WHALEY
ESTATE LITIGATION

Remedies for Non-Compliance with Court Orders

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Whaley Estate Litigation

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REMEDIES FOR NON-COMPLIANCE WITH COURT ORDERS

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CONTEMPT OF COURT

A finding of contempt is a declaration that a person has acted in breach of a court order. A failure to abide by a court order, other than an order for payment of money, constitutes civil contempt of court. Rule 60.11 of the Rules of Civil Procedure governs the procedure and requirements for a motion for civil contempt.

In order to find contempt of court, a three-part test must be met:

(a) The order that was breached must state clearly and unequivocally what must and must not be done;
(b) The party who disobeys the order must have done so deliberately and willfully; and
(c) The evidence must show contempt beyond a reasonable doubt.[1]

The purpose of contempt proceedings is to uphold the authority of the courts and more fundamentally the rule of law. In *United Nurses of Alberta v. Alberta (Attorney General)*,[2] McLachlin J. (as she then was) highlighted the direct connection between contempt of court and the rule of law:

> The rule of law is at the heart of our society; without it there can be neither peace, nor order nor good government. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect. To maintain their process and respect, courts since the 12th century have exercised the power to punish for contempt of court.

The notion that contempt proceedings are essential for upholding the dignity of the courts and sanctioning those who choose to defy the court is found throughout the case law. In *Surgeoner*

[1] *Children's Aid Society of Ottawa-Carleton v. C.(T.)* 39 R.F.L. (6th) 387, [2007] W.D.F.L. 3696
[2] [1992] 1 S.C.R. 901 at page 931 [*United Nurses*]

v. Surgeoner[3], a family law case, Blair J. wrote of the import of contempt in the administration of law and justice:

> No society which believes in a system of even-handed justice can permit its members to ignore, disobey or defy its laws and its courts' orders at their whim because in their own particular view, it is right to do so. A society which countenances such conduct is a society tottering on the precipice of disorder and injustice.
>
> The need for the sanction of contempt proceedings is of significant importance in the field of family law. There is an undertow of bitterness and sense of betrayal which often threatens to drown the process and the parties themselves in a sea of anger and "self-rightness". In this environment it is all too easy for a spouse to believe that he or she "knows what is right," even after a matter has been determined by the Court, and to decide to ignore, disobey or defy that determination.

Civil versus Criminal Contempt

There are two types of contempt: civil contempt and criminal contempt. Generally, the difference between the two lies in the public nature of the act of defiance of the court. However, it is not as simple as an act of contempt being deemed public that it is then necessarily deemed criminal. For criminal contempt to be established the act has to be accompanied by an intention on the part of the perpetrator to disobey the order in a public manner, so as to "depreciate the authority of the court".[4] Thus criminal contempt requires not only the *actus reus* of a public act of contempt but also the *mens rea* of intention to act in public defiance.[5]

Another difference between civil and criminal contempt is that civil contempt is used to compel compliance, and criminal contempt is employed to punish non-compliance.[6]

[3] (1991), 6 C.P.C. (3d) 318 (Ont. Gen. Div.)
[4] *United Nurses*, supra at note 2

However, this important distinction between the two types of contempt is not all that clearly drawn. Indeed, all contempt proceedings are quasi-criminal in nature. Even with civil contempt, a perpetrator can be imprisoned,[7] and may be subjected to other penalties available for criminal offences such as fines or community service.[8]

For this reason, the Supreme Court outlined a unified approach to criminal and civil contempt in *Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc.*[9] such that a case of civil or criminal contempt must meet the criminal standard of proof, that is, it must be proved beyond a reasonable doubt.[10] So notwithstanding the distinctions between the purposes and definitions of criminal and civil contempt, the legal treatment of both types of contempt is the same.

As a result, a person subject to contempt proceedings – whether criminal or civil - is afforded criminal law protections: a person alleged to be in contempt is not compellable,[11] nor is he or she competent to act as a witness for the prosecution.[12]

Given the gravity of a contempt finding, and the fact that it could lead to a loss of liberty, courts are required to allow for the alleged contemnor to establish that "he acted with all reasonable care in the circumstances and had not intention of interfering with the court process."[13]

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[5] *United Nurses*, *supra* at note 2
[6] *Chiang (Re)*, (2009) 93 O.R. (3d) 483 [*Chiang*]
[7] Rule 60.11(5)
[8] *Pro Swing Inc. v. Elta Golf Inc.*, [2006] 2 S.C.R. 612 at paragraph 35; *Westfair Foods Ltd. v. Naherny*, (1990), 63 Man. R. (2d) 238 (C.A.).
[9] [1992] 2 S.C.R. 1065 [*Videotron*]
[10] *Anthes v. Wilson*, 2005 CanLII 14567 (On.C.A.) at paragraph 4
[11] *Vidéotron*, *supra* note 9 at page 1078
[12] *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 4; *P.-A.P. v. A.F.*, [1996] R.D.J. 419 (C.A.)
[13] *R. v. Edge*, [1988] 4 W.W.R. 163 (B.C.C.A.)

Courts will consider whether any attempt was made to comply with the court order in question and use such to decide whether the party alleged to be in contempt was indeed in contempt of the court order in question. If a court finds that a sincere attempt was made to abide by the order, then it is not likely to find contempt, although the court can order other remedies for the wrong, such as the imposition of a fine or an order of costs.[14]

Courts are also required to consider an apology on the part of the alleged contemnor and whether it was sincerely made as an admission of wrongdoing and made in a timely manner.[15]

After a Contempt Finding

A person imprisoned following a finding of contempt remains under the jurisdiction of the court. The Parole Board has no jurisdiction over civil contemnors. The reason is that the purpose of the incarceration in contempt proceedings is to punish but also to compel compliance. To allow the Parole Board jurisdiction over the person would undermine the purposes of contempt penalties.[16]

Once a finding of contempt has been made, in order to purge the contempt, the person found in contempt must establish that he or she has complied with all the requirements of the order on a balance of probabilities. The analogy is drawn between purging contempt and mitigating factors in sentencing, again on the basis that contempt is quasi-criminal in nature.[17] The balance of

[14] *Macievich v. Anderson,* [1952] 4 D.L.R. 507 (Man. C.A.), and *Cook v. Town of Lockeport* (1971), 7 N.S.R. (2d) 191 (S.C.T.D.)
[15] *Ontario (Attorney General) v. Paul Magder Furs Ltd.* (1993) 12 O.R. (3d) 72 (Gen. Div.)
[16] *Chiang, supra* note 6 at paragraphs 116 to 117
[17] *Chiang, supra* note 6 at paragraph 51; *Ryan v. Maljkovich,* [2001] O.J. No. 1268 (S.C) at paragraphs 37 to 40

probabilities is defined as being met "if the Court is satisfied, on the evidence, that the existence of a fact in dispute is **more probable than not**. In other words, based on the evidence before this Court .. the event or fact in dispute is not only possible but probable…"[18]

Recent Contempt Decisions

A recent British Columbia Court of Appeal upheld the principle that in civil contempt a party may be subjected to imprisonment. In *Majormaki Holdings LLP v. Wong*[19] the appellant had been ordered to account for $3.5 million he had fraudulently received from the respondent. Almost immediately after the order issued, the appellant spent $190,000.00 of the money in question. The appellant failed to properly account to the judge and even with a second accounting could not remedy the spending. The appellant was able to settle the matter with the respondent and apologized before his sentence for contempt. However, the judge found the apology insincere and deemed the contempt serious as the appellant's conduct threatened the administration of justice. The judge ordered the appellant to be sentenced for 21 days. The Court of Appeal upheld the stiff sentence on the basis that the sentence underscored the seriousness of the act of contempt.

On May 29, 2009 the Court of Appeal of Ontario delivered a decision in *International Tour Entertainment Corporation v. Cutting Edge Films Inc.*[20] The appeal was in respect of a contempt order that had been issued by the Superior Court of Justice. The order of contempt was as against the CEO of the debtor corporation. The Court of Appeal found that the order of

[18] *Canada (Minister of Citizenship & Immigration) v. Furman (2006),* 2006 FC 993 at paragraph 25 [emphasis added]

contempt could not be sustained against the CEO himself. The Court found that the motion judge did not explain under which rule the order had issued. The Court's decision was based on the fact that there were no reasons in the decision that explained the jurisdiction of the Court to issue the contempt order. The contempt order was overturned.

This brief decision underlines the importance of a Court clearly outlining the basis on which a contempt order is made. It is consistent with the gravity of contempt orders. Just as the party alleging contempt must do so beyond a reasonable doubt, so must a Court finding a party in contempt clearly explain the basis on which the finding was made, in a manner that reflects the high burden of proof.

Successful Contempt Motions in the Estates Context

In *Hinds (Re).*[21] the Honourable Madam Justice Fuerst found the estate trustee without a Will to be in contempt of an order made on September 20, 2005 and ordered that a warrant of committal be issued for him so that he would be imprisoned for fifteen days.

In *Jordan (Re.)*[22] an endorsement by the Honourable Mr. Justice Ricchetti was issued on March 25, 2009. In the motion brought by the Office of the Children's Lawyer, in spite of an August 2007 order for the two estate trustees to provide their accounts in respect of the estate, the estate trustees had not complied. The motion was for contempt as well as other remedies. By March

[19] [2009] B.C.J. No, 1648, B.C.C.A.
[20] 2009 ONCA 507 (CanLII)

2009, the hearing of the motion, the estate trustees had still failed to account for their spendings in respect of the estate. In deciding on whether to issue the contempt finding, Justice Ricchetti considered three points: first if there was a pre-existing directive order; second if the order was clear and unambiguous; and third whether the order had been breached. Justice Ricchetti concluded that the Children's Lawyer had established beyond a reasonable doubt that the order had been directive, clear and it had been breached.

The Court was also asked to provide injunctive relief enjoining the estate trustees from dealing with the property of the deceased. In spite of the fact that the estate trustees had co-mingled the estate monies with their own and spent from the estate monies for their own use, the Court refused to grant an injunction. The Children's Lawyer specifically requested a *Mareva* injunction.[23] The Court refused to grant such but did grant an injunction preventing the estate trustees from selling, transferring, encumbering mortgaging or otherwise disposing of estate property until the next hearing date set for the matter, one month later, for the purposes of preserving the status quo until the accounting was provided.

In the recent decision of *Re. Willis Estate*,[24] issued on May 21, 2009 in the Toronto Estates Court, the Honourable Mr. Justice Brown addressed the issue of contempt in the failure of a son to provide an accounting and inventory of his mother's assets as ordered by the Court. In January 2008 the Court had previously ordered the son to provide a full inventory of assets owned by his mother and jointly with him, as well as a full accounting of all dealings with the

[21] Court File no. 72334/04
[22] Court File no. CV-07-2521-ES
[23] See discussion of *Mareva* injunctions and other injunctive relief, below.

joint assets. After the son failed to provide the inventory and accounting, several further orders were made, until finally a motion was brought for contempt. Justice Brown explained the purposes of the Court's contempt authority:

> A court exercises its contempt power to uphold the dignity and process of the court, thereby sustaining the rule of law and maintaining the orderly, fair and impartial administration of justice.

Justice Brown considered the particular circumstances of the case including the son's repeated failure to produce the inventory and accounting, the possible presence of a medical condition that affected the son's ability to comply with the order, and the fact that it was the son's first instance of contempt. In the end, Justice Brown ordered that the son pay a fine of $7,000.00, and if he failed to pay the fine, Justice Brown ordered that he was to be jailed for seven days.

Costs in Contempt Proceedings

On contempt motions, courts can order costs on a solicitor-client basis as a reflection of the policy that the party bringing the motion is assisting the court in the enforcement of its orders and ought not to be penalized financially for doing so.[25]

When Contempt Cannot Assist

Rules 60.05 and 60.11(1) explicitly exclude non-payment of money as a matter that can be enforced through contempt proceedings.

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[24] 2009 CanLII 30681 (Ont. S.C.J.)
[25] *Canada (Minister of National Revenue) v. Bjornstad*¸ 2006 FC 818

> **60.05** An order requiring a person to do an act, **other than the payment of money**, or to abstain from doing an act, may be enforced against the person refusing or neglecting to obey the order by a contempt order under rule 60.11
>
> **60.11** (1) A contempt order to enforce an order requiring a person to do an act, **other than the payment of money,** or to abstain from doing an act, may be obtained only on motion to a judge in the proceeding in which the order to be enforced was made.

In *Forrest v. Lacroix Estate*[26] the Court of Appeal overturned a ruling of the Superior Court of Justice that found an estate trustee in contempt for failing to make a payment as ordered pursuant to the *Succession Law Reform Act.* In the judgment, Morden J.A. clarified that the wording of Rules 60.05 and 60.11(1) were so clear that they could not be interpreted to allow for contempt proceedings against a party in cases of non-payment of monies. Morden J.A. traced the history of the law of contempt and pointed out that contempt for non-payment of monies was linked to section 12 of the *Fraudulent Debtors Arrears Act*[27] and predecessor legislation back to the nineteenth century that prohibited arrest for contempt for non-payment of a money judgment.[28]

Morden J.A. referred to a 1977 High Court decision, *Re. Kapis*[29] in which Wright J. emphasized that family support orders were an exception to the "payment of money" provision of the contempt rule. Morden J.A. disagrees with Wright J. finding the wording of the Rules on contempt are far too clear and comprehensive to allow for the exception that Wright J. found for family support orders.

[26] (2000) 48 O.R. (3d) 619 (C.A.)[*Forrest v. Lacroix Estate*]
[27] R.S.O. 1990, c. 30, s. 12
[28] *Forrest v. Lacroix Estate, supra* note 26 at paragraph 22
[29] *Kapis, Re* (1977), 15 O.R. (2d) 772 (H.C.)

The bottom line is, if you are looking for enforcement of an order to pay money, no matter what the circumstances are, you are best to avoid contempt proceedings and proceed with other avenues as outlined in Rule 60.02:

> **60.02** (1) In addition to any other method of enforcement provided by law, an order for the payment or recovery of money may be enforced by,
> (a) a writ of seizure and sale (Form 60A) under rule 60.07;
> (b) garnishment under rule 60.08;
> (c) a writ of sequestration (Form 60B) under rule 60.09; and
> (d) the appointment of a receiver.

These avenues, for the enforcement of orders for the payment of recovery of money, are addressed below.

OTHER STRATEGIES EMPLOYING THE RULES OF CIVIL PROCEDURE TO OBTAIN ORDERS TO ASSIST IN OBTAINING COMPLIANCE WITH COURT ORDERS CIRCUITOUSLY OR DIRECTLY FROM THE SOURCE

Writ of Seizure and Sale

Rule 60.07 outlines the requirements for a writ of seizure and sale. In cases where an order provides that it can be enforced through a writ of seizure and sale, no further leave is required of the court to issue such a writ.[30] The party seeking the writ needs to file the order, the payment received and the outstanding amount and rate of postjudgment interest with the registrar in order to have the writ issued.[31]

A writ of seizure and sale is effective for six years after its issue.[32]

If six years have lapsed from the order in question, and a party has not sought a writ of seizure and sale, he or she must obtain leave from the court to do so. That order, if so issued is effective for one year after the date of the order.[33]

If a party is required to pay money into court, the writ issued contains a notice that all money received by the sheriff is to be paid into court.[34]

Rule 60.07 provides further details on the mechanics of the sale and notice of sale of personal and real property.[35]

[30] Rule 60.07(1)
[31] Rule 60.07(1)
[32] Rule 60.07(6)
[33] Rules 60.07(2) and 60.07(3)

Garnishment

Rule 60.08 outlines the procedure for garnishment. A party with an order for payment or recovery of money may enforce the order by garnishment of debts payable to the debtor by other persons.[36] Leave of the court is not required, unless six years or more have lapsed since the date of the order, or unless the order provides a condition requiring leave.[37] In order to obtain a notice of garnishment, the creditor is required to file information with the registrar by way of a requisition and an affidavit providing details on the date and amount of any payment received, the amount owing including post judgment interest, details of any calculations, the address of the debtor, names and address of all persons to whom the notice is to be directed, the basis on which the creditor believes those persons are or will be indebted to the debtor, details of such debts, whether the debtor can sue the person in Ontario to recover the debt, and any future debts that will be owing to the debtor.[38]

A notice of garnishment is specific and only applies to one person or party who owes the debtor money. If there is more than one person, the creditor will have to issue multiple notices of garnishment.[39]

A notice of garnishment is valid for a period of six years from the date of its issue, and with each renewal is valid for another six years.[40]

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[34] Rule 60.07(4)
[35] Rules 60.07(15) to (24)
[36] Rule 60.08(1)
[37] Rule 60.08(2)
[38] Rule 60.08(4)
[39] Rule 60.08(6.1)
[40] Rule 60.08(6.2)

In general most income can be garnished: even future income, such as a real estate agent's commissions receivable from his employer broker.[41]

However not all "income" or debts can be garnished. For instance, in *Metropolitan Toronto (Municipality) v. O'Brien*[42] the court ruled that Old Age Security and Canada Pension Plans that were automatically deposited into the debtor's account could not be garnished. In another example, in *Assaf Estate (Re.)*[43] the court ruled that monies to be paid out of court by the Accountant of the Superior Court of Justice to an individual did not constitute a debt payable to the individual and therefore could not be garnished. In *Mullins v. R-M&E Pharmacy*[44] the court ruled that as garnishment is an equitable remedy, the court has jurisdiction to exclude pain and suffering damages for personal injury from garnishment. Nor is spousal support garnishable.[45]

Writ of Sequestration

Rule 60.09(1) provides that a writ of sequestration, which directs a sheriff to take possession of and hold property of a person against whom an order has been made and to collect and hold any income from the property until that person complies with the order in question can be issued with leave of the court, obtained on a motion. Such a writ, if issued, may be in respect of all or part of a person's real or personal property.

[41] *Cram v. Bellman*, (1991) 2 O.R. (3d) 207 (Gen. Div.)
[42] (1995), 23 O.R. (3d) 543 (Gen. Div.)
[43] (2008), 297 D.L.R. (4th) 694 (S.C.J.)
[44] (1995), 74 O.R. (3d) 278 (S.C.J.)
[45] *Taylor v. Taylor* (2002), 60 O.R. (3d) 138 (C.A.)

However, to grant such an order, a court must be satisfied that other enforcement measures are not effective and are not likely to be effective.[46]

Certificate of Pending Litigation

Rule 42.01(1) provides that a certificate of pending litigation can only be issued by a registrar pursuant to an order of the court. The statutory basis of certificate of pending litigation is found at section 103 of the *Courts of Justice Act*.[47]

The test for granting a certificate of pending litigation is the same as that for interlocutory injunction (canvassed in more detail, below). The test a plaintiff must meet for a certificate of pending litigation is (a) there is a serious question to be tried; (b) the plaintiff will suffer irreparable harm if the certificate of pending litigation is not granted; and (c) the balance of convenience favours the granting of the certificate of pending litigation.

A certificate of pending litigation can be sought in respect of property even if the property itself is not directly claimed by the plaintiff. It is sufficient if the interest in the land is in question.[48] In estates cases, judges will look particularly carefully at properties for which certificates of pending litigation are sought and enquire into whether they ought to be secured to ensure the estate is not depleted, and particularly in cases where there have been dubious transfers by attorneys, guardians or trustees. This is particularly the case where the interests of an incapable person are implicated.

[46] Rule 60.08 (2)
[47] R.S.O. 1990, c. C. 43, section 103

Orders for Assistance

Another tool in estates cases, where contempt is not appropriate are the "orders for assistance" under Rule 74.15 of the Rules of Civil Procedure. This rule allows a person who appears to have a financial interest in an estate to bring various motions for assistance from the court, as follows:

> **74.15** (1) In addition to a motion under section 9 of the *Estates Act*, any person who appears to have a financial interest in an estate may move,
> **Order to Accept or Refuse Appointment**
> (a) for an order (Form 74.36) requiring any person to accept or refuse an appointment as an estate trustee with a will;
> (b) for an order (Form 74.37) requiring any person to accept or refuse an appointment as an estate trustee without a will;
> **Order to Consent or Object to Proposed Appointment**
> (c) for an order (Form 74.38) requiring any person to consent or object to a proposed appointment of an estate trustee with or without a will;
> **Order to File Statement of Assets of the Estate**
> (d) for an order (Form 74.39) requiring an estate trustee to file with the court a statement of the nature and value, at the date of death, of each of the assets of the estate to be administered by the estate trustee;
> **Order for Further Particulars**
> (e) after receiving the statement described in clause (d), for an order for further particulars by supplementary affidavit or otherwise as the court directs;
> **Order to Beneficiary Witness**
> (f) for an order (Form 74.40) requiring a beneficiary or the spouse of a beneficiary who witnessed the will or codicil, or who signed the will or codicil for the testator, to satisfy the court that the beneficiary or spouse did not exercise improper or undue influence on the testator;
> **Order to Former Spouse**
> (g) for an order (Form 74.41) requiring a former spouse of the deceased to take part in a determination under subsection 17 (2) of the *Succession Law Reform Act* of the validity of the appointment of the former spouse as estate trustee, a devise or bequest of a beneficial interest to the former spouse or the conferring of a general or special power of appointment on him or her;
> **Order to Pass Accounts**
> (h) for an order (Form 74.42) requiring an estate trustee to pass accounts; and
> **Order for Other Matters**
> (i) for an order providing for any other matter that the court directs.

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[48] *Courts of Justice Act, supra* note 47, section 103(1); Rules 42.01 and 45.01(1); *Chillian v. Augdome Corp.* (1992

All of these orders for assistance except for the order for further particulars (Rule 74.15(1)(e)) may be made without notice:[49]

> ***Notice of motion***
> (2) A motion under subrule (1) may be made without notice, except a motion under clause (1) (e), which requires 10 days notice to the estate trustee.

These orders for assistance are helpful and bring about goals that are similar to those achieved with contempt, in that they have real repercussions for the responding party. For instance, if a person is required to accept an appointment as an estate trustee[50] and then fails to file an application for a certificate of appointment as directed, that person will be deemed to have renounced his or her right to be appointed. A beneficiary witness to the will who fails to satisfy the court that he or she did not exercise undue influence over the testator[51] may lose entitlement under the will, and a former spouse who fails to file an appearance in the will action[52] may be deemed in default.

In instances where persons are required to file a statement of assets or pass accounts, a failure to do so can subsequently be dealt with by a contempt motion on the basis that an order has issued. A party can also seek injunctive relief as outlined in more detail below, or disclosure orders that require banks or other institutions to provide the financial information that is sought. The important point is that armed with one of these orders for assistance, the applicant can then take steps to steer the matter him or herself, and find means – through contempt, injunctive relief, or disclosure orders – that allow him or her to obtain the information and relief sought.

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[49] Please see further discussion on orders for assistance made without notice, in the reference to *Ignagni Estate (Re).*¸below
[50] Rule 74.15(1)(a)(b)
[51] Rule 74.15(1)(f)
[52] Rule 74.15(1)(g)

Even Before the Proceeding Begins

Rule 37.17 provides that in an urgent case, a motion may be brought before a proceeding commences if the moving party undertakes to commence the proceeding immediately:

> 37.17 In an urgent case, a motion may be made before the commencement of a proceeding on the moving party's undertaking to commence the proceeding forthwith

INJUNCTIONS

When one is concerned about the potential conduct of opposing parties, and is concerned that they may take steps to thwart a plaintiff's claim, an interlocutory injunction can prove helpful.

The three-part test for interlocutory injunctions is set out in *RJR -- MacDonald Inc. v. Canada (Attorney General),*[53] and is as follows:

(a) Serious issue to be tried;
(b) Irreparable harm that would be caused by failure to grant the interlocutory injunction; and
(c) The balance of convenience of the parties favours the granting of the interlocutory injunction.

(a) Serious Issue

In *American Cyanamid Co. v. Ethicon Ltd.*,[54] the House of Lords lowered what had been the previous standard of a strong *prima facie* case, to one where "the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried". This standard has been adopted by the Canadian courts. Generally, it is a low threshold.[55]

[53] [1994] 1 S.C.R. 311

(b) Irreparable Harm

This is an essential factor in the assessment of the appropriateness of an interlocutory injunction. It is a requirement based in equity.

At the second stage of the test, the court is asked to determine whether a refusal to grant the injunction could result in harm to the applicants' interests such that the harm could not be remedied if the applicants were successful in the proceedings.

In *RJR MacDonald* the Court explained:

> "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.

Although the court may look at whether the responding party will have funds to pay damages, the fact that the party may not have the funds will not automatically lead to a finding of irreparable harm.

Usually, however, a court will find the potential for damages is sufficient, so the evidence of irreparable harm must be clear and unequivocal.

(c) Balance of Convenience

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[54] [1975] A.C. 396 [*RJR MacDonald*]
[55] *RJR MacDonald*, *supra* note 54

This consideration is comparative in nature. In *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*[56] Justice Beetz wrote that the third part of the interlocutory injunction could be described as:

> A determination of which of the two parties would suffer the greater harm from the granting of the refusal of an interlocutory injunction, pending a decision on the merits.

The Court in *RJR MacDonald* expressly approved of this characterization.

Undertaking as to Damages

Rules 40.03 requires that the moving party provide an undertaking to abide by any order that may be given at a later date if the court determines that the granting of the injunction caused damage to the responding party such that damages are warranted. The rule also provides that the court can dispense with this requirement. In public interest cases, courts have dispensed with this requirement. This is not the case for private interest cases, where the requirement is strictly upheld.[57] This is a risk that practitioners should consider and when advising their clients on how to proceed, ensure that their clients understand that if it is later determined that the injunctions caused the responding party harm, the clients could be liable for significant damages.

Anton Piller Orders

[56] [1987] 1 S.C.R. 110
[57] Robert J. Sharpe, *Injunctions and Specific Performance* (Canada Law Book: Looseleaf edition, November 2004) at pages 2 to 37 [Sharpe]

These orders are named for the English Court of Appeal Case, *Anton Piller KG v Manufacturing Processes Ltd & Ors.*[58] They are granted on a without notice basis on the grounds that there is "extraordinary urgency".

These orders are highly intrusive and require the defendant to permit entry to its private premises so that the plaintiff can locate and secure property, most frequently documents and confidential information.

The moving party requires:

(a) strong or extremely strong prima facie case;
(b) very serious harm if order not granted;
(c) respondent has in his or her possession documents or other items to be seized; and
(d) good reason to believe the respondent will destroy or secret the items to be seized if given notice of the motion.

Lord Denning called this remedy a "search warrant in disguise". In spite of the fact that it does allow the moving party to search the defendant's premises for items it seeks, the courts in Ontario have rejected this characterization.[59]

Mareva Injunctions

These are also granted on the basis of "extraordinary urgency". *Mareva* injunctions are the most commonly used tool by plaintiffs to freeze defendants' assets prior to judgment. They ensure that defendants will have sufficient assets to pay defendants' damages. The purpose of Mareva

[58] [1975] EWCA Civ 12 (08 December 1975)
[59] *Ridgewood Electric v. Robbie et al.* (2005), 74 O.R. (3d) 514 (Sup. Ct.)

injunctions is to "prevent the effective destruction of the plaintiff's rights in the period of delay awaiting trial."[60]

There is a two-part test for Mareva injunctions that plaintiffs must meet:

(a) Strong prima facie case on its merits; and
(b) Real risk that respondent party is disposing of assets in a manner different than in regular business

As for the second branch of the test, the plaintiff is required to establish that there is a real risk that the defendant will improperly dispose of the assets in order to avoid an eventual judgment.[61] While courts will consider previous fraudulent conduct as evidence of a risk of future dissipation of assets, that in itself may be insufficient to support a Mareva injunction.[62]

Mills Injunctions

These fall under the so-called "fraud exception" where courts hold that when a party has committed fraud, the court may effectively grant execution prior to judgment.[63] These have been traditionally been granted where there has been an actual fraudulent disposition of an asset pending litigation.[64]

The requirements for this type of injunction are two-fold. First the defendant has to have committed a fraud with respect to certain property in order to defeat a claim against him or her, and second, the injunction must relate to that property that was fraudulently disposed of.

[60] Sharpe, *supra* note 57 at paragraph 2.770
[61] *Bank of Montreal v. Misir*, (2004) 8 C.P.C. (6th) 92 (Ont. S.C.J.)
[62] *United States of America v. Yemec*, (2003), 67 O.R. (S.C.J.), aff'd (2005), 195 O.A.C. 164 (Div. Ct.)
[63] *Mills and Mills v. Petrovic* (1980), 30 O.R. (2d) 238 H.C. at 239
[64] Sharpe, *supra* note 57 at paragraph 2.720

Although traditionally these injunctions were granted in cases where the defendant had behaved in a fraudulent manner in respect of the property in dispute, further cases have expanded the application of Mills injunctions to instances where the fraud was not directly related to the asset in question in the action.[65]

Ex Parte Injunctions

Rules 37.07(2) and 37.07(3) of the *Rules of Civil Procedure* allow, under certain circumstances for the court to make orders without notice:

> **37.07(2)** Where not required -- Where the nature of the motion or the circumstances render service of the notice of motion impracticable or unnecessary, the court may make an order without notice.
> **(3)** Where the delay necessary to effect service might entail serious consequences, the court may make an interim order without notice.

In general, one must proceed very carefully with *ex parte* motions, as the courts are cautious about granting such orders on the basis that there is potential for misuse of the mechanism.[66] As stated by Justice Meehan Meehan J. in *M. (S.) v. C. (J.R.)*[67]:

> It may be that an injunction is necessary and it might not unduly prejudice the rights of the defendant, but at this time such a belief is mere conjecture. Both sides of the story are necessary for a proper determination. For this reason I do not believe that the injunction should be given on an *ex parte* basis. The courts simply cannot conduct a proper balancing of the parties' rights on an *ex parte* basis.

The onus on the moving party in *ex parte* motions is very burdensome. If a court is not satisfied that a motion could only have proceeded *ex parte* then a court is not likely to grant such a motion.

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[65] *Toronto (City of) v. McIntosh* (1977), 17 O.R. (2d) 717 (H.C.J.)
[66] *Watson v. Slavik* (1996), 5 C.P.C. (3d) 315 (B.C.S.C.); *Robert Half Canada Inc. v. Jeewan* 71 O.R. (3d) 650 at paragraph 30 [*Robert Half*]

In *Launch! Research & Development Inc. v. Essex Distributing Co.*,[68] Southey J. denied the plaintiffs' *ex parte* motion on the basis that the plaintiffs knew that some of the defendants had retained counsel. Southey J.wrote, generally:

> [A] plaintiff should only apply for an injunction *ex parte* where it is genuinely impossible to give any notice to the defendant of the order sought without defeating the purposes of the order.[69]

In *Royal Bank v. W. Got & Associates Electrical Ltd.*[70] McLachlin J.(as she then was) and Bastarache J, upheld the trial judge's decision to set aside an *ex parte* motion that had been granted for the plaintiff. The trial judge had found that the plaintiff had not met the "duty of candour and utmost good faith" required for *ex parte* injunctions. The bank had alleged that the defendant would move inventory to avoid damages, even though the bank had already taken steps to protect itself by notifying the defendant's accounts and perfecting the assignment of book debts. The bank had created a "false sense of urgency" to secure the granting of the injunction and this, the trial judge held (and the Supreme Court, later) warranted the setting aside of the injunction. [71]

Courts have often commented that the moving party is better to proceed with short notice, rather than no notice on the basis that the provision of notice was impossible.[72]

Extraordinary Urgency

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[67] (1993), 13 O.R. (3d) 148 (Gen. Div.) at paragraph 27 [*M(S) v. C.(J.R.)*]
[68] [1977] O.J. No. 1451 [*Launch*]
[69] *Launch, supra* note 60 at paragraph 5

The moving party must demonstrate circumstances of extraordinary urgency, to the point that giving notice to the responding party would cause serious and irreparable harm to the moving party.[73]

In *Robert Half Canada Inc. v. Jeewan*, Corbett J. described two categories of extraordinary urgency:

(i) where there is good reason to believe that the defendants, if given notice, will act to frustrate the process of justice before the motion can be decided; and
(ii) where there is simply not the time and/or means to provide notice.[74]

Full and Frank Disclosure

The moving party must also provide full and frank disclosure with respect to the facts and the law. Rule 39.01(6) outlines as follows:

> **39.01(6)** Where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all materials facts, and failure to do so it in itself sufficient ground for setting aside any order obtained on the motion or application.

The onus is high on the moving party. Counsel for the moving party is obligated to give a fair and balanced statement of the facts of the motion as well as the facts upon which the moving party relies in bringing the motion without notice. Counsel for the moving party is further

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[70] [1999], 3 S.C.R. 408
[71] *Supra* note 62 at paragraph 12
[72] *M(S) v. C.(J.R.) (1993)*, 13 O.R. (3d) 148 (Gen. Div.)
[73] Sharpe, *supra* note 57 at paragraph 2.30
[74] *Supra* note 66 at paragraphs 31, 36 and 38

obliged to canvass the applicable law.[75] Practitioners should note that the onus of providing full and frank disclosure in respect of the facts and the law falls squarely on them, and not on their clients.

Time Limitations on Without Notice Injunctions

Injunctions brought by motion without notice are granted for a limited time, of up to ten days.[76] Rule 40.02 provides that an injunction or order granted on a motion without notice is limited to a period of ten days, and if the moving party seeks an extension he or she must do so on notice to the responding party, unless the judge is of the view that the responding party has been evading service.

> **40.02(1)** An interlocutory injunction or mandatory order may be granted on motion without notice for a period not exceeding ten days.
> **(2)** Where an interlocutory injunction or mandatory order is granted on a motion without notice, a motion to extend the injunction or mandatory order may be made only on notice to every party affected by the order, unless the judge is satisfied that because a party has been evading service or because there are other exceptional circumstances, the injunction or mandatory order ought to be extended without notice to the party.
> **(3)** An extension may be granted on a motion without notice for a further period not exceeding ten days.
> …

If a party brings an application to extend an order granted on a without notice basis, the presiding judge can re-consider all the criteria for the original order. In the case of *Robert Half Canada Inc. v. Jeewan*[77] the plaintiff sought an extension of its interim injunction against the defendants until the parties completed their exchange of materials and conducted cross-examinations.

[75] *United States of America v. Friedland,* [1996] O.J. No. 4399 (Gen. Div.), appeal abandoned January 7, 1997.
[76] *Robert Half, supra* note 66 at paragraphs 26 and 33
[77] 71 O.R. (3d) 650

Corbett J. declined the extension. He reviewed the circumstances of the original injunction and found that it had not been warranted in the circumstances.

Ex Parte Motions in the Estates Context

In the recent decision of *Ignagni Estate (Re),*[78] Brown J.addressed the use of *ex parte* motions in estate cases. While his comments addressed orders for assistance in particular, they are equally applicable to other *ex parte* motions. At paragraph 14, Brown J.wrote:

> Members of the Estates Bar may regard the requirement to give notice of a motion for an order for assistance unless "extraordinary urgency" exists as imposing undue costs on the administration of the estate. Against that must be weighed the fundamental principle that a court should not issue an order against a person without affording that person an opportunity to explain the other side of the story. Many estate disputes arise in the context of strained family relationships, or out-and-out family battles. **Courts should exercise great caution before granting an order that imposes obligations on one side in a family dispute. Unless some extraordinary urgency exists, prudence and the principles of natural justice require a moving party to give notice of the order requested so that the respondent enjoys the opportunity of placing the rest of the story before the court.**[79]

This reasoning is consistent with the general caution about *ex parte* motions, that better than no notice, is at least short notice, and that generally *ex parte* motions should be approached carefully by counsel.

GETTING CREATIVE WITH ENFORCEMENT MOTIONS AND COURT ORDERS

In the context of estates, there are various other methods available for enforcement in addition to those listed above.

[78] 2009 CanLII 54768 (ON S.C.)
[79] [emphasis added]

Timetabling

Often, considering the gravity of contempt orders, judges will look for less onerous means of enforcing orders. A practical solution is to have the motions judge set out a timetable for the delivery of materials.

In *Switzer Estate (Re.)*[80] counsel for the plaintiffs brought a motion for judgment in default and/or contempt in respect of the defendants' failure to file a statement of defence. Morawetz J. heard the motion and set out a timetable for the delivery of a statement of defence, and the affidavit of documents, failing which the defendants would be automatically noted in default and the applicants could then move for judgment in default on the value of the action on an *ex parte* basis. When the deadline for the delivery of the affidavit of documents lapsed, the plaintiffs brought an *ex parte* motion for judgment. Although Morawetz J. declined to grant judgment, he ordered that if the defendants did not abide by the remainder of the timetable, the plaintiffs could move *ex parte* to have the defence struck and move for judgment.[81] One month later, counsel for the plaintiffs brought a motion for judgment and Himel J. granted the motion on the basis that the orders of Morawetz J. had been clear and had not been complied with.[82] The defendants appealed the decision of Himel J. to the Court of Appeal. The Court of Appeal upheld the motion for judgment on the basis that there was ample evidence that the defendants had failed to meet the requirements as set out in the orders of Morawetz J.[83]

[80] 2006 CarswellOnt 9459, Court file number 03-121/03
[81] 2006 CarswellOnt 9460
[82] 2006 CarswellOnt 9458
[83] 2007 ONCA 789

A court-enforced timetable can be of value in moving actions forward, and in forcing parties to act or providing means to bring matters to an end. A timetable is especially helpful to the moving party if it carries serious implications, such as judgment, for failure to abide by the timetable.

Case Management Judge

Another alternative means to "get things done" is to have a case management judge appointed under Rule 37.15. A party has to write to the regional senior justice for the appointment of a case management judge.

The advantage of a case management judge is that he or she can prod the parties along and remains apprised of matters as they proceed, or do not proceed as the case may be. There is also consistency of application, in rulings of the court and a single judge hearing the entirety of the motions.

In *Breslin (Re.)*[84] the Children's Lawyer brought a motion in July 2007 for contempt and compliance and sale of the property in the estate. The orders that the respondent had not complied with were from May, 2003 and January, 2007. A case management judge was appointed in the case, and there were separate attendances before Herman J. However, by December 18, 2007, the case management judge had issued an order that the property was to be sold, and that the responding party was in contempt of the orders in question. In less than six

[84] Court file number 01-3565/98

months, several years of inaction were brought to an end, with the use of contempt, and through the assistance of a highly involved case management judge.