Criminal Code* charges. For example, in *Slocan Forest Products Ltd. v. John Doe McEwan J.* quotes extensively from the British Columbia Attorney General's policy document which illustrated the relative success of the policy. It stated:

For example, in 1989 before British Columbia had a civil disobedience policy, 70 individuals were prosecuted on Criminal Code charges relating to protests against mining in British Columbia's Strathcona Park. Notwithstanding the disruption of logging activities, sixty-seven of the accused were acquitted of charges of mischief. Only three persons were convicted and they received minor sentences. The trials lasted over a period of 18 months.

Compare this to civil disobedience at Clayoquot Sound in the summer of 1993 where more than 700 people who disobeyed an injunction were prosecuted for criminal contempt. Police responded swiftly in making arrests. The trials were concluded over a period of eight months. Almost all those prosecuted were convicted and the average jail sentence was three weeks, served usually on electronic monitoring.⁸⁴

By any stretch of the imagination these are large numbers of non-parties being held liable for criminal contempt arising from a private civil action between named parties. Against the reticence of the English courts to exercise jurisdiction against non-parties for interference in the administration of justice, Canadian courts appear down right profligate.

A third observation concerns the relationship between non-parties and final, rather than interlocutory, injunctions. In *MacMillan Bloedel McLachlin J.* noted the cautious approach of the Ontario Court of Appeal in *Sandwich West (Township) v. Bubu Estates Ltd.*⁸⁵ There, the court indicated that it

⁸³ *Ibid.* at 131, and see for example *Ontario (A.G.) v. Dieleman* (1994), 20 O.R. (3d) 229 (Gen. Div.) for the arguments that can be raised when it is the Attorney General who seeks the injunction to prevent civil unrest.

⁸⁴ *Supra* note 80 at para. 23, citing C. Gabelmann, "British Columbia's Civil Disobedience Policy — A Measured Response".

⁸⁵ (1986), 30 D.L.R. (4th) 477 (Ont. C.A.). The township had been successful in gaining an injunction requiring the named defendant and any other property owners who had knowledge of the order to comply with a certain by-law. In subsequent proceedings brought for contempt against non-parties the trial judge had dismissed the contempt charges but without prejudice to the township to relay them after it had exercised its alternative enforcement rights. The ultimate effect of the order was to allow the determination of the rights of all property owners in the disputed subdivision to depend on the success of actions against a few named defendants. See also R.J. Sharpe, *Injunctions and Specific Performance* (Toronto: Canada Law Book, 1992) at ¶6.270.

was inappropriate to determine the rights of non-parties over land usage in a subdivision, without having heard from them, based on a final settlement consent order made with the named defendants.⁸⁶ The legal demarcation between final and interlocutory proceedings is clear, however, the procedural practicalities are a little less so. Often, the plaintiff has no intention to proceed to judgment after gaining an effective interlocutory order. Indeed, the plaintiff in *MacMillan Bloedel* never proceeded to final judgment against the named defendants. The lack of effective time limits on the validity of interlocutory orders can also result in contempt proceedings being brought years after the injunction was granted. For example, Julia Lawn points out that in one case a defendant was convicted of contempt seven years after the interlocutory injunction had been granted.⁸⁷

Apart from cost and inconvenience, it is still possible for any named defendant to defend in interlocutory proceedings and to have his or her day in court. In the case of contempt proceedings against a named defendant it is always possible for the defendant to argue over the propriety of the original order, although they may be required to purge their contempt before being allowed to continue their defence.⁸⁸ However, in the case of a non-party the only issue for the court is whether they have committed the contempt alleged. Because there is no action between the parties there is nothing for the non-party to contest. In fact the validity of the injunction is quite irrelevant because even an invalid injunction must be obeyed until it is set aside.⁸⁹ In addition, because the *mens rea* element of the contempt only focusses upon whether the non-party has the requisite intent to act in defiance of the court's order, which can itself be inferred from acting publicly,⁹⁰ a non-party never has an opportunity to explain why he or she acted in defiance of the court order, or why the order should not have been granted in the first place. As Julia Lawn identifies, the protesters in *MacMillan Bloedel* found the court's disinterest in their substantive merits for acting the way they had, quite bizarre.⁹¹ In contrast, Cory J. in his

⁸⁶ See also the decision of the Federal Court of Appeal in *Montres Rolex S.A. v. Balshin*, *supra* note 3 which decline to allow a final John and Jane Doe order to have prospective effect. Discussed *infra*.

⁸⁷ *Supra* note 82 at 122 citing *R. v. Watson* (1996), 22 B.C.L.R. (3d) 1 (S.C.).

⁸⁸ *Ontario (A.G.) v. Paul Magder Furs Ltd.* (1991), 6 O.R. (3d) 188 (C.A.).

⁸⁹ *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626.

⁹⁰ In *United Nurses of Alberta v. Alberta (A.G.)*, *supra* note 73 at 913, Cory J. points out the difficulty in the majority's judgment which made acting in public the central feature of the distinction between civil and criminal contempt. Such an approach replaces the functional distinction between civil and criminal contempt (i.e. the former focussing upon ensuring that the plaintiff's interest in gaining compliance are met, the latter focussing upon the court's interest in having its orders obeyed so that the administration of justice is not led into disrepute) with one purely centred on the publicity attached to the contemnor's act.

⁹¹ *Supra* note 82 at 105.

dissenting opinion in *United Nurses of Alberta v. Alberta (A.G.)*⁹² thought the fact that the leader of the Alberta Nurses Association acted with reticence when being interviewed by the media, refrained to agree with a reporter's suggestion that the 'law was an ass', and simply presented the nurses' grievances with their employer so as to minimize any disrespect shown to the court, were all relevant to determine whether the charge of criminal contempt, as against civil contempt, had been proved. Under the majority's approach these considerations were irrelevant. This is not to suggest that Cory J. would have decided differently in *MacMillan Bloedel*, indeed he was part of the court that heard that case and did not render his own judgment, however, I do suggest that the criteria established by Cory J. to determine criminal contempt would at least permit non-parties to raise issues on why they acted the way they had and why their actions did not amount to a public injury.

A final observation, although not one arising directly out of McLachlin J.'s judgment, concerns the breadth of the orders which have been made to control civil disobedience. In *MacMillan Bloedel* the order was carefully worded so as to only prevent obstruction of a bridge leading to the plaintiff's work site. However, in another case, *Atco Lumber Ltd. v. Faust*,⁹³ the court's order to restrict all persons from coming within 1000 metres of the plaintiff's logging road had the effect of preventing some non-parties from having access to their residences. The *ex parte* injunction was set aside on the basis that these affected parties had not been given notice. Recall that in *A.-G. v. Times Newspaper Ltd.*⁹⁴ a number of the Law Lords cautioned against orders being overly broad and thus impinging on the legitimate pursuit of a non-party's own self-interest even where that had the effect of frustrating the purpose of the injunction order. *Atco Lumber Ltd* demonstrates the need for that cautionary approach. An overly broad injunction may also obscure the main purpose of the order. In England that would be fatal to any charge of criminal contempt based on interference of the administration of justice. In Canada the same would not be true. The only issue would be a determination of whether the non-party had violated the injunction in a public manner. Another problem with an overly broad injunction that interferes with the pursuit of legitimate activities of non-parties is that while the interference may give rise to an independent action by the non-party against the plaintiff, it may give no right to seek recovery pursuant to the damages undertaking given by the plaintiff as a standard requirement for an interlocutory injunction.⁹⁵

⁹² *Supra* note 73 at 922-23.

⁹³ Unreported [1991] B.C.J. No. 3415 (S.C.) (Q.L.) further reasons [1991] B.C.J. No. 3636 (S.C.) (Q.L.), and see the discussion in Lawn, *supra* note 82 at 123.

⁹⁴ *Supra* note 19.

⁹⁵ The non-party is not a defendant nor is his or her conduct specifically enjoined. In addition the plaintiff has not wrongfully obtained the interlocutory injunction. Equally, the propriety of the injunction is not a relevant issue at the time that the non-party is charged

A fundamental principle of our justice system is the right to be heard before being made subject to a court order. A central problem with the way that the law has developed in Canada is that, not only have non-parties been deprived of a right to be heard before an order is made, but that they have been deprived of any right to be heard at all.⁹⁶ This position is exacerbated when the plaintiff's action is brought either *ex parte*, or against the anthropomorphic John and Jane Doe, and has only had to meet a fairly low threshold test, without challenge from a known named defendant, before being granted an interlocutory injunction. While a similar position prevails in England, it is mitigated by the generally more circumspect reverence given to the notion that equity can only act *in personam*, and, further, the stringent requirement that the person who interferes or impedes the administration of justice must actually be proven to have achieved, and intended, that result before being found guilty of criminal contempt.

If Canadian courts are adamant in the direction they are currently heading, they may think it appropriate to pick up on a suggestion made by Balcombe L.J. in the Court of Appeal decision in *A.-G. v. Newspaper Publishing Plc.*⁹⁷ that the plaintiff should be required to seek directly an injunction that is intended to have effect beyond the named defendants and to argue its merits at that time as a principled exception to the rule that equity only acts *in personam*.⁹⁸ An alternative approach to the liability of non-parties is to regularize their status by incorporating them into the existing civil litigation procedure. One way of doing that is to bring an action against a representative defendant, the other is the use of the John and Jane Doe nomenclature in the cause of action.

for contempt. Arguably, the non-party may have experienced a loss of procedural rights in that the plaintiff has failed to bring to the attention of the court the impact of a widely drafted order. See A. Zuckerman, "The Undertaking in Damages — Substantive and Procedural Dimensions" (1994) 53 *Camb. L.J.* 546.

⁹⁶ This approach was picturesquely described by Winneke P. for the court in *Maritime Union v. Patrick Stevedores Operations* *supra* note 67 at 161 as having "the novel feature — which would have appealed to Lewis Carroll — that it became binding upon a person only because that person was already in breach of it."

⁹⁷ *Supra* note 27 at 388-90. See also S. Auerback, "Third Parties and Contempt: the Spycatcher case" (1988) 17 *Industrial L.J.* 46 at 48-50.

⁹⁸ See also the suggestion, made in the context of Anton Piller orders against John and Jane Doe and persons unknown, that the court should appoint an *amicus curiae* to represent the unknown parties. Per Anderson J. in *Tony Blain Pty. Ltd. v. Splain*, [1993] 3 *N.Z.L.R.* 185 (H.C.).

VII. *Representative Defendant Actions*

The respective provincial and Federal Court rules of civil procedure⁹⁹ allow for a plaintiff to commence an action against a named defendant as a representative class of all defendants. These rules follow similar principles established in the United Kingdom.¹⁰⁰ The rules are designed to cover both plaintiff and defendant representative actions although in many Canadian jurisdictions plaintiffs, as a representative class, now have access to specific class action legislation. Although there is a long history to this rule in Chancery practice,¹⁰¹ little modern resort has been made to it to have defendants represented by a representative defendant. As explained in the Ontario Law Reform Commission Report on Class Actions,¹⁰² there have been essentially two categories of cases which have utilized this rule. One category covers actions brought against an unincorporated association or trade union where a union or association representative is made the representative for the union or association membership as a whole. This approach was necessitated because of a lacuna in the law which did not historically accord any legal status to an unincorporated association. In this category an action utilizing a representative defendant is only allowed to proceed where there is a common fund or pool of assets and an homogeneous group of defendants capable of being represented by one party.¹⁰³ The only real issue is the question of liability and the distribution of damages, if there are a number of plaintiffs. The second category is where there is a common suit against a number of defendants, but that the defendants have no pre-existing relationship other than allegedly committing in common the wrong made subject of the plaintiff's action.¹⁰⁴

Within both categories Canadian courts have adopted a fairly restrictive approach to representative defendant actions, partly because of the Supreme Court of Canada's ruling in *Naken v. General Motors of Canada Ltd.*¹⁰⁵ which saw little opportunity in the respective rules of civil procedure to

⁹⁹ Federal Court Rules, 114; Ontario, Rule 12.07; Manitoba Rule 12.01; Alberta Rule 42; and Nova Scotia Rule 5.09.

¹⁰⁰ United Kingdom Ordinance 15, rule 12.

¹⁰¹ See the history discussed in B. Wolfson, "Defendant Class Actions" (1977) 38 Ohio State L.J. 459.

¹⁰² Ontario Law Reform Commission, Report on Class Actions (1982) Vol. 1 at 42. See also the discussion of the Alberta Law Reform Commission Report No. 85, Class Actions (Dec. 2000) at 170

¹⁰³ See Williston & Rolls, *The Law of Civil Procedure* (Toronto: Butterworths, 1970) at 216-18, and recently cited with favour in *Industrial Hardwood Products (1996) Ltd. v. International Wood and Allied Workers of Canada* (2001), 52 O.R. (3d) 694 (C.A.) at 702.

¹⁰⁴ See for example *National Supply Company v. Greenbank*, [1941] 3 W.W.R. 711 (Alta S.C.), and *New Brunswick Broadcasting Co. v. Speaker of House (N.S.)* (1989), 92 N.S.R. (2d) 245 (T.D.).

¹⁰⁵ (1983), 144 D.L.R. (3d) 385 (S.C.C.).

advance, and deal with the commensurate complex and technical problems, of a class action regime.¹⁰⁶ Recently, a more liberal approach has emerged and the requirement that there be some ascertainable fund in existence has been down-played.¹⁰⁷ This liberalised approach is consistent with developments in England, which adopt similar wording but which now has additional provisions detailing procedural safeguards for the defendant.¹⁰⁸

Another development, as yet only in Ontario, has been the extension of class action legislation to encompass representative defendant actions. Under the *Ontario Class Proceedings Act 1992*,¹⁰⁹ a party can move to have proceedings certified as a ‘class proceeding’ and a party appointed as a representative defendant. The Act specifies the criteria for determining whether a class proceeding can be certified and focusses upon the following:

- [i] whether the pleadings disclose a cause of action;
- [ii] whether there is an identifiable class of two or more persons;
- [iii] the claims or defences of the class members raise common issues;
- [iv] a class proceeding would be preferable for resolution of the common issues;
- [v] the representative defendant would fairly and adequately represent the interest of the class, can produce a workable plan for the proceeding on behalf of the class, and with respect to the common interest of the class, does not have a conflict of interest.¹¹⁰

The ability to certify a representative defendant was discussed in *Chippewas of Sarnia Band v. Canada (Attorney General)*.¹¹¹ The plaintiff claimed title to certain land in Sarnia which it maintained had been violated by the Crown. Over 2,200 parties were affected by the claim either as current owners or holding other encumbrances over the title. The plaintiff sought certification of representative defendants representing six sub-classes of defendants. Adams J. reviewed both the procedure under the *Class Proceedings Act* and the representative defendant rule 12.07. The rationale for defendant class actions is the desire to allow the plaintiff to proceed with its litigation without the need to ensure every potentially affected defendant is given notice of the proceedings and a right to be heard, where that

¹⁰⁶ *Robinson v. Adams* (1924), 56 O.L.R. 217 (C.A.). For recent application and discussion of the rule applying a restrictive approach see; *Marshall v. National Automobile, Aerospace, Transportation and General Workers Union of Canada* (2000), 7 C.C.E.L. (3d) 267 (Ont.S.C.) and, *National Life Assurance Co. of Canada v. Hucker*, [2001] O.J. No. 1484 (Q.L.) (Ont.S.C.).

¹⁰⁷ *Ginter v. Gardon*, [2001] O.J. No. 1148 (Q.L.) (Ont.S.C.) at paras. 24-28.

¹⁰⁸ See UK *The Supreme Court Practice 1999 (The White Book)* Vol. 1 at 15/12/27. For instance before the judgment against a representative defendant can be enforced against other defendants leave of the court must be gained. Once leave is granted the other defendant is estopped from disputing the judgment but may still escape enforcement if “reason of facts and matters particular to his case” exempt him or her from liability.

¹⁰⁹ S.O. 1992, c.6. ss.3 & 4.

¹¹⁰ *Ibid.* s.5(1).

¹¹¹ (1996), 29 O.R. (3d) 549 (Ont.Gen.Div.). See James I. Reynolds, “Aboriginal title: The Chippewas of Sarnia” (2002), 81 Can. Bar Rev. 97.

procedure is impracticable. The procedure is designed to expedite the litigation process, preserve scarce judicial resources, maximize litigants' resources by creating economies of scale, reduce the opportunity for a multiplicity of proceedings over common issues, and ensure a fair trial process. In this case the main impediment to certifying a representative defendant was the unwillingness of the named defendant to be appointed to represent the class, and the fear that other defendants would specifically opt out of the class when advised of the certification. On the first issue Adams J. did not believe that the legislation required the consent of the named defendant. In fact, unwillingness to serve has been seen as a virtue in American courts because it is a way of ensuring a vigorous defence. In this case the named defendants had employed counsel who were extremely experienced in native land claim litigation such that Adams J. had no doubt that the defendant class would be fairly and adequately represented. The possibility of other defendants opting out is a right conferred by the statute. Adams J. simply suggested that if opting out became a problem, he would reconsider whether he should order under rule 12.07 and make a representative order which could control other defendants opting out. Adams J. saw in the *Class Proceedings Act* a comprehensive regime to handle litigation involving numerous parties which could respond more effectively than a representative order under rule 12.07. However, if the need arose, he was quite willing to exercise his power under rule 12.07 and make a representative order. The defendants submitted this as the better approach because the named defendants were unwilling to assume the responsibility of representing the class as a whole, involving as it would, the preparation of a 'workable plan' to advance the class proceeding. The plaintiff objected to the use of rule 12.07 because it feared that any judgment which resulted from the proceedings may not withstand the scrutiny of a later court which may be inclined to view the judgment as not binding on a third party defendant unless the particular defendant actually participated in the litigation.¹¹² In addition, it also feared that it would not be given the opportunity to adduce evidence of its native land claims involving history and legend in the way approved by the Supreme Court of Canada. While not conceding these arguments, Adams J. simply preferred the comprehensive process under the class action legislation to the rule, noting also that the rule had been given conservative judicial treatment.¹¹³

¹¹²The plaintiff had relied upon *Coulson v. Secure Holdings* (1976), 1 C.P.C. 168 (Ont. C.A.) to the effect that a court order could not have *in rem* effect against a third-party without affording the affected party an opportunity to be heard.

¹¹³Another recent certification of both a representative plaintiff as well as representative defendant in a class action dispute is *Berry v. Pulley* (2001), 197 D.L.R. (4th) 317 (S.C.). The plaintiff has been certified to commence an action based on various economic torts against a certified defendant in a dispute involving the merger of pilots from Air Ontario into Air Canada and the establishment of a seniority list.

The conservative approach to defendant representative orders by Canadian courts may be changing as a result of widespread adoption of class action proceedings legislation. Nevertheless, it is interesting to contrast the use of defendant representative actions in other jurisdictions, and where they have been used in circumstances where Canadian courts have been quick to allow non-parties to be prosecuted for contempt of court.

Experience in England has shown a willingness by courts to use the representative defendant order to enable plaintiffs to bring actions against protesters and those who participate in widespread violation of intellectual property rights. These actions have also included interlocutory injunctions to prevent further trespass or infringement. Most recently, the English Court of Appeal had to determine whether a representative defendant action was appropriate in *Monsanto v. Tilly and Others*.¹¹⁴ The plaintiff had entered into a number of contracts with farmers for the experimental purpose of growing genetically modified crops. The named defendants and others were all members of a loose association of citizens concerned by the alleged threat that genetically modified crops pose to the environment. They had commenced a very public campaign in which they would raid farmers plots and pull out of the ground a token number of genetically modified plants. The plaintiff brought an action for an interlocutory injunction based on trespass naming the defendants in a representative capacity of all members of GenetiX Snowball (GXS), the umbrella organization of those opposed to genetically modified crops. The Court of Appeal affirmed that a representative action was appropriate in this case. The injunction was a central feature of the plaintiff's action and the membership of GXS was united in its belief that uprooting genetically modified crops was central to bring pressure to bear on both the plaintiff and the legislature which had licensed the experimental plots. It was that particular activity that the defendants had in common and for which a representative action was appropriate.¹¹⁵

Two interesting features of this case are first, that the defendants argued that a representative action was not necessary since other non-parties would be bound to obey the injunction order under the *Spycatcher* principle. Stuart-Smith L.J., specifically rejected this submission on the basis that while the *Spycatcher* principle may validly catch those who acted in concert with the named defendants, it would not catch other defendants who had acted independently of the named defendants; mere knowledge of the injunction being insufficient to found liability. The second feature is the ability of the defendants to raise arguments as to the appropriateness of the injunctive order and whether a trespass was committed. The

¹¹⁴[2000] Env. L.R. 313 (C.A.).

¹¹⁵*Ibid.* at 331-32. See also *Michaels (Furriers) Ltd v. Askew & others* (Unreported, June 23, 1983)(C.A.) and noted in (1983), 127 Sol. J. 597, representative defendant action for an interlocutory injunction based on trespass against defendants who were members of Animal Aid, and who were opposed to the use of animal furs.

defendants argued a defence of necessity and justification in committing the trespass in that the genetically modified crops posed a risk to human health and public safety. Ultimately, the court did not believe that the defendants had brought themselves within the limited ambit of such a defence and thus the defendants were deprived the opportunity of having a full scale trial concerning the public safety of genetically modified crops. Nevertheless, the defendants did have an opportunity to explain their actions and the reasons for why they had acted in the way they had. This is in contrast to the *MacMillan Bloedel* contemnors.

In two other cases, dealing with Anton Piller injunctions, courts in England and Australia have allowed the plaintiff to seek interlocutory relief against a representative defendant, and thereby execute the order against other defendants whose identity at the time of requesting the Anton Piller order are unknown to the plaintiff. In *E.M.I. Records Ltd. v. Kudhail*¹¹⁶ the plaintiff successfully gained an interlocutory injunction against the named defendant and 'all other persons engaged in the trade of selling tapes bearing the trade-name "Oak records"'. This order was granted on the basis that the named defendant was a representative of the class of copyright and trade-mark infringers. The court saw in the individuals who operated throughout London sufficient common interest and found by inference that they were linked in some secret organization for the distribution of pirated material. In *Tony Blain Pty. Ltd. v. Jamison*¹¹⁷ the Australian Federal Court closely followed *Kudhail*. The plaintiff successfully sought an order against named defendants as representatives of all those who were engaged in the sale of pirated copyright material outside specified concert venues where Paul McCartney and Metallica were scheduled to perform.¹¹⁸

VIII. *John and Jane Doe Orders*

The use of the fictitious John and Jane Doe appellation, and other variations, has been a part of our common law for a considerable period of time.¹¹⁹

¹¹⁶[1985] F.S.R. 36 (C.A.). This was not a true Anton Piller order in that the injunction did not authorize the search and seizure of infringing material but required the defendants to refrain from dealing in infringing material. Nevertheless, the pirated goods were seized pursuant to s.18 of the UK *Copyright Act (U.K.) 1956*, 4 & 5 Eliz. 2, c.74, which deems the right of ownership of pirated material to the copyright holder. The order has become known as a 'Doorstep Piller', and see, D. Barron, "Roving Anton Piller Orders: Yet to be Born, Dead or Alive?" (1996) 18 E.I.P.R. 183, and P. Prescott, "*EMI Records Ltd. v. Kudhail: Class Injunctions*" (1986) 8 E.I.P.R. 58.

¹¹⁷(1993), 41 F.C.R. 414 (F.C.T.D.). This was a true Anton Piller order and authorized both search and seizure.

¹¹⁸A similar case in New Zealand involving the same plaintiff was argued in *Tony Blain Pty. Ltd. v. Splain*, *supra* note 98. The case is not a representative defendant action, although, it is clearly aimed at unknown persons who infringe the plaintiff's copyright. The fact that it appears to be an order made against the world at large was severely condemned by Winneke P. in *Maritime Union v. Patrick Stevedores Operations*, *supra* note 67 at 163.

¹¹⁹See A.W.B. Simpson, *A History of Land Law*, 2nd ed. (Oxford: Clarendon Press, 1986) at 147-49.

Today it is used in respect to three areas. One area is to maintain a party's security and confidentiality.¹²⁰ A second area is where the plaintiff does not know the identity of the defendant at the time of launching the suit. Once the proceedings have been served and the identity of the defendant known, the plaintiff seeks to amend the pleadings by adding the defendant's name. The plaintiff may be forced to commence its suit in this fashion to avoid missing limitation periods or because the defendant has acted in a nefarious way so as to disguise his or her identity.¹²¹ The third area is where the plaintiff commences its action in advance of knowing who may be violating its rights or even where that violation will take place. It is under this guise that the Federal Court of Canada has developed a specialized form of Anton Piller order known as a 'Rolling Anton Piller Order'.¹²² The common feature of these orders is that the plaintiff, in *ex parte* interlocutory proceedings, is able to demonstrate to the court that its intellectual properties are being violated by numerous transient and evasive defendants over a large geographical area and that other methods of enforcement have proved ineffective. It is the fact that the defendants are unknown at the time of seeking the interlocutory relief which suggests that a John and Jane Doe order is similar to making an order against the world at large. I suggest that there are important differences between a John and Jane Doe order and an order which purports to bind the world at large.

Where John and Jane Doe is sued the action is initially brought against a fictional party. Since the law does not allow fictitious suits the *raison d'être* of the use of the term is that a known defendant will be added at some time so that the action can proceed. Where the plaintiff has asked for interlocutory relief on an *ex parte* basis, there is in the appropriate tests for considering the order a realization that the court is making a determination in something less than ideal conditions. In particular, there has been no adversarial test of the plaintiff's claim that a substantive right exists, or of the evidence demonstrating violation of the same. There is an appreciation that before proceeding to judgment the plaintiff will have to prove its case and that a defendant, once known, will have an opportunity to challenge the plaintiff's proof if so inclined. By and large the practice of the Federal Court in granting rolling Anton Piller orders respects these principles. First, the plaintiff is required to demonstrate the need for proceeding on the basis of a John and Jane Doe order.¹²³ Second, once the order is served, the

¹²⁰ See for example, *John Doe v. CBC*, [1994] 2 W.W.R. 679 (B.C.C.A.).

¹²¹ See for example, *Jackson v. Bubela and Doe*, [1972] 5 W.W.R. 80 (B.C.C.A.).

¹²² See for example *Fila Canada Inc. v. Doe*, [1996] 3 F.C. 493 (T.D.), *Nike Canada Ltd. v. Jane Doe* (1999), 2 C.P.R. (4th) 501 (F.C.T.D.), and *Club Monaco Inc. v. Woody World Discounts* (1999), 2 C.P.R. (4th) 436 (F.C.I.D.).

¹²³ *Club Monaco Inc. v. Woody World Discounts*, *ibid.*, *Nike Canada Ltd. v. Jane Doe*, *ibid.*, and *Columbia Pictures Industry Ltd. v. John and Jane Doe* T-1270-00 (October 2, 2000)(F.C.T.D.).

plaintiff is required to add the defendant's name to the cause of action and to report on the service of the order in a review motion.¹²⁴ At this time the defendant has an opportunity to contest the grant of the interlocutory injunction. If the defendant continues to violate the interlocutory injunction then the plaintiff may proceed with a show cause hearing for contempt of court,¹²⁵ where the defendant can again challenge the basis of the injunction.¹²⁶

The cautious treatment of John and Jane Doe defendants outlined above is also reflected in the Federal Court of Appeal's judgment in *Montres Rolex v. Balshin*.¹²⁷ The plaintiff was the holder of registered trade-marks for Rolex and Crown watches. The defendants were named parties who had been selling imitation "knock-offs" of the plaintiff's products from street stalls. The plaintiff had been successful in obtaining a number of interlocutory Anton Piller orders. In subsequent interlocutory proceedings the plaintiff started to lay the ground work to move for an all encompassing final order so as to restrict the activities of both known as well as unknown defendants. In particular, the plaintiff had sought to make one of the named defendants a representative of a class. This had been rejected by the court on the basis that there was no assurance that the defendants would mount a vigorous defence for the class.¹²⁸ As it transpired the named defendant actually consented to judgment being entered against it at a later stage in the litigation. However, the plaintiff continued to seek a final injunction in the name of John and Jane Doe and persons unknown. The trial judge had made such an order but had limited it to unnamed defendants who were engaged in sales of counterfeit products on or before the date of commencement of the trial. The applicant appealed this order, claiming it was vague and that it should be amended to include any unnamed defendant who undertook illicit trade even after the date of trial.

¹²⁴ *Adobe Systems Inc. v. KLJ Computer Solutions Inc.*, [1999] 3 F.C. 621 (F.C.T.D.) at 629.

¹²⁵ *Long Shong Pictures (H.K.) Ltd. v. NTC Entertainment Ltd.* (2000), 6 C.P.R. (4th) 509 (F.C.T.D.). *Hugo Boss A.G. v. John Doe* (2000), 5 C.P.R. (4th) 432 (F.C.T.D.) is one case in which the plaintiff proceeded to a show cause hearing for contempt by a non-named party on the basis that those who aid and abet others in breaching an interlocutory injunction are liable for contempt. The non-named party was the owner of a market where stall holders would rent space to conduct their operations. The evidence demonstrated that the non-named party had been warned repeatedly of the violation of the stall holders and that he had facilitated the ongoing infringements.

¹²⁶ Even of the defendant can establish that the injunction should not have been granted the defendant may still be liable for contempt on the basis that even an unjustified injunction must be obeyed. However, in these circumstances the courts have indicated that the invalidity of the injunction will have a real bearing on the penalty imposed. See *Coca-Cola Ltd. v. Pardhan* (2000), 5 C.P.R. (4th) 333 (F.C.T.D.) at 339.

¹²⁷ *Supra* note 3.

¹²⁸ *Montres Rolex v. Balshin*, [1990] 3 F.C. 253 (T.D.) at 364.

In this sense the appellant was seeking a permanent order against all future unnamed defendants.

Robertson J.A., for the court, first reviewed the earlier case law discussed above that concluded that only a party to a suit is bound by an order. Robertson J.A. then acknowledged limited exceptions to this principle concerning corporations as named defendants and their liability for the actions of corporate officers, trade unions and the liability of union members, and for others who are guilty of aiding and abetting as agents and servants of a named defendant. Robertson J.A. then turned to the applicant's argument that the final order could be addressed to John and Jane Doe. He first distinguished between two groups of unnamed defendants: one being those who had engaged in illicit sales prior to judgment being obtained but whose identity was unknown — these he termed 'unknown defendants', and, two, those who may in the future violate the injunction — these he termed 'potential defendants'.

With respect to unknown defendants, Robertson J. A. allowed the trial judge's order to stand. The action of an itinerant trader in illicit goods was akin to one who aided and abetted in infringing the applicant's legitimate intellectual property rights. They were 'artful dodgers' who used the fact that the plaintiff could not identify them prior to bring the order as a means to avoid being subject to it. However, before being subject to the order Robertson J.A. insisted that the unknown defendant "be served with a copy of the judgment and given an opportunity to challenge the applicability of the injunction as it impacts upon them."¹²⁹ In this way the unknown defendant was assured of receiving notice and being given an opportunity to challenge the order before being found guilty for contempt in failing to obey the order. The order was not extended with respect to the 'potential defendants'. The justification for including unknown defendants was to meet the specific concern that the plaintiff could not identify them for the purpose of service prior to trial. Extending an order to cover potential defendants cannot be rationally connected to giving the potential defendant an opportunity to be heard prior to a determination of the plaintiff's rights, because potential defendants may only commence infringing those rights after the merits of the plaintiff's case have been heard. Thus, the rationale applicable to unknown defendants could not be equally extended.¹³⁰

¹²⁹ *Supra* note 3 at 254.

¹³⁰ *Ibid.* at 256. The plaintiff also sought to argue that because the *Trade-marks Act*, R.S.C., 1985, c. T-13 gave the court a power to make an order stopping the importation of infringing goods at the border, and that such order is not directed at specific defendants, then the court could give a final order enjoining the sale of goods once landed which is not directed against specific defendants. The court rejected this argument noting that the legislation specifically mandated the importation order. Nor did the importation order initiate contempt proceedings for violation but in fact gave a right to the importer to object to the seizure. The court, further added that a successful applicant could use *mandamus* against the customs department to ensure the order's enforcement. *Ibid.* at 256-60.

However, the main objection against an order aimed at potential defendants was the violation of due process concerns and that the contempt of court process should not become an expedient means of achieving judgment enforcement.

Thus, in *Montres Rolex v. Balshin* the plaintiff was able to keep John and Jane Doe in the style of cause and to hold the injunction binding on those who were violating the plaintiff's intellectual property at the time the litigation commenced up to the date of trial. At trial the plaintiff proved its substantive rights to the intellectual property rights and could enforce the injunction on unknown defendants after giving notice and affording the now known defendant an opportunity to challenge the order if so inclined. Only then could the defendant be charged with contempt.

In *MacMillan Bloedel* McLachlin J. did not rule on the appropriateness of the John and Jane Doe nomenclature in the style of cause. Given the court's decision on the ability to hold non-parties in contempt of an injunction order, McLachlin J. thought that this nomenclature was 'surplusage', although she opined that no authority had been given to suggest that the use of 'John and Jane Doe or Persons Unknown' invalidated the order.¹³¹

There are important differences between *Montres Rolex v. Balshin* and *MacMillan Bloedel* in respect to the enforcement of injunctions against non-parties. In the former, the non-party is made a party to the action through the rubric of an unknown defendant. In the latter, the non-party is never made a party to the litigation but proceeds straight to contempt proceeding. By making the non-party in effect a party to the proceedings important consequences follow. One, the non-party is given a right to be heard on the substantive merits of whether the plaintiff should have been granted the injunction in the first place, and if granted, whether it applied to the non-party specifically. The non-party has the opportunity to plead any specific defences to the substantive action which may be peculiar to him or her rather than have these determined as irrelevant for the purposes of contempt proceedings. Two, the use of John and Jane Doe is consistent with established rules of civil procedure and does not engage any special attention to the court's inherent jurisdiction, as in the case of actions brought for contempt to impede or interfere with the administration of justice. Three, there is a greater likelihood that in the event that contempt charges are brought for violating the court's injunction order, the contempt will be kept as one of civil rather than criminal contempt. The plaintiff will be seeking compliance by a now named party rather than prosecuting a contemnor for interfering or impeding the administration of justice. In this sense there is not the same open public defiance of a court order. Lowering the possibility of criminal contempt charges also lowers the likelihood that the attorney general will be party to the proceedings. It also has the benefit that the court is not seen as making precipitous use of its contempt powers to

¹³¹ *Supra* note 2 at 1069.

preserve its own dignity. Four, the non-party will have access to the plaintiff's damages undertaking where he or she can show that the injunction should not have been enforced against him or her. Because there is now an action, the non-party may seek enforcement of the undertaking where it has suffered loss to either its substantive or procedural rights. Of course, a non-party who is added as a named defendant to an action will become liable for any damages which the plaintiff is able to prove. However, this is a risk always borne by a non-party and it is still dependent upon the plaintiff proving that the now named defendant caused the plaintiff's actual losses. The type of public interest dynamic which led MacMillan Bloedel to drop its civil action against protesters will not change because it has been required to add the non-parties as defendants as is being suggested here. With respect to costs, a non-party in contempt proceedings has always been liable for costs at a solicitor-client level.¹³² Nothing changes in this respect by adding the non-party to the action. Apart from the procedural safeguards afforded a non-party who is added to the proceedings through the use of the John and Jane Doe appellation, there is the added advantage that the plaintiff must prove a need for such an order prior to its granting. This is normally done by the plaintiff demonstrating that the abuse of rights is so wide-spread that it is unable to identify defendants in advance. The Federal court has insisted that the plaintiff prove how conventional ways of proceeding have failed before resorting to a John and Jane Doe order.¹³³ This is a close approximation to Balcombe L.J.'s suggestion that the plaintiff be required to explicitly request an order that is good against all the world and to argue its merits at that time.¹³⁴ It may also engage the court in debate about other possible avenues open to the plaintiff to gain redress of its grievances before seeking equitable relief. This may include an action of *mandamus* against the Attorney General and/or police.

IX. Conclusion

In *Vidéotron Ltée v. Industries Microlec Produits Electroniques Inc.*¹³⁵ the Supreme Court of Canada cautioned against using the contempt of court power as just another summary and simple enforcement mechanism of judgments. The contempt power of courts is of ancient origin and largely one that entrusts courts with considerable coercive and corrective authority. The jurisdiction to apply remains within the courts' inherent jurisdiction to exercise and is a power that all have suggested should be used sparingly. While any non-observance of

¹³² See *Coca-Cola Ltd. v. Pardhan*, *supra* note 126, and *Pfizer Canada Inc. v. Apotex Inc.* (1998), 86 C.P.R. (3d) 33 (F.C.T.D.) at 35.

¹³³ *Club Monaco Inc. v. Woody World Discounts*, *supra* note 121 at 440.

¹³⁴ *A.-G. v. Newspaper Publishing Plc.*, *supra* note 27 at 387-90.

¹³⁵ [1992] 2 S.C.R. 1065.

a court order should not be condoned, we should not automatically assume that an individual who fails to obey a court injunction order is launching an open attack on the integrity of the justice system. After all, a judgment debtor is equally disobeying a court order, yet we do not regard that individual as openly assailing the rule of law. A fundamental canon of our law is the right to be heard. It behoves courts to reconcile that right with methods adopted to enforce injunctions. I have suggested here that where at all possible civil litigants should be required to conform to the usual civil litigation procedures and to bring their action against a known defendant. When the injunction is aimed at unknown persons, the applicant should be required to add the unknown person, once identified, to the pleadings so as to accord that person with the usual rights of a defendant in being able to challenge the granting of the order. If it is the intention of the applicant to request, and the court to grant, an injunction against all the world, then courts should develop criteria specifically aimed at addressing how unknown persons are to have their rights safeguarded and why other enforcement mechanisms have failed the applicant. An interim measure may be the appointment by the court of an *amicus curiae* to represent the unknown persons.¹³⁶

¹³⁶Such a suggestion was made by Anderson J. in the New Zealand case of *Tony Blain Pty. Ltd. v. Splain*, *supra* note 98.