



AN OVERVIEW OF EXTRAORDINARY REMEDIES

EXTRAORDINARY REMEDIES IN CIVIL LITIGATION

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EXTRAORDINARY REMEDIES

Extraordinary remedies available in civil proceedings include:

- Prohibitive, Mandatory and Preventative Injunctions
- Preservation of and Recovery of Property orders
- Pre-judgment garnishment orders
- Pending litigation orders

THE PURPOSE OF EXTRAORDINARY REMEDIES

**POTENTIAL FOR QUICK,
COST-EFFECTIVE RESOLUTION
OF DISPUTES**

**PRESERVATION AND PROTECTION
OF PROPERTY, RIGHTS AND
EVIDENCE PENDING LITIGATION**

PRINCIPLES COMMON TO OBTAINING MANY EXTRAORDINARY REMEDIES

- Demonstrating an underlying cause of action on a standard commensurate to the nature of the relief sought
- Providing full and frank disclosure of all material facts
- Demonstrating the necessity or desirability of obtaining urgent or immediate relief
- Satisfying technical requirements
- Demonstrating why pre-judgment relief should be awarded in the face of competing rights and interests
- Coming to Court in good faith and with “clean hands”
- Having a sympathetic judge

RISK, BENEFIT, COST

RISK OF LOSING

PRACTICAL
EFFECTIVENESS OF
CHOSEN REMEDY

COST

DELAY IN PURSUING
MAIN ACTION

RISK OF DIMINISHMENT OF PROFESSIONAL
REPUTATION IF THERE IS A FAILURE TO BE
FORTHRIGHT WITH THE COURT

DEFLATION OF CLIENT'S MORALE/INFLATION OF
OPPONENT'S MORALE ("INFLATEGATE")

SOURCES OF JURISDICTION

Court of Queen's Bench Act: ss. 55-57 (Injunctions), s. 58 (Pending Litigation Orders), s. 59 (Recovery of Personal Property), ss. 60 and 62 (Pre-Judgment Attachment), ss. 61 and 62 (Pre-Judgment Garnishment)

QB Rules: R. 40 (Injunctions), R. 42 (Pending Litigation Orders), Rule 44 (Interim Recovery of Personal Property), Rule 45 (Interim Preservation of Property), Rule 46 (Pre-Judgment Attachment and Garnishment)

Equity, Common Law and "Inherent Jurisdiction" of the Court: Anton Piller and Mareva

INJUNCTIONS

Types of injunctions include:

Mareva

(freezing order)

Anton Piller

(private search warrant)

Quia timet

(preventing imminent harm)

The Courts will typically apply the tri-partite test set out in *RJR – MacDonald Inc. v. Canada* (Attorney General) to determine whether or not an injunction should be granted prior to trial:

Is there a serious question to be tried?

Will the plaintiff suffer irreparable harm?

Does the balance of convenience favour the granting of the injunctive relief?

A more stringent test is applied to more intrusive injunctions, such as the Mareva, Anton Piller and quia timet.

FLEXIBILITY OF THE TRI-PARTITE TEST

“The three criteria mentioned in *RJR - MacDonald Inc.* (serious issue to be tried; irreparable harm to the moving party if injunction is not granted; and the balance of convenience) are not separate hurdles for an applicant for an injunction; rather, they are “interrelated considerations.” Depending on the circumstances, strength in one of the factors can compensate for weakness in another ...”

Hudson Bay Mining & Smelting Co., Limited v. Dumas et al., 2014 MBCA 6 at para. 82

MANDATORY V. PROHIBITORY INJUNCTIONS

When the injunctive relief sought requires the target to carry out a positive act, the first step of the tri-partite test is modified and the plaintiff must establish a strong *prima facie* case.

“In the context of claims for mandatory injunctions, a strong *prima facie* case has been interpreted to mean that the plaintiff must satisfy the court that he or she is clearly right and is almost certain to be successful at trial. Given the very intrusive nature of a mandatory injunction, there must be a high assurance that the injunction would be rightly granted.” (*Saba v. Interlake Eastern Regional Health Authority*, 2016 MBQB 78 at para. 80)

IRREPARABLE HARM

"Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. (*RJR - MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311 at 341)

Evidence of irreparable harm must be clear and not speculative (*Oberg et al. v. Canada (Attorney General)*, 2012 MBQB 64 at para. 36).

DAMAGES UNDERTAKING

Rule 40.03 requires parties seeking injunctive relief to provide an undertaking as to damages. Parties giving undertakings may also be required to tender evidence concerning their ability to satisfy the undertaking.

If the injunction is set aside, the party that obtained it may be required to compensate their opponent for any damages suffered as a result of the injunction. The giving of the undertaking exposes the party to contempt proceedings if they fail to pay the damages award.

The Court has the discretion to waive the undertaking but that is typically done only when the moving party is impecunious.

Ex Parte MOTIONS AND FULL AND FRANK DISCLOSURE

Rule 37.06 permits motions to be brought without notice (ex parte).

However, Rule 39.01(6) states:

Where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application.

Ex Parte MOTIONS AND FULL AND FRANK DISCLOSURE

Applying for an order without notice places upon an applicant a heavy onus for full, frank and complete disclosure of all material facts (*St. Vital School Division No. 6 v. Trnka*, 2001 MBCA 164 at para. 2)

... an *ex parte* injunction must be dissolved promptly once it appears that material facts were not presented to the Judge who granted the *ex parte* injunction (*Griffin Steel Foundries Ltd. v. Canadian Association of Industrial, Mechanical and Allied Workers (1977)*, 80 D.L.R. (3d) 634 at 640 (Man. C.A.)).

MAREVA INJUNCTIONS

PURPOSE

- To prevent the frustration of judgment enforcement by the dissipation or concealment of assets
- Most often brought in cases involving allegations of fraud
- Generally require third party compliance to be effective

LEGAL REQUIREMENTS

- A strong *prima facie* case
- A serious risk of removal or disposition of assets
- An intention to frustrate the plaintiff's potential judgment (although the absence of such an intention is not fatal where there is a very compelling and strong claim)
- Irreparable harm
- Favourable balance of convenience

MAREVA INJUNCTIONS

PROCESS

- Motion brought without notice, ex parte
- Full and frank disclosure of all material facts
- Order needs to specify what assets are frozen and provide as much detail as possible to ensure third party compliance
- Order should provide for disclosure of assets and ability to obtain information from third parties such as banks
- Order may contain provisions for reasonable living and legal expenses
- Order should be served widely and quickly

AUTHORITIES

- *Clark et al. v. Nuicare PLC*, 2006 MBCA 101
- *Isofoton S.A. v. Toronto Dominion Bank* (2007), 85 O.R. (3d) 780 (Ont. S.C.J.)
- *Canadian Imperial Bank of Commerce v. Credit Valley Institute of Business and Technology*, 2003 CanLII 12916 (Ont. S.C.J.)

ANTON PILLER ORDERS

PURPOSE

- Prevent the destruction of evidence by an unscrupulous opposing party

LEGAL REQUIREMENTS

- Strong prima facie case
- Serious damage to the plaintiff as a result of the defendant's alleged misconduct, potential or actual
- Convincing evidence that the defendant has incriminating documents or things
- A real possibility that the defendant may destroy such material before the discovery process

ANTON PILLER ORDERS

PROCESS

- Similar to a criminal search warrant and sometimes known as a “civil search warrant”
- Motion brought without notice, *ex parte*
- Full and frank disclosure of all material facts
- Security posted
- Order needs to specify materials sought and provide safeguards against disclosure of privileged information
- Search supervised by independent, court appointed solicitor
- Restraint against over-zealous execution of order

AUTHORITIES

- *Celanese Canada Inc. v. Murray Demolition Corp.* [2006] 2 S.C.R. 189
- *British Columbia (Attorney General) v. Malik*, 2011 SCC 18

QUIA TIMET INJUNCTIONS

PURPOSE

- To prevent imminent harm that has not yet occurred

LEGAL REQUIREMENTS

- High degree of probability that the harm will in fact occur"
- Strong probability almost amounting to moral certainty" or a "strong *prima facie* case"
- Irreparable harm
- Favourable balance of convenience

AUTHORITIES

- *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441

REPLEVIN

PURPOSE

- To recover possession of personal property on an interim basis pending trial

LEGAL REQUIREMENTS

- Substantial grounds or high degree of assurance the plaintiff will succeed at trial
- Right of ownership or lawful possession
- Unlawful taking or detention
- Payment of security

REPLEVIN

PROCESS

- Affidavit describing nature of property, right to ownership or possession and circumstances of unlawful taking or detention
- Security in the amount of twice the value often required
- Failure to comply may give plaintiff right to obtain possession of other property of the defendant of an equivalent value

AUTHORITIES

- Section 59 of *The Court of Queen's Bench Act*
- Rule 44 of the *Queen's Bench Rules*
- *Manitoba Agricultural Credit Corp. v. Heaman* (1990), 70 D.L.R. (4th) 518 (Man. C.A.)
- *Clark Door of Canada Ltd. v. Inline Fibreglass Ltd*, (1996) 45 C.P.C (3d) 244 (Ont. Gen. Div.)

PRE-JUDGMENT GARNISHMENT

PURPOSE

- Securing collection of a claim for the payment of a debt or specified (“liquidated”) demand

LEGAL REQUIREMENTS

- “Good” cause of action for payment of a debt or liquidated demand
- Amount of claim must be known and factor in just credits, set-offs and counterclaims
- Identification of object of garnishment
- Evidence that the object of garnishment is or will become indebted to the defendant
- Particulars of the debts as are known to the plaintiff

PRE-JUDGMENT GARNISHMENT

PROCESS

- (Usually) without notice *ex parte* motion
- Full and frank disclosure of all material facts
- Security is sometimes required

AUTHORITIES

- QB Act ss. 61 and 62
- Rule 46
- *DVJ Inc. v. Mercor Management Inc.*, 2011 MBQB 239 (Master)
- *S.E.G. Engineering Inc. v. Garden Hill First Nation*, 2010 MBQB 160

PRE-JUDGMENT ATTACHMENT

PURPOSE

- Preserve and secure property of the defendant pending litigation

LEGAL REQUIREMENTS

- “Good” cause of action in which the payment of money is claimed
- One of the following characteristics of the defendant:
 - Residence outside of Manitoba (if an individual)
 - Corporate registration outside of Manitoba (if a corporation)
 - Is about to leave or has left Manitoba with the intent to
 - Change residence,
 - Defraud a creditor, or
 - Avoid service of a document
 - Is about to permanently remove or has permanently removed property out of Manitoba
 - Has concealed, removed, assigned, transferred, conveyed, converted or otherwise disposed of property with an intent to delay, defeat or defraud a creditor or is about to do so

PRE-JUDGMENT ATTACHMENT

PROCESS

- (Usually) without notice *ex parte* motion
- Full and Frank disclosure of all material facts
- Security
- Enforced by Sheriff where object is personal property

AUTHORITIES

- QB Act, ss. 60 and 62
- Executions Act, ss. 5(1) , 8-9.1
- Real Property Act, s. 75(7)
- Rules 46.01-46.13
- *Clark v. Nuicare PLC*, 2006 MBCA 101

PENDING LITIGATION ORDER

PURPOSE

- Provides notice to third parties of an interest in land and constitutes a lien and charge against land

LEGAL REQUIREMENTS

- Triable issue as to whether the plaintiff has a reasonable claim to an interest in land

PENDING LITIGATION ORDER

PROCESS

- Provides notice to third parties of an interest in land and constitutes a lien and charge against land

AUTHORITIES

- QB Act, s. 58
- Rule 42
- *Mellco Developments v. Portage la Prairie (City)*, 2002 MBCA 125
- *Elgin Enterprises Inc. (Receiver of) v. Sopko*, 1991 CarswellMan 220

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