INTERIM RELIEF: NATIONAL REPORT FOR CANADA

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I INTRODUCTION

Evolving litigation poses many challenges to litigants and their counsel before final adjudication. Canadian courts have fashioned various remedies to meet these challenges in order to preserve and maintain the court's authority to secure a just result.

In this paper, we explain the types of interim relief available to litigants in the Canadian civil justice system. In Part II, we give a brief overview of Canadian constitutional law as it relates to jurisdictional authority over procedural law. In Part III, we outline the most basic remedy for interim relief: the injunction. In Part IV, we detail three extraordinary interlocutory remedies that Canadian courts may order in response to specific pre-trial challenges: the Mareva injunction, the Anton Piller order, and the Norwich order. Our analysis continues in Part V with general comments about other remedies available in Canada, including family law and costs remedies. We conclude in Part VI with an examination of *Carey v Laiken*,[1] a case recently decided by the Supreme Court of Canada. This case highlights some of the unique

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[1] *Carey v Laiken* [2015] SCC 17; [2015] 2 SCR 79.

intersections between interim relief and the professional obligations of lawyers.

II CONSTITUTIONAL DIVISION

In order to understand the scope of procedural law in Canada, we first briefly explain the constitutional underpinnings of jurisdiction over civil procedure. The *Constitution Act 1867* divides constitutional authority to legislate in Canada between the federal and provincial governments.[2] Provincial legislatures have the authority to legislate matters relating to 'the administration of justice in the province', which includes the power to organise provincial courts and the 'Procedure in Civil Matters in those Courts'.[3] Thus, civil procedure varies across each of the provincial jurisdictions in Canada, and provincial courts adjudicate civil disputes. Canada's provincial courts are courts of 'inherent jurisdiction,' meaning that they are invested with 'those powers which are essential to the administration of justice and the maintenance of the rule of law'.[4] While there are federal courts in Canada, they are statutory courts with specified jurisdiction over federal matters that have been delegated to them.[5]

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2 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 ('*Constitution Act 1867*'). This founding constitutional document was originally passed by the Parliament of the United Kingdom, and was known for many years as the *British North America Act 1867*. It established the Dominion of Canada. However, with the patriation of the Canadian Constitution in 1982, the name of the *British North America Act 1867* was changed. For an explanation of Canada's constitutional history, see generally Peter W Hogg, *Constitutional Law of Canada*, (Carswell, 5th ed, 2007) 1.1-1.6.

3 *Constitution Act 1867* s 92(14).

4 *MacMillan Bloedel Ltd v Simpson* [1995] 4 SCR 725 [38].

5 See Federal Court of Canada, *Jurisdiction* (23 November 2015) <http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Jurisdiction>.

Even though each province has distinct procedural law and jurisprudence, Canada's final court of appeal, the Supreme Court of Canada, has plenary jurisdiction to hear cases of both provincial and federal origin. As the Court itself explained, Canada's court system is 'a unitary one under which provincially constituted inferior and superior courts of original and appellate jurisdiction apply federal as well as provincial laws under a hierarchical arrangement culminating in the Supreme Court of Canada'.[6] Therefore, appeals on matters of civil procedure that are heard by the Supreme Court have the effect of binding all provinces. For example, in *Western Canadian Shopping Centres Inc v Dutton*,[7] the Supreme Court of Canada provided guidance on the class action proceedings criteria that are applicable across Canada, despite the fact that only three provincial governments had enacted comprehensive class actions legislation.[8]

Many of Canada's interim relief remedies originate primarily from the court's equitable jurisdiction, not through statute.[9] Thus, Canada's court structure has created general uniformity on the equitable remedies that we discuss below. Even where provinces have codified the existence of these remedies, the operation of these remedies is still often driven by the common law.[10] As a result, our discussion below mainly focuses on Supreme Court of Canada jurisprudence. Where appropriate, we also explain divergences across provinces.

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6 *Ontario (Attorney General) v Pembina Exploration Canada Ltd* [1989] 1 SCR 206 [14].

7 [2001] 2 SCR 534.

8 See ibid [30].

9 See, eg, Robert J Sharpe, *Injunctions and Specific Performance* (Canada Law Book, 2012) [1.60].

10 See, eg, *Courts of Justice Act*, RSO 1990, c C.43, s 101 (in Ontario); *Court of Queen's Bench Act*, SM 1988-89, c 4, CCSM c C-280, s 55(1) (in Manitoba).

III INJUNCTIONS

One of the primary remedies in Canada for interim relief is the interlocutory or pre-trial injunction. Injunctions are equitable remedies that originate from the 19th century English Courts of Equity. They were developed to respond to situations where a remedy of damages would be inadequate in the context of a given case.[11] Injunctions have been available in Canada for many years, but the Supreme Court of Canada introduced and affirmed the modern approach to pre-trial injunctions in 1987 and 1994.[12] Generally, an injunction is sought to 'preserve a party's rights in anticipation of future litigation.'[13] Given the Supreme Court's endorsement, this remedy is regularly available in all jurisdictions throughout Canada.

A *Types of Injunctions*

Injunctions can be categorised by the timing and duration of the relief sought. Injunctions can be ordered on an interlocutory, interim, final, and ex parte basis. An interlocutory injunction is a pre-trial remedy that, when ordered, remains in force until the disposition of a case. Typically, parties will seek an interlocutory injunction to preserve their rights pending the adjudication of their case. An example of interlocutory relief would be an application to restrain someone from disposing of an asset pending trial. The purpose of an interlocutory injunction is to 'mitigate the risk of injustice to the plaintiff during the period before' the uncertainty of the case is resolved.[14] However, the risks do not flow only to the plaintiff. Justice Robert Sharpe of the Court of Appeal for Ontario, Canada's leading author on injunctions, explains that there also 'lies the

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[11] Sharpe, above n 9, [1.60].

[12] *Manitoba (Attorney General) v Metropolitan Stores (MTS) Ltd* [1987] 1 SCR 110; *RJR MacDonald Inc v Canada (AG)* [1994] 1 SCR 311 ('*RJR MacDonald* ').

[13] Lorne Sossin and Janet Walker, *Civil Litigation* (Irwin Law, 2010) 229.

[14] *American Cyanamid Co v Ethicon Ltd (No 1)* [1975] AC 396, 406 (Lord Diplock) ('*American Cyanamid*').

risk of harming the defendant by enjoining a course of conduct that ultimately may be found to be lawful.'[15]

Similar to an interlocutory injunction, an interim injunction is an order for injunctive relief for a specific period of time.[16] For example, parties can move swiftly to seek an interim injunction to protect their rights pending the hearing of a motion for an interlocutory injunction.[17] The same legal test applies on motions for interim and interlocutory relief.[18] A final injunction is one granted at the conclusion of a trial, and the principles governing final injunctions differ from those governing pre-trial injunctions.[19] Ex parte injunctions, which are sought by one party without the knowledge or involvement of the other party, are explained in our discussion of extraordinary remedies in Part IV, below.

Further, there are two main types of injunctive relief.[20] Prohibitive injunctions are negative orders that forbid a party from doing a specific act, such as in a labour dispute, where an injunction may prevent picketers from protesting. Mandatory injunctions, on the other hand, require a party to take positive action to do a specific act. An example of a mandatory injunction can be found in *Gross v Wright*,[21] where the Supreme Court of Canada ordered a party to demolish a wall that was built on the applicant's property in violation of an agreement.[22]

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15 Sharpe, above n 9, [2.70].
16 Ibid [2.55].
17 For an unsuccessful example of this strategy, see e.g. *Pfizer Ireland Pharmaceuticals v Lilly Icos LLC* [2003] FC 1278.
18 *RJR MacDonald Inc* [1994] 1 SCR 311, 334.
19 Sharpe, above n 9, [2.15].
20 See generally ibid [1.10]-[1.30].
21 [1923] SCR 214.
22 Mandatory injunctions appear to overlap with specific performance, but they are not the same. Here, the mandatory injunction required the removal of the wall. Specific performance, which was ordered by one judge (Justice Idington), would also require the defendant to rebuild the wall in accordance with the agreement. See ibid 215-3. For further explanation of this case, see Sharpe, above n 9, [1.610].

Mandatory injunctions are often more intrusive than prohibitive injunctions because they require a party to perform a specific action. Therefore, mandatory injunctions are more difficult to obtain, and courts have imposed a higher threshold on parties seeking these injunctions.[23]

B *The Test for an Interlocutory Injunction*

As this paper is focused largely on interim relief, we will focus our analysis on the test governing interlocutory inunctions.[24] Canadian courts have followed the English approach to interlocutory injunctions set out in the leading House of Lords decision, *American Cyanamid Co v Ethicon Ltd*.[25] The test, as adopted by the Supreme Court of Canada in *RJR MacDonald*, requires a party seeking an interlocutory injunction to establish that:

(1) There is a serious issue to be tried;

(2) He or she will suffer irreparable harm if the injunction application is refused; and

(3) That the balance of convenience favours the granting of the injunction.[26]

Under the first branch of the test, the court is required to look at the strength of the applicant's case to ensure that it is not 'vexatious or

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[23] Sossin and Walker, above n 13, 230. See, eg, *Quizno's Canada Restaurant Corp* v *1450987 Ontario Corp* [2009] OJ No 1743 (QL) [39]; 176 ACWS (3d) 1016 (Sup Ct); *Johnston Terminal Ltd v Forks Renewal Corp* [2003] MBQB 151 [21]-[23]; 175 Man R (2d) 155.

[24] This test also applies to interim injunctions. See *RJR MacDonald Inc v Canada (AG)* [1994] 1 SCR 311, 334.

[25] *American Cyanamid* [1975] AC 396.

[26] *RJR MacDonald Inc* [1994] 1 SCR 311, 334. See also *Metropolitan Stores* [1987] 1 SCR 110.

frivolous'.[27] This threshold is a 'low one'.[28] Prior to *American Cyanamid*, applicants were required to prove that they had a prima facie or presumptive case to be granted an interlocutory injunction. The Supreme Court of Canada agreed with *American Cyanamid* that this high merit-based threshold should no longer apply.[29]

The second and third parts of the test have been described as 'a substitute for the proper determination of the rights and obligations of the parties'.[30] Both prongs of the analysis try to weigh the competing harms of granting or denying relief prior to final adjudication.

The second prong of the test asks whether the party applying for the injunction will suffer 'irreparable harm' if the injunction is not granted. The Supreme Court explained in *RJR MacDonald* that, at this stage, the 'only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied' in the eventual decision on the merits.[31] Irreparable harm, according to the Court, 'refers to the nature of the harm suffered rather than its magnitude.'[32] Specifically, irreparable harm is harm that cannot be remedied through a monetary award or another type of award at trial. Examples of irreparable harm include a party being put out of business, damage to one's business or professional reputation, and a threat of serious environmental harm.[33] No exhaustive list of irreparable harm exists or is desirable: the meaning of irreparable harm 'takes shape in the context of each particular case'.[34]

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27 *RJR MacDonald Inc* [1994] 1 SCR 311, 337.
28 Ibid.
29 Ibid 335.
30 Jean-Phillipe Groleau, 'Interlocutory Injunctions: Revisiting the Three-Pronged Test' (2008) 53 *McGill Law Journal* 269, 300.
31 *RJR MacDonald* [1994] 1 SCR 311, 341.
32 Ibid.
33 Ibid; *Alliance Pipeline Ltd v Seibert* [2003] ABQB 872 [43]-[44]; 25 Alta LR (4th) 365. For more examples, see Sharpe, above n 9, [2.411]-[2.415.1].
34 Sharpe, above n 9, [2.450].

The third step of the test looks to the balance of convenience between the two parties in relation to the injunction. The court must make 'a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits'.[35] If irreparable harm will be caused to the plaintiff if an injunction is not granted, the court must also 'consider whether granting an interlocutory injunction to the plaintiff risks irreparable harm to the defendant.'[36] There are countless factors that a court can consider in assessing this factor.[37] Justice Sharpe lists some of the questions that courts may consider under this factor:

> Apart from, and in addition to, the risks of monetary loss and gain, what will be the relative impact upon the parties of granting or withholding the injunction? Does the benefit the plaintiff will gain from preliminary relief outweigh the convenience to the defendant of withholding relief? … Would withholding the injunction result in an injustice?[38]

Ultimately, the granting of an injunction is a 'risk-balancing exercise',[39] and this final step of the test may depend on an assessment of the first two.

C *Recognised Exceptions to the* American Cyanamid *Test*

Despite the primacy of the *American Cyanamid* test, the Supreme Court of Canada has recognised a few exceptions to its typical application. First, courts will more rigorously review the merits of a case under the

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[35] *Metropolitan Stores* [1987] 1 SCR 110, 129. The Supreme Court has subsequently cited this passage with approval. See *RJR MacDonald* [1994] 1 SCR 311, 342.
[36] Sossin and Walker, above n 13, 235.
[37] *RJR MacDonald Inc* [1994] 1 SCR 311, 342.
[38] Sharpe, above n 9, [2.530].
[39] Ibid [2.540].

first branch of the test where an interlocutory injunction would effectively dispose of the action.[40] This situation arises where:

> the right which the applicant seeks to protect [pursuant to the injunction] can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial.[41]

This exception is known as the *Woods* exception, based on the English case that recognised it.[42] Interlocutory injunctions in labour disputes, for example, typically dispose of the matter. Thus, in these cases, the court will consider the merits of the claim when deciding whether to grant the injunction.[43] As Justice Sharpe explains, in 'cases where, practically speaking, the rights of the parties are finally determined on the motion, it is essential, as a matter of justice, that the strength of the case be the predominant consideration. Difficulty in deciding does not justify judicial abdication.'[44]

When the *Woods* exception applies, Jean-Phillipe Groleau argues that the second and third steps of the *American Cyanamid* test are redundant. He writes that a finding of irreparable harm is unnecessary because 'neither party would have an interest in proceeding to trial to seek redress.'[45] The third criterion is equally inapplicable because 'it is nonsensical to apply a test [balance of convenience] used to determine

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40 *RJR MacDonald* [1994] 1 SCR 311, 338.
41 Ibid.
42 *NWL Ltd v Woods* [1979] 1 WLR 1294 (Lord Diplock) (HL) ('*Woods*').
43 *RJR MacDonald Inc* [1994] 1 SCR 311, 338. See *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 740 v Peter Kiewit Sons Co* [2005] NLCA 8 [28]; 244 Nfld & PEIR 342. See also *HSBC Capital Canada Inc v First Mortgage Nova Scotia Fund (III) Inc et at* [2002] NSCA 32 [23]-[29]; 203 NSR (2d) 29.
44 Sharpe, above n 9, [2.210].
45 Groleau, above n 30, 294.

the most equitable way to preserve the rights of the parties pending trial' where there will be no trial.[46]

A second exception to the *American Cyanamid* framework is when the court is presented with a pure question of law. A motion judge can make a determination on these questions without the need for a full hearing, and therefore, the judge must consider the merits of the case. In these cases, the second and third steps of *American Cyanamid* are unnecessary.[47] The Supreme Court recognised that these cases 'are exceptional'.[48]

Similarly, where the facts before a judge on a motion for an interlocutory injunction are not in dispute, the Supreme Court has suggested that the merits of the case may be considered.[49] After all, if there are no disputed facts, the judge can readily consider the merits by applying the applicable law to the facts.[50] This is merely another way of stating the pure question of law exception. Several provincial appellate courts have endorsed this exception.[51]

Finally, different standards apply where interlocutory injunctive relief is sought in a challenge to the constitutionality of legislation.[52] These

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[46] Ibid 295.

[47] *RJR MacDonald Inc* [1994] 1 SCR 311, 339-40.

[48] Ibid.

[49] Ibid 340.

[50] Jean-Phillipe Groleau argues by analogy that this category of cases should also be extended to those with complete factual records. See Groleau, above n 30, 298-300. For a partial endorsement of Groleau's view, see *Tall Boys Ltd v Bennett* [2002] NFCA 50 [21]; 216 DLR (4th) 307.

[51] See Groleau, above n 30, 296-298. However, the Supreme Court recognized that this exception does not apply to constitutional *Charter* litigation. See *RJR MacDonald Inc* [1994] 1 SCR 311, 340.

[52] The Supreme Court of Canada developed the Canadian approach to interlocutory injunctions in the context of two constitutional cases cited in this paper. See *Metropolitan Stores* [1987] 1 SCR 110; *RJR MacDonald Inc* [1994] 1 SCR 311.

interlocutory injunctions ask the court to suspend the application of the law or exclude the applicant from the effects of the law until its constitutional status is determined. Given the complexity of assessing the merits of constitutional litigation,[53] the typical 'serious issue to be tried' standard is used under the first branch of the test.[54] The second branch of the test, irreparable harm, 'fits awkwardly in the paradigm of constitutional litigation.' [55] If a constitutional right is infringed, a monetary remedy is not usually granted and will often be inadequate. Thus, the inquiry into irreparable harm in the constitutional context should look to 'whether the interest and purposes of the *Charter* [essentially Canada's constitutional bill of rights] would be irreparably harmed'.[56]

The biggest distinction between interlocutory injunctions sought in constitutional cases versus private law cases is at the third stage of the analysis. Given that a law which impacts the public may be suspended, the public interest must be considered at the balance of convenience stage. Both parties can rely on considerations of the public interest to 'tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought.'[57] Legislation aimed at a public good is presumed to be in the public interest.[58] Therefore, it is usually more difficult for a private applicant to demonstrate that an injunction is in the public interest than a public authority. Ultimately, it is challenging to obtain an interlocutory injunction in constitutional litigation except where the constitutional question presents as '(1) a pure question of law, [there is an] (2) urgent

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53 Sharpe, above n 9, [2.510].

54 *Metropolitan Stores* [1987] 1 SCR 110 128. However, where the constitutional question is stated as a simple question of law, or where there is a situation of urgency, the court may be willing to consider the merits in a constitutional case. See, Sharpe, above n 9, [3.1270]-[3.1285].

55 Ibid [3.1287].

56 Kent Roach, *Constitutional Remedies in Canada*, (Canada Law Book, 2nd ed, 2013) [7.210], cited in Sharpe, above n 9, [3.1287].

57 *RJR MacDonald Inc* [1994] 1 SCR 311, 343.

58 Ibid 348-9; *Harper v Canada (Attorney General)* [2000] 2 SCR 764 [9]-[10].

and transient situation, [and it is] (3) possible to craft an exemption and leave the legislative scheme intact'.[59]

D *Recent Developments*

While '[i]t is now viewed as trite law' that the three step test from *American Cyanamid* governs interlocutory injunctions in Canada, this presumptive test has evolved since the Supreme Court of Canada last considered it in detail.[60] Beyond the exceptions described above, we outline a few recent developments that impact a party's chance of success on an application for an interlocutory injunction.

First, a more thorough consideration of a claim's merit has crept back into the first step of the test in certain instances. Justice Sharpe advocates this approach. He writes that the strength of the claim should be considered at the first step of the test because a plaintiff's chance of success 'is directly relevant to an assessment of the relative risks of harm.'[61] Justice Sharpe also notes that in Canada, parties have the right to cross-examine on affidavit evidence, giving a motion judge a clearer picture of the factual issues on a motion.[62] Based on these considerations, the New Brunswick Court of Appeal recently concluded that a higher threshold of evidentiary review is warranted in the employment context if there have been oral cross-examinations.[63] Additionally, Québec courts also consider the strength of a claim in the context of some cases.[64] Awarding an injunction is a balancing exercise, and therefore, it is desirable for courts to look to the merits to appreciate the risks

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[59] Justice Robert J Sharpe, 'The Test for an Injunction: Understanding the Thresholds' (Speech delivered at Osgoode Professional Development CLE Injunctions: The Practical Guide to Law, Procedure and Strategy, 19 April 2010).

[60] Groleau, above n 30, 271.

[61] Sharpe, above n 9, [2.150].

[62] Ibid [2.170].

[63] *Imperial Sheet Metal Ltd et al v Landry and Gray Metal Products Inc* [2007] NBCA 51 [8]-[24]; 315 NBR (2d) 328.

[64] See Groleau, above n 30, 280.

involved. However, courts must remain cautious. Even with oral cross-examinations, it will be difficult to weigh the merits in cases with complicated and conflicting evidentiary records. To deny an interlocutory injunction due to a premature or misguided assessment of the strength of a claim may deny interim relief to a deserving party.

Second, the threshold for proof of irreparable harm varies across jurisdictions in Canada. In the Federal Courts, the standard of proof is very high.[65] A party seeking an interlocutory injunction must prove that the harm is 'not speculative' and that the harm 'will occur'.[66] To satisfy this high bar, the harm must be established on clear evidence, and monetary damages must be incalculable.[67] In some of the provincial courts, the standard is lower. For example, the Saskatchewan Court of Appeal recently rejected the standard at the Federal Courts and put the standard as follows:

> it is sufficient that, as a general rule, a plaintiff seeking interlocutory injunctive relief be required to establish a meaningful risk of irreparable harm or, to put it another way, a meaningful doubt as to the adequacy of damages if the injunction is not granted. This is a relatively low standard which will serve to fairly easily move the analysis into the balance of convenience stage of the decision-making.[68]

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[65] Norman Siebrasse, 'Interlocutory Injunctions and Irreparable Harm in the Federal Courts' (2009) 88 *Canada Bar Review* 515. For an explanation of how this standard developed, see 538-9.

[66] *International Longshore and Warehouse Union, Canada v. Canada (Attorney General)* [2008] FCA 3 [25]; 371 NR 357.

[67] Siebrasse, above n 65, 518. See *Aventis Pharma SA v Novopharm Ltd* [2005] FCA 390 [5]; 44 CPR (4th) 326.

[68] *Potash Corp of Saskatchewan Inc v Mosaic Potash Esterhazy Limited Partnership* [2011] SKCA 120 [61]; 341 DLR (4th) 407 ('*Potash*'). See also *Wang v Luo* [2002] ABCA 224 [17]; 117 ACWS (3d) 370 (for Alberta); *Bell Canada v Rogers Communications Inc* [2009] OJ No 3161 (QL) [37]-[41]; 76 CPR (4th) 61 (for Ontario).

The Court reasoned that the granting of an interlocutory injunction 'involves, and must involve, a weighing of *risks* rather than a weighing of *certainties*.'[69] Thus, requiring the plaintiff to prove that irreparable harm is certain could "frustrate the balancing exercise" the court must undertake on an application for interlocutory relief.[70] In general, we prefer the Saskatchewan approach. A lower, more malleable threshold best serves the interests of justice and allows judges the discretion to look holistically at the application for relief.

Finally, the general application of the *American Cyanamid* test has become more flexible. As the case law has unfolded since *RJR MacDonald*, the test has become more akin to 'guidelines rather than firm rules.'[71] The Saskatchewan Court of Appeal explained that 'there are important and considerable interconnections between the three tests. They are not watertight compartments.'[72] The fluidity of the test is a positive development for litigants seeking interim relief. It allows courts to consider each aspect of the analysis, and come to a conclusion that is just and equitable in the specific context before it.

IV EXTRAORDINARY REMEDIES

In specific circumstances, courts have the power to make more invasive interim orders. A Mareva order or injunction, also known as a freezing order, imposes restrictions on the ability of an individual to move or relinquish assets pending litigation. An Anton Piller order, which 'bears uncomfortable resemblance to a private search warrant,' allows a court to order the private seizure of evidence in the context of a civil dispute.[73]

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69 *Potash* [2011] SKCA 120 [58] (emphasis in original).
70 Ibid [59].
71 Sharpe, above n 9, [2.600].
72 *Potash* [2011] SKCA 120 [26]. See Sharpe, above n 9, [2.620].
73 *Celanese Canada Inc v Murray Demolition Corp* [2006] 2 SCR 189 [1] ('*Celanese*').

Justice Belobaba of the Ontario Superior Court has described these two remedies in stark fashion:

> The Mareva injunction and Anton Piller order are the two 'nuclear weapons' in the judge's arsenal. Properly deployed, on good affidavit evidence and without notice, they can stop a fraudster dead in his tracks, freezing assets and seizing business records. Improperly deployed, that is, wrongly obtained on bad affidavit evidence, the damage done to the unsuspecting and sometimes innocent defendant can be devastating … .[74]

A third remedy, the Norwich order, allows discovery against a party prior to the initiation of an action.[75] These three remedies have all been imported into Canadian law from English cases. They are ex parte orders, meaning that one party moves without notice to the other party and they are brought with urgency.[76] These orders only last for a limited period of time, and the court must be satisfied that the urgency of the situation is sufficiently important to forego notice.[77] In what follows, we will explain how Canadian courts have approached these remedies.

A *Mareva Orders*

Mareva orders are named after one of the English cases that establish the power of the court to prevent the disposition of assets pending judgment.[78] In 1985, the Supreme Court of Canada recognised the availability of Mareva injunctions in Canada.[79] Justice Estey of the Supreme Court explained:

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[74] *United States of America v Yemec* (2002) 97 OR (3d) 409 [1]; [2009] OJ No 3546 (QL) (Sup Ct), rev'd on other grounds [2010] ONCA 414; 100 OR (3d) 321.

[75] See generally *GEA Group AG v Ventra Group Co* [2009] ONCA 619; 96 OR (3d) 481 ('*GEA Group*').

[76] Sharpe, above n 9, [2.20].

[77] *Provincial Rental Housing Corporation v Hall* [2005] BCCA 36 [13]; 250 DLR (4th) 112.

[78] See *Mareva Compania Naviera SA v International Bulkcarriers SA* [1980] 1 All ER 213.

[79] *Aetna Financial Services v Feigelman*, [1985] 1 SCR 2.

> The gist of the *Mareva* action is the right to freeze exigible assets when found within the jurisdiction, wherever the defendant may reside, providing, of course, there is a cause between the plaintiff and the defendant which is justiciable… However, unless there is a genuine risk of disappearance of assets, either inside or outside the jurisdiction, the injunction will not issue.[80]

To obtain a Mareva order, the moving party must:

(a) Make full and frank disclosure of all matters in his or her knowledge which are material for the judge to know;

(b) Give particulars of the claim against the defendant, stating the grounds of the claim and the amount of the claim;

(c) Give grounds for believing that there is a risk of the assets being removed before judgment;

(d) Give grounds for believing that the defendants have assets in the jurisdiction; and

(e) Give an undertaking in damages in the event that the injunction is unjustified.[81]

The applicant must establish a prima facie case or at least a strong prospect of success at trial to be granted a Mareva order.[82] The provincial courts, however, have varied in their articulation of what an

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[80] Ibid [26].

[81] Sharpe, above n 9 at [2.850]-[2.940]. These criteria have been adapted from *Third Chandris Shipping Corp v Unimarine SA* [1979] QB 645, 668-69 (CA) (Lord Denning). These criteria have been applied regularly in Canada. See also Sossin and Walker, above n 13, 238; *Front Carriers Ltd v Atlantic & Orient Shipping Corp* [2006] FC 18 [16].

[82] *Aetna Financial Services v Feigelman*, [1985] 1 SCR 2 [30]; *Tracy v Instaloans Financial Solutions Centres (BC) Ltd* [2007] BCCA 481 [54]; 48 CPC (6th) 157.

applicant must prove to demonstrate a risk of an asset being removed before judgment.[83] Some courts typically require evidence that the defendant has an 'intention to frustrate the plaintiff's potential judgment,'[84] whereas other courts are more flexible in their approach to this question.[85] Courts are also cautious when issuing Mareva orders in order 'to avoid the mischief of litigious blackmail or bullying'.[86] Ultimately, courts will only make this order when it is just and convenient in the circumstances, and the order may be varied or rescinded at any time.[87]

B *Anton Piller Orders*

Anton Piller orders, also named after an English case,[88] are akin to private search warrants. They are granted to prevent the destruction of evidence in a private dispute, and allow a party to search, seize, and preserve evidence pending litigation.[89] The Supreme Court of Canada has recently and exhaustively addressed this remedy in *Celanese*[90] and *British Columbia (Attorney General) v Malik*.[91] Writing for the unanimous court in both decisions, Justice Binnie set out the governing framework to apply when a court is considering an Anton Piller order.

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83 Sharpe, above n 9 [2.880].

84 *Clark v Nucare PLC* [2006] MBCA 101; 274 DLR (4th) 479 [46]. See also *R v Consolidated Fastfrate Transport Inc* (1995) 24 OR (3d) 564; 125 DLR (4th) 1, 12 (CA).

85 See, eg, *Insurance Corp of British Columbia v Patko* [2008] BCCA 65 [24]-[26]; 290 DLR (4th) 687.

86 *Tracy v Instaloans Financial Solutions Centres (BC) Ltd* [2007] BCCA 481 [54]; 48 CPC (6th) 157 [46].

87 Ibid [41].

88 *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55.

89 Sossin and Walker, above n 13, 239.

90 [2006] 2 SCR 189.

91 [2011] 1 SCR 657.

Justice Binnie did not mince words in his description of this order. He described it as 'a thoroughly "draconian" measure … reserved for "exceptional circumstances" where "unscrupulous defendants" may if forewarned make "relevant evidence disappear"'.[92] As this remedy is sought on an ex parte basis, the moving party must provide full and frank disclosure.[93] Justice Binnie set out the four requirements for granting an Anton Piller order:

> First, the plaintiff must demonstrate a strong *prima facie* case. Second, the damage to the plaintiff of the defendant's alleged misconduct, potential or actual, must be very serious. Third, there must be convincing evidence that the defendant has in its possession incriminating documents or things, and fourthly it must be shown that there is a real possibility that the defendant may destroy such material before the discovery process can do its work.[94]

In *Celanese*, the search improperly disclosed documents protected by solicitor-client privilege to counsel for the plaintiff. Given this breach, plaintiff's counsel was removed by the Court in ongoing litigation against the defendant. In setting out comprehensive guidelines for future Anton Piller orders, Justice Binnie placed much emphasis on the protections required to ensure that the conduct of the search respects the rights of the parties and protects solicitor-client privilege.[95] Significant consequences may flow to counsel and parties who improperly obtain or inappropriately execute an Anton Piller order.[96]

C *Norwich Orders*

A third more infrequently used interim remedy is the Norwich order. Again, named after an English case,[97] Norwich orders 'are available to

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92 Ibid [29] (citations omitted).
93 *Celanese* [2006] 2 SCR 189 [37].
94 Ibid [35].
95 For the full framework, see ibid [40].
96 See Sharpe, above n 9, [2.1265].
97 *Norwich Pharmacal Co v Commissioners of Customs & Excise* [1974] AC 133.

gain disclosure of facts required to bring an action'.[98] It is based historically on the ancient equitable bill of discovery. The Court of Appeal for Ontario explains that 'it is the duty of the Court to assist with the administration of justice by granting an order for discovery', absent a well-founded objection, 'where discovery is absolutely necessary in order to enable a party to proceed with a bona fide claim'.[99] However, a Norwich order is an 'intrusive and extraordinary remedy that must be exercised with caution.'[100] To obtain a Norwich order, the court must consider the following factors:

(a) Whether the applicant has provided evidence sufficient to raise a valid, bona fide or reasonable claim;

(b) Whether the applicant has established a relationship with the third party from whom the information is sought, such that it establishes that the third party is somehow involved in the acts complained of;

(c) Whether the third party is the only practicable source of the information available;

(d) Whether the third party can be indemnified for costs to which the third party may be exposed because of the disclosure . . .; and

(e) Whether the interests of justice favour obtaining the disclosure.[101]

While these orders are uncommon, two interesting examples demonstrate its application. First, a university was successfully granted a Norwich order that required two internet service providers to reveal the

[98] Sharpe, above n 9, [2.1197].
[99] *GEA Group* [2009] ONCA 619 [76].
[100] Ibid [85].
[101] Ibid [51]; *Alberta (Treasury Branches) v Leahy* [2000] ABQB 575 [106]; 270 AR 1, affirmed in [2002] ABCA 101; 303 AR 63, leave to appeal refused in [2002] SCCA No 235 (QL).

identity of alleged defamers using their services.[102] The order was granted because the university established a prima facie case and had no other recourse against the defamers without the disclosure of their identities by the internet providers.[103] However, in *1654776 Ontario Ltd v Stewart*,[104] the Court of Appeal for Ontario refused to grant a Norwich order against a newspaper because to do so would require journalists to disclose confidential sources. In the court's view, disclosure of this privileged information would not be in the interests of justice, and therefore, the fifth step of the Norwich framework was not satisfied.[105]

As these two cases illustrate, Norwich orders are highly discretionary and dependent on the specific facts in each case. The Supreme Court of Canada has not considered the principles governing Norwich orders.[106] Until it does, this remedy is only available in provinces that have recognised it.[107] Two provinces also have statutory enactments that allow for pre-trial discovery.[108]

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[102] *York University v Bell Canada Enterprises* (2009) 99 OR (3d) 695; 311 DLR (4th) 755 (Sup Ct).

[103] Ibid [25], [27], [39].

[104] [2013] ONCA 184; 114 OR (3d) 745.

[105] Ibid [5], [144]-[145].

[106] The Supreme Court of Canada refused leave in ibid. See *1654776 Ontario Limited v Sinclair Stewart* [2013] SCCA No 225 (QL); [2013] CanLII 59893 (SCC).

[107] See, eg, *Glaxo Wellcome plc v MNR*, [1998] 4 FC 439 (QL) (CA), leave to appeal refused, [1998] SCCA No 422 (QL) (for the Federal Courts); *GEA Group* [2009] ONCA 619 (for Ontario); *Alberta (Treasury Branches) v Leahy* [2000] ABQB 575 [106]; 270 AR 1, affirmed in [2002] ABCA 101; 303 AR 63, leave to appeal refused in [2002] SCCA No 235 (QL) (for Alberta); *Kenney v Loewen* (1999), 64 BCLR (3d) 346; 28 CPC (4th) 179 (for British Columbia).

[108] See *Leahy v B(A)* (1992) 113 NSR (2d) 417; [1992] NSJ No 160 (SC (TD) (for Nova Scotia); *Johnston (Re)* (1980) 33 Nfld & PEIR 341; [1980] PEIJ No 34 (CA) (for Prince Edward Island).

V OTHER REMEDIES

Beyond the powerful interim orders described above, several more modest remedies can be granted to provide specific interim relief when warranted. Courts have statutory powers to make an interim order for recovery of personal property that a litigant has been unlawfully deprived of.[109] On a motion for recovery of personal property, the moving party must prove a prima facie case or show that there are 'substantial grounds' to the allegations.[110] This is a lower standard than that needed for a Mareva order.[111] Much like other interim relief discussed above, the plaintiff must also establish that the balance of convenience favours returning the property.[112]

With regard to costs, there are two unique but disparate pre-trial mechanisms recognised in Canada. First, a defendant to an action can seek 'security for costs' to ensure that the defendant has 'some prospect of recovering costs from the unsuccessful plaintiff'.[113] Security for costs cannot be ordered in all cases. The court may order security for costs where:

(a) the complainant is ordinarily resident outside the province;

(b) the complainant has another proceeding for the same relief pending;

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[109] See, eg, *Courts of Justice Act*, RSO 1990, c C.43, s 104(1); *Ontario Rules of Civil Procedure*, RRO 1990, Reg 194, rr 44.01-44.07; *Alberta Rules of Court*, Alta Reg 124/2010, r 6.25(1); *Supreme Court Civil Rules*, BC Reg 168/2009, r 10-1 (in British Columbia); *Queen's Bench Rules*, r 6-42 (in Saskatchewan).

[110] *Toronto Blue Jays Baseball Club v John Doe* (1992) 9 OR (3d) 622; [1992] OJ No 1086 [21] (QL) (Ct J (Gen Div)).

[111] *Clark Door of Canada Ltd v Inline Fiberglass Ltd* (1996), 45 CPC (3d) 244; [1996] OJ No 238 [22] (QL) (Ct J (Gen Div)).

[112] Ibid [36].

[113] *Padnos v Luminart Inc* (1996) 32 OR (3d) 120; [1996] OJ No 4549 (QL) (Ct J (Gen Div)).

(c) the complainant has failed to pay, in whole or in part, costs in the same or another proceeding;

(d) the complainant is a corporation or a nominal complainant, and there is good reason to believe that the complainant has insufficient assets in the province to pay the costs of the defender; or

(e) a statute entitles the defender to security for costs.[114]

In Ontario and Prince Edward Island, security for costs can also be ordered where there is 'good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets' in the jurisdiction to pay costs.[115]

Typically, the defendant must demonstrate that the plaintiff fits within one of the enumerated grounds above to be awarded security for costs. If a ground is established, the onus shifts to the plaintiff to demonstrate either that the claim is meritorious, that he or she is impecunious, or that it is unjust to award security for costs in the circumstances.[116] Interestingly, in Ontario, less attention is paid to the strength of the underlying claim if the plaintiff establishes his or her impecuniosity.[117] This rule ensures that litigants are not denied access to justice merely because they may be unable to pay.

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[114] See *Court of Queen's Bench Rules*, Man Reg 553/88, r 56.01 (for Manitoba). For similar rules across other jurisdictions, see, eg, *Alberta Rules of Court*, Alta Reg 124/2010, r 4.22; *Nova Scotia Civil Procedure Rules*, r 45; *Ontario Rules of Civil Procedure*, RRO 1990, Reg 194, r 56.01 (in Ontario).

[115] *Ontario Rules of Civil Procedure*, RRO 1990, Reg 194 r 56.01; *Prince Edward Island Rules of Civil Procedure* r 56.01.

[116] *Brown v Hudson's Bay Co* [2014] ONSC 1065 [45]-[46]; 318 OAC 12 (Div Ct). The procedure varies slightly from province to province.

[117] *Zeitoun v Economical Insurance Group* (2008) 91 OR (3d) 131, 145-146; 292 DLR (4th) 313 (Div Ct), affirmed in [2009] ONCA 415; 96 OR (3d) 639.

A second costs rule that is also premised on access to justice is an award of interim or advance costs in special circumstances. In *British Columbia (Minister of Forests) v Okanagan Indian Band*,[118] the Supreme Court of Canada set out the circumstances where interim costs may be awarded. In that case, an aboriginal group claimed title to government lands and challenged the constitutionality of legislation that regulated the land's use. The government applied for the case to be set for trial, but the aboriginal group preferred to proceed summarily, arguing that they did not have the funds to pay for an expensive trial. Therefore, the British Columbia Court of Appeal ordered the government to provide 'concrete assistance to the [Aboriginal] Bands without exposing the Minister to unreasonable or excessive costs.'[119] The Supreme Court of Canada dismissed the government's appeal, holding that interim costs were justified in this case. Generally, the Court held that interim costs are only available in the following circumstances:

> The party seeking the order must be impecunious to the extent that, without such an order, that party would be deprived of the opportunity to proceed with the case. The claimant must establish a *prima facie* case of sufficient merit to warrant pursuit. And there must be special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate.[120]

Public interest cases will fall into this narrow class of cases where '[t]he issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.'[121] Of course, even if all the factors are present, the court should

[118] [2003] 3 SCR 371 ('*Okanagan*').
[119] Ibid [17].
[120] Ibid [36].
[121] Ibid [40]. See this paragraph of *Okanagan* [2003] 3 SCR 371 for a slightly refined articulation of the test to be applied to public interest cases, which we outlined at the text accompanying n 120, above.

only exercise its discretion to make an interim costs order where the 'interests of justice would be best served by making the order.'[122]

Several years later, in *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*,[123] the Supreme Court limited the scope of discretionary interim costs orders. In *Little Sisters*, the Court denied an application for interim costs by a bookstore whose constitutional rights had been violated by Canadian Customs practices.[124] The majority of the Court held:

> [In *Okanagan*] [t]he Court did not seek to create a parallel system of legal aid or a court-managed comprehensive program to supplement any of the other programs designed to assist various groups in taking legal action, and its decision should not be used to do so. The decision did not introduce a new financing method for self-appointed representatives of the public interest. This Court's *ratio* in *Okanagan* applies only to those few situations where a court would be participating in an injustice — against the litigant personally and against the public generally — if it did not order advance costs to allow the litigant to proceed.[125]

Despite the compelling nature of the case, the majority held that '[w]here only one of the possible results on the merits could render the case publicly important, the court should not conclude that the public importance requirement is met.'[126] In *Little Sisters*, only a decision in favour of the bookstore would be of public importance. Based on these cases, interim costs should only be seen as a remedy of 'last resort',[127] and may only be awarded in cases such as *R v Caron*, where an issue as

[122] Ibid [41].
[123] [2007] 1 SCR 38 ('*Little Sisters*').
[124] See *Little Sisters Book and Art Emporium v Canada (Minister of Justice)* [2000] 2 SCR 1120.
[125] *Little Sisters* [2007] 1 SCR 38 [5].
[126] Ibid [66].
[127] Ibid [41], [105].

important as the 'uncertainty about French language rights in Alberta' is before a court.[128]

Finally, we conclude this section with a brief note about interim relief in family law disputes. While it is beyond the scope of this paper to discuss family law issues in detail, many orders granted in the family law context are interim in nature.[129] Many family law remedies are not final. Unlike in non-family litigation, where a judgment disposes of the matter, an order for spousal support, child support, or custody can always be varied.[130] Family law statutes also contain several extraordinary interim remedies reserved for special situations. For example, Ontario courts may grant a spouse exclusive possession of a matrimonial or family home on an interim basis, regardless of title, where the circumstances justify it.[131]

VI *CAREY V LAIKEN*: A CURRENT CASE STUDY

In December 2014, the Supreme Court of Canada heard an appeal of a case that sits on the intersection between civil procedure, a lawyer's professional obligations, and the purposes of interim relief remedies. In *Carey v Laiken*,[132] Peter Carey, a solicitor, was held in contempt for breaching a Mareva order that was aimed at his client's accounts.

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[128] *R v Caron* [2011] 1 SCR 78 [45].

[129] For the court's power to order interim spousal support upon a divorce, see, eg, *Divorce Act*, RSC 1985, c 3 (2nd Supp), s 15.2(2).

[130] See, eg, ibid, s 17(1).

[131] For the criteria to make this order, see *Family Law Act*, RSO 1990, c F.3, s 24(1)(3).

[132] *Carey* [2013] SCCA No 431 (QL). For the Supreme Court's reasons, see *Carey*, [2015] SCC 17, [2015] 2 SCR 79. For full disclosure, Jonathan Silver provided research support for a party in this appeal as a summer law student.

The facts of the case are complicated, but here are the relevant details.[133] Mr Carey was acting for his client, Peter Sabourin, who was embroiled in litigation against Judith Laiken. Ms Laiken obtained an ex parte Mareva order against Mr Sabourin to prevent him from depleting his accounts prior to the resolution of the litigation. Subsequent to the order, Mr Sabourin sent a cheque for $500,000 to Mr Carey without instructions. Mr Carey deposited the money into his trust account as required under the Law Society regulations.[134] Later, he received instructions from Mr Sabourin to use the money to settle litigation with a third party. Mr Carey explained to Mr Sabourin that the Mareva order prohibited this action. After failing to settle the litigation with Ms Laiken, Mr Sabourin instructed Mr Carey to return the money. Therefore, Mr Carey took $60,000 for legal fees, as permitted under the Mareva order, and returned the remaining $440,000 to Mr Sabourin.[135]

Months later, Mr Sabourin disappeared. At around the same time, Ms Laiken was awarded over $1 million in combined damages and costs against Mr Sabourin at an uncontested trial. Subsequently, Ms Laiken launched a contempt proceeding against Mr Carey. She argued that Mr Carey breached the Mareva order by returning Mr Sabourin's $440,000 to him.

Justice Roberts of the Ontario Superior Court initially held Mr Carey in contempt of court.[136] However, as contempt hearings are bifurcated in Ontario, Justice Roberts reversed her decision upon reconsideration at the second hearing.[137]

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[133] For a complete summary of the facts, see *Sabourin and Sun Group of Companies v Laiken* [2013] ONCA 530 [5]-[28]; 367 DLR (4th) 415 ('*Sabourin CA*').

[134] The Law Society of Ontario is the body that governs and regulates lawyers in Ontario. The Law Society passes regulations that require certain conduct of lawyers. See ibid [8].

[135] *Sabourin CA* [2013] ONCA 530 [8]-[9].

[136] *Laiken v Carey* [2011] ONSC 5892; [2011] OJ No 5376 (QL).

[137] *Laiken v Carey* [2012] ONSC 7252; [2012] OJ No 6596 (QL).

On appeal, Justice Sharpe of the Court of Appeal restored Justice Roberts' original decision and found Mr Carey in contempt.[138] He held that while Mr Carey did not intend to disrespect the administration of justice, his voluntary committal of an act that breached the order was enough to constitute contempt. As a sanction for this alleged contempt, Ms Laiken requested that Mr Carey pay her the missing $440,000.[139] Justice Sharpe disagreed, ordering Mr Carey to pay Ms Laiken's costs in the contempt proceedings.[140]

At the Supreme Court of Canada, Mr Carey advanced two main grounds of appeal. First, he argued that Mr Sabourin's instructions and accounts were privileged, and that the Mareva order did not require him to breach solicitor-client privilege. Thus, his only recourse was to return the funds. Second, he argued that lawyers should not be held to a strict standard of liability on a contempt motion where they do not act with the intention to obstruct the administration of justice. This is especially so where they are faced with competing professional obligations.[141]

This case demonstrates the tensions that can arise between interim remedies and a lawyer's ongoing professional obligations. Like in *Celanese*,[142] where lawyers were removed from the case for breaching solicitor-client privilege after obtaining an Anton Piller order, Ms Laiken's Mareva injunction placed Mr Carey in an untenable position. Had Mr Carey held onto Mr Sabourin's funds and sought instructions from the court, he would have risked disclosing privileged account information and settlement negotiations to the court. Had Mr Carey held onto the funds and not returned them or sought instructions, he would

[138] *Sabourin CA* [2013] ONCA 530.
[139] Ibid [67].
[140] Ibid [69].
[141] *Carey* [2013] SCCA No 431 (QL), Factum of the Appellant at [3-9].
[142] [2006] 2 SCR 189.

have risked sheltering the funds from creditors.[143] So, Mr Carey decided to return the funds to his client. Yet, his decision led to an outcome that the Mareva order was obtained to prevent: the disappearance of Mr Sabourin's funds. His decisions also landed him in the Supreme Court of Canada, fighting a quasi-criminal contempt finding.

The Supreme Court upheld the Court of Appeal's judgment, concluding that Mr Carey ought to have left the funds in his trust account after receiving instructions to return the money. This would have respected both solicitor-client privilege and the Mareva order. The Court explained that Mr Carey might have faced a 'future ethical dilemma' as between his solicitor-client privilege obligations, his duty to comply with the Mareva order, and his obligation to avoid assisting his client in evading creditors. However, this ethical dilemma had not yet arrived. When Mr Carey returned the funds to Mr Sabourin, Ms Laiken had not obtained a judgment against Mr Sabourin. Therefore, leaving the funds in the trust account would not have sheltered Mr Sabourin from execution.[144]

What is important to learn from this case and *Celanese* is that interim relief orders *must* anticipate and deal with the challenges that they pose for lawyers and litigants. Many of these remedies are extraordinary, often sought on an urgent basis, in compelling circumstances. These orders are unusual, and given their invasiveness, often conflict with other pressing obligations. In *Celanese*, Justice Binnie wrote that 'the more detailed and standardized the terms of the order the less opportunity there will be for misunderstandings or mischief'. This lesson is instructive in *Carey*. The Mareva order issued against Mr Sabourin

[143] This was not permitted under the Law Society regulations in effect at the time. See The Law Society of Upper Canada, *Rules of Professional Conduct* (22 June 2000), r 2.02 (5). A new version of these rules is now in force, but contains a similar rule. See The Law Society of Upper Canada, *Rules of Professional Conduct* (1 October 2014) <http://www.lsuc.on.ca/lawyer-conduct-rules/> rr 3.2-7.

[144] *Carey v. Laiken* [2015] SCC 17 [56]-[57].

did not require him to disclose or report his assets to the court, even though the standard form Mareva order in the jurisdiction requires this disclosure.[145] Had the Mareva order contemplated disclosure, or merely followed the standard form, the existence of Mr Sabourin's $500,000 would have been known to Ms Laiken and the court. Mr Carey's ethical dilemma, the disappearance of the funds and the contempt litigation could have all been avoided.

Another issue raised by *Carey* is the extent and appropriateness of remedies for breaching interim orders. Obviously, a blatant and intentional breach of *any* court order will be swiftly denounced and punished by the court.[146] However, how should third parties to an order be treated if they breach an order without malevolent intent, or do so despite a good faith effort to comply with the order? Should lawyers be even considered third parties? Does a lesser standard apply when competing obligations are at play? The Supreme Court held that to establish civil contempt, the same fault element applies in all cases, even where a lawyer breaches an order without malicious intent.[147] But since the Court concluded that Mr Carey was not facing conflicting obligations, it remains to be seen whether courts will craft exceptions where an order is violated in the face of a true conflict. Justice Binnie's plea for more detailed and specific orders will help militate against inadvertent breaches. However, orders cannot anticipate every eventuality, and remedies for breaches of orders must develop in a fair and just manner.

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[145] *Sabourin CA* [2013] ONCA 530 [6]. See Superior Court of Justice, Mareva Order Form, <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/>.

[146] Typically, the court will use its contempt power. See generally *Poje v Attorney-General (BC)* [1953] 1 SCR 516; *United Nurses of Alberta v Alberta* [1992] 1 SCR 901; *Pro Swing Inc v Elta Golf Inc* [2006] 2 SCR 612.

[147] *Carey v. Laiken* [2015] SCC 17 [38], [41], [44].

VII CONCLUSION

In this paper, we have outlined many of the oft-used interim remedies in Canadian civil procedure. In doing so, we have attempted to set out the governing framework for each type of interim relief, and have addressed any inconsistencies or controversies in the law. Given the Supreme Court of Canada's endorsement and explanation of most of these remedies, they are commonly used across Canada. And as the *Carey* case demonstrates, there continues to be room for new developments in Canadian interim procedure law to keep pace with the modern realities of a changing and progressive society.