A User's Guide to Injunctions & Related Remedies in Alberta

Prepared For: Legal Education Society of Alberta

Common Chambers' Applications

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INTRODUCTION

While injunctions have been part of the judicial arsenal since the days of the Exchequer Court, in more recent years several new forms of injunctions have been developed by the Courts, including Mareva Injunctions and Mills Injunctions. Other injunctions have been legislated such as the remedy provided by section 17 of the ***Civil Enforcement Act*** and preservation orders under Rule 6.25 of the Alberta ***Rules of Court***.

Other related extraordinary remedies have also developed in conjunction with injunctive relief, including Norwich Orders and Anton Piller Orders.

While these types of remedies remain exceptional and rare, several of them are being granted more frequently in Alberta.

Injunctions

An injunction is an equitable remedy in which one party must refrain from some action harmful to the party seeking such relief (prohibitive injunction), or perform a positive act to remedy a past wrong (mandatory injunction). For a comprehensive text on injunctions, see Justice Robert J. Sharpe, ***Injunctions and Specific Performance,*** looseleaf, (Aurora, ON: Canada Law Book, 2011).

Although the jurisdiction to grant these equitable remedies is within the inherent jurisdiction of the Court, this jurisdiction is confirmed by section 13(2) of the ***Judicature Act***, R.S.A. 2000, c. J-2, which provides:

> An order in the nature of mandamus or injunction may be granted or a receiver appointed by interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any other conditions the Court thinks just.

Mandatory injunctions are generally restorative in nature, requiring the defendant to remedy or undo some past action which has been found by the Courts to be inconsistent with the plaintiff's rights.

The more common form of injunction remains the prohibitive injunction, which restrains the defendant from engaging in actions which would interfere with the rights of others. The Courts have

historically found that a prohibitive injunction is less intrusive to the rights of the defendant and more easily defined and enforceable than a mandatory injunction.

Injunctions fall into one of three temporal classifications. *Quia timet* injunctions are preventative in nature and may be granted before any harm has actually been done, but the applicant must show a "very strong probability upon the facts that grave damage will accrue to him in the future" (***Operation Dismantle Inc. v. Canada***, [1985] 1 S.C.R. 441). Interlocutory or interim injunctions may be granted prior to a final adjudication on the merits of the underlying action and remain in force until such a final determination or as otherwise ordered. Permanent injunctions, as their name suggests, may only be granted after a hearing on the merits of the claim and remain in force until further order of the Court.

Quia timet and interlocutory injunctions are not simply procedural tools used in the course of litigation. These types of pre-trial injunctions may go to the heart of the matter and can significantly impact the substantive rights of the parties involved. For example, in the context of environmental litigation, a pre-trial injunction may be sought to prohibit specific actions and preserve a certain state of the environment. Injunctions may be appropriate in these circumstances because the aspects of the environment that are the subject matter of the litigation would have been destroyed or irrevocably altered before the rights of the parties are determined at trial. This is the sort of outcome that Courts try to avoid by granting injunctions (**McMillan Bloedel Ltd. v. Mullin [1985] 3 W.W.R. 577 (BC CA)**).

Interlocutory or interim injunctions may be granted where the test articulated by the Supreme Court of Canada ("S**CC**") in ***RJR MacDonald Inc. v. Canada (Attorney General)***, [1994] 1 S.C.R. **311** [***RJR MacDonald***], is met.

In *RJR MacDonald***,** the SCC set out the following three-part test for granting interlocutory injunctions ("*RJR MacDonald Test*"):

1. the applicant must show a serious issue to be tried (or as described below, a strong *prima facie* case if seeking a mandatory injunction);

2. the applicant must show irreparable harm will result if the injunction is not granted; and

3. the applicant must show that greater harm or inconvenience will result if the application is not granted, than would result if it were.

Under the first part of the test, a party applying for an interlocutory prohibitive injunction must demonstrate that there is a serious issue to be tried. However, due to the potentially serious consequences that may result from granting mandatory injunctions, the proper test to be applied at this first stage where such an injunction is sought is that the applicant must demonstrate a strong *prima facie* case (***Exotic Frozen Foods Ltd. v. Nelco Corporation Ltd. Rustkote of Canada Ltd.*** (1981), 29 A.R. 38; ***Pasar Micro Controls Ltd. v. Q-Tron Ltd.***, 1998 ABQB 182; and ***Medical Laboratory Consultants Inc. v. Calgary Health Region***, 2003 ABQB 995, aff'd 2005 ABCA 97 [***Medical Laboratory Consultants***]).

Under the second part of the test, the applicant must demonstrate that irreparable harm will result if the injunction is not granted. As noted by the SCC in ***RJR MacDonald***, "irreparable refers to the nature of the harm rather than its magnitude". Generally, the Courts have indicated that this stage of the test is met if the damages which are likely to be suffered cannot be adequately compensated for by a monetary award (***Lubicon Lake Indian Band v. Norcen Energy Resources Ltd.*** (1985), 36 Alta. L.R. (2d) 137 (CA) and ***Medical Laboratory Consultants***, *supra*).

However, where an injunction is sought to enforce a clear restrictive covenant contained in an agreement, and the Court finds there has been a clear breach of this clear covenant, the applicant need not show irreparable harm where there is a strong case and little doubt in relation to the merits of the underlying case (***Stonewater Group of Restaurants Inc. v. Mikes Restaurants Inc.***, 2005 ABQB 799).

It is worth noting that the second part of the ***RJR MacDonald Test*** has been applied differently by the Federal Courts than Courts of other Canadian jurisdictions, including Alberta. In Alberta, and most other Canadian jurisdictions, uncertainty as to quantum or the inability to quantify damages is a basis for finding that the applicant's harm is irreparable. This rationale is consistent with the reasoning of the SCC in ***RJR MacDonald***. In contrast, Federal Courts have held that uncertainty of damages is not itself sufficient to support a finding of irreparable harm, and thus have not awarded injunctions to applicants relying on that ground. The Federal Court of Appeal's decision in ***Cutter Ltd. v. Baxter Traverol Laboratories of Canada Ltd***. (1980) 47 C.P.R. (2d) 53, is illustrative of this point. This matter involved an interlocutory application brought at a time when it was uncertain whether the applicant was entitled to damages, and what those damages might be, if so entitled. The Federal Court of Appeal held that the uncertainty of the applicant's entitlement to, and potential quantum of, damages was insufficient to support a finding of irreparable harm, and therefore did not satisfy the second part of the test. Thus, compared to matters before Alberta Courts, applications for interlocutory matters before Federal Courts must satisfy a higher threshold for the second part of the