

The Tangled Web We Weave: Judicial Remedies to Fight Business Fraud

Prepared for: Legal Education Society of Alberta
Business Disputes

Presented by:
Richard Billington QC
Billington Barristers
Calgary, Alberta

For presentation in:
Lake Louise, May 5, 2018

THE TANGLED WEB WE WEAVE:
JUDICIAL REMEDIES TO FIGHT BUSINESS FRAUD

Anton Piller Orders	5
The Test for an Anton Piller Order:.....	5
How an Anton Piller Order is Executed	6
How Have the Courts Dealt With Electronic Data in the Context of Orders?	7
Mareva Injunctions	8
The Execution of a Mareva Injunction	9
<i>In Camera</i> (Secret!) Investigations Under Part 18 of the ABCA	10
Oppression Actions Under Part 19 of the ABCA.....	12
Conclusion.....	13

You're a business owner. Something is wrong, very wrong and you need to act fast. You're losing deals to a competitor who somehow knows your proprietary secrets. ... or your business partner is freezing you out of the company. It's all going wrong and you must act to save your investment.

You've heard that suits are taking years to get to trial, even after all of the discovery process is done. You don't have that kind of time. Your business is under attack by wrongdoers and you need to protect it. What are the judicial remedies that are available to address these urgent situations?

Your lawyer tells you that merely filing suit won't protect you. There are four options to fight fraud that should be considered. Two of these remedies are specialized forms of injunctions: The Anton Piller Order and the Mareva Injunction. The third is a set of rights which permit an investigation to occur when fraud is suspected within a corporation, but where the parties are not yet capable of offering proof that fraud has actually occurred. Another remedy is the Oppression Action, notable because of the extremely broad authority given to the Court to craft an appropriate remedy.

Let's discuss the injunctions first. Interlocutory injunctions are fairly rare and can be difficult to obtain. These two remedies are not usual, even for interlocutory injunctions and require you to meet an even sterner test. They've been called the "nuclear weapons of the litigator's arsenal." Named after the English cases in which they were first utilized, they have been adopted in Canada. They are:

- **The Anton Piller Order** - An exceptional Order that is a form of civil search warrant that displaces the normal rules of discovery of records. The Court, on an *ex parte* Application, orders that the Defendant must provide permission, on pain of contempt of court, to permit the entry by an Independent Supervising Solicitor (ISS) into business premises, personal residences, automobiles and anywhere else thought appropriate by the Court for the purpose of searching for and seizing evidence which is critically necessary for the prosecution of a civil law suit. This remedy is rapidly expanding to keep up with the growing demands for the preservation of electronically stored data, and to prevent its alteration or unauthorized dissemination.

Anton Piller Orders are employed to preserve evidence in order to ensure that the pending civil action is not frustrated by a lack of evidence and, in some cases, to recover the Plaintiff's property: *Capitanescu v. Universal Weld Overlays Inc.* (1996), 46 Alta. L.R. (3d) 203 at 211-212. It is viewed as being "highly intrusive measure that, unless sparingly granted and closely controlled, is capable of great prejudice and potentially irredeemable loss", *BC (AG) v. Malik*, 2011 SCC 18, [2011] 1 SCR 657.

The Order derives its name from an English case, **Anton Piller K.G. v. Manufacturing Processes Ltd.**, [1976] 1 All E.R. 779 (C.A.), wherein the Court set out a three-prong legal test the Plaintiff must meet in order to be granted an Order. First, there must be a strong *prima facie* case. Second, the potential or actual damage must be very serious for the Plaintiff. Third, there must be clear evidence that the Defendants have in their possession incriminating documents or things, and that there is a real possibility that they may destroy such material before any application can be made *inter partes* (that is, on notice to the affected parties).

- **The Mareva Injunction** - in which the Court orders, on an *ex parte* basis, that assets are not to leave the jurisdiction of the Court, are not to be sold, destroyed, altered or given away, and are not to be hidden. The Order can bind anyone with knowledge of it to provide cooperation in revealing the whereabouts of the assets, or to cooperate in allowing the Court to maintain jurisdiction over those assets. Originally used in maritime shipping cases to prevent boats and their cargo from leaving the jurisdiction, the remedy has more recently found favour in preventing the electronic transfer of currency and intellectual property. This Order significantly enhances the normal rules of court preventing the dissipation of assets. This form of relief found favour of our Supreme Court in **Aetna Financial Services Ltd. v. Feigelman** [1985] 1 S.C.R. 2.

In addition to these two remedies, and the case law which has developed from them, other legal remedies exist that can be used to protect information, evidence and property when the more common legal remedies may be inadequate:

- **An investigation Under Part 18 of the Alberta Business Corporations Act** - in which the Court will direct that an *in camera* investigation is to occur. (That is, a secret investigation known only to the Court and its appointed investigator, the applicant and the subject corporation. The Court may direct that certain others be advised of the existence of the investigation.) This is used primarily where there are good grounds to believe that fraud **may** be occurring in a corporation, but where there is still insufficient proof of fraud. The Court may direct that the application for such an investigation may occur *ex parte*, or it may require that notice be given to some or all of the affected parties.
- **Oppression Remedies Under Part 19 of the Alberta Business Corporations Act** - the *Alberta Business Corporations Act* provides for very broad remedies in the case of corporations and their affiliates when Complainants are subject to oppressive or unfairly

prejudicial treatment. As we will examine, the legislature has recognized that such unfair treatment of shareholders, directors, creditors, and other interested persons must be met with a wide range of discretionary remedies.

A Note About Interlocutory (Interim) *Ex Parte* Orders: Rules of Court usually require that any application for an Order must be made on notice to the party who will be adversely affected. In certain circumstances, the Court will permit the application to be made without notice. In those circumstances, the applicant has a duty to be scrupulously thorough in advising the Court of any circumstances or arguments of law which the Defendant might make if they were represented in Court. Failure to disclose material adverse information can be grounds to later vacate the initial Order. ***Secure 2013 Group Inc. v. Tiger Calcium Services***, 2017 ABCA 316. An *ex parte* Order need not be appealed to the Court of Appeal in order to be challenged – any judge of the Court which granted the initial Order has jurisdiction to review, vary, or vacate the initial Order, usually on two days’ notice to any interested party.