PRELIMINARY INJUNCTIONS AND PRE-JUDGMENT EXECUTION IN CANADA

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Introduction

In Canada, there are a number of preliminary actions, including injunctions, that can be taken to preserve the status quo, prevent harm or preserve assets pending trial. If you or your client is seeking this type of relief in Canada, it is important to understand the Canadian legal landscape. This paper will discuss the various types of preliminary actions available in Canada. These actions are wide-ranging. The paper also addresses the courts that can issue preliminary actions in Canada, as well as the scope of any appeals.

The Canadian Landscape

Canada has been described as a mosaic in relation to its cultural diversity. This sentiment aptly describes the legal landscape as well. While most of the provinces have a common law legal system, the Province of Quebec is a civil law jurisdiction. In addition, each province has its own legislation, which may affect preliminary injunctions and pre-judgment execution. As a result, it is important to know the law of the province that applies in any given situation.

Subject to local provincial legislation, the highest court in Canada is the Supreme Court of Canada, which issues cases that are binding on all other Canadian courts. The laws in Canada are further shaped by the United Kingdom and other Commonwealth countries and are sometimes influenced by United States judgments. The House of Lords still has a significant influence on Canadian courts, although the decisions are not binding.

Types of Preliminary Actions

As the words "preliminary actions" suggest, this paper addresses injunctive and other relief available to an applicant before trial. In Canada, the following categories of preliminary actions are available:

(a) Prohibitive and Mandatory Injunctions,

(b) *Quia Timet* Injunctions,

(c) Anton Piller Orders,

(d) Mareva Injunctions, and

(e) Pre-judgment Execution.

(a) Prohibitive and Mandatory Injunctions

A prohibitive injunction is the most common form of injunctive relief. It restrains the defendant from committing a specified act. For example, the enforcement of a restrictive covenant such as a non-competition clause is a prohibitive injunction. A mandatory injunction, on the other hand, requires the defendant to take some positive action to repair the situation according to the plaintiff's rights or to carry out some unperformed duty to act. For example, an injunction that requires the defendant to take down signage that infringes on the plaintiff's copyright is a mandatory injunction. Generally, Canadian courts favour prohibitive relief over mandatory relief, as the scope of the negative obligation is easier to define, easier to enforce, and normally less intrusive to the defendant and third parties.

In considering whether to grant a mandatory injunction, the appropriate criteria is set out in *R.*

v. Canadian Broadcasting Corp., 2018 SCC 5 (at paras 12-18). In such cases, the applicant must demonstrate a strong *prima facie* case. The applications judge must be satisfied that there is a strong likelihood on the law and the evidence that at trial, the defendant will ultimately be successful.

(b) ***Quia Timet* Injunctions**

A *quia timet* injunction is issued before any harm has actually come to pass. Here, the plaintiff is seeking to stop some harm that he or she thinks will take place, but has not yet begun. Canadian courts are reluctant to grant this order and will usually wait to see if the anticipated activity will occur before making an order.

Applicants for a *quia timet* injunction must prove three elements: 1) there is a serious issue to be tried, 2) there is a high degree of probability that they will suffer irreparable harm if the injunction is not granted, and 3) the plaintiff will suffer greater harm from refusing the remedy than the defendant will suffer from granting it (i.e. the "balance of convenience" weighs in favour of granting the remedy). The required degree of probability of future injury will depend on the severity of the prejudice or inconvenience that the apprehended injury may cause. A severe prejudice or inconvenience will require a lower probability of future injury and vice versa (*RJR - MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; *Amnesty International Canada v. Canadian Forces*, 2008 FC 162; *Zoocheck Canada Inc. v. Canada (Parks Canada Agency)*, 2008 FC 540.

(c) **Anton Piller Orders**

An Anton Piller order directs a defendant to allow representatives of the plaintiff access to the defendant's premises without prior warning, in order to search for evidence that is vital to the plaintiff's case, where there is a danger that the evidence will be destroyed. In Canada, there is a prescribed form of order that must be used.

In order to obtain an Anton Piller order, the plaintiff must prove four requirements: 1) an extremely strong *prima facie* case, 2) the actual or potential damage to the plaintiff is very serious, 3) convincing evidence that the defendants have in their possession documents or things important to the plaintiff's case, and 4) a real possibility exists that the defendants may destroy the documents or materials before any application *inter partes* can be made (*Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 SCC 36).

(d) **Mareva Injunctions**

A Mareva injunction restrains a defendant from removing assets from the jurisdiction, or otherwise disposing or dealing with assets within the jurisdiction, in order to protect the claim of a creditor.

Applicants for Mareva injunctions must: 1) make full and frank disclosure of all material matters; 2) give particulars of the claim, the grounds of it, and the amount thereof, and fairly state the points made against it by the defendant; 3) show some grounds for believing the respondent has assets within the court's jurisdiction; and 4) show some grounds for believing there is a risk of the assets being removed or dissipated before judgment is satisfied (*Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2).

(e) **Pre-judgment Execution**

In some provinces in Canada, pre-judgment garnishment is available. A garnishing order requires debts due from the garnishee (a third party such as a bank) to the defendant be paid into court. A garnishing order will only be granted before judgment if the claim is for a

specified amount. In some provinces, garnishment before the action has even commenced is available. The funds paid into court by the third party garnishees remain there pending judgment, other court order, or settlement by the parties. The usual practice is to start an action and simultaneously apply for a garnishing order.

In order to obtain a garnishing order, applicants must file an affidavit that supports their application. If a judgment has already been granted, then the affidavit must state this fact along with the amount unsatisfied. If a judgment has not been granted, the affidavit must typically state: 1) that an action is pending; 2) the time of its commencement; 3) the nature of the cause of action; 4) the actual amount of the debt, claim, or demand; and 5) that the debt is justly due and owing. In either case, the affidavit must also state the following: 1) the garnishee is indebted or liable to the defendant; 2) the garnishee is in the jurisdiction of the court, and 3) with reasonable certainty, the place of residence of the garnishee (e.g. *Court Order Enforcement Act*, R.S.B.C. 1996 c. 78, Schedule 1, Forms A and B).

Who can issue Preliminary Actions in Canada

General

Judges of the Supreme Courts of each province as well as Federal Court judges may grant a preliminary injunction, based on affidavit evidence, if it appears "just or convenient" to do so. Judges may include such terms as are considered just. Often, the applicant must provide an undertaking as to damages, that they will abide by any court order in the event the injunction is found to have been wrongly granted. On occasion, the court will require security be posted in addition to the undertaking.

The term "just or convenient" has the same effect as the words "just and equitable"; it refers to the court's discretion to grant an injunction to protect rights or prevent injury according to established equitable principles. Thus, a court will not grant an injunction merely because it will not harm the defendant, nor will it restrain a trivial or temporary injury.

Applicants must establish a justiciable cause of action. Once this burden has been met, the court may grant an injunction even if any final order may be granted by another court, tribunal or arbitral body, whether foreign or domestic. The court retains a residual jurisdiction to grant preliminary injunctions, where notwithstanding a comprehensive statutory scheme for settling disputes, there is no adequate remedy pending a resolution (*Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd.*, [1996] 2 S.C.R. 495).

Preliminary Injunctions can be brought ex parte (without notice to the other side) under two circumstances:

1. if given notice the defendant will act to frustrate the process, for example, by destroying documents; and,
2. if the matter is so urgent that giving notice is impractical or impossible.

A party seeking an ex parte order must give full and frank disclosure of all facts material to the case. The failure to give full disclosure may result in the injunction being set aside on that ground alone. The ex parte order is typically granted for a limited period of time until a full hearing on affidavit evidence with notice can be given.

Federal Court vs. Provincial Court Jurisdiction and Nation-wide Orders

In Canada, the Federal Court has jurisdiction over Intellectual Property and Marine Law matters. An injunction obtained through the Federal Court will apply nationwide, whereas one obtained through a provincial court will generally only be in force throughout that province. In the latter case, if assets are being moved from one province to another, it may be necessary for the applicant to obtain injunctions in both provinces.

An exception to the limited breadth of provincial court injunctions pertains to Mareva injunctions. In 1994, the Supreme Court of British Columbia became the first court in Canada to issue a worldwide Mareva injunction in *Mooney v. Orr* (1994), 100 B.C.L.R. (2d) 335 (S.C.) add'l reasons in 1 B.C.LR. (3d) 150 (S.C.). Justice Newbury ordered the plaintiff (the defendant by counterclaim) to refrain from disposing of or dealing with his assets, wherever situated, until the final disposition of the action, and to disclose the location and value of his assets. Newbury J. noted the developments in English and Australian courts, which granted worldwide injunctions and held that the same reasons for extending Mareva injunctions to apply to foreign assets in those cases, also applied in British Columbia (pp. 337-338). Since *Mooney*, it has become generally accepted in Canada that Canadian courts have the power to grant Mareva injunctions to enjoin parties, in the courts jurisdiction, from disposing of assets anywhere in the world.

Enforcement of Foreign Injunctions

The traditional common law rule refused enforcement of foreign non-money judgments, including injunctions. However, in *Pro Swing Inc. v. Elta Golf Inc.,* 2006 SCC 52, the Supreme Court of Canada held that a foreign judgment for an injunction could be enforced provided that the judgment was rendered by a court of competent jurisdiction, was final, and was of a nature that the principle of comity requires the domestic court to enforce it (para 31). The Supreme Court held that the principle of comity does not require receiving courts to extend greater judicial assistance to foreign litigants than it does to its own litigants. Further, Canadian courts can exercise discretion when deciding whether or not to enforce a foreign judgment (para 31).

However, the Supreme Court held that foreign contempt orders are not enforceable, as they have a "criminal component" (para 39). Further, courts are to take a case by case approach. On the facts of *Pro Swing*, the majority refused to enforce the foreign judgment, as it included a contempt order, its intended territorial scope was uncertain, it was not clear that other judicial assistance mechanisms were not available, and enforcement would risk the violation of privacy rights.

Notably, in *Sociedade-de-fomento Industrial Private Limited v. Pakistan Steel Mills Corporation (Private) Limited*, 2014 BCCA 205, application for leave to appeal to the Supreme Court of Canada dismissed with costs, the British Columbia Court of Appeal overturned a decision of the lower court, which held that a Mareva injunction enforcing an international arbitration award had been wrongly granted. The Court of Appeal noted that British Columbia has incorporated the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (commonly known as "the *New York Convention"*) into its domestic law. The Court held that the *New York Convention* and the adopting provincial legislation required British Columbia courts to recognize and enforce an international

arbitration award on the same basis as a domestic award.

Scope of Appeals

Parties may appeal the decision of a lower court to grant or refuse to grant an injunction, namely, the Federal Court of Appeal in the case of Federal Court decisions, and the provincial appeal court for provincial Supreme Court decisions. Appeals typically take several months, but in the case of an injunction, the process can be expedited to a few days, or even less, to account for the urgency. The scope of an appeal of a preliminary injunction that was fully argued with all parties having adequate notice, is quite limited because it is a discretionary order. An appellate court cannot interfere with the lower court's discretion merely because it would have exercised its discretion differently; rather, it can only interfere if there is a clear mistake on the law or evidence or if there is some other glaring error (*Fettes v. Culligan Canada Ltd.*, 2009 SKCA 144).

Conclusion

In Canada, courts have the ability to order a variety of preliminary injunctions and in some provinces order prejudgment execution. These tools are very powerful in that they have immediate effect and relief from the potential harm that would otherwise result. The evolution of preliminary injunctions in Canada shows that Canadian courts will take seriously the threat of defendants hiding or disposing of their assets in order to avoid payment to plaintiffs. In today's world when money or assets can be easily moved from one jurisdiction to another, preliminary injunctions become all the more important and Canadian courts are willing to grant injunctions to prevent harm[1].

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[1] See Also: R.J. Sharpe, *Injunctions and Specific Performance* (Toronto: Canada Law Book, 1992) (loose-leaf updated 2018, release 27); L.R. Robinson, Q.C., *British Columbia Debtor-Creditor Law and Precedents* (Toronto: Carswell, 1993) (loose-leaf updated 2018, release 6)).