

A PRACTICAL GUIDE

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## Introduction

#### A. OVERVIEW

Fraud is fire, and law is ice. The ever-accelerating rate of fraud destroys businesses and families; the all-too-frequent glacial pace of the law and its inadequacy to counteract fraud and compensate its victims renders the legal system itself a further victim of fraud. In an electronic age, fraudsters and funds escape across fluid borders, protected by at-times impermeable legal and banking systems that stymie tracing and enforcement. Over the course of the life cycle of a legal claim, from demand to filing to trial to judgment to execution, any fraudster worth her salt will be wholly judgment-proof, with all exigible assets rendered far beyond reach and recourse. An intrepid fraudster or counterfeiter or thief of trade secrets will also cover her tracks by deleting or removing electronic or physical evidence.

This modest book sets out the Canadian law on the most potent, if still often inadequate, civil litigation tools for combatting fraud.

A *Mareva* injunction is a court order that prevents or limits a defendant from dealing with or disposing of some or all of his assets. It may be granted either before trial or after trial in aid of execution. It may freeze the defendant's assets worldwide, as well as assets held in another's name or by a related business or person. This form of

See Mareva Compania Naviera v International Bulkcarriers (1975), [1980] 1 All ER
 213 (CA) [Mareva Compania].

equitable relief has also been called a "Mareva order," a "freezing order," a "freezing injunction," and an "asset preservation order."

The Anton Piller order, or "search order" or "evidence preservation order," allows a plaintiff to search the defendant's home or business to seize and preserve documents and other evidence. The order has been referred to as a "civil search warrant."<sup>2</sup>

These two remedies have famously been described as the "nuclear weapons" of civil litigation.<sup>3</sup> Given their extraordinary powers, they are generally issued only where there has been a clear case of fraudulent or otherwise dishonest activity. But, as we shall review, they have also been granted in less stark circumstances. Courts and counsel must be vigilant to ensure that these remedies are not abused.

Asset and evidence preservation orders arise most frequently in fraud litigation, but such orders are potent tools wherever human corruption or frailty threatens the integrity of the judicial process through the destruction or removal of evidence or assets. Freezing orders are also frequently issued in family law cases and business disputes of a more innocuous nature. Evidence preservation orders are frequently granted in intellectual property disputes, but they have been used in litigation as diverse as defamation and employment law. Although documents, both paper and electronic, are the most frequent targets of *Anton Piller* orders, the orders are often used to seize goods, particularly in actions to counteract piracy, counterfeiting, and other intellectual property torts.

For completeness, this book also provides, in Part Two, an overview of the preservation of property rules that exist in all Canadian jurisdictions.<sup>4</sup> These rules are narrower than the *Mareva* and *Anton* 

See Anton Piller KG v Manufacturing Processes, [1976] 1 All ER 779 [Anton Piller KG].

<sup>3</sup> Bank Mellat v Nikpour, [1985] FSR 87 at 92 (CA).

See Supreme Court Civil Rules, BC Reg 168/2009, r 10-1; Alberta Rules of Court, Alta Reg 124/2010, r 6.25; The Queen's Bench Rules, S Gaz 27 December 2013, 2684, r 6-42; Court of Queen's Bench Rules, Man Reg 553/88, rr 45.01 & 45.02; Rules of Civil Procedure, RRO 1990, Reg 194, rr 45.01 & 45.02 (also adopted by Prince Edward Island); Code of Civil Procedure, CQLR c C-25.01, art 516-23; Rules of Court, NB Reg 82-73, rr 35.02, 35.03, and 40.03; Nova Scotia Civil Procedure Rules, Royal Gaz 19 November 2008, r 42.01; Rules of the Supreme Court, 1986, SNL 1986, c 42, Schedule D, r 22.02; Rules of Court, YOIC 2009/65, r 52; Rules of the Supreme Court of the Northwest Territories, NWT Reg 010-96, rr 468-72; Rules of the Supreme Court of

*Piller* powers, and they are limited to preserving the property specifically in dispute in a lawsuit, such as a fund, an account, or (less commonly) physical property. In contrast to the relatively recent innovations of the *Mareva* and *Anton Piller* orders, Canadian and English civil procedure has long allowed the preservation of disputed property. These rules have been somewhat superseded by the rise of the *Mareva* order, which freezes property that does not necessarily but could include the assets in dispute. Further, at least in British Columbia, the flexible test for a *Mareva* order may be more readily established than that for a preservation of property order under the rules. That said, given the codification of the preservation of property rules and their more targeted and less intrusive nature, they will usually be the preferred avenue for litigants and courts where appropriate.

This chapter will set out the purpose of and use for this book. It will then provide an overview of the purpose of and procedure for obtaining asset freezing or search orders in Canada, before tracing their origins, and then envisioning their future.

## **B. STRUCTURE AND USE OF THIS BOOK**

Attaining and responding to *Mareva* and *Anton Piller* orders will, by their very nature, be a race against the clock. For the plaintiff, the orders must be obtained and served on financial institutions and premises before the usually insalubrious defendant is alerted to their existence and secretes her assets out of the jurisdiction, or otherwise beyond reach, or destroys evidence. For the enjoined defendant, the imposition of such orders will not only inconvenience the defendant's ordinary use of his own assets but also endanger pending transactions, as well as payments to creditors and employees, and harm reputation. Notwithstanding the standard language in an order allowing for payments in the ordinary course of business, financial institutions served with an order will not usually risk the release of funds or assets without the further clarification of a court order or written consent of the plaintiff. The knowledge that one of these

the Northwest Territories, NWT Reg (Nu) 010-96, rr 468-72; Federal Courts Rules, SOR/98-106, rr 377-79.

fraud-focused remedies has been granted will cast a shadow over the personal and trade reputation of the defendant.

This book, accordingly, is designed for urgent court applications. Legal propositions are stated in short sentences and paragraphs, with pinpoint references to the governing authorities, for quick gathering of the law and presentation in court. This book finds its inspiration in classic rule texts such as the *Ontario Civil Practice*,<sup>5</sup> the British Columbia "White Book" and "Black Book," *Power's Western Practice Digest*, and the *Civil Procedure Encyclopedia*.9

## 1) Two Cautions

First, as with any book of this nature, it is critical that counsel not read or present each legal proposition in isolation from the case that it comes from. Even more so than with other remedies, *Mareva* and *Anton Piller* orders, as interlocutory exercises of judicial discretion, often turn on factual nuances: close reading of each case is critical before presenting the authority to the court. Do not blindly cite these cases, and heed the admonition of Lord Halsbury:

every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found . . . a case is only an authority for what it actually decides. 10

Second, given the powers and potential abuses of the *Anton Piller* order and given the fact that it is usually obtained *ex parte*, many of the *Mareva* principles, such as the duty of full and frank disclosure, the

<sup>5</sup> Garry Watson & Michael McGowan, *Ontario Civil Practice* (Toronto: Thomson Reuters, 2016).

The Honourable Madam Justice Janice R Dillon & Gordon Turriff, QC, British Columbia Annual Practice 2017 (Toronto: Canada Law Book, 2016).

<sup>7</sup> Allan P Seckel, QC & James C MacInnis, Supreme Court Rules Annotated 2017 (Toronto: Carswell, 2016).

<sup>8</sup> GF Butterwick, Power's Western Practice Digest (Calgary: Burroughs, 1977).

<sup>9</sup> The Honourable Justice William A Stevenson & Jean E Côté, Civil Procedure Encyclopedia (Edmonton: Juriliber, 2003).

<sup>10</sup> Quinn v Leathem, [1901] AC 495 at 506 (HL).

undertaking, evidence, and procedure, apply equally. I have avoided duplication and covered in the *Anton Piller* part of this book (Part Three) only cases arising in a specific *Anton Piller* context. More general principles are generally found in the *Mareva* part (Part One), and the reader should always review the analogous section.

## C. PRESERVATION ORDERS GENERALLY

## 1) Test for Extraordinary Injunctions

Most Canadian jurisdictions impose a high-threshold test for issuing these extraordinary orders: The applicant must show a strong *prima facie* or good arguable case and a real risk that the defendant will remove or dissipate assets to avoid judgment or will destroy evidence. The analysis then turns to the relative balance of convenience: Which party will suffer the most prejudice from the granting or denial of the order?

Readers outside of British Columbia should be cautious in their use of British Columbia jurisprudence with respect to the threshold test. British Columbia, where the author practises, takes a more flexible approach to preservation orders. Although most Canadian courts generally will not issue freezing orders absent proof of fraud or other intentional nefarious conduct, and specifically will not issue the orders as a form of security, British Columbia courts have consistently stated that "they are not prisoners to a formula" and that a preservation order may be granted in any situation, based on the overarching consideration of the balance of justice and convenience. That being said, British Columbia courts, like those in other Canadian jurisdictions, agree that a freezing order should not be granted based merely on "speculation that the plaintiff will ultimately succeed in its claim and have difficulty collecting on its judgment if the injunction is not granted."12 Generally, fraudulent conduct, or at least extraordinary facts of evasion or dissipation, must be present to justify the intrusive order.

Tracy v Instaloans Financial Solutions Centres (BC), 2007 BCCA 481 at para 31 [Tracy], citing British Columbia (Attorney General) v Wale (1986), 9 BCLR (2d) 333 (CA), aff'd (sub nom Wale v British Columbia (Attorney General)) [1991] 1 SCR 62 [Wale]. Note that other jurisdictions may be moving towards this more flexible approach: see SFC Litigation Trust (Trustee of) v Chan, 2017 ONSC 1815.

<sup>12</sup> ICBC v Patko, 2008 BCCA 65 at para 26 [ICBC].

## 2) Procedure

In most circumstances, for either a *Mareva* or an *Anton Piller* order, the applicant will prepare and file materials starting the legal proceeding, along with the applicable notice of application or motion, and affidavits indicating that the assets or evidence in question may well be dissipated or destroyed before trial. In extremely rare and urgent cases, the matter may be heard on the basis of *viva voce* evidence.

To prevent the defendant from swiftly dissipating her assets or destroying evidence, the materials are filed but generally not served upon the defendant until after the order has been obtained. Usually, the matter is first heard *ex parte*, without notice to the defendant. Canadian court registries and courts are usually accommodating in facilitating the hearing of the motion immediately or within hours of filing.

The order is almost always issued for a limited time, with leave granted in advance for the defendant to return to apply for the release or variation of the order on notice. A claimant successfully obtaining an injunction must expect a swift and furious return to court, to face a battery of evidence and responsive arguments microscopically dissecting the fullness and frankness of the claimant's earlier *ex parte* submissions.

An order may be granted at any time during the litigation, and even after judgment has been given. That said, if litigation has been ongoing and if the defendant has attorned to and complied with the court's processes, a freezing or evidence preservation order will generally be more difficult to justify.

Historically, typical freezing orders froze the entirety of the defendant's assets. Now, courts insist upon more nuanced terms. The defendant is generally allowed to move assets in the ordinary course of its business. The defendant is also permitted reasonable living and legal expenses. Finally, the freezing order should not freeze assets over the amount claimed in the litigation.

## 3) Execution of the Order

#### a) Mareva Order

For practical enforcement, an asset freezing order is served on the financial institutions and other parties (such as trustees or brokerage houses) that are known, or likely, to hold assets of the defendant. Ideally, these specific institutions, with specific account numbers, will be listed in the order. But the typical order contains a blanket prohibition against dealing with the defendant's assets or assisting or allowing the defendant to withdraw or dissipate assets, binding all persons with knowledge of the order, including financial institutions not specifically listed. The applicant should map out a thorough service strategy before proceeding to court to obtain the order: Service letters, ideally addressed to the appropriate manager and legal counsel at each financial institution, should be ready. The freezing order should also, where possible, be registered on title of all real estate owned by the defendant.

In practical terms, financial institutions, even Canadian financial institutions, often push back against a freezing order. Where the order is served on a foreign bank, the bank will often insist upon domestication of that order in its own jurisdiction before it will freeze accounts. There have been few cases directly addressing this point, showing that litigants and bank counsel often come to reasonable accommodations. Prudent counsel will contact in advance counsel for the financial institution at which the defendant is thought to have assets. While financial institution counsel will generally not indicate the presence of an account, they may well indicate that no such funds exist, such that there is no use in spending the time to seek the order with respect to that financial institution. In any case, it is often wise and courteous to send a draft of the order sought (omitting specific details of the defendant) to the financial institution for comment in advance of the order: In addition to facilitating the financial institution's timely cooperation, it also allows counsel to advise the court that an affected nonparty - the financial institution that in most cases will be the effective means of enforcing the order - has no objections to the form of the order.

## b) Anton Piller Order

As with a freezing order, an *Anton Piller* order is almost always obtained *ex parte*. The defendant usually first learns of the order after he hears a knock on his door and is presented with the order. The search is generally carried out by a representative of the applicant, the party's lawyer, and an independent supervising solicitor specific-

ally retained to supervise the search and to ensure strict compliance with the terms of the order—by both plaintiff and defendant. While police often attend the execution of such orders, they should do so only to keep the peace, and not to facilitate the execution of the order. The order is civil, not criminal: The defendant is not obliged to allow the search to proceed, and may refuse entry. But if she does so, she immediately harms her credibility before the court in the litigation and also faces contempt proceedings, with possible criminal sanctions, for breach of the order.

Early abuses of the procedure led to strict court edicts on the proper execution of search orders, with strict safeguards to protect privileged materials in the possession of the defendant. While earlier orders gave the gathered evidence directly to the plaintiff soon after execution, the independent supervising solicitor will now hold those materials until the court orders that they can be released to the plaintiff. The purpose of the order is not discovery, or evidence gathering, but rather evidence preservation. Security and safeguards trump speed and plaintiff convenience.

## 4) Risks of Applying for Preservation Orders

Applying for an asset or evidence preservation order is a high-stakes exercise for several reasons. First, as such applications are almost always made *ex parte*, the applicant's counsel is required to make full and frank disclosure of all material facts to the court. As there is often very little time to prepare the materials for a freezing order and as such information is often incomplete at best in a fraud scenario, it is often a challenge to uncover and disclose sufficient facts to ensure that counsel is meeting the client's duties of disclosure. Counsel must bring to the court's attention not only the facts that might fairly assist the defendant's case but also any adverse law. Even innocent nondisclosure can result in the setting aside of the order, and a marked failure in disclosure may well attract judicial castigation, as well as a full indemnity costs award payable to the defendant.

Second, as with most injunctions, the applicant must provide an undertaking to the court to compensate the defendant for any damages suffered if it is later determined that the order should not have been granted. And when a party's assets are substantially frozen or

when its files are seized, there is significant risk of significant damages, for which the applicant will *prima facie* be liable.

Third, an order that is improperly obtained or that is drafted too broadly or imprecisely will cost the party, and counsel personally, heavily in terms of credibility with the court. Canadian jurisprudence and that of other jurisdictions contain many judicial chastisements against parties seeking freezing orders for an ulterior purpose of litigation blackmail or where the risk of dissipation or destruction is insufficient to justify these extreme remedies. Thus, an improperly obtained freezing or search order that is later set aside can hobble the claimant from the outset of litigation, rather than empowering the claimant.

Finally, a search order adds the additional risk of exposing the applicant and its counsel to privileged materials (an increasingly frequent risk given the seizure of hard drives and electronic materials). In such circumstances, the search order may be a cursed gift: In extreme cases, the court may order that counsel tainted by exposure to privileged material be removed from the file, or the applicant's case or defence dismissed.

## 5) Terminology

## a) Mareva Order

Various terms have been used to describe the relief provided by the *Mareva* order, the most common being "asset preservation order" or "asset preservation injunction" and "freezing order" or "freezing injunction." While "*Mareva* injunction" remains the most commonly used term, the other terms are also used in Canada, and are occasionally used in this book. The term "freezing injunction" came into common use when it was adopted in the English *Civil Procedure Rules* in April 1999, in an attempt to move away from the case-specific reference to a *Mareva* order to a more plain-language description of the remedy. That said, as Steven Gee, QC, observes in his leading United Kingdom text on these orders, the term "freezing injunction" is somewhat misleading in that it implies that the remedy is *in rem*, focused on freezing the assets of the defendant; in fact, a *Mareva* injunction is an *in personam* remedy that restrains the defendant, rather than

<sup>13</sup> See Civil Procedure Rules 1998 (UK), r 25 and practice direction 25A [UK CPR].

the defendant's assets. <sup>14</sup> Further, the order does not necessarily freeze specific assets, and if the defendant acquires further assets after the date of the initial order, she is restrained from using those assets as well. As described in one case, the order is "ambulatory" with the defendant. <sup>15</sup>

## b) Anton Piller Order

The most common term for an *Anton Piller* order is just that. The order is rarely called an injunction, although it is a form of short-term mandatory injunction. The British Columbia model order is called an "Order for Seizure and Safekeeping of Evidence" while the Ontario model order uses the phrase "Order to Allow Entry and Search of Premises." In the United Kingdom, they are called "search and seizure orders." "Evidence Preservation Order" is also a recurring term and properly emphasizes that the primary purpose of these orders is to preserve, rather than gather, evidence. But the *Anton Piller* power goes beyond preservation of evidence and may preserve property that is the subject of the dispute. This property is itself, it is granted, evidence, but it is also the very subject matter of the litigation. Accordingly, preference will be given to the term "search order" as being the most broadly accurate.

#### D. MAREVA ASSET FREEZING ORDERS

# 1) Lister v Stubbs: No Prejudgment Restraint of Defendants' Assets

Courts have traditionally balked at restricting or enjoining a defendant's use of his assets before judgment at trial. The 1890 case of *Lister v Stubbs* is usually presented as the authority for the proposition that a court will not permit pretrial execution on or restraint of a defendant's assets to provide security for the plaintiff.<sup>17</sup> That case arose from

Steven Gee, QC, *Commercial Injunctions*, 6th ed (London: Sweet & Maxwell, 2016) at 1-029.

<sup>15</sup> Cretanor Maritime v Irish Marine Management, [1978] 1 WLR 966 at 973 (CA).

<sup>16</sup> See UK CPR, above note 13, r 25 and practice direction 25A.

<sup>17 (1890), [1886–90]</sup> All ER Rep 797 (CA).

unusual facts: The plaintiff sued the defendant, its employee, for the proceeds of a secret commission and sought an order to pay funds into court. Lord Cotton refused to grant the order: "I know of no case where, because it is highly probable if the action were brought the plaintiff could establish that there was a debt due to him by the defendant, the defendant has been ordered to give a security till the debt has been established by the judgment or decree."<sup>18</sup>

Vice-Chancellor Megarry described this principle in the early *Mareva* decision of *Barclay-Johnson v Yuill*:

In broad terms, this establishes the general proposition that the court will not grant an injunction to restrain the defendant from parting with his assets so that they may be preserved in case the plaintiff's claim succeeds. The plaintiff, like other creditors of the defendant, must obtain his judgment and then enforce it. He cannot prevent the defendant from disposing of his assets *pendente lite* merely because he fears that by the time he obtains judgment in his favour the defendant will have no assets against which the judgment can be enforced. Were the law otherwise, the way would lie open to any claimant to paralyse the activities of any person or firm against whom he makes his claim by obtaining an injunction freezing their assets.<sup>19</sup>

As shown by the early history of the asset freezing order, the nascent remedy had to crawl out from under the shadow of the *Lister v Stubbs* principle. However, as noted by the Supreme Court of Canada in *Aetna Financial Services v Feigelman*, even *Lister v Stubbs* implicitly recognized that an order would be granted in specific circumstances, as exceptions to the rule: The court will restrain the defendant's use of her assets (1) to protect assets that are demonstrably the property of the claimant; (2) where the contractual or other relationship between the parties includes a condition whereby the defendant debtor could not, without the claimant's agreement, defend the claim; or (3) where the defendant is the trustee of the claimant.<sup>20</sup> The *Aetna* Court noted further exceptions to the rule. As set out below, dynamic jurists,

<sup>18</sup> Ibid at 799.

<sup>19 [1980] 3</sup> All ER 190 at 193 (Ch) [Barclay-Johnson].

<sup>20</sup> Aetna Financial Services v Feigelman, [1985] 1 SCR 2 at para 14 [Aetna].

particularly Lord Denning, were able to mould these exceptions into a potent remedy to better combat asset dissipation that harms not only claimants but the reputation and efficacy of the courts themselves.

## 2) Origins of the Mareva Order

Despite its most common present-day use as an antifraud remedy, the modern asset preservation order was developed in a series of maritime cases, largely through the judicial creativity of Lord Denning, between 1975 and 1980. The phrase "Mareva injunction," despite its popular usage, fails to give credit where credit is due: The first Mareva injunction was not granted in the case of that name but rather in the earlier case of Nippon Yusen Kaisha v Karageorgis,21 where Geoffrey Brice, QC, persuaded the English Court of Appeal to issue an asset freezing order. Nippon Yusen was not on its face a fraud claim but rather a debt claim: The defendants had failed to pay for the charter of three ships supplied by the Japanese plaintiff. The defendants had disappeared, their business office appeared to have shut down, and it was likely that their funds, held in a British bank, would also soon disappear from the jurisdiction. The judge on first instance refused the order. On appeal, in a one-page opinion, Lord Denning noted that while such an order had never been granted, "[i]t seems to me that the time has come when we should revise our practice." He viewed the order as an extension or manifestation of the court's power to grant an injunction where just and convenient to do so.

Four weeks later, Lord Denning confirmed the remedy in the eponymous *Mareva Compania Naviera v International Bulkcarriers*, another charterparty case not directly involving fraud.<sup>22</sup> In granting the freezing order to protect the interests of the owner of the chartered vessel *Mareva*, Lord Denning cited the broad injunction powers granted by the *Judicature Act 1873*, section 25(8), allowing the court to grant an injunction "in all cases in which it shall appear to the Court to be just or convenient."<sup>23</sup> In concurring reasons, Lord Roskill agreed that

<sup>21 [1975] 1</sup> WLR 1093 (CA) [Nippon Yusen].

<sup>22</sup> Above note 1.

<sup>23</sup> Ibid at 214.

the injunction should be continued but only on the basis of certain unusual aspects of the facts.

Two years later, Lord Denning further confirmed the *Mareva* jurisdiction in *Rasu Maritima v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*. He provided a comprehensive review of the history of attachment of assets before trial and reviewed the available processes for attachment of foreign assets in London as well as Europe. The *Lister v Stubbs* line of authority was distinguished in that it concerned domestic litigants while the emerging *Mareva* jurisprudence attached the assets of foreign defendants. In this, Lord Denning also noted a precedential procedure under the customary law of the City of London dating back to the late fifteenth century: These "foreign attachments" were granted to restrain the assets of noncitizens doing business in the City of London.

That same year, *Siskina v Distos Compania Naviera (The Siskina)*<sup>25</sup> provided an intercourt dialogue on the *Mareva* scope and jurisdiction as the House of Lords considered it for the first time. The trial court had set aside a *Mareva* order, and the Court of Appeal reversed this decision. In that latter decision, Lord Denning dismissed arguments that the introduction of the *Mareva* remedy should be left to the Rule Committee or to Parliament:

To wait for the Rule Committee would be to shut the stable door after the steed had been stolen. And who knows that there will ever again be another horse in the stable? Or another ship sunk and insurance moneys here? I ask: why would the judges wait for the Rule Committee? The judges have an inherent jurisdiction to lay down the practice and procedure of the courts; and we can invoke it now

<sup>24 [1977] 3</sup> All ER 324 (CA). The judgment is a classic gripping Lord Denning read, *ibid* at 327:

The story starts in Indonesia. It is an archipelago of thousands of islands. It extends 3,000 miles across the South Pacific with a population of 130 million people. It became independent soon after the war. The first President was General Sukarno, but he fell and was replaced by President Soeharto. Second only to the President of Indonesia was the man who fills the pages of evidence in this case, General Ibnu Sutowo. I will call him, as everybody has, "the General." He was the man in charge of the commercial activities of the country. He did it in his capacity as the head of the state-owned company called, for short, Pertamina....

<sup>&</sup>lt;sup>2</sup>5 [1979] AC 210 (HL) [The Siskina].

to restrain the removal of these insurance moneys. To the timorous souls I would say in the words of William Cowper:

'Ye fearful saints fresh courage take, The clouds ye so much dread Are big with mercy, and shall break In blessings on your head.'

Instead of 'saints', read 'judges'. Instead of 'mercy', read 'justice'. And you will find a good way to law reform!<sup>26</sup>

The Siskina was further appealed to the House of Lords. The Lords provided a restrained endorsement of the remedy insofar as they found that the facts before them did not provide an appropriate vehicle to set out the parameters of the remedy. Ultimately, as the contract in question contained a forum-selection clause and as the only link to England was the presence of assets in the jurisdiction (neither party was English, and the dispute had no connection to England), the remedy was denied.

Despite this limited reception, Lord Denning interpreted *The Siskina* enthusiastically in *Third Chandris Shipping v Unimarine*,<sup>27</sup> citing the Lords' silences as a tacit endorsement to widening the remedy:

Two years ago, the House of Lords had this procedure under their close consideration. It was in *The Siskina*. If the House had any doubts about our jurisdiction in the matter, I should have expected them to give voice to them, rather than let the legal profession continue in error. But none of their Lordships did cast any doubt on it. Impressed with the unanimity of his colleagues, Lord Hailsham of St. Marylebone said: 'Since the House is in no way casting doubt on the validity of the new practice by its decision in the instant appeal, I do not wish in any way to do so myself.' The only reservations made by their Lordships were as to restrictions to be put on it or the modifications to be made on it. It was Lord Diplock who referred to 'restrictions', and Lord Hailsham who referred to 'modifications'. So I take it as established that the High Court has jurisdiction to grant a *Mareva* injunction in appropriate cases . . . .

<sup>26 [1977] 3</sup> WLR 532 at 554 (CA).

<sup>27 [1979] 2</sup> All ER 972 at 983 (CA) [Third Chandris].

In *Third Chandris*, Lord Denning further entrenched the remedy by laying down five core principles that still generally apply for the granting of *Mareva* injunctions:

Applicants for a Mareva injunction should be required to observe the following guidelines: (i) the plaintiff should make full and frank disclosure of all matters in his knowledge which are material for the judge to know; (ii) the plaintiff should give particulars of his claim against the defendant stating the ground of his claim and the amount thereof, and fairly stating the points made against it by the defendant; (iii) the plaintiff should give some grounds for believing that the defendant has assets in the jurisdiction; (iv) the plaintiff should give some grounds for believing that there is a risk of the assets being removed before the judgment or award is satisfied; the mere fact that the defendant is abroad is not by itself sufficient; (v) the plaintiff must give an undertaking in damages, which in a suitable case should be supported by a bond or security, and the injunction should only be granted on it being given or on an undertaking that it is to be given.<sup>28</sup>

The final important English progression of the remedy before its adoption in Canada was its extended application in *Barclay-Johnson* not only to nonresidents that happened to have domestic assets but also to residents of the domestic jurisdiction itself.<sup>29</sup> While in retrospect this proposition appears uncontroversial, it changed the remedy from one focused on "marauding charterers" to one of general application that restrained improper dissipation of assets wherever appropriate.<sup>30</sup>

## 3) Canadian Reception of the Mareva Order

## a) Introduction

The freezing order appropriately came to Canada from the North: The first lengthy consideration of the remedy was that of Tallis J of the

<sup>28</sup> Ibid at 984-85.

<sup>29</sup> Above note 19.

To use the phrase of Huddart J in Mooney v Orr (No 2) (1994), 100 BCLR (2d) 335 at para 58 (SC).

Northwest Territories Supreme Court in *BP Exploration Co (Libya) v Hunt.*<sup>31</sup> There, the court continued an order earlier granted *ex parte* to freeze certain assets of the defendant: primarily assets and funds in the Northwest Territories connected to petroleum exploration activities. The underlying claim was to enforce an English judgment against the defendant, a Texas-based oil baron.

Later that year, the Federal Court of Canada endorsed the *Third Chandris* principles in *Elesguro Inc v Ssangyong Shipping*.<sup>32</sup> In the end, the court declined to issue a freezing order, deciding the case on the more narrow point of disallowing service *ex juris*. But for that aspect, however, the court would have adopted the *Third Chandris* guidelines and issued a *Mareva* injunction.

In 1981, the freezing injunction arrived in Ontario, where it was championed in a pair of decisions by Montgomery J: *Liberty National Bank & Trust v Atkin*,<sup>33</sup> in February, and *Quinn v Marsta Cession Services*,<sup>34</sup> in December. In *Liberty National*, Montgomery J concluded:

In my view, the winds of change cry out for the new equitable remedy that *Mareva* provides . . . . I cannot believe that the equitable jurisdiction of this Court should be any less than that of the English Court. The statute affording jurisdiction is practically the same. The size of Ontario and the complexity of its geography invite the remedy. In my view, the doctrine should not be restricted to the threat of removal of assets from Ontario.<sup>35</sup>

<sup>1980</sup> CanLII 2492 (NWTSC). The first citation of Mareva Compania, above note 1, and Nippon Yusen, above note 21, was in Robert Reiser & Co v Nadore Food Processing Equipment (1977), 17 OR (2d) 717 (HCJ), where Steele J continued until trial an injunction restraining the defendant from dealing with property that was alleged to have been fraudulently conveyed. Although those two cases were cited, the court did not rely on them in making its decision. The first application of the Mareva remedy in Canada arose in a family law case from British Columbia, Manousakis v Manousakis (1979), 10 BCLR P 21 (SC), where, in brief reasons, Trainor J granted an order restraining the estranged husband from dealing with his shareholdings in his pizza company or disposing of its assets.

<sup>32 (1980), 117</sup> DLR (3d) 105 at 116 (FCTD).

<sup>33 (1981), 121</sup> DLR (3d) 160 (Ont HCJ) [Liberty National].

<sup>34 (1981), 34</sup> OR (2d) 659 (HCJ) [Quinn].

<sup>35</sup> Liberty National, above note 33 at 168.

Presented with compelling evidence that the defendants were dissipating assets, he applied Lord Denning's *Third Chandris* guidelines and granted the injunction. In *Quinn*, Justice Montgomery confirmed that the remedy was not confined to commercial cases, but was a remedy of general application. The court found that it could be applied in a wrongful dismissal case and ordered payment into court of a portion of the proceeds from the sale of the defendant's property. In 1982, the Ontario Court of Appeal confirmed its court's *Mareva* jurisdiction in *Chitel v Rothbart*, <sup>36</sup> cautioning that "the *Mareva* is here and here to stay and properly so, but it is not the rule — it is the exception to the rule." <sup>37</sup> *Chitel* remains the most cited Ontario case for *Mareva* orders.

That same year, the British Columbia Court of Appeal also accepted freezing injunctions in *Sekisui House Kabushiki Kaisha v Nagashima*.<sup>38</sup> The original freezing order had been granted by McLachlin J, later Chief Justice of Canada, in unwritten reasons. In brief reasons, Nemetz CJ confirmed Lord Denning's *Third Chandris* principles. The major contribution of *Sekisui* to the Canadian jurisprudence is its endorsement of the order that the defendant provide an affidavit of assets, "in order to breathe some life into the injunction" and assist in its enforcement.<sup>39</sup>

## b) Aetna Financial Services v Feigelman

The Supreme Court of Canada came to consider the remedy in *Aetna*. <sup>40</sup> In reasons written by Estey J, the Court comprehensively reviewed the development of the remedy over the previous decade and confirmed it to be Canadian law. The main issue before the Court was whether the English cases restraining the movement of assets outside of that unitary jurisdiction should equally apply to restrain the transfer of assets in the ordinary course of business from one Canadian province to another. The Court answered no, noted that there had been no finding of improper motive or secrecy in the transfers, and set aside the orders issued below. The Court confirmed that the

<sup>36 (1982), 141</sup> DLR (3d) 268 at 290 (Ont CA) [Chitel].

Albeit in reasons that were expressly *obiter dicta*: The order was set aside due to material nondisclosure by the plaintiff in the supporting affidavit.

<sup>38 1982</sup> CanlII 800 (BCCA) [Sekisui].

<sup>39</sup> Ibid at para 10.

<sup>40</sup> Above note 20.

Mareva order was available in Canada but concluded that such orders should be issued with restraint:

There is still, as in the days of *Lister*, a profound unfairness in a rule which sees one's assets tied up indefinitely pending trial of an action which may not succeed, and even if it does succeed, which may result in an award of far less than the caged assets. The harshness of such an exception to the general rule is even less acceptable where the defendant is a resident within the jurisdiction of the court and the assets in question are not being disposed of or moved out of the country or put beyond the reach of the courts of the country. This sub-rule or exception can lead to serious abuse. A plaintiff with an apparent claim, without ultimate substance, may, by the *Mareva* exception to the *Lister* rule, tie up the assets of the defendant, not for the purpose of their preservation until judgment, but to force, by litigious blackmail, a settlement on the defendant who, for any one of many reasons, cannot afford to await the ultimate vindication after trial.<sup>41</sup>

## c) The Flexible British Columbia Approach

All Canadian jurisdictions have more or less followed the restrained approach of *Aetna*, generally requiring a "strong *prima facie* case" <sup>42</sup> and adamant that the remedy not be used to provide the plaintiff with security for judgment—its application being limited to clear cases of deliberate dissipation of assets, usually in the context of fraud. In the words of the Manitoba Court of Appeal, "proof of a serious risk of removal or disposition of assets is required even where the action is based on fraud and it is shown that the defendant has committed a fraudulent act." <sup>43</sup>

As set out above, British Columbia has taken a more flexible approach, which has its genesis in the province's more flexible approach to the general test for injunctions. While most provinces follow the three-part *RJR-MacDonald Inc v Canada (AG)* test,<sup>44</sup> itself an adoption of the modern English test for injunctions in *American Cyanamid (No* 

<sup>41</sup> *Ibid* at para 43.

<sup>42</sup> Ibid at para 30.

<sup>43</sup> Clark v Nucare PLC, 2006 MBCA 101 at para 41.

<sup>44 [1994] 1</sup> SCR 311 [RJR-MacDonald].

1) v Ethicon,45 British Columbia courts frequently follow their homegrown two-part injunction test (albeit one also approved by the Supreme Court of Canada) in British Columbia (AG) v Wale. 46 The Wale test requires a good arguable case and that the balance of convenience favours the injunction. Irreparable harm is rolled into the overall consideration of the balance of convenience. 47 In Wale, McLachlin IA, as she then was, famously stated that a judge considering an injunction "must not allow himself to become the prisoner of a formula,"48 which was in turn quoted in the leading British Columbia Mareva decision, Tracy v Instaloans Financial Solutions Centres (BC).49 Whether considering a conventional injunction or a Mareva application, "the fundamental question in each case is whether the granting of an injunction is just and equitable in all the circumstances of the case."50 Thus a preservation order may be granted in any situation, based on the overarching consideration of the balance of justice and convenience. The other leading British Columbia case, Silver Standard *Resources v Joint Stock Co Geolog, stated:* 

Thus I would be reluctant to adopt a hard and fast rule, as counsel for the defendants urged upon us, that a *Mareva* injunction may never be made or continued unless there is a fraudulent intent on the part of the debtor; or where the payment in question is one proposed to be made in the ordinary course of business; or where it would materially and adversely affect an innocent third party.<sup>51</sup>

With respect to the first part of the test—the ostensible strength of the case—British Columbia is also arguably more flexible. After reviewing the various iterations of the threshold test in the jurisprudence, Saunders JA for the *Tracy* court concluded as follows:

<sup>45 [1975]</sup> UKHL 1 [American Cyanamid].

<sup>46</sup> Above note 11.

<sup>47</sup> See David A Crerar, "The Death of the Irreparable Injury Rule in Canada" (1998) 36 Alberta Law Review 957.

<sup>48</sup> Wale, above note 11 at para 51.

<sup>49</sup> Tracy, above note 11.

<sup>50</sup> Ibid at para 31, citing Wale, above note 11. See also Silver Standard Resources v Joint Stock Co Geolog (1998), 168 DLR (4th) 309 at paras 19–20 (BCCA) [Silver Standard].

<sup>51</sup> Silver Standard, ibid at para 20.

I do not consider that a strict formula should be applied. Whereas, the Supreme Court of Canada in *Aetna* appeared to favour "strong *prima facie* case", that Court also appeared to leave considerable room for courts to frame the test as fits the nature of the case before them. *Mooney No.* 2 recognized both standards, "strong *prima facie* case" and "good arguable case," as formulations that have been used. I expect that the difference in words is a difference without practical consequence. In either case, it is more than an arguable case, and may be met by an assessment that does not reach the "bound to succeed" threshold.<sup>52</sup>

With these flexible standards, British Columbia courts have granted, for better or for worse, freezing injunctions in a wider range of cases, including ones with no nefarious action on the part of the defendant. British Columbia counsel, as well, have been more adventurous in seeking such injunctions in conventional debt and tort actions. While no statistics are available, anecdotally, British Columbia sees proportionally more *Mareva* orders and applications than any other province.

That said, British Columbia courts, like those in other Canadian jurisdictions, agree that a freezing order should not be granted based on mere "speculation that the plaintiff will ultimately succeed in its claim and have difficulty collecting on its judgment if the injunction is not granted." Generally, fraudulent conduct, or at least extraordinary facts of evasion or dissipation, must exist to justify the intrusive order. Similarly, an applicant is generally expected to provide compelling evidence commensurate with such an invasive remedy.

# 4) Worldwide Freezing Orders

As Canadian courts have developed expertise and confidence in issuing freezing orders, they have followed English courts in extending the reach of such orders beyond the domestic jurisdiction: Courts may and do grant worldwide freezing orders. The current British Col-

<sup>52</sup> Above note 11 at para 54.

<sup>53</sup> ICBC, above note 12 at para 26.

umbia and Ontario model orders for preservation of assets provide for worldwide effect where the defendant is believed to have assets outside of the jurisdiction of the issuing court. International commerce, and particularly electronic commerce, has increased exponentially in speed and volume in the forty years since *Mareva Compania* and *Nippon Yusen*, and in many cases an order limited to domestic borders will be ineffectual.

Worldwide freezing orders purport to freeze the defendant's assets wherever situated. This extraterritorial reach may occur where the Canadian court has *in personam* jurisdiction over the defendant — more clearly against a defendant that has attorned to the domestic jurisdiction, or against any person with a physical or business presence in the issuing jurisdiction. If the defendant or a nonparty recipient of the freezing order ignores or breaches the order, that party can be punished through domestic contempt proceedings insofar as she resides or does business in the issuing jurisdiction.

While now firmly entrenched in the jurisprudential landscape, the idea of a worldwide freezing injunction developed haltingly. As with the development of the Mareva jurisdiction itself, courts initially hesitated to extend this powerful tool beyond their borders. This is somewhat ironic as the earliest Mareva cases targeted foreign defendants, albeit those with assets held by English banks within the reach of English courts. English and Canadian courts struggled with a postcolonial re-evaluation of attitudes toward the courts of foreign jurisdictions. Certain foreign courts were no longer to be regarded as inferior to Anglo-Canadian courts - an attitude exemplified by the disdainful phrase "palm tree justice" - but were to be prima facie respected. This rise of judicial comity, or respect for the workings and pronouncements of foreign courts, manifested itself in the rise of the doctrine of forum non conveniens: Courts should not assert jurisdiction over disputes that have their essential character in another jurisdiction. Similarly, domestic courts became more open to the recognition and registration of foreign orders, at least with respect to final judgments. Orders purporting to control litigants and their assets beyond the jurisdiction of the domestic court are especially problematic in the context of asset freezing orders, which rely primarily on the intervention of nonparty financial institutions for their effective

execution. Such actors are themselves subject to complicated regulation by the foreign states in question, and may often be controlled by those states. A court issuing an order of the power and complexity of an asset freezing order risks offending international notions of comity and further risks dilution of its own authority if the foreign financial institution or litigant chooses to ignore the order.

In 1988, the English Court of Appeal held that it could in theory issue a worldwide *Mareva* order, although such an order would likely be rarely granted and would have to contain a proviso (commonly referred to as the "*Babanaft* proviso" after the case that suggested it) confirming that it did not purport to control the activities of non-parties.<sup>54</sup> The 1990 case *Derby & Co v Weldon (Nos 3 & 4)* confirmed the court's jurisdiction to grant a worldwide *Mareva* order.<sup>55</sup>

The British Columbia Supreme Court relied upon *Derby & Co* in issuing the first Canadian worldwide freezing order in *British Columbia v Shah.* <sup>56</sup> In the 1994 case *Mooney v Orr (No 1)*, Newbury J, then of the British Columbia Supreme Court, confirmed the court's jurisdiction to issue a worldwide order:

The reasons for extending Mareva injunctions to apply to foreign assets are valid in British Columbia no less than in England and Australia—the notion that a court should not permit a defendant to take action designed to frustrate existing or subsequent orders of the court, and the practical consideration that in this day of instant communication and paperless cross-border transfers, the courts must, in order to preserve the effectiveness of their judgments, adapt to new circumstances. Such adaptability has always been, and continues to be, the genius of the common law.<sup>57</sup>

The hearing before Newbury J was made *ex parte*. After an *inter partes* hearing two months later, the order was confirmed by Huddart J in what is still the leading Canadian case on worldwide freezing or-

<sup>54</sup> Babanaft International v Bassatne, [1989] 1 All ER 433 at 466 (CA).

<sup>55 [1990] 1</sup> Ch 65 (CA) [Derby & Co].

<sup>56</sup> British Columbia v Shah, [1991] BCJ No 3994 (SC) (issued in December 1989 but not formalized in reasons until 1991). Successful counsel was the present Groberman JA of the British Columbia Court of Appeal.

<sup>57 (1994), 98</sup> BCLR (2d) 318 at para 11 (SC).

ders. 58 While worldwide freezing orders should in theory remain rare, only granted when there are insufficient domestic assets to satisfy a judgment, in practice many, if not most, freezing orders purport to have extrajurisdictional effect, freezing the defendant's assets "wherever situate." 59

# E. PROPERTY PRESERVATION ORDERS UNDER THE RULES OF COURT

As acknowledged by the *Lister v Stubbs* and *Aetna* courts, the common law permits pretrial orders for the preservation of the very property in dispute between the litigants. All Canadian jurisdictions, including the Federal Court, have express rules confirming this jurisdiction. Most of these rules existed in the original rule books of the provinces and were based on the equivalent English rule:

## Interim Detention and Preservation and Inspection of Property

When by any contract a *prima facie* case of liability is established, and there is alleged, as matter of defence, a right to be relieved wholly or partially from such liability, the Court or a Judge may make an order for the preservation, or interim custody of the subject-matter of the litigation, or may order that the amount in dispute be brought into Court or otherwise secured.<sup>60</sup>

Although these rules are similarly worded, the caselaw under these rules differs by province. Most provinces have interpreted these provisions expansively to allow for preservation where appropriate, usually on the basis of the *RJR-MacDonald/American Cyanamid* injunction test. Some provinces (like Nova Scotia and New Brunswick) have codified *Mareva* and *Anton Piller* preservation orders, and others have grouped these preservative powers with the traditional preservation of property

<sup>58</sup> Mooney v Orr (No 2), above note 30.

Both the British Columbia Model Order for Preservation of Assets (at para 1(b)) and the Ontario Model Asset Preservation Order (at para 1(a)) include provision for worldwide orders: see Appendices A & B.

<sup>60</sup> Quoted in CC Dale, CW Greenwood, & SE Williams, *The Practice of the Chancery Division* (London: Stevens & Sons, 1901) ch XXIX.

rules. As such, those provinces' preservation rules overlap considerably with the more invasive and expansive *Mareva* and *Anton Piller* remedies, and this may account for the relative paucity of common law *Mareva* orders in those provinces when compared with British Columbia, for example. Conversely, the robust flexibility of the British Columbia *Mareva* jurisprudence may account for the diminished utility and use of the preservation rules in that province.

### F. ANTON PILLER SEARCH ORDERS

## No Searches in Civil Cases

Just as *Lister v Stubbs*<sup>61</sup> was interpreted as standing for the proposition that a defendant's assets may not be restrained before trial, the 1765 decision of *Entick v Carrington* was understood to hold that courts will not order searches or seizures in civil cases. <sup>62</sup> *Entick* was a claim in trespass. The defendants, ostensibly under the authority of an order issued by the Earl of Halifax and purporting to act as a magistrate for the purpose of searching for a seditious libel,

with force and arms broke and entered the dwelling-house of the plaintiff in the parish of St. Dunstan Stepney, and continued there four hours without his consent and against his will, and all that time disturbed him in the peaceable possession thereof, and broke open the doors to the rooms, the locks, iron bars, &c. thereto affixed, and broke open the boxes, chest, drawers, &c. of the plaintiff in his house, and broke the locks thereto affixed, and searched and examined all of the rooms, &c. in his dwelling-house, and all the boxes, &c. so broke open, and read over, pryed into, and examined all the private papers, books, &c. of the plaintiff there found, whereby the secret affairs, &c. of the plaintiff became wrongfully discovered and made public; and took and carried away 100 printed charts, 100 printed pamphlets, &c. &c. of the plaintiff there found, and other 100 charts, &c. &c. took and carried away, to the damage of the plaintiff 2000 *l*.

<sup>61</sup> Above note 17.

<sup>62 (1765), 95</sup> ER 807 [Entick].

## The court rebuked the search:

Our law is wise and merciful, and supposes every man accused to be innocent before he is tried by his peers: upon the whole, we are all of opinion that this warrant is wholly illegal and void. One word more for ourselves; we are no advocates for libels, all Governments must set their faces against them and whenever they come before us and a jury we shall set our faces against them; and if juries do not prevent them they may prove fatal to liberty, destroy Government and introduce anarchy; but tyranny is better than anarchy, and the worst Government better than none at all.<sup>63</sup>

This principle stood for over two hundred years until the fertile year of 1974, when Lord Denning was asked to make yet another innovative order.

## 2) The Rise of the Search Order

The rise of the *Anton Piller* order paralleled and was contemporaneous with the rise of the *Mareva* injunction. As with the *Mareva* injunction, Lord Denning was the judicial champion of the remedy. As with the *Mareva* injunction, the name "*Anton Piller*" is a misnomer because it was not the first case, as Lord Denning acknowledges in the *Anton Piller KG v Manufacturing Processes* decision: "During the last eighteen months the judges of the Chancery Division have been making Orders of a kind not known before. They have some resemblance to search warrants. Under these Orders, the plaintiff and his Solicitors are authorised to enter the defendant's premises so as to inspect papers, provided the defendant gives permission."<sup>64</sup>

Theft of music, specifically Indian music, led to the first reported search order, issued by Templeman J in *EMI v Pandit*. <sup>65</sup> The music publisher accused the defendant of making counterfeit recordings of its published recordings and of passing them off as his own. The

<sup>63</sup> Ibid at 818.

Above note 2 at 779. Lord Denning, *ibid* at 781, also acknowledges Hugh Laddie, QC, as the primary advocate appearing "in most of these cases, and can claim the credit — or the responsibility — for them."

<sup>65 [1975] 1</sup> All ER 418 (Ch).

defendant provided an affidavit denying same. On its subsequent *ex parte* application, the plaintiff was able to convince the court that the affidavit was "a pack of lies" that exhibited a forged document. <sup>66</sup> The court ordered that the plaintiff be allowed, within specified hours, to enter the premises occupied by the defendant to inspect, photograph, and remove allegedly infringing articles, to photograph certain documents, and to inspect, photograph, and test typewriters that had been allegedly used in the counterfeiting. The court confirmed its power to make an order for seizure and inspection of evidence in exceptional and urgent cases where the plaintiff faced irreparable harm in the form of destroyed evidence such as to likely deprive it of a remedy. But the extreme order could be justified only on very strong evidence. <sup>67</sup>

This remedy first came before the Court of Appeal one year later, in the Anton Piller KG case. Instead of music, the threatened intellectual property was the plaintiff's equipment used in "the big new computer industry."68 Two "defector" employees were accused of forwarding confidential plans and documents to a German competitor. The judge below had declined to make an order for inspection or removal of documents. Continuing ex parte, the plaintiff appealed, and the Court of Appeal granted the order. The court recognized the invasiveness of the order: Lord Denning stated that it "can only be justified in the most exceptional circumstances," and Lord Ormrod noted that the proposed order was "at the extremity of the court's powers." 69 Lord Shaw identified the rationale and purpose as ensuring that the law is not rendered impotent through the defendant's dishonesty: "The overriding consideration in the exercise of this salutary jurisdiction is that it is to be resorted to only in circumstances where the normal processes of the law would be rendered nugatory if some immediate and effective measure was not available."70 Accordingly, Lord Denning commenced his reasons by dispelling the notion that the order constituted a civil search warrant:

<sup>66</sup> Ibid at 420.

<sup>67</sup> Ibid at 424.

<sup>68</sup> Above note 2 at 781.

<sup>69</sup> Ibid at 784.

<sup>70</sup> Ibid.

But the order sought in this case is not a search warrant. It does not authorise the plaintiffs' solicitors or anyone else to enter the defendant's premises against his will. It does not authorise the breaking down of any doors, nor the slipping in by a back door, nor getting in by an open door or window. It only authorises entry and inspection by the permission of the defendants. The plaintiff must get the defendant's permission. But it does do this: It brings pressure on the defendants to give permission. It does more. It actually orders him to give permission — with, I suppose, the result that if he does not give permission, he is guilty of contempt of court.<sup>71</sup>

Despite the cautions of the justices, by the time of the 1978 decision of *Ex parte Island Records*, *Anton Piller* orders were, as Lord Denning noted, "in daily use."<sup>72</sup>

Before the reception of the remedy in Canada, English law made two further important extensions of the order for more effective preservation of evidence. *EMI v Sarwar* added a term to the order requiring the defendant to provide the names and addresses of the defendant's suppliers and customers.<sup>73</sup> In *Yousif v Salama*, an *Anton Piller* order was granted to seize nonindustrial documents that served a purely evidentiary role, specifically files containing details of transactions between the plaintiff and the defendant that were alleged by the plaintiff to be the best evidence of the debt underlying the action and at risk of destruction.<sup>74</sup> As Donaldson LJ stated,

there is a very clear *prima facie* case leading the court to fear that the defendant will conceal or destroy essential evidence in the grossest possible contempt of the court, and . . . should he do so the whole processes of justice will be frustrated because the plaintiff will be left without any evidence to enable him to put forward his claim. In that limited class of case I, for my part, think that the *Anton Piller* order is absolutely right. No court can stand by and see the processes of justice totally frustrated by a defendant in contempt of its order.75

<sup>71</sup> Ibid at 782.

<sup>72 [1978] 3</sup> All ER 824 at 828 (CA).

<sup>73 [1977]</sup> FSR 146 (CA).

<sup>74 [1980] 3</sup> All ER 405 (CA) [Yousif].

<sup>75</sup> Ibid at 407.

The *Yousif* goal, of seizing evidence rather than assets, is now the primary objective of the *Anton Piller* order.

# 3) Canadian Reception of the Anton Piller Order

## a) Introduction

The first reported Canadian *Anton Piller* order was granted in the 1982 Ontario decision *Bardeau v Crown Food Service Equipment.*<sup>76</sup> Justice Steele granted the order allowing the plaintiff to search the residences and motor vehicles of the defendants, who were former employees of the plaintiff, to inspect, photograph, and remove into the custody of an interim receiver drawings, blueprints, and sketches of tubing and jigs alleged to have been taken by the departing defendants.

Unsurprisingly, the *Anton Piller* order found early acceptance and continues to be most frequently granted in the Federal Court of Canada, with its abundance of intellectual property disputes. The *Anton Piller* remedy was recognized and accepted by the Federal Court in two 1982 cases involving counterfeit forms of the quintessential products of that decade: video arcade games. In *Nintendo of America v Coinex Video Games*, the Federal Court of Appeal reversed the chambers judge's refusal to issue an *Anton Piller* order to seize evidence with respect to counterfeit Donkey Kong arcade games.<sup>77</sup> In *Midway Manufacturing v Bernstein*, the *Anton Piller* order earlier granted *ex parte* was set aside due to the applicant's failure to disclose that it no longer manufactured the pirated game in question, Pacman (which had been supplanted by the plaintiff's Ms Pacman game).<sup>78</sup>

## b) Celanese Canada v Murray Demolition

Although well-established in the courts below, the Supreme Court of Canada did not have occasion to consider the Anton Piller order until Celanese Canada v Murray Demolition nearly a quarter century after the remedy's Canadian arrival.<sup>79</sup> And even then, the existence of the remedy was not the focus of the appeal. Instead, the Court considered

<sup>76 (1982), 36</sup> OR (2d) 355 (HCJ).

<sup>77 [1983] 2</sup> FC 189 (CA).

<sup>78 (1982), 67</sup> CPR (2d) 112 (FCTD).

<sup>79 2006</sup> SCC 36.

the appropriate sanctions to impose for the plaintiff's violation of solicitor-client privilege exploited through the *Anton Piller* seizure. Specifically, after the seizure, plaintiff's counsel had improperly opened a sealed envelope containing a hard drive and discs. Counsel had then reviewed and sorted the electronic documents into groupings of "Relevant," "Irrelevant," "Proprietary," and "Hot." Some documents had also been saved in a separate electronic folder marked "Privileged." In the end, the Court found that the breaches left it no choice but to disqualify plaintiff's counsel from further acting on the plaintiff's behalf.

While noting that *Anton Piller* orders were frequently issued, Binnie J reiterated Lord Denning's original premise that they were appropriate only "in an extreme case where there is grave danger of property being smuggled away or of vital evidence being destroyed."80 While recognizing the utility and necessity of the remedy, Binnie J agreed with this high threshold and the critical need for restraint and vigilance in granting and executing such orders:

Experience has shown that despite their draconian nature, there is a proper role for *Anton Piller* orders to ensure that unscrupulous defendants are not able to circumvent the court's processes by, on being forewarned, making relevant evidence disappear. Their usefulness is especially important in the modern era of heavy dependence on computer technology, where documents are easily deleted, moved or destroyed. The utility of this equitable tool in the correct circumstances should not be diminished. However, such orders should only be granted in the clear recognition of their exceptional and highly intrusive character and, where granted, the terms should be carefully spelled out and limited to what the circumstances show to be necessary. Those responsible for their implementation should conform to a very high standard of professional diligence. Otherwise, the moving party, not its target, may have to shoulder the consequences of a botched search.<sup>81</sup>

<sup>80</sup> Ibid at para 30, quoting Anton Piller KG, above note 2 at 783.

<sup>81 -</sup> Above note 79 at para 32. -

#### G. CONCLUSION: THE FUTURE OF PRESERVATION ORDERS

Although preservation orders have been issued by Canadian courts for nearly forty years, their power and flexibility make them exotic animals still, and rightly so. How will they evolve over the next forty years? I predict that the issuance of such orders will become more common and more accepted worldwide. These orders were developed in a pre-Internet age, and indeed in the nascent age of computing — as set out above, in the Anton Piller KG decision itself, Lord Denning quaintly referred to "the big new computer industry."82 Of course, that big new industry and its spawn, the Internet, have accelerated and facilitated fraud, the dissipation of assets, and the deletion of evidence as much as they have increased human knowledge, commerce, and interconnectivity. Coupled with this trend is the rise in international trade, which has increased approximately fivefold between 1975 and the present.83 The opportunities for fraud, dissipation, and evasion, and the natural inability to make and enforce claims across borders, have correspondingly increased. If the law and the courts are to hope to combat such behaviour, which attacks the integrity of the legal process as much as it does the funds of its victims, they must make generous and flexible use of the remedies surveyed in this book. The more flexible British Columbia approach may come to predominate in the approach of Canadian courts to preservation orders.

Paralleling the rise of these remedies is the ascent of comity as the guiding principle of private international law. Justice La Forest in *Morguard Investments v De Savoye* described "the real nature of the idea of comity" as "an idea based not simply on respect for the dictates of a foreign sovereign, but on the convenience, nay necessity, in a world where legal authority is divided among sovereign states of adopting a doctrine of this kind."<sup>84</sup> In this, comity is not only ethical—respect for the courts of foreign nations—but also practical:

<sup>82</sup> Above note 2 at 781.

<sup>83</sup> See Esteban Ortiz-Ospina & Max Roser, "Value of Global Exports, 1800–2014" in "International Trade," online: https://ourworldindata.org/international-trade (data obtained from Giovanni Federico & Antonio Tena-Junguito).

<sup>84 [1990] 3</sup> SCR 1077 at 1096.

The world has changed since the above rules [concerning the recognition and enforcement of foreign judgments] were developed in 19th century England. Modern means of travel and communications have made many of these 19th century concerns appear parochial. The business community operates in a world economy and we correctly speak of a world community even in the face of decentralized political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal.<sup>85</sup>

This comity brings an increased tendency to respect and enforce the judgments of foreign courts domestically. It now seems remarkable that foreign nonmonetary judgments have been enforceable in Canada for only a decade. While a foreign *Mareva* order, as a nonfinal order, will not be recognized, registered, and enforced in Canada, the existence of a foreign freezing order from a familiar Commonwealth jurisdiction will usually provide compelling evidence in favour of the issuance of a parallel freezing order by a Canadian court, thus accomplishing the same goal. In this, an increased, but at the same time principled, application of these extraordinary remedies will marry comity and judicial efficiency to better serve litigants and better ensure the effectiveness of the courts. This modest book hopes in a small way to facilitate this goal.

<sup>85</sup> *Ibid* at 1098.

See Pro Swing v Elta Golf, 2006 SCC 52.