Court File No. CV-18-602745-00 CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

ASTRAZENECA CANADA INC.

Plaintiff

and

SAMEH SADEK also known as Sam Sadek, ST. MAHARIAL PHARMACY INC. DBA MD HEALTH PHARMACY, ST. MAHARIAL CLINIC INC., SRX INVESTMENT INC., SHEPHERD RX PHARMACY INC. and LILIAN FAM

Defendants

BOOK OF AUTHORITIES OF THE MOVING PARTY LILIAN FAM

April 9, 2019

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TAB 1

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13, + 32

CITATION: Sualim v. Thomas; 2019 ONSC 837
COURT FILE NO.: CV-17-583433
RELEASED: 2019/02/04

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Halimat Sualim v. Gevoni Thomas, Amplify Masonry Ltd. et al.

BEFORE: Master Graham **HEARD:** January 30, 2019

COUNSEL: D. McGhee for the plaintiff

M. Bélanger for the defendants Thomas and Amplify Masonry (moving parties)

REASONS FOR DECISION
(Defendants' motion to set aside noting of default)

[1] The defendants Gevoni Thomas ("Thomas") and Amplify Masonry Ltd. ("Amplify") move to set aside the noting of default against them. For these reasons, I have ordered that the noting of default be set aside.

History of the action

[2] The history of the action prior to and following the noting of default is as follows:

September 27, 2017: Statement of claim issued.

October 16, 2017 and November 6, 2017: Statement of claim served on Thomas and Amplify respectively.

December 7, 2017: Plaintiff noted Thomas in default.

December 11, 2017: Thomas and Amplify, as well as the defendants William Nopper and Aztech Masonry Inc., retained Miller Thomson LLP to defend them.

December 14, 2017: Plaintiff noted Amplify in default.

December 14, 2017: Lawyer Pietro Palleschi of Miller Thomson first wrote to plaintiff's counsel to advise of his involvement on behalf of Thomson, Amplify, Nopper and Aztech and to seek an indulgence until January 31, 2018 with respect to delivery of a statement of defence. The moving parties accept that the plaintiff's requisition to note Thomas and Amplify in default was submitted to the court before plaintiff's counsel received this letter.

January 4, 2018: Plaintiff's counsel wrote to counsel at Miller Thomson to provide affidavits of service on Thomas and Amplify, to advise that they were noted in default, and to request that the statement of defence of the other defendants be provided by

and that "as you know, if forced to proceed on a motion, costs will be unnecessarily increased in this matter". Plaintiff's counsel did not reply to this letter.

Late August, 2018: Miller Thomson reported the matter to LawPRO, which appointed counsel to investigate the matter.

September 5, 2018: Miller Thomson ended its representation of the defendants.

October 19, 2018 – November 28, 2018: Counsel for the defendants on this motion, retained by LawPRO, and plaintiff's counsel exchanged correspondence with respect to the circumstances leading to the noting of default, setting out the events summarized above, and stating their respective views on the applicable law with respect to setting aside the noting of default.

November 29, 2018: The moving defendants Thomas and Amplify served their motion record for this motion to set aside the noting of default.

Applicable rule and case law

[3] The defendants move under rule 19.03(1):

19.03(1) The noting of default may be set aside by the court on such terms as are just.

[4] The law with respect to when the court should set aside the noting in default of a defendant is summarized in *Intact Insurance Company v. Kisel*, 2015 ONCA 205 (para. 13):

13 When exercising its discretion to set aside a noting of default, a court should assess "the context and factual situation" of the case: *Metropolitan Toronto Condominium Corporation No. 706 v. Bardmore Developments Ltd.* (1991), 3 O.R. (3d) 274 (C.A.) at p. 285. It should particularly consider such factors as the behaviour of the plaintiff and the defendant; the length of the defendant's delay; the reasons for the delay; and the complexity and value of the claim. These factors are not exhaustive. See *Nobosoft Corp. v. No Borders Inc.*, 2007 ONCA 444 at para. 3; *Flintoff v. von Anhalt*, 2010 ONCA 786, [2010] O.J. No. 4963, at para.7. Some decisions have also considered whether setting aside the noting of default would prejudice a party relying on it: see e.g. *Enbridge Gas Distribution Inc. v. 135 Marlee Holdings Inc.*, [2005] O.J. No. 4327 at para. 8. Only in extreme circumstances, however, should the court require a defendant who has been noted in default to demonstrate an arguable defence on the merits: *Bardmore*, at p. 285.

[5] The court in *Intact v. Kisel* also states (at para. 9):

9 . . . [T]he test for setting aside a default judgment and the test for setting aside a noting of default differ.

[6] This passage is essentially a reference to the fact that the test for setting aside a default judgment includes a consideration of whether the defendant has an arguable defence on

whether an error or delay by a lawyer should deprive the party itself of an adjudication of an action on the merits.

Application of the law

[12] Based on *Intact v. Kisel, supra*, the factors to be considered on this motion are as follows:

1. The conduct of the parties.
2. The length of the delay and reasons for the delay.
3. The complexity and value of the claim.
4. Whether setting aside the noting in default would prejudice the plaintiff.

[13] **The conduct of the parties:** Consideration of this factor is directed primarily to whether the defendants consistently displayed an intention to defend the action but also to whether the plaintiff contributed to any delay.

[14] Based on the dates of service of the statement of claim set out above, the time for delivery of Thomas' and Amplify's statements of defence expired on November 5, 2017 and November 26, 2017 respectively. Although they did not retain counsel until December 11, 2017, they did so during the same week in which they were noted in default and before they were aware of the fact. Their counsel's letter of December 14, 2017 demonstrates a clear intention to defend the action.

[15] It is common ground that the defendants' counsel did not receive plaintiff's counsel's letter of January 4, 2018 so no lack of intention to defend can be inferred from a failure to respond. The defendants' intention to defend the action was reiterated in Ms. De Caria's letter of January 29, 2018, in which she set out the defendants' position and asked for confirmation that the plaintiff would not require a defence at that time. This letter warranted a reply, particularly given that defendants' counsel was clearly not aware that Thomas and Amplify were noted in default, but plaintiffs' counsel did not respond to it nor does he explain his failure to do so.

[16] Neither counsel took any steps in the action until May 30, 2018 when plaintiff's counsel brought the substituted service motion before Master Muir and then served the motion on Miller Thomson. The fact that Ms. Garraway of Miller Thomson responded to the motion indicates that that firm was still involved in the matter on behalf of the defendants.

[17] I accept that the fact that the motion record for the substituted service motion contained plaintiff's counsel's January 4, 2018 letter stating that Thomas and Amplify had been noted in default should have been sufficient to notify the defendants' lawyers of the fact. Given that Ms. Garraway stated in correspondence of June 25, 2018 that she was recently

Thomas' email of July 26, 2018, and to Ms. Garraway's email of August 7, 2018. All of this correspondence warranted a response. I will address this further in considering the length of the delay and the reasons for the delay.

[24] **The length of the delay and the reasons for the delay.** The delay between when the moving defendants' statements of defence were due and the first correspondence from their counsel is about 5.5 weeks in the case of Thomas and less than three weeks in the case of Amplify. There was some further delay between Ms. De Caria's letter of January 29, 2018 and service of the plaintiff's substituted service motion on May 30, 2018, but much of this delay can be attributed to plaintiff's counsel's failure to respond to that letter. There is a delay of another month between when Ms. Garraway likely reviewed the motion record with plaintiff's counsel's letter of January 4, 2018 and the emails from Mr. Thomas (July 26, 2018) and Ms. Garraway (August 7, 2018) but first, this is not a lengthy delay and second, the defendants' right to defend should not be compromised by a delay for which their lawyers were responsible (See *Finlay, supra*).

[25] The delay between August 7, 2018 and service of the motion record on November 29, 2018 was a consequence of Miller Thomson referring the matter to LawPRO and the subsequent exchange of correspondence between counsel for the defendants on the motion and plaintiff's counsel.

[26] Although there was initially some relatively brief delay on the part of the defendants in retaining counsel, a greater amount of delay resulted from plaintiff's counsel's admittedly innocent error in sending his January 4, 2018 letter to the wrong email address, but more significantly, in failing to respond to Ms. De Caria's letter of January 29, 2018. Plaintiff's counsel should have responded to Ms. De Caria's letter of January 29, 2018 with at least a succinct "I disagree with your position, please defend the action forthwith and by the way, as I told you before, Thomas and Amplify have been noted in default." If he had done so, the defendants would have known that they had to bring their motion in February, 2018 rather than in June or July. His failure to respond to Ms. Garraway's August 7, 2018 letter compounded this delay.

[27] In summary, the delay for which the defendants are responsible is not lengthy, and certainly not sufficient to deprive them of their right to an adjudication on the merits. This is particularly the case where the delay arising from plaintiff's counsel's unexplained failure to respond to correspondence is longer than that for which the defendants are responsible.

[28] **The complexity and value of the claim.** I do not consider this to be a significant factor on this motion. If the conduct of the defendants in relation to the defence of the action, and the length of and reasons for the delay, warrant the setting aside of the noting of default, then it should be set aside regardless of the nature of the action.

[29] **Prejudice to the plaintiff.** The issue is not whether the plaintiff would be prejudiced by the defendants being able to defend the action, but whether as a consequence of the defendants' failure to defend before being noted in default, or moving more promptly,

moving defendants within 30 days and the plaintiff within 20 days thereafter. I will retain the file for 45 days pending receipt of the defendants' costs submissions or notification from the parties that they have resolved the issue of costs.

February 4, 2019

MASTER GRAHAM

TAB 2

At para 37

CITATION: Ferina Construction Ltd. v. Labno Developments Corp., 2018 ONSC 125
COURT FILE NO.: CV-11-438516
DATE: 20180109

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
FERINA CONSTRUCTION LIMITED	)	Bernie Romano, for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	
LABNO DEVELOPMENTS CORP., ROYAL VISTA HOMES LTD., SEBASTIAN LABNO, ANNA LABNO and ANNA LABNO, LITIGATION ADMINISTRATOR OF THE ESTATE OF WIESLAW LABNO, A DECEASED	)	Kim Ferreira, for the Defendants
Defendants	)	
	)	
	)	**HEARD:** November 2, 2017

KOEHNEN J.

[1] This is a motion by the defendants to set aside orders striking their defence and granting summary judgment against them.

[2] For the reasons set out below I grant the defendants' motion.

A. Background

[3] The underlying action is a debt enforcement claim with respect to a loan of $250,000 that Ferina Construction Limited ("Ferina") advanced to the defendant Labno Developments Corp. ("LDC") in 2006. LDC allegedly defaulted on the loan in the fall of 2009. On November 4, 2009, Ferina issued a number of demands. Ferina did not commence the action until November 1, 2011.

[4] The defendants defended and were examined for discovery on January 26, 2015.

[5] In December 2015, the registrar dismissed the action for delay. The defendants consented to having the dismissal set aside. As part of the setting aside, a timetable was put in place to have the action set down for trial by the fall of 2016.

[6] In February 2016, the defendants' former lawyers removed themselves from the record. The order removing the former solicitors from the record required the defendants to appoint new legal counsel or file a notice of intent to act in person within 30 days, failing which the court could dismiss the defence.

[7] The order removing the former solicitors of record contained outdated addresses for the defendants even though the defendant Anna Labno had given her current address on her examination for discovery and had indicated on examination for discovery that the defendant Sebastian Labno now lived in Florida. The former solicitors of record appear to have served the defendants at the incorrect addresses listed in the order, as a result of which the issued and entered order did not come to the defendants' attention.

[8] On March 30, 2016, Ferina's lawyer called Ms. Labno and advised her that she should appoint new counsel. Ms. Labno advised that she was unaware of the order removing her former lawyers from the record. Ferina's lawyer indicated he intended to bring a motion to strike the defence on May 5, 2016.

[9] Although Ms. Labno had given her correct address during her discovery, Ferina's lawyers served the defendants at the outdated addresses indicated in the order removing defence counsel from the record. As a result, the defendants did not receive the notice of motion.

[10] On May 5, 2016, Master Dash granted an order striking the statement of defence. On September 12, 2016, Ferina obtained a default judgment against the defendants from Faieta J. The notice of motion for default judgment was also sent to the outdated addresses listed in the order removing the defendants' former counsel. The default judgment renders each of the defendants personally liable for the amount of $671,375.91. The judgment also declares that each defendant breached its trust obligations to Ferina and that the judgment survives any assignment into or discharge from bankruptcy.

[11] When the plaintiff wanted to conduct an examination in aid of execution of Ms. Labno, it was able to serve her personally at her workplace by conducting an internet search. In late April 2017, Ms. Labno became aware of the orders striking the defence and the default judgment. On May 25, 2017, the defendants retained new counsel who has moved to set aside the default judgment.

B. The Test to Set Aside Default Judgment

[12] Rule 19.08 (2) of the Rules of Civil Procedure provides that a default judgment may be set aside or varied by a judge on such terms as are just.

[13] As a general rule, opposing counsel consent to orders setting aside defaults as a matter of professional courtesy. Where there is opposition to such a motion, it is not in the interests of justice to grant judgments solely based on technical defaults. The court will generally strive to see that the issues are resolved on their merits if that can be done with fairness to the parties: *Nobosoft Corp. v. No Borders Inc.*, 2007 ONCA 444 at para. 7.

[14] In *Mountainview Farms Ltd. v. McQueen*, 2014 ONCA 194 (CanLII) the Ontario Court of Appeal set out the following factors to consider when deciding whether to set aside a default judgment:

(a) Whether the motion was brought promptly after the defendant learned of the default judgment.

(b) Whether there is a plausible excuse or explanation for the defendant's default in complying with the Rules.

(c) Whether the facts establish that the defendant has an arguable defence on the merits.

(d) The potential prejudice to the moving party should the motion be dismissed, and the potential prejudice to the respondent should the motion be allowed.

(e) The effect of any order the court might make on the overall integrity of the administration of justice.

(a) Motion Brought Promptly

[15] The defendants received notice of the default judgment on April 19, 2017. By May 25, 2017, they had retained new counsel who immediately advised plaintiff's counsel of their intention to bring this motion.

(b) Plausible Excuse for Failing to Comply

[16] The defendants have provided a plausible excuse for failing to appoint new counsel or file notices of intention to act in person within 30 days of the order removing their former counsel from the record. They did not receive a copy of that order because it was sent to the wrong address.

[17] While her former counsel did send Ms. Labno a copy of the motion record by email, that is not the same as receiving the actual order. It is noteworthy that the defendants' former counsel does not appear to have sent Ms. Labno a copy of the issued and entered order by email.

[18] The defendants have otherwise participated in the action. They defended, attended examinations for discovery and answered undertakings.

[19] The plaintiff argues the defendants Anna Labno and her son Sebastian Labno had no valid excuse for failing to appoint new counsel within 30 days because they received the notice of motion from their former counsel by email. They point out that Sebastian Labno acknowledged on cross-examination that he knew his statement of defence could be struck if he failed to appoint new counsel within 30 days. In a similar vein, the plaintiff notes that its counsel spoke with Ms. Labno on March 30, 2016 and advised her she had not complied with the requirement to appoint new counsel within 30 days and strongly urged her to retain a lawyer. However, plaintiff's counsel did not make any attempt to ensure that a motion record got to the correct address.

[20] The somewhat lax reaction of Anna Labno and Sebastian Labno to the call from plaintiff's counsel must also be understood in the context of: (i) an action in which nothing had occurred for quite some time; and (ii) the absence of any motion record striking their defence or seeking default judgment, let alone orders to that effect.

(c) Arguable Defence

[21] The defendants have raised arguable defences on the merits.

[22] The loan in question was advanced to LDC. Only LDC signed the loan agreement, yet the judgment makes all defendants liable for the amount allegedly outstanding on the loan. Only Sebastian Labno guaranteed the loan.

[23] The default judgment states that each defendant breached its trust obligations that they owed to the plaintiff with respect to the indebtedness and that the indebtedness survives any assignment into or discharge from bankruptcy. Ordinarily, there would be no trust obligations associated with a simple loan. The simple failure to pay a debt does not necessarily amount to a breach of trust. There are legitimate issues about whether the defendants did in fact engage in a breach of trust.

[24] Ms. Labno signed a share pledge agreement as security for the $250,000 loan in favour of Labno developments Corp. The share pledge agreement stipulates that Ms. Labno is only liable if she receives a dividend from LDC. and fails to hold it in trust for Ferina. There is a real issue about whether Ms. Labno received any dividends from LDC.

[25] Ferina provided other loans to LDC and two other corporate defendants which were secured with mortgages of $2 million against a real estate development project. Ferina issued a notice of sale, commenced enforcement actions against the properties, took possession, completed the development and sold the lots that comprised the project. Ferina has not accounted for the monies it received from the development and sale of that project pursuant to the exercise of its mortgage security.

[26] The defendants assert that Ferina's profit on the mortgages upon which they enforced and which stood as security for the loans to LDC more than paid off all of LDC's indebtedness to Ferina. This raises issues about the extent to which Ferina has suffered any damages and the extent to which Ferina properly mitigated its damages.

(d) Prejudice to Plaintiff and Defendants

[27] The plaintiff has introduced no evidence of prejudice that it would suffer if the default judgment were set aside.
[28] The defendants would suffer significant prejudice if the judgment is not set aside. They would have lost the ability to defend an action that they had been defending for several years.
[29] While there may be additional delay associated with going to trial, the plaintiff has hardly advanced the action in an expeditious manner to date.

(e) Effect on the Integrity of the Administration of Justice

[30] I have three concerns about the effect of the default judgment on the integrity of the administration of justice.

[31] First, I am concerned about the possibility that the plaintiff may have been trying to take advantage of a technical slip that occurred when the defendants' former lawyers inserted outdated addresses into the order as the defendants' address for service. While the plaintiffs may have been technically correct in serving materials on those addresses, they knew or ought to have known that the addresses were outdated. They certainly knew from Ms. Labno's examination for discovery that she resided at a different address than stated in the order removing her former counsel. After serving the notice of motion to strike the defence, they also knew that the remaining addresses were invalid because the notices of motion were returned to them. When it suited the plaintiff's purposes to serve Ms. Labno personally with a notice of examination in aid of execution, it had no difficulty in finding her through a simple internet search. The same level of application should have been applied at an earlier stage.

[32] Second, the default judgment renders the defendants personally liable for obligations for which they would not ordinarily be held liable absent some material evidence. I refer here to the personal liability of individuals for corporate debt, liability on the basis of fraud or breach of trust in circumstances where the commercial relationship would not ordinarily be one of trust and liability predicated on the personal receipt of funds when the defendants maintained they received no such funds. Given that the defendants have set out arguable defences that may absolve them of liability and given that the defendants have not otherwise delayed the progress of this proceeding, they should be permitted to defend.

[33] Third, the plaintiff has not provided an accounting of the enforcement of its security on the related project. If the defendants are correct and the plaintiff has been fully paid, they are not

entitled to any of the default judgment. Allowing the plaintiff its obligation to account because it obtained default judgment as a result of the wrong addresses being included in a court order, would not speak well of the administration of justice.

[34] In resisting this motion, the plaintiff pointed to the defendants' failure to provide a proper accounting of funds that LDC received and did not use to re-pay Ferina. The defendants say they have provided an accounting. The plaintiff says it is inadequate. It is noteworthy, however, that before obtaining default judgment, the plaintiff took no steps to compel production of a better or proper accounting. The plaintiff remains free to pursue whatever courses of action it wishes to you with respect to this issue.

C. Disposition and Costs

[35] For the reasons set out above I order that:

(a) The order of Master Dash dated May 5, 2016 be set aside;

(b) The default judgment of Justice Faieta dated September 12, 2016 be set aside; and

(c) All enforcement proceedings taken by Ferina against the defendants be set aside

[36] Both parties submitted cost and disbursement outlines that came within $14 of each other. I therefore accept the quantum submitted by each as reasonable.

[37] In my view, the defendants should have their costs of the motion. They have been entirely successful. The relief they sought is ordinarily granted as a matter of professional courtesy. I note that the defendants agreed to reinstate the action after it had been subject to an administrative dismissal for delay. Had they wanted to be difficult, the defendants could have resisted reinstatement of the action. The failure to provide proper service of a motion for default judgment is an appropriate ground for setting it aside and awarding the party in default costs: see *Metal Door Hardware & Installations Ltd. v. York Region District School Board* 2012 ONSC 3067.

[38] I therefore award the defendants costs and disbursements fixed at $14,628.07 payable within 30 days. The plaintiff may set off against that cost order any amounts outstanding on account of cost awards in this proceeding against the defendants.

[39] In its cost submissions, the plaintiff asked for an opportunity to make brief submissions on further terms of the order. Plaintiff's counsel may contact my secretary through Judges' reception at 361 University Ave. to arrange a 9:30 appointment to address those issues.

Koehnen J.

Released: January 9, 2018

CITATION: Ferina Construction Ltd. v. Labno Developments Corp., 2018 ONSC 125
COURT FILE NO.: CV-11-438516
DATE: 20180109

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

FERINA CONSTRUCTION LIMITED

Plaintiff

– and –

LABNO DEVELOPMENTS CORP., ROYAL VISTA HOMES LTD., SEBASTIAN LABNO, ANNA LABNO and ANNA LABNO, LITIGATION ADMINISTRATOR OF THE ESTATE OF WIESLAW LABNO, A DECEASED

Defendants

REASONS FOR JUDGMENT

Koehnen J.

Released: January 9, 2018

TAB 3

At paras 17+18

Canadian Broadcasting Corporation *Appellant*

v.

Her Majesty The Queen *Respondent*

and

CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Postmedia Network Inc., Vice Studio Canada Inc., Aboriginal Peoples Television Network and AD IDEM/Canadian Media Lawyers Association *Interveners*

INDEXED AS: R. *v.* CANADIAN BROADCASTING CORP.

2018 SCC 5

File No.: 37360.

2017: November 1; 2018: February 9.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

Injunctions — Interlocutory injunctions — Publication bans — Mandatory publication ban issued pursuant to Criminal Code respecting identity of young victim — Media outlet refused to remove from its website articles which pre-existed publication ban and which identified victim by name and photograph — Crown bringing application for contempt and for mandatory interlocutory injunction requiring removal of information from media outlet's website — Applicable framework for granting mandatory interlocutory injunction — Whether Crown must establish strong prima facie case or serious issue to be tried — Whether chambers judge erred in refusing interlocutory injunction because Crown failed to show strong prima facie case of criminal contempt — Criminal Code, R.S.C. 1985, c. C-46, s. 486.4(2.1), (2.2).

Société Radio-Canada *Appelante*

c.

Sa Majesté la Reine *Intimée*

et

CTV, une division de Bell Média inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Postmedia Network Inc., Studio Vice Canada Inc., Réseau de télévision des peuples autochtones et AD IDEM/Canadian Media Lawyers Association *Intervenants*

RÉPERTORIÉ : R. *c.* SOCIÉTÉ RADIO-CANADA

2018 CSC 5

N° du greffe : 37360.

2017 : 1 novembre; 2018 : 9 février.

Présents : La juge en chef McLachlin et les juges Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown et Rowe.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Injonctions — Injonctions interlocutoires — Interdictions de publication — Prononcé d'une interdiction de publication mandatoire en vertu du Code criminel quant à l'identité d'une jeune victime — Refus du média de retirer de son site Web les articles affichés avant l'interdiction de publication et identifiant la victime par son nom et sa photo — Demande par le ministère public pour que soient prononcées une assignation pour outrage au tribunal et une injonction interlocutoire mandatoire intimant le retrait des renseignements du site Web du média — Cadre d'analyse applicable à la délivrance d'une injonction interlocutoire mandatoire — Le ministère public doit-il établir une forte apparence de droit ou l'existence d'une question sérieuse à juger? — Le juge en cabinet a-t-il commis une erreur en refusant de délivrer une injonction interlocutoire parce que le ministère public n'a pas établi une forte apparence de droit quant à l'existence d'un outrage criminel? — Code criminel, L.R.C. 1985, c. C-46, art. 486.4(2.1), (2.2).

An accused was charged with the first degree murder of a person under the age of 18. Upon the Crown's request, a mandatory ban prohibiting the publication, broadcast or transmission in any way of any information that could identify the victim was ordered pursuant to s. 486.4(2.2) of the *Criminal Code*. Prior to the issuance of the publication ban, CBC posted information revealing the identity of the victim on its website. As a result of CBC's refusal to remove this information, the Crown sought an order citing CBC in criminal contempt of the publication ban and an interlocutory injunction directing the removal of the victim's identifying information. The chambers judge concluded that the Crown had not established the requirements for a mandatory interlocutory injunction, and dismissed its application. The majority of the Court of Appeal allowed the appeal and granted the mandatory interlocutory injunction.

Held: The appeal should be allowed.

To obtain a mandatory interlocutory injunction, the appropriate criterion for assessing the strength of the applicant's case at the first stage of the *RJR — MacDonald* test is not whether there is a serious issue to be tried, but rather whether the applicant has demonstrated a strong *prima facie* case. The potentially severe consequences for a defendant which can result from a mandatory interlocutory injunction further demand an extensive review of the merits at the interlocutory stage. This modified *RJR — MacDonald* test entails showing a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice. The applicant must also demonstrate that irreparable harm will result if the relief is not granted and that the balance of convenience favours granting the injunction.

In this case, a literal reading of the originating notice shows that the Crown brought an application for criminal contempt and sought an interim injunction in that proceeding. The Crown thus proceeded on the basis that its application for an interlocutory injunction was sought in respect of the citation for criminal contempt. The originating notice itself, and the sequencing therein of the relief sought, belies its putatively hybrid character. The two applications are linked, such that the latter is tied not to the mere placement by CBC of the victim's identifying information on its website, but to the sought-after criminal contempt citation. Each prayer for relief does not launch an independent proceeding; rather, both relate to

Un accusé a été inculpé du meurtre au premier degré d'une personne âgée de moins de 18 ans. À la demande du ministère public, une interdiction mandatoire de publier ou de diffuser de quelque façon que ce soit tout renseignement permettant d'identifier la victime a été délivrée en vertu du par. 486.4(2.2) du *Code criminel*. Avant la délivrance de l'interdiction de publication, la SRC a affiché sur son site Web des renseignements qui révélaient l'identité de la victime. Compte tenu du refus de la SRC de retirer ces renseignements de son site Web, le ministère public a sollicité une assignation pour outrage criminel contre la SRC pour violation de l'interdiction en question ainsi qu'une injonction interlocutoire exigeant le retrait des renseignements identifiant la victime. Le juge en cabinet a conclu que le ministère public n'avait pas satisfait aux exigences relatives à l'injonction interlocutoire mandatoire et a rejeté sa demande. Les juges majoritaires de la Cour d'appel ont accueilli l'appel et accordé l'injonction interlocutoire mandatoire.

Arrêt : L'appel est accueilli.

Pour obtenir une injonction interlocutoire mandatoire, le critère approprié pour juger de la solidité de la preuve du demandeur à la première étape du test énoncé dans *RJR — MacDonald* n'est pas celui de l'existence d'une question sérieuse à juger, mais plutôt celui de savoir si le demandeur a établi une forte apparence de droit. Les conséquences potentiellement sérieuses pour un défendeur de la délivrance d'une injonction interlocutoire mandatoire exigent en outre qu'un examen approfondi soit fait sur le fond à l'étape interlocutoire. Suivant cette version modifiée du test énoncé dans *RJR — MacDonald*, le demandeur doit démontrer une forte chance au regard du droit et de la preuve présentée que, au procès, il réussira ultimement à prouver les allégations énoncées dans l'acte introductif d'instance. Le demandeur doit aussi démontrer qu'il subira un préjudice irréparable si la réparation n'est pas accordée et que la prépondérance des inconvénients favorise la délivrance de l'injonction.

En l'espèce, une interprétation littérale de l'avis introductif d'instance démontre que le ministère public a intenté une action pour outrage criminel et a cherché à obtenir une injonction interlocutoire dans le cadre de cette instance. Le ministère public s'est donc fondé sur le fait que l'injonction interlocutoire était sollicitée à l'égard de la demande d'assignation pour outrage criminel. L'avis introductif d'instance en soi, ainsi que l'ordre dans lequel les réparations y sont demandées, contredit qu'il puisse avoir un caractère hybride. Les deux demandes sont liées, de sorte que la deuxième se rapporte non pas au simple affichage sur le site Web de la SRC des renseignements identifiant la victime, mais à l'assignation pour outrage

the alleged criminal contempt. In addition, an injunction is not a cause of action, in the sense of containing its own authorizing force. It is a remedy. An originating application must state both the claim and the basis for it and the remedy sought. Here, the Crown's originating notice discloses only a single basis for seeking a remedy: CBC's alleged criminal contempt of court. Therefore, the Crown was bound to show a strong *prima facie* case of criminal contempt of court. This case should not however be taken as standing for the proposition that injunctive relief is ordinarily or readily available in criminal matters. The delineation of the circumstances in which an interlocutory injunction may be sought and issued to enjoin allegedly criminal conduct is not decided here.

The decision to grant or refuse an interlocutory injunction is a discretionary exercise, with which an appellate court must not interfere solely because it would have exercised the discretion differently. Appellate intervention is justified only where the chambers judge proceeded on a misunderstanding of the law or of the evidence before him, where an inference can be demonstrated to be wrong by further evidence that has since become available, where there has been a change of circumstances or where the decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge could have reached it. In this case, the Crown's burden was not to show a case for criminal contempt that leans one way or another, but rather a case, based on the law and evidence presented, that has a strong likelihood that it would be successful in proving CBC's guilt of criminal contempt of court. This is not an easy burden to discharge and the Crown has failed to do so here. The chambers judge applied the correct legal test in deciding the Crown's application and his decision that the Crown's case failed to satisfy that test did not, in these circumstances, warrant appellate intervention.

Cases Cited

Applied: *RJR — MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; **distinguished:** *Canada (Human Rights Commission) v. Canadian Liberty Net*,

criminel sollicitée. Chaque demande de réparation ne donne pas lieu à une instance distincte; elles sont plutôt toutes les deux liées à l'outrage criminel reproché. De plus, l'injonction n'est pas une cause d'action, en ce sens qu'elle ne contient pas son propre pouvoir d'autoriser l'action. Il s'agit d'une réparation. Une demande introductive d'instance doit énoncer tant l'objet de la demande et son fondement que la réparation demandée. En l'espèce, la demande introductive d'instance du ministère public n'indique qu'un motif pour lequel il veut obtenir une réparation : l'outrage criminel au tribunal reproché à la SRC. Le ministère public était donc tenu d'établir une forte apparence de droit quant à l'existence d'un outrage criminel au tribunal. L'issue du présent appel ne devrait cependant pas être interprétée comme signifiant que l'injonction est une réparation courante et facile à obtenir dans les affaires criminelles. La façon dont il faut définir les circonstances permettant de demander et de délivrer une injonction interlocutoire pour empêcher une conduite prétendument criminelle n'est pas tranchée ici.

La décision d'accorder ou de refuser une injonction interlocutoire relève d'un pouvoir discrétionnaire, et les cours d'appel ne doivent pas modifier la décision en découlant simplement parce qu'elles auraient exercé ce pouvoir différemment. Une intervention en appel est justifiée uniquement lorsque le juge en cabinet a pris une décision qui repose sur une erreur de droit ou sur une interprétation erronée de la preuve produite devant lui, lorsque le caractère erroné d'une conclusion peut être démontré par des éléments de preuve supplémentaires dont on dispose au moment de l'appel, lorsque les circonstances ont changé ou lorsque la décision du juge d'accorder ou de refuser l'injonction est à ce point aberrante qu'elle doit être infirmée pour le motif qu'aucun juge raisonnable n'aurait pu la rendre. En l'espèce, le fardeau du ministère public n'était pas de présenter une preuve d'outrage criminel qui penche dans un sens ou dans l'autre, mais plutôt une preuve qui, au regard du droit et des éléments de preuve présentés, avait une forte chance de réussir à prouver la culpabilité de la SRC pour outrage criminel au tribunal. Il n'est pas facile de s'acquitter d'un tel fardeau et le ministère public n'a pas réussi à le faire en l'espèce. Le juge en cabinet a appliqué le bon test juridique lorsqu'il s'est prononcé sur la demande du ministère public, et sa décision selon laquelle la preuve présentée par ce dernier ne satisfaisait pas à ce test ne justifiait pas, dans les circonstances, une intervention en appel.

Jurisprudence

Arrêt appliqué : *RJR — MacDonald Inc. c. Canada (Procureur général)*, [1994] 1 R.C.S. 311; **distinction d'avec l'arrêt :** *Canada (Commission des droits de la*

[1998] 1 S.C.R. 626; **referred to:** *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901; *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110; *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396; *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, [2017] 1 S.C.R. 824; *Medical Laboratory Consultants Inc. v. Calgary Health Region*, 2005 ABCA 97, 19 C.C.L.I. (4th) 161; *Modry v. Alberta Health Services*, 2015 ABCA 265, 388 D.L.R. (4th) 352; *Conway v. Zinkhofer*, 2006 ABCA 74; *D.E. & Sons Fisheries Ltd. v. Goreham*, 2004 NSCA 53, 223 N.S.R. (2d) 1; *AMEC E&C Services Ltd. v. Whitman Benn and Associates Ltd.*, 2003 NSSC 112, 214 N.S.R. (2d) 369, aff'd 2003 NSCA 126, 219 N.S.R. (2d) 126; *Cytrynbaum v. Look Communications Inc.*, 2013 ONCA 455, 307 O.A.C. 152; *Sawridge Band v. Canada*, 2004 FCA 16, [2004] 3 F.C.R. 274; *Jamieson Laboratories Ltd. v. Reckitt Benckiser LLC*, 2015 FCA 104, 130 C.P.R. (4th) 414; *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Limited Partnership*, 2011 SKCA 120, 341 D.L.R. (4th) 407; *La Plante v. Saskatchewan Society for the Prevention of Cruelty to Animals*, 2011 SKCA 43, [2012] 3 W.W.R. 293; *Summerside Seafood Supreme Inc. v. Prince Edward Island (Minister of Fisheries, Aquaculture and Environment)*, 2006 PESCAD 11, 256 Nfld. & P.E.I.R. 277; *National Commercial Bank Jamaica Ltd. v. Olint Corp. Ltd.*, [2009] UKPC 16, [2009] 1 W.L.R. 1405; *H&R Block Canada Inc. v. Inisoft Corp.*, 2009 CanLII 37911; *Fradenburgh v. Ontario Lottery and Gaming Corp.*, 2010 ONSC 5387; *Boehringer Ingelheim (Canada) Inc. v. Bristol-Myers Squibb Canada Inc.* (1998), 83 C.P.R. (3d) 51; *Shepherd Home Ltd. v. Sandham*, [1970] 3 All E.R. 402; *Barton-Reid Canada Ltd. v. Alfresh Beverages Canada Corp.*, 2002 CanLII 34862; *Bark & Fitz Inc. v. 2139138 Ontario Inc.*, 2010 ONSC 1793; *Quality Pallets and Recycling Inc. v. Canadian Pacific Railway Co.*, 2007 CanLII 13712; *West Nipissing Economic Development Corp. v. Weyerhaeuser Co.*, 2002 CanLII 26148; *Parker v. Canadian Tire Corp.*, [1998] O.J. No. 1720 (QL); *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897; *Hadmor Productions Ltd. v. Hamilton*, [1982] 1 All E.R. 1042; *B.C. (A.G.) v. Wale*, [1987] 2 W.W.R. 331, aff'd [1991] 1 S.C.R. 62; *White Room Ltd. v. Calgary (City)*, 1998 ABCA 120, 62 Alta. L.R. (3d) 177; *Musqueam Indian Band v. Canada (Minister of Public Works and Government Services)*, 2008 FCA 214, 378 N.R. 335, leave to appeal refused, [2008] 3 S.C.R. viii.

Statutes and Regulations Cited

Alberta Rules of Court, Alta. Reg. 124/2010, r. 3.8(1).
Criminal Code, R.S.C. 1985, c. C-46, s. 486.4 (2.1), (2.2).

personne) c. Canadian Liberty Net, [1998] 1 R.C.S. 626; **arrêts mentionnés :** *United Nurses of Alberta c. Alberta (Procureur général)*, [1992] 1 R.C.S. 901; *Manitoba (Procureur général) c. Metropolitan Stores Ltd.*, [1987] 1 R.C.S. 110; *American Cyanamid Co. c. Ethicon Ltd.*, [1975] A.C. 396; *Google Inc. c. Equustek Solutions Inc.*, 2017 CSC 34, [2017] 1 R.C.S. 824; *Medical Laboratory Consultants Inc. c. Calgary Health Region*, 2005 ABCA 97, 19 C.C.L.I. (4th) 161; *Modry c. Alberta Health Services*, 2015 ABCA 265, 388 D.L.R. (4th) 352; *Conway c. Zinkhofer*, 2006 ABCA 74; *D.E. & Sons Fisheries Ltd. c. Goreham*, 2004 NSCA 53, 223 N.S.R. (2d) 1; *AMEC E&C Services Ltd. c. Whitman Benn and Associates Ltd.*, 2003 NSSC 112, 214 N.S.R. (2d) 369, conf. par 2003 NSCA 126, 219 N.S.R. (2d) 126; *Cytrynbaum c. Look Communications Inc.*, 2013 ONCA 455, 307 O.A.C. 152; *Bande de Sawridge c. Canada*, 2004 CAF 16, [2004] 3 R.C.F. 274; *Jamieson Laboratories Ltd. c. Reckitt Benckiser LLC*, 2015 CAF 104; *Potash Corp. of Saskatchewan Inc. c. Mosaic Potash Esterhazy Limited Partnership*, 2011 SKCA 120, 341 D.L.R. (4th) 407; *La Plante c. Saskatchewan Society for the Prevention of Cruelty to Animals*, 2011 SKCA 43, [2012] 3 W.W.R. 293; *Summerside Seafood Supreme Inc. c. Prince Edward Island (Minister of Fisheries, Aquaculture and Environment)*, 2006 PESCAD 11, 256 Nfld. & P.E.I.R. 277; *National Commercial Bank Jamaica Ltd. c. Olint Corp. Ltd.*, [2009] UKPC 16, [2009] 1 W.L.R. 1405; *H&R Block Canada Inc. c. Inisoft Corp.*, 2009 CanLII 37911; *Fradenburgh c. Ontario Lottery and Gaming Corp.*, 2010 ONSC 5387; *Boehringer Ingelheim (Canada) Inc. c. Bristol-Myers Squibb Canada Inc.* (1998), 83 C.P.R. (3d) 51; *Shepherd Home Ltd. c. Sandham*, [1970] 3 All E.R. 402; *Barton-Reid Canada Ltd. c. Alfresh Beverages Canada Corp.*, 2002 CanLII 34862; *Bark & Fitz Inc. c. 2139138 Ontario Inc.*, 2010 ONSC 1793; *Quality Pallets and Recycling Inc. c. Canadian Pacific Railway Co.*, 2007 CanLII 13712; *West Nipissing Economic Development Corp. c. Weyerhaeuser Co.*, 2002 CanLII 26148; *Parker c. Canadian Tire Corp.*, [1998] O.J. No. 1720 (QL); *Amchem Products Inc. c. Colombie-Britannique (Workers' Compensation Board)*, [1993] 1 R.C.S. 897; *Hadmor Productions Ltd. c. Hamilton*, [1982] 1 All E.R. 1042; *B.C. (A.G.) c. Wale*, [1987] 2 W.W.R. 331, conf. par [1991] 1 R.C.S. 62; *White Room Ltd. c. Calgary (City)*, 1998 ABCA 120, 62 Alta. L.R. (3d) 177; *Musqueam Indian Band c. Canada (Minister of Public Works and Government Services)*, 2008 CAF 214, 378 N.R. 335, autorisation d'appel refusée, [2008] 3 R.C.S. viii.

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Code criminel, L.R.C. 1985, c. C-46, art. 486.4 (2.1), (2.2).

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APPEAL from a judgment of the Alberta Court of Appeal (Slatter, McDonald and Greckol JJ.A.), 2016 ABCA 326, 404 D.L.R. (4th) 318, [2017] 3 W.W.R. 413, 43 Alta. L.R. (6th) 213, 93 C.P.C. (7th) 269, [2016] A.J. No. 1085 (QL), 2016 CarswellAlta 2034 (WL Can.), setting aside a decision of Michalyshyn J., 2016 ABQB 204, [2016] 9 W.W.R. 613, 37 Alta. L.R. (6th) 299, 86 C.P.C. (7th) 373, [2016] A.J. No. 336 (QL), 2016 CarswellAlta 620 (WL Can.). Appeal allowed.

Frederick S. Kozak, Q.C., Sean Ward, Tess Layton and *Sean Moreman*, for the appellant.

Iwona Kuklicz and *Julie Snowdon*, for the respondent.

Iain A. C. MacKinnon, for the interveners.

The judgment of the Court was delivered by

BROWN J. —

I. Introduction

[1] The background leading to this appeal was summarized in the reasons of the chambers judge:[1]

> On March 5, 2016, [the accused] was charged with the first degree murder of D.H., a person under the age of 18 ("the victim"). On March 15, 2016 the Crown requested and a judge ordered a mandatory ban under s. 486.4(2.2) of the *Criminal Code*, R.S.C., 1985, c. C-46. The order prohibits the publication, broadcast or transmission in any way of information that could identify the victim.

[1] 2016 ABQB 204, [2016] 9 W.W.R. 613, at paras. 2-6 (emphasis added).

Doctrine et autres documents cités

Sharpe, Robert J. *Injunctions and Specific Performance*, 4th ed, Toronto, Canada Law Book, 2012.

Vermette, Marie-Andrée. « A Strong Prima Facie Case for Rationalizing the Test Applicable to Interlocutory Mandatory Injunctions », in Todd L. Archibald and Randall Scott Echlin, eds., *Annual Review of Civil Litigation, 2011*, Toronto, Carswell, 2011, 367.

POURVOI contre un arrêt de la Cour d'appel de l'Alberta (les juges Slatter, McDonald et Greckol), 2016 ABCA 326, 404 D.L.R. (4th) 318, [2017] 3 W.W.R. 413, 43 Alta. L.R. (6th) 213, 93 C.P.C. (7th) 269, [2016] A.J. No. 1085 (QL), 2016 CarswellAlta 2034 (WL Can.), qui a infirmé une decision du juge Michalyshyn, 2016 ABQB 204, [2016] 9 W.W.R. 613, 37 Alta. L.R. (6th) 299, 86 C.P.C. (7th) 373, [2016] A.J. No. 336 (QL), 2016 CarswellAlta 620 (WL Can.). Pouvoi accueilli.

Frederick S. Kozak, c.r., Sean Ward, Tess Layton et *Sean Moreman*, pour l'appelante.

Iwona Kuklicz et *Julie Snowdon*, pour l'intimée.

Iain A. C. MacKinnon, pour les intervenants.

Version française du jugement de la Cour rendu par

LE JUGE BROWN —

I. Introduction

[1] Le contexte ayant mené au présent pourvoi est résumé dans les motifs du juge en cabinet[1] :

> [TRADUCTION] Le 5 mars 2016, [l'accusé] a été inculpé du meurtre au premier degré de D. H., une personne âgée de moins de 18 ans (« la victime »). Le 15 mars 2016, le ministère public a demandé et obtenu une interdiction mandatoire en vertu du par. 486.4(2.2) du *Code criminel*, L.R.C. 1985, c. C-46. L'ordonnance interdit de publier ou de diffuser de quelque façon que ce soit tout renseignement qui permettrait d'établir l'identité de la victime.

[1] 2016 ABQB 204, [2016] 9 W.W.R. 613, par. 2-6 (je souligne).

As of March 16, 2016, two articles which pre-existed the publication ban, and which identified the victim by name and photograph ("the articles"), continued to exist on the CBC Edmonton website.

In response to a March 16, 2016 Edmonton Police Service inquiry, a senior digital producer with CBC Edmonton advised that no future stories would contain the victim's identifying information.

On March 18, 2016, however, the pre-publication ban articles remained on the website, unaltered.

One of the articles contains some evidence that the victim's identity appears already in wide circulation, by way of social media, but also by reason of the fact the victim attended school and lived in a smaller Alberta community where the murder is alleged to have occurred.

[2] Because CBC would not remove from its website the victim's identifying information published prior to the order granting a publication ban, the Crown filed an Originating Notice seeking an order citing CBC in criminal contempt of the publication ban, and an interlocutory injunction[2] directing removal of that information from CBC's website. As the terms of that Originating Notice are important to my proposed disposition of this appeal, I reproduce them here, in relevant part:[3]

TAKE NOTICE that an Application will be made by the Attorney General of Alberta on behalf of her Majesty the Queen before the presiding Justice of the Court of Queen's Bench, . . . for an Order citing [CBC] in criminal contempt of court.

[2] The Crown's Originating Notice uses the term "interim injunction". In substance, however, the Crown's application was for an interlocutory injunction. (See R. J. Sharpe, *Injunctions and Specific Performance* (4th ed. 2012), at paras. 2.15 and 2.55.)

[3] A.R., at pp. 39-40.

En date du 16 mars 2016, deux articles publiés avant l'interdiction de publication, et qui révélaient l'identité de la victime par son nom et sa photo (« les articles »), figuraient encore sur le site Web de la SRC d'Edmonton.

Le 16 mars 2016, lors d'une conversation entre un détective du service de police d'Edmonton et un producteur principal de contenu numérique de la SRC d'Edmonton, ce dernier a affirmé qu'aucun article futur ne contiendrait de renseignements permettant d'établir l'identité de la victime.

Or, le 18 mars 2016, les articles publiés avant l'interdiction de publication figuraient toujours sur le site Web, sans qu'ils aient été modifiés.

Un des articles contient des éléments de preuve selon lesquels l'identité de la victime est déjà largement connue en raison des médias sociaux, mais aussi parce que la victime fréquentait l'école et vivait dans une petite collectivité de l'Alberta où le meurtre aurait été commis.

[2] Puisque la Société Radio-Canada (« SRC ») ne voulait pas retirer de son site Web les renseignements qui établissaient l'identité de la victime publiés avant la délivrance de l'ordonnance de non-publication, le ministère public a déposé un avis introductif d'instance afin de faire déclarer la SRC coupable d'outrage criminel pour violation de l'interdiction en question, et afin d'obtenir une injonction interlocutoire[2] exigeant le retrait des renseignements en cause du site Web de la SRC. Les mots utilisés dans l'avis introductif d'instance sont importants compte tenu de la décision que j'entends rendre dans le présent pourvoi; j'en reproduis donc ici les passages pertinents[3] :

[TRADUCTION]

PRENEZ AVIS que le procureur général de l'Alberta, au nom de Sa Majesté la Reine, présentera une demande au juge présidant la Cour du Banc de la Reine [. . .] visant l'obtention d'une ordonnance déclarant [la SRC] coupable d'outrage criminel au tribunal.

[2] L'avis introductif d'instance du ministère public utilise le terme anglais « *interim injunction* » ([TRADUCTION] « injonction intérimaire »). Il s'agit toutefois en substance d'une demande d'injonction interlocutoire. (Voir R. J. Sharpe, *Injunctions and Specific Performance* (4e éd. 2012), par. 2.15 et 2.55.)

[3] d.a., p. 39-40.

AND FURTHER TAKE NOTICE that an application will be made for an interim injunction, directing that [CBC] remove any information from their website that could identify the complainant in the [subject] case.

RELIEF SOUGHT:

1. That [CBC] be cited in criminal contempt of court.

2. That [CBC] be directed to remove any information from their website that could identify the complainant in the [subject] case.

3. That an appropriate sentence be imposed against [CBC].

4. Any such further order that this Honourable Court deems appropriate.

[3] The chambers judge concluded that the Crown had not established the requirements for a mandatory interlocutory injunction, and dismissed its application. On appeal, the Court of Appeal divided on whether the Crown was entitled to a mandatory interlocutory injunction. While the majority allowed the appeal and granted the injunction, Greckol J.A., in dissent, would have dismissed the appeal, finding that the majority applied incorrect legal principles to the Crown's application.[4]

[4] For the reasons that follow, I would allow the appeal. In my respectful view, the chambers judge applied the correct legal test in deciding the Crown's application, and his decision that the Crown's case failed to satisfy that test did not, in these circumstances, warrant appellate intervention.

II. Legislative Provisions

[5] Sections 486.4(2.1) and 486.4(2.2) of the *Criminal Code*,[5] taken together, provide that a presiding judge or justice shall make an order, upon application by the victim or the prosecutor, for a publication ban in cases involving offences against victims under the age of 18 years. Specifically, the Crown or the victim

[4] 2016 ABCA 326, 404 D.L.R. (4th) 318.
[5] R.S.C. 1985, c. C-46.

ET EN OUTRE PRENEZ AVIS qu'une demande d'injonction intérimaire sera présentée afin qu'il soit ordonné à [la SRC] de retirer de son site Web tout renseignement qui permettrait d'établir l'identité de la plaignante dans [la présente] affaire.

RÉPARATION DEMANDÉE :

1. Que [la SRC] soit déclarée coupable d'outrage criminel au tribunal.

2. Qu'il soit ordonné à [la SRC] de retirer de son site Web tout renseignement qui permettrait d'établir l'identité de la plaignante dans [la présente] affaire.

3. Qu'une peine appropriée soit infligée à [la SRC].

4. Toute autre ordonnance que cette honorable Cour juge appropriée.

[3] Le juge en cabinet a conclu que le ministère public n'avait pas satisfait aux exigences relatives à l'injonction interlocutoire mandatoire et a rejeté sa demande. En appel, les juges étaient divisés quant au droit du ministère public d'obtenir une telle injonction. Bien que les juges majoritaires aient accueilli l'appel et accordé l'injonction, la juge Greckol, dissidente, aurait rejeté l'appel, concluant que les juges majoritaires appliquaient des principes juridiques erronés à la demande du ministère public[4].

[4] Pour les motifs qui suivent, j'accueillerais le pourvoi. À mon avis, le juge en cabinet a appliqué le bon test juridique lorsqu'il s'est prononcé sur la demande du ministère public, et sa décision selon laquelle la preuve présentée par ce dernier ne satisfaisait pas à ce test ne justifiait pas, dans les circonstances, une intervention en appel.

II. Dispositions législatives

[5] Les paragraphes 486.4(2.1) et 486.4(2.2) du *Code criminel*[5], considérés conjointement, prévoient que le juge ou le juge de paix qui préside est tenu, à la demande de la victime ou du poursuivant, de rendre une ordonnance d'interdiction de publication dans les affaires relatives à toute infraction dont la

[4] 2016 ABCA 326, 404 D.L.R. (4th) 318.
[5] L.R.C. 1985, c. C-46.

is entitled to an order "directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way".

III. Judicial History

A. *The Chambers Judge's Reasons*

[6] Acceding to the parties' submissions, the chambers judge applied a modified version of the tripartite test for an interlocutory injunction stated in *RJR — MacDonald Inc. v. Canada (Attorney General)*.[6] This required the Crown to prove (1) a strong *prima facie* case for finding CBC in criminal contempt; (2) that the Crown would suffer irreparable harm were the injunction refused; and (3) that the balance of convenience favoured granting the injunction.

[7] As to the requirement of a strong *prima facie* case, the Crown had argued for a "broad interpretation" of s. 486.4(2.1)'s terms "publish[ed]" and "transmit[ted]", such that it would catch web-based articles posted *prior* to the publication ban.[7] The chambers judge, however, concluded that the case authorities did not support such an interpretation. In these circumstances, and applying the test for criminal contempt stated in *United Nurses of Alberta v. Alberta (Attorney General)*,[8] he found that the Crown could not "likely succeed" in proving beyond a reasonable doubt that CBC, by leaving the victim's identifying information on its website after the publication ban had been issued, was in "open and public defiance" of that order.[9]

[8] Regarding the requirement of irreparable harm, the Crown had argued such harm would be suffered by the administration of justice, since the ongoing

[6] [1994] 1 S.C.R. 311.
[7] Chambers judge's reasons, at para. 26.
[8] [1992] 1 S.C.R. 901, at p. 933.
[9] Chambers judge's reasons, at para. 34.

victime est âgée de moins de 18 ans. Plus particulièrement, le ministère public ou la victime a droit à une ordonnance « interdisant de publier ou de diffuser de quelque façon que ce soit tout renseignement qui permettrait d'établir l'identité de la victime ».

III. Historique judiciaire

A. *Motifs du juge en cabinet*

[6] Souscrivant aux arguments des parties, le juge en cabinet a appliqué une version modifiée du test en trois étapes applicable à l'octroi d'une injonction interlocutoire énoncé dans *RJR — MacDonald Inc. c. Canada (Procureur général)*[6], selon lequel le ministère public devait établir (1) une forte apparence de droit menant à la conclusion que la SRC était coupable d'outrage criminel; (2) que le ministère public subirait un préjudice irréparable si la demande d'injonction était rejetée; et (3) que la prépondérance des inconvénients favorisait l'octroi de l'injonction.

[7] En ce qui a trait à l'exigence relative à la forte apparence de droit, le ministère public a revendiqué une [TRADUCTION] « interprétation large » des mots « *publish[ed]* » et « *transmitt[ed]* » de la version anglaise du par. 486.4(2.1), de sorte que ceux-ci viseraient les articles mis en ligne *avant* le prononcé de l'interdiction de publication[7]. Le juge en cabinet a cependant conclu que la jurisprudence n'étayait pas une telle interprétation. Dans ces circonstances, et appliquant le test relatif à l'outrage criminel établi dans l'arrêt *United Nurses of Alberta c. Alberta (Procureur général)*[8], il a jugé que le ministère public ne pourrait « vraisemblablement » pas « réussir » à démontrer hors de tout doute raisonnable que la SRC, en laissant sur son site Web les renseignements identifiant la victime après la délivrance de l'interdiction de publication, était en « transgression patente et publique » de cette ordonnance[9].

[8] En ce qui a trait à l'exigence relative au préjudice irréparable, le ministère public a soutenu que ce serait l'administration de la justice qui subirait un

[6] [1994] 1 R.C.S. 311.
[7] Motifs du juge en cabinet, par. 26.
[8] [1992] 1 R.C.S. 901, p. 933.
[9] Motifs du juge en cabinet, par. 34.

display of the victim's identifying information on CBC's website would deter others from seeking assistance or remedies. The chambers judge declined to so find, however, noting that the underlying policy objective of protecting a victim's anonymity loses significance where the victim is deceased. And, in assessing balance of convenience, the chambers judge determined that the compromising of CBC's freedom of expression, and of the public's interest in that expression, outweighed any harm to the administration of justice that would result from leaving the two impugned articles on CBC's website.

B. *The Court of Appeal*

[9] At the Court of Appeal, the majority (Slatter and McDonald JJ.A.) reversed the chambers judge's decision and granted the mandatory interlocutory injunction sought by the Crown. The chambers judge, it held, had erred by characterizing this matter as requiring the Crown to demonstrate a strong *prima facie* case of criminal contempt. Rather, the Originating Notice, "[w]hile essentially civil in nature, . . . has a 'hybrid' aspect to it",[10] in that it seeks both a citation for criminal contempt *and* the removal of the victim's identifying information from CBC's website. The request for the interlocutory injunction, the majority explained, is "tied back" to the latter request for an order removing the identifying information, and not to the request for a criminal contempt citation.[11] The issue, therefore, was "whether the Crown has demonstrated a strong *prima facie* case entitling it to a mandatory order directing removal of the identifying material from the website".[12]

[10] As to whether or not s. 486.4(2.1)'s reference to identifying information that is "published" is (as the Crown contends) met by the ongoing appearance

[10] para. 5.
[11] para. 6.
[12] para. 7.

tel préjudice, puisque l'affichage continu des renseignements identifiant la victime sur le site Web de la SRC dissuaderait d'autres personnes de demander de l'aide ou de solliciter des réparations. Le juge en cabinet a refusé de tirer une telle conclusion, mais il a souligné que l'objectif de politique sous-jacent visant la protection de l'anonymat des victimes perd de son importance lorsque la victime est décédée. De plus, lorsqu'il a soupesé la prépondérance des inconvénients, le juge en cabinet a établi que l'atteinte à la liberté d'expression de la SRC, et à l'intérêt du public envers cette expression, l'emportait sur tout préjudice causé à l'administration de la justice qui découlerait du fait que les deux articles en cause soient laissés sur le site Web de la SRC.

B. *La Cour d'appel*

[9] En Cour d'appel, les juges majoritaires (les juges Slatter et McDonald) ont infirmé la décision du juge en cabinet et ont accordé l'injonction interlocutoire mandatoire demandée par le ministère public. Selon eux, le juge en cabinet avait commis une erreur en jugeant que le ministère public devait établir une forte apparence de droit quant à l'existence d'un outrage criminel. En effet, l'avis introductif d'instance, [TRADUCTION] « [b]ien qu'il soit essentiellement de nature civile, [. . .] comporte un aspect "hybride" »[10], dans la mesure où il vise l'obtention d'une assignation pour outrage criminel *et* le retrait du site Web de la SRC des renseignements identifiant la victime. Les juges majoritaires ont expliqué que la demande d'injonction interlocutoire « se rapportait » à la demande relative à l'ordonnance de retrait des renseignements identifiant la victime, et non à la demande relative à l'assignation pour outrage criminel[11]. En conséquence, la question était de savoir si « le ministère public a établi une forte apparence de droit donnant ouverture en sa faveur à une ordonnance mandatoire visant le retrait du site Web des renseignements identifiant la victime »[12].

[10] Quant à la question de savoir si les renseignements identifiant la victime sont considérés comme « publi[és] » aux termes du par. 486.4(2.1) (comme

[10] par. 5.
[11] par. 6.
[12] par. 7.

of such information on a website after it is first posted, the majority conceded that "either position is arguable".[13] That said, the majority viewed the Crown as having a strong *prima facie* case for a mandatory interlocutory injunction, since, if "published" is construed as a continuous activity, CBC is arguably wilfully disobeying the publication ban. Further, such disobedience is harmful to the integrity of the administration of justice, and contrary to Parliament's direction that such orders are to be mandatory.[14] Finally, the balance of convenience did not favour CBC, since the publication ban must be presumed to be constitutional at this stage of the proceedings, and freedom of expression would not, in any case, be a defence against the contempt charge.

[11] Justice Greckol would have dismissed the appeal. In her view, the majority's characterization of the relief sought in the Originating Notice as "hybrid" was misplaced, since the Crown's application for an interlocutory injunction was brought in respect of the sought-after citation for criminal contempt. The chambers judge asked the right question (being, whether the Crown could show a strong *prima facie* case of criminal contempt), and his exercise of discretion to refuse an injunction was entitled to deference. And here, where the proscriptions against "publish[ing]" and "transmitt[ing]" may reasonably bear two meanings, one capturing the impugned articles and one not, no strong *prima facie* case of criminal contempt could be shown. Further, and even allowing that open defiance of a facially valid court order may amount to irreparable harm to the administration of justice, the ambit of s. 486.4's proscriptions is an unsettled question. And, as the victim in this case is deceased, the privacy of the victim is not vulnerable to harm. Finally, and even if the pertinent provisions of the *Criminal Code* are presumed constitutional, the chambers judge was entitled to

[13] para. 10.
[14] para. 11.

le prétend le ministère public) du fait qu'ils apparaissent de façon continue sur le site Web depuis qu'ils y ont été affichés pour la première fois, les juges majoritaires ont reconnu que [TRADUCTION] « les deux thèses sont défendables »[13]. Cela dit, selon eux, le ministère public avait établi une forte apparence de droit justifiant l'octroi d'une injonction interlocutoire mandatoire puisque, si le mot « publier » est interprété comme étant une activité continue, on peut faire valoir que la SRC a volontairement désobéi à l'interdiction de publication. En outre, une telle désobéissance porte préjudice à l'intégrité de l'administration de la justice, et est contraire à la directive du législateur selon laquelle de telles ordonnances sont mandatoires[14]. Enfin, pour les juges majoritaires, la prépondérance des inconvénients ne milite pas en faveur de la SRC, puisque, à cette étape de l'instance, il faut présumer que l'interdiction de publication est constitutionnelle et que la liberté d'expression ne peut, en aucun cas, constituer un moyen de défense contre l'accusation d'outrage.

[11] La juge Greckol aurait rejeté le pourvoi. À son avis, les juges majoritaires ont été mal avisés de qualifier d'« hybride » la réparation demandée dans l'avis introductif d'instance, puisque la demande d'injonction interlocutoire du ministère public a été présentée à l'égard de l'assignation sollicitée pour outrage criminel. Le juge en cabinet a posé la bonne question (soit celle de savoir si le ministère public pouvait établir une forte apparence de droit quant à l'existence d'un outrage criminel) et l'exercice de son pouvoir discrétionnaire de refuser de délivrer une injonction commandait la retenue. En outre, en l'espèce, où les proscriptions relatives à la « publi[cation] » et la « diffu[sion] » peuvent raisonnablement comporter deux sens — un visant les articles en cause et l'autre non —, aucune forte apparence de droit quant à l'existence d'un outrage criminel ne peut être établie. De plus, même si on admet que la transgression patente d'une ordonnance judiciaire en apparence valide peut constituer un préjudice irréparable pour l'administration de la justice, la portée des proscriptions énoncées à l'art. 486.4 du *Code criminel* est une question non résolue. J'ajouterais que, comme

[13] par. 10.
[14] par. 11.

consider freedom of expression in assessing the balance of convenience.

IV. Analysis

A. *What Is the Applicable Framework for Granting a Mandatory Interlocutory Injunction?*

[12] In *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*[15] and then again in *RJR — MacDonald*, this Court has said that applications for an interlocutory injunction must satisfy each of the three elements of a test which finds its origins in the judgment of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*[16] At the first stage, the application judge is to undertake a preliminary investigation of the merits to decide whether the applicant demonstrates a "serious question to be tried", in the sense that the application is neither frivolous nor vexatious.[17] The applicant must then, at the second stage, convince the court that it will suffer irreparable harm if an injunction is refused.[18] Finally, the third stage of the test requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits.[19]

[13] This general framework is, however, just that — general. (Indeed, in *RJR — MacDonald*, the Court identified two exceptions which may call for "an extensive review of the merits" at the first stage of the analysis.[20]) In this case, the parties have at every level of court agreed that, where a *mandatory* interlocutory injunction is sought, the appropriate inquiry at the first stage of the *RJR — MacDonald* test is into whether the applicants have shown a strong *prima*

[15] [1987] 1 S.C.R. 110.
[16] [1975] A.C. 396.
[17] *RJR — MacDonald*, at pp. 334-35.
[18] *RJR — MacDonald*, at pp. 334 and 348.
[19] *RJR — MacDonald*, at p. 334.
[20] pp. 338-39.

la victime en l'espèce est décédée, sa vie privée n'est pas susceptible de subir un préjudice. Finalement, et même si les dispositions pertinentes du *Code criminel* sont présumées constitutionnelles, le juge en cabinet pouvait tenir compte de la liberté d'expression lorsqu'il a soupesé la prépondérance des inconvénients.

IV. Analyse

A. *Quel est le cadre d'analyse applicable à la délivrance d'une injonction interlocutoire mandatoire?*

[12] Dans l'arrêt *Manitoba (Procureur général) c. Metropolitan Stores Ltd.*[15], et plus tard dans l'arrêt *RJR — MacDonald*, la Cour a affirmé que les demandes d'injonction interlocutoire devaient respecter chacun des trois volets du test qui tire son origine de la décision de la Chambre des Lords dans *American Cyanamid Co. c. Ethicon Ltd.*[16] À la première étape, le juge de première instance doit procéder à un examen préliminaire du bien-fondé de l'affaire pour décider si le demandeur a fait la preuve de l'existence d'une « question sérieuse à juger », c'est-à-dire que la demande n'est ni futile ni vexatoire[17]. À la deuxième étape, le demandeur doit convaincre la cour qu'il subira un préjudice irréparable si la demande d'injonction est rejetée[18]. Enfin, à la troisième étape, il faut apprécier la prépondérance des inconvénients, afin d'établir quelle partie subirait le plus grand préjudice en attendant qu'une décision soit rendue sur le fond, selon que la demande d'injonction est accueillie ou rejetée[19].

[13] Ce cadre d'analyse n'est toutefois que général. (En effet, dans *RJR — MacDonald*, la Cour a cerné deux exceptions qui pourraient commander un « examen plus approfondi du fond d'une affaire » à la première étape de l'analyse[20].) Dans le présent litige, les parties ont convenu à chaque palier judiciaire que, lorsqu'une injonction interlocutoire *mandatoire* est sollicitée, la question à trancher à la première étape du test énoncé dans *RJR — MacDonald* était celle de

[15] [1987] 1 R.C.S. 110.
[16] [1975] A.C. 396.
[17] *RJR — MacDonald*, p. 334-335.
[18] *RJR — MacDonald*, p. 334 et 348.
[19] *RJR — MacDonald*, p. 334.
[20] p. 338-339.

facie case. I note that this heightened threshold was not applied by this Court in upholding such an injunction in *Google Inc. v. Equustek Solutions Inc.*[21] In *Google*, however, the appellant did not argue that the first stage of the *RJR — MacDonald* test should be modified. Rather, the appellant agreed that only a "serious issue to be tried" needed to be shown and therefore the Court was not asked to consider whether a heightened threshold should apply.[22] By contrast, in this case, the application by the courts below of a heightened threshold raises for the first time the question of just what threshold ought to be applied at the first stage where the applicant seeks a mandatory interlocutory injunction.

[14] Canadian courts have, since *RJR — MacDonald*, been divided on this question. In Alberta, Nova Scotia and Ontario, for example, the applicant must establish a strong *prima facie* case.[23] Conversely, other courts have applied the less searching "serious issue to be tried" threshold.[24]

[15] In my view, on an application for a mandatory interlocutory injunction, the appropriate criterion for assessing the strength of the applicant's case at the first stage of the *RJR — MacDonald* test is *not* whether there is a serious issue to be tried, but rather whether the applicant has shown a strong *prima facie*

savoir si les demandeurs ont établi une forte apparence de droit. J'observe que ce seuil plus exigeant n'a pas été appliqué par la Cour lorsqu'elle a maintenu une telle injonction dans *Google Inc. c. Equustek Solutions Inc.*[21] Dans cet arrêt, l'appelante n'avait toutefois pas plaidé que la première étape du test énoncé dans *RJR — MacDonald* devait être modifiée. Elle avait plutôt reconnu qu'il suffisait de prouver l'existence d'une « question sérieuse à juger », de sorte que la Cour n'a pas été appelée à se pencher sur l'opportunité d'appliquer un seuil plus élevé[22]. En revanche, en l'espèce, l'application par les tribunaux d'instances inférieures d'un seuil plus élevé pose pour la première fois la question du seuil qui devrait être effectivement appliqué à la première étape, lorsque le demandeur sollicite une injonction interlocutoire mandatoire.

[14] Depuis *RJR — MacDonald*, les tribunaux canadiens sont divisés quant à cette question. En Alberta, en Nouvelle-Écosse et en Ontario, par exemple, le demandeur doit établir une forte apparence de droit[23]. À l'inverse, d'autres tribunaux ont appliqué le seuil moins exigeant, soit celui de la « question sérieuse à trancher »[24].

[15] À mon avis, lorsqu'il s'agit d'examiner une demande d'injonction interlocutoire mandatoire, le critère approprié pour juger de la solidité de la preuve du demandeur à la première étape du test énoncé dans *RJR — MacDonald n'*est *pas* celui de l'existence d'une question sérieuse à juger, mais plutôt celui de

[21] 2017 SCC 34, [2017] 1 S.C.R. 824.

[22] *Google*, at paras. 25-27.

[23] *Medical Laboratory Consultants Inc. v. Calgary Health Region*, 2005 ABCA 97, 19 C.C.L.I. (4th) 161, at para. 4; *Modry v. Alberta Health Services*, 2015 ABCA 265, 388 D.L.R. (4th) 352, at para. 40; *Conway v. Zinkhofer*, 2006 ABCA 74, at paras. 28-29 (CanLII); *D.E. & Sons Fisheries Ltd. v. Goreham*, 2004 NSCA 53, 223 N.S.R. (2d) 1, at para. 10; *AMEC E&C Services Ltd. v. Whitman Benn and Associates Ltd.*, 2003 NSSC 112, 214 N.S.R. (2d) 369, at para. 20, aff'd 2003 NSCA 126, 219 N.S.R. (2d) 126; *Cytrynbaum v. Look Communications Inc.*, 2013 ONCA 455, 307 O.A.C. 152, at para. 54.

[24] *Sawridge Band v. Canada*, 2004 FCA 16, [2004] 3 F.C.R. 274, at para. 45; *Jamieson Laboratories Ltd. v. Reckitt Benckiser LLC*, 2015 FCA 104, 130 C.P.R. (4th) 414, at paras. 1 and 22-25; *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Limited Partnership*, 2011 SKCA 120, 341 D.L.R. (4th) 407, at para. 42; *La Plante v. Saskatchewan Society for the Prevention of Cruelty to Animals*, 2011 SKCA 43, [2012] 3 W.W.R. 293, at paras. 16-17; *Summerside Seafood Supreme Inc. v. Prince Edward Island (Minister of Fisheries, Aquaculture and Environment)*, 2006 PESCAD 11, 256 Nfld. & P.E.I.R. 277, at para. 65.

[21] 2017 CSC 34, [2017] 1 R.C.S. 824.

[22] *Google*, par. 25-27.

[23] *Medical Laboratory Consultants Inc. c. Calgary Health Region*, 2005 ABCA 97, 19 C.C.L.I. (4th) 161, par. 4; *Modry c. Alberta Health Services*, 2015 ABCA 265, 388 D.L.R. (4th) 352, par. 40; *Conway c. Zinkhofer*, 2006 ABCA 74, par. 28-29 (CanLII); *D.E. & Sons Fisheries Ltd. c. Goreham*, 2004 NSCA 53, 223 N.S.R. (2d) 1, par. 10; *AMEC E&C Services Ltd. c. Whitman Benn and Associates Ltd.*, 2003 NSSC 112, 214 N.S.R. (2d) 369, par. 20, conf. 2003 NSCA 126, 219 N.S.R. (2d) 126; *Cytrynbaum c. Look Communications Inc.*, 2013 ONCA 455, 307 O.A.C. 152, par. 54.

[24] *Bande de Sawridge c. Canada*, 2004 CAF 16, [2004] 3 R.C.F. 274, par. 45; *Jamieson Laboratories Ltd. c. Reckitt Benckiser LLC*, 2015 CAF 104, par. 1 et 22-25 (CanLII); *Potash Corp. of Saskatchewan Inc. c. Mosaic Potash Esterhazy Limited Partnership*, 2011 SKCA 120, 341 D.L.R. (4th) 407, par. 42; *La Plante c. Saskatchewan Society for the Prevention of Cruelty to Animals*, 2011 SKCA 43, [2012] 3 W.W.R. 293, par. 16-17; *Summerside Seafood Supreme Inc. c. Prince Edward Island (Minister of Fisheries, Aquaculture and Environment)*, 2006 PESCAD 11, 256 Nfld. & P.E.I.R. 277, par. 65.

case. A mandatory injunction directs the defendant to undertake a positive course of action, such as taking steps to restore the *status quo*, or to otherwise "put the situation back to what it should be", which is often costly or burdensome for the defendant and which equity has long been reluctant to compel.[25] Such an order is also (generally speaking) difficult to justify at the interlocutory stage, since restorative relief can usually be obtained at trial. Or, as Justice Sharpe (writing extrajudicially) puts it, "the risk of harm to the defendant will [rarely] be less significant than the risk to the plaintiff resulting from the court staying its hand until trial".[26] The potentially severe consequences for a defendant which can result from a mandatory interlocutory injunction, including the effective final determination of the action in favour of the plaintiff, further demand what the Court described in *RJR — MacDonald* as "extensive review of the merits" at the interlocutory stage.[27]

[16] A final consideration that may arise in some cases is that, because mandatory interlocutory injunctions require a defendant to take positive action, they can be more burdensome or costly for the defendant. It must, however, be borne in mind that complying with prohibitive injunctions can also entail costs that are just as burdensome as mandatory injunctions.[28] While holding that applications for mandatory interlocutory injunctions are to be subjected to a modified *RJR — MacDonald* test, I acknowledge that distinguishing between mandatory and prohibitive injunctions can be difficult, since an interlocutory injunction which is framed in prohibitive language may "have the effect of forcing the enjoined party to take . . . positive actions".[29] For example, in this case, ceasing to transmit the victim's identifying information would require an employee of CBC to take the necessary action to remove that

[25] *Injunctions and Specific Performance*, at paras. 1.510, 1.530 and 2.640.

[26] *Injunctions and Specific Performance*, at para. 2.640.

[27] *RJR — MacDonald*, at pp. 338-39.

[28] *Injunctions and Specific Performance*, at paras. 1.530 and 1.540. See also *Potash*, at paras. 43-44.

[29] *Potash*, at para. 44; see also *Injunctions and Specific Performance*, at para. 1.540.

savoir si le demandeur a établi une forte apparence de droit. Une injonction mandatoire intime au défendeur de faire quelque chose — comme de rétablir le *statu quo* —, ou d'autrement [TRADUCTION] « restaurer la situation », ce qui est souvent coûteux et pénible pour le défendeur et ce que de longue date l'equity a été réticente à faire[25]. Une telle ordonnance est également (en règle générale) difficile à justifier à l'étape interlocutoire, puisque la réparation qui vise à restaurer la situation peut habituellement être obtenue au procès. De plus, comme l'a exprimé le juge Sharpe (dans un ouvrage de doctrine), « le risque qu'un tort soit causé au défendeur est [rarement] moins important que le risque couru par le demandeur du fait de la décision du tribunal de ne pas agir avant le procès »[26]. Les conséquences potentiellement sérieuses pour un défendeur du prononcé d'une injonction interlocutoire mandatoire, y compris la décision finale relativement à la poursuite en faveur du plaignant, exigent en outre ce que la Cour a décrit dans *RJR — MacDonald* comme étant « un examen approfondi sur le fond » à l'étape interlocutoire[27].

[16] Dans certains cas, un dernier élément devra être examiné, soit que, parce que les injonctions interlocutoires mandatoires requièrent que le défendeur fasse quelque chose, elles peuvent constituer un fardeau plus important ou avoir des conséquences coûteuses pour lui. Il faut toutefois garder à l'esprit que le respect d'injonctions prohibitives peut entraîner des coûts aussi lourds que ceux découlant des injonctions mandatoires[28]. Tout en concluant que les demandes d'injonctions interlocutoires mandatoires doivent être examinées à la lumière d'une version modifiée du test énoncé dans *RJR — MacDonald*, je reconnais qu'il peut être difficile de faire une distinction entre les injonctions mandatoires et les injonctions prohibitives, puisqu'une injonction interlocutoire au libellé prohibitif peut avoir [TRADUCTION] « l'effet de forcer le défendeur à faire quelque chose »[29]. Par exemple, en l'espèce, cesser de diffuser les renseignements

[25] *Injunctions and Specific Performance*, par. 1.510, 1.530 et 2.640.

[26] *Injunctions and Specific Performance*, par. 2.640.

[27] *RJR — MacDonald*, p. 338-339.

[28] *Injunctions and Specific Performance*, par. 1.530 et 1.540. Voir aussi *Potash*, par. 43-44.

[29] *Potash*, par. 44; voir aussi *Injunctions and Specific Performance*, par. 1.540.

information from its website. Ultimately, the application judge, in characterizing the interlocutory injunction as mandatory or prohibitive, will have to look past the form and the language in which the order sought is framed, in order to identify the substance of what is being sought and, in light of the particular circumstances of the matter, "what the practical consequences of the . . . injunction are likely to be".[30] In short, the application judge should examine whether, in substance, the overall effect of the injunction would be to require the defendant to *do* something, or to *refrain from doing* something.

[17] This brings me to just what is entailed by showing a "strong *prima facie* case". Courts have employed various formulations, requiring the applicant to establish a "strong and clear chance of success";[31] a "strong and clear" or "unusually strong and clear" case;[32] that he or she is "clearly right" or "clearly in the right";[33] that he or she enjoys a "high probability" or "great likelihood of success";[34] a "high degree of assurance" of success;[35] a "significant prospect" of success;[36] or "almost certain" success.[37] Common to all these formulations is a burden on the applicant to show a case of such merit that it is very likely to succeed at trial. Meaning, that upon a preliminary review of the case, the application judge

[30] *National Commercial Bank Jamaica Ltd. v. Olint Corp. Ltd.*, [2009] UKPC 16, [2009] 1 W.L.R. 1405, at para. 20.

[31] *H&R Block Canada Inc. v. Inisoft Corp.*, 2009 CanLII 37911 (Ont. S.C.J.), at para. 24.

[32] *Fradenburgh v. Ontario Lottery and Gaming Corp.*, 2010 ONSC 5387, at para. 14 (CanLII); *Boehringer Ingelheim (Canada) Inc. v. Bristol-Myers Squibb Canada Inc.* (1998), 83 C.P.R. (3d) 51 (Ont. Ct. (Gen. Div.)), at paras. 49 and 52 (citing *Shepherd Home Ltd. v. Sandham*, [1970] 3 All E.R. 402 (Ch. D.), at p. 409).

[33] *Barton-Reid Canada Ltd. v. Alfresh Beverages Canada Corp.*, 2002 CanLII 34862 (Ont. S.C.J.), at para. 9; *Bark & Fitz Inc. v. 2139138 Ontario Inc.*, 2010 ONSC 1793, at para. 12 (CanLII).

[34] *Quality Pallets and Recycling Inc. v. Canadian Pacific Railway Co.*, 2007 CanLII 13712 (Ont. S.C.J.), at para. 16.

[35] *West Nipissing Economic Development Corp. v. Weyerhaeuser Co.*, 2002 CanLII 26148 (Ont. S.C.J.), at para. 16.

[36] *Parker v. Canadian Tire Corp.*, [1998] O.J. No. 1720, at para. 11 (QL).

[37] *Barton-Reid*, at paras. 9, 12 and 17. (See, generally, M.-A. Vermette, "A Strong Prima Facie Case for Rationalizing the Test Applicable to Interlocutory Mandatory Injunctions" in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation, 2011* (2011), 367, at pp. 378-79.)

établissant l'identité de la victime requerrait qu'un employé de la SRC prenne les mesures nécessaires pour retirer ces renseignements du site Web de l'entreprise. En définitive, le juge de première instance, lorsqu'il qualifie l'injonction interlocutoire de mandatoire ou de prohibitive, doit regarder au-delà de la forme et du libellé de la demande sollicitant l'ordonnance de manière à déceler l'essence de ce qui est recherché et, à la lumière des circonstances particulières de l'affaire, à déterminer [TRADUCTION] « quelles risquent d'être les conséquences pratiques de l'injonction »[30]. Bref, le juge de première instance doit examiner si, en substance, l'effet global de l'injonction consisterait à exiger du défendeur qu'il *fasse* quelque chose ou qu'il *s'abstienne* de le faire.

[17] Ceci m'amène à ce qu'implique l'établissement d'une « forte apparence de droit ». Les tribunaux ont utilisé diverses formulations, exigeant que le demandeur présente la preuve [TRADUCTION] « convaincante et manifeste d'une possibilité de succès »[31]; qu'il présente une preuve [TRADUCTION] « convaincante et manifeste » ou « exceptionnellement convaincante et manifeste »[32]; qu'il a [TRADUCTION] « nettement raison »[33]; qu'il y a une [TRADUCTION] « forte probabilité » ou une « forte chance de succès »[34]; qu'il y a une [TRADUCTION] « grande assurance » quant au succès[35]; une [TRADUCTION] « perspective importante » de succès[36]; ou un succès [TRADUCTION] « presque assuré »[37]. Toutes ces formulations ont en

[30] *National Commercial Bank Jamaica Ltd. c. Olint Corp. Ltd.*, [2009] UKPC 16, [2009] 1 W.L.R. 1405, par. 20.

[31] *H&R Block Canada Inc. c. Inisoft Corp.*, 2009 CanLII 37911 (C.S.J. Ont.), par. 24.

[32] *Fradenburgh c. Ontario Lottery and Gaming Corp.*, 2010 ONCS 5837, par. 14 (CanLII); *Boehringer Ingelheim (Canada) Inc. c. Bristol-Myers Squibb Canada Inc.* (1998), 83 C.P.R. (3d) 51 (C. Ont. (div. gén.)), par. 49 et 52 (citant *Shepherd Home Ltd. c. Sandham*, [1970] 3 All E.R. 402 (Ch. D.), p. 409).

[33] *Barton-Reid Canada Ltd. c. Alfresh Beverages Canada Corp.*, 2002 CanLII 34862 (C.S.J. Ont.), par. 9; *Bark & Fitz Inc. c. 2139138 Ontario Inc.*, 2010 ONSC 1793, par. 12 (CanLII).

[34] *Quality Pallets and Recycling Inc. c. Canadian Pacific Railway Co.*, 2007 CanLII 13712 (C.S.J. Ont.), par. 16.

[35] *West Nipissing Economic Development Corp. c. Weyerhaeuser Co.*, 2002 CanLII 26148 (C.S.J. Ont.), par. 16.

[36] *Parker c. Canadian Tire Corp.*, [1998] O.J. No. 1720, par. 11 (QL).

[37] *Barton-Reid*, par. 9, 12 et 17. (Voir, plus généralement, M.-A. Vermette, « A Strong Prima Facie Case for Rationalizing the Test Applicable to Interlocutory Mandatory Injunctions », dans T. L. Archibald et R. S. Echlin, dir., *Annual Review of Civil Litigation, 2011* (2011), 367, p. 378-379.)

must be satisfied that there is a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice.

[18] In sum, to obtain a mandatory interlocutory injunction, an applicant must meet a modified *RJR — MacDonald* test, which proceeds as follows:

(1) The applicant must demonstrate a strong *prima facie* case that it will succeed at trial. This entails showing a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice;

(2) The applicant must demonstrate that irreparable harm will result if the relief is not granted; and

(3) The applicant must show that the balance of convenience favours granting the injunction.

B. *Does the Liberty Net "Rarest and Clearest of Cases" Test Apply in These Circumstances?*

[19] CBC argues that, on an application for an interlocutory injunction where a media organization's right to free expression is at stake, the application judge should apply the test stated in *Canada (Human Rights Commission) v. Canadian Liberty Net*.[38] This would entail the applicant showing "the rarest and clearest of cases",[39] such that the conduct complained of would be impossible to defend.

commun d'imposer au demandeur le fardeau de présenter une preuve telle qu'il serait très susceptible d'obtenir gain de cause au procès. Cela signifie que, lors de l'examen préliminaire de la preuve, le juge de première instance doit être convaincu qu'il y a une *forte chance* au regard du droit et de la preuve présentée que, au procès, le demandeur réussira ultimement à prouver les allégations énoncées dans l'acte introductif d'instance.

[18] En résumé, pour obtenir une injonction interlocutoire mandatoire, le demandeur doit satisfaire à la version modifiée que voici du test établi dans *RJR — MacDonald* :

(1) Le demandeur doit établir une forte apparence de droit qu'il obtiendra gain de cause au procès. Cela implique qu'il doit démontrer une *forte chance* au regard du droit et de la preuve présentée que, au procès, il réussira ultimement à prouver les allégations énoncées dans l'acte introductif d'instance;

(2) Le demandeur doit démontrer qu'il subira un préjudice irréparable si la demande d'injonction n'est pas accueillie;

(3) Le demandeur doit démontrer que la prépondérance des inconvénients favorise la délivrance de l'injonction.

B. *Le test d'un cas parmi « les plus manifestes, et extrêmement rares » énoncé dans Liberty Net s'applique-t-il dans ces circonstances?*

[19] Selon la SRC, dans le cas d'une demande d'injonction interlocutoire où la liberté d'expression d'un média est en jeu, le juge de première instance devrait appliquer le test énoncé dans l'arrêt *Canada (Commission des droits de la personne) c. Canadian Liberty Net*[38]. Ainsi, le demandeur serait tenu de prouver qu'il s'agit d'un cas parmi [TRADUCTION] « les plus manifestes, et extrêmement rares »[39], de sorte que le comportement reproché serait impossible à défendre.

[38] [1998] 1 S.C.R. 626.
[39] *Liberty Net*, at para. 49 (emphasis deleted).

[38] [1998] 1 R.C.S. 626.
[39] *Liberty Net*, par. 49 (soulignement omis).

[20] In *Liberty Net*, the Court explained that the *RJR — MacDonald* tripartite test is not appropriately applied to cases of "pure" speech, comprising the expression of "the non-commercial speaker where there is no tangible, immediate utility arising from the expression other than the freedom of expression itself".[40] This appeal does not present such a case. The reason the Court gave in *Liberty Net* for not applying the *RJR — MacDonald* test to "pure" speech was that the defendant in such cases "has no tangible or measurable interest [also described as a 'tangible, immediate utility'] other than the expression itself".[41] Where discriminatory hate speech or other potentially low-value speech is at issue (as was the case in *Liberty Net*), the *RJR — MacDonald* test would "stac[k] the cards" against the defendant at the second and third stages.[42] In this appeal, however, the chambers judge correctly identified a "tangible, immediate utility" to CBC's posting of the identifying information, being the "public's interest" in CBC's right to express that information, and in freedom of the press.[43] Because CBC does not therefore face the same disadvantage as defendants face at the second and third stages of the *RJR — MacDonald* test in cases of low- to no-value speech, it is unnecessary to apply the "clearest of cases" threshold, and I would not do so.

C. *What Strong Prima Facie Case Must the Crown Show?*

[21] As I have already canvassed, in this case, the majority at the Court of Appeal, in reversing the chambers judge, reasoned that he had mischaracterized the basis for which the Crown had sought the injunction. Specifically, the majority said that the

[20] Dans *Liberty Net*, la Cour a expliqué que le test en trois étapes établi dans *RJR — MacDonald* ne convient pas dans les affaires de liberté d'expression « seulement », ce qui comprend celle de la personne « qui s'exprime en dehors [du] contexte [commercial], lorsque le discours en cause n'a pas d'utilité concrète et directe à part la liberté d'expression elle-même »[40]. Le présent appel n'est pas un cas de ce type. Pour expliquer sa décision dans *Liberty Net* de ne pas appliquer le test énoncé dans *RJR — MacDonald* pour les affaires de liberté d'expression « seulement », la Cour a affirmé que le défendeur dans de tels cas « n'a [. . .] aucun intérêt tangible ou mesurable [aussi appelé "utilité concrète et directe"] outre le discours lui-même »[41]. Lorsqu'un discours haineux discriminatoire ou un autre type de discours possiblement de peu de valeur est en cause (comme c'était le cas dans *Liberty Net*), le test énoncé dans *RJR — MacDonald* « joue[rait] contre » le défendeur aux deuxième et troisième étapes[42]. Cependant, dans le présent appel, le juge en cabinet a correctement discerné une « utilité concrète et directe » à ce que la SRC diffuse l'information permettant d'établir l'identité de la victime, soit [TRADUCTION] « l'intérêt public » à ce que la SRC ait le droit d'exprimer la teneur de ces renseignements, et la liberté de la presse[43]. Puisque la SRC n'a donc pas à faire face au même désavantage que les défendeurs aux deuxième et troisième étapes du test énoncé dans *RJR — MacDonald* dans les cas où il est question d'un discours de peu ou pas de valeur, il n'est pas nécessaire d'appliquer le seuil du cas parmi « les plus manifestes » et je m'abstiendrais de le faire.

C. *Quelle forte apparence de droit le ministère public doit-il établir?*

[21] Comme je l'ai déjà évoqué, lorsque, en l'espèce, les juges majoritaires de la Cour d'appel ont infirmé la décision du juge en cabinet, ils ont estimé que celui-ci avait mal évalué le fondement de la demande d'injonction présentée par le ministère public.

[40] paras. 47 and 49.
[41] para. 47 (emphasis in original).
[42] para. 47.
[43] Chambers judge's reasons, at para. 59.

[40] par. 47 et 49.
[41] par. 47 (souligné dans l'original).
[42] par. 47.
[43] Motifs du juge en cabinet, par. 59.

Originating Notice, properly read, was "hybrid",[44] such that the application for the injunction did not "relate directly"[45] to the criminal contempt citation, but to the direction sought that CBC remove the victim's identifying information from its website. The identical wording shared by part of the Originating Notice's preamble ("AND FURTHER TAKE NOTICE that an application will be made for an interim injunction, directing that [CBC] remove any information from their website that could identify the complainant in the [subject] case") and the part of the Originating Notice which sought an injunction ("That [CBC] be directed to remove any information from their website that could identify the complainant in the [subject] case") was said to demonstrate "that the request for an interim injunction is tied back . . . to . . . the removal of the objectionable postings".[46] The "strong *prima facie* case" which the Crown was bound to show, then, was *not* one of criminal contempt, but rather of an "entitl[ement] . . . to a mandatory order directing removal of the identifying material from the website".[47]

[22] In dissent, Greckol J.A. saw the matter differently. "A literal reading of the Originating Notice", she said, "shows that the Crown brought an application for criminal contempt and sought an interim injunction in that proceeding".[48] This was in her view confirmed by the record which reveals that the Crown had proceeded on the basis that its application for an interlocutory injunction was sought in respect of the citation for criminal contempt.

[23] For two reasons, I agree with Greckol J.A. First, the Originating Notice itself, and the sequencing therein of the relief sought, belies its putatively

[44] para. 5.
[45] para. 6.
[46] C.A. reasons, at para. 6.
[47] C.A. reasons, at para. 7.
[48] C.A. reasons, at para. 23 (emphasis added).

Plus précisément, les juges majoritaires ont affirmé que l'avis introductif d'instance, correctement interprété, était [TRADUCTION] « hybride »[44], de sorte que la demande d'injonction n'était pas « directement liée »[45] à la demande d'assignation pour outrage criminel, mais plutôt à la directive sollicitée exigeant que la SRC retire de son site Web tout renseignement identifiant la victime. Ils ont soutenu que le libellé identique du préambule de l'avis introductif d'instance ([TRADUCTION] « ET EN OUTRE PRENEZ AVIS qu'une demande d'injonction intérimaire sera présentée afin qu'il soit ordonné à [la SRC] de retirer de son site Web tout renseignement qui permettrait d'établir l'identité de la plaignante dans [la présente] affaire ») et de la partie de l'avis introductif d'instance où l'injonction est sollicitée (« Qu'il soit ordonné à [la SRC] de retirer de son site Web tout renseignement qui permettrait d'établir l'identité de la plaignante dans [la présente] affaire ») prouvait que « la demande d'injonction interlocutoire se rapportait [. . .] au [. . .] retrait des articles en cause »[46]. Selon les juges majoritaires, la « forte apparence de droit » que le ministère public était tenu d'établir *n'*était donc *pas* celle quant à l'existence d'un outrage criminel, mais plutôt celle quant à l'existence du « droit [. . .] à une ordonnance mandatoire visant le retrait du site Web des renseignements identifiant la victime »[47].

[22] Dissidente, la juge Greckol a vu l'affaire d'un autre œil. Elle a affirmé qu'une [TRADUCTION] « interprétation littérale de l'avis introductif d'instance démontre que le ministère public a intenté une action pour outrage criminel et a cherché à obtenir une injonction interlocutoire dans le cadre de cette instance »[48]. Selon elle, le dossier — qui révèle que le ministère public s'était fondé sur le fait que l'injonction interlocutoire était sollicitée à l'égard de la demande d'assignation pour outrage criminel — le confirmait.

[23] Je souscris à l'opinion de la juge Greckol pour deux raisons. Premièrement, l'avis introductif d'instance en soi, ainsi que l'ordre dans lequel les

[44] par. 5.
[45] par. 6.
[46] Motifs de la Cour d'appel, par. 6.
[47] Motifs de la Cour d'appel, par. 7.
[48] Motifs de la Cour d'appel, par. 23 (je souligne).

hybrid character. It begins by giving notice ("TAKE NOTICE") of an "an [a]pplication . . . for an Order citing [CBC] in criminal contempt of court". That notice is immediately followed by a *further* notice ("AND FURTHER TAKE NOTICE") of an "application . . . for an interim injunction, directing that [CBC] remove any information from [its] website that could identify the complainant in the [subject] case".[49] The text "AND FURTHER TAKE NOTICE" makes plain that the two applications are linked, such that the latter is tied *not* to the mere placement by CBC of the victim's identifying information on its website, but to the sought-after criminal contempt citation. In other words, each prayer for relief does not launch an independent proceeding; rather, both relate to the alleged criminal contempt.

[24] The second reason goes to the fundamental nature of an injunction and its relation to a cause of action. Rule 3.8(1) of the *Alberta Rules of Court*[50] requires that an originating application state *both* "the claim and the basis for it", *and* "the remedy sought". In other words, an applicant must record both "a basis" *and* "[a] remedy". An injunction is generally "a remedy ancillary to a cause of action".[51] And here, the Crown's Originating Notice discloses only a single basis for seeking that remedy: CBC's alleged criminal contempt of court. As I have already noted, this is consistent with how the Crown framed its case at the courts below.

[25] The majority's conclusion at the Court of Appeal that the basis for the injunction is an "entitl[ement] . . . to a mandatory order directing removal

[49] A.R., at p. 39.
[50] Alta. Reg. 124/2010.
[51] *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, at p. 930 (emphasis added).

réparations y sont demandées, contredit qu'il puisse avoir un caractère théoriquement hybride. En effet, il commence par un avis ([TRADUCTION] « PRENEZ AVIS ») quant à la présentation d'une « demande [. . .] visant l'obtention d'une ordonnance déclarant [la SRC] coupable d'outrage criminel au tribunal ». Cet avis est immédiatement suivi d'un *autre* avis (« ET EN OUTRE PRENEZ AVIS ») quant à la présentation d'une « demande d'injonction intérimaire [. . .] afin qu'il soit ordonné à [la SRC] de retirer de son site Web tout renseignement qui permettrait d'établir l'identité de la plaignante dans [la présente] affaire »[49]. L'expression « ET EN OUTRE PRENEZ AVIS » indique clairement que les deux demandes sont liées, de sorte que la deuxième se rapporte *non pas* au simple affichage sur le site Web de la SRC des renseignements identifiant la victime, mais à l'assignation pour outrage criminel sollicitée. Autrement dit, chaque demande de réparation ne donne pas lieu à une instance distincte; elles sont plutôt toutes les deux liées à l'outrage criminel reproché.

[24] La deuxième raison pour laquelle je souscris à la conclusion de la juge Greckol se rapporte à la nature fondamentale d'une injonction et à son lien avec une cause d'action. Le paragraphe 3.8(1) des *Alberta Rules of Court*[50] prévoit qu'une demande introductive d'instance doit énoncer *tant* [TRADUCTION] « l'objet de la demande et son fondement », *que* « la réparation demandée ». Autrement dit, le demandeur doit indiquer *tant* « un fondement » *qu'*« [une] réparation ». En général, une injonction est « une réparation qui est subordonnée à une cause d'action »[51]. Or, en l'espèce, la demande introductive d'instance du ministère public n'indique qu'un motif pour lequel il veut obtenir cette réparation : l'outrage criminel au tribunal reproché à la SRC. Comme je l'ai déjà souligné, cette analyse est conforme à la façon dont le ministère public a présenté sa thèse aux tribunaux de juridictions inférieures.

[25] En conséquence, la conclusion des juges majoritaires de la Cour d'appel selon laquelle l'injonction repose sur le [TRADUCTION] « droit à une

[49] d.a., p. 39.
[50] Alta. Reg. 124/2010.
[51] *Amchem Products Inc. c. Colombie-Britannique (Workers' Compensation Board)*, [1993] 1 R.C.S. 897, p. 930 (je souligne).

of the identifying material from the website",[52] therefore, simply begs the question: what, precisely, is the source in law of that entitlement? An injunction is not a cause of action, in the sense of containing its own authorizing force. It is, I repeat, a remedy. This is undoubtedly why, before both the chambers judge and the Court of Appeal, the Crown framed the matter as an application for an interlocutory injunction in the proceedings for a criminal contempt citation.[53] And, on that point, I respectfully endorse Greckol J.A.'s conclusion that it was not for the Court of Appeal to re-cast the Crown's case as a civil application for an interlocutory injunction pending a permanent injunction. The Crown was bound to show a strong *prima facie* case of criminal contempt of court.

[26] I add this. It is implicit in the foregoing analysis that, in some circumstances, an interlocutory injunction may be sought and issued to enjoin allegedly criminal conduct. The delineation of those circumstances, however, I would not decide here. To be clear, the disposition of this appeal should not be taken as standing for the proposition that injunctive relief is ordinarily or readily available in criminal matters, or that — even had the Crown been able to show in this case a strong *prima facie* case of criminal contempt — an injunction would have been available.

D. *Is the Crown Entitled to a Mandatory Interlocutory Injunction?*

[27] The decision to grant or refuse an interlocutory injunction is a discretionary exercise, with which an appellate court must not interfere solely because it would have exercised the discretion differently. In

[52] C.A. reasons, at para. 7.

[53] C.A. reasons, at paras. 25-26; chambers judge's reasons, at para. 7.

ordonnance mandatoire visant le retrait du site Web des renseignements identifiant la victime »[52] soulève clairement la question de savoir quelle est la source précise de ce droit. L'injonction n'est pas une cause d'action, en ce sens qu'elle ne contient pas son propre pouvoir d'autoriser l'action. Il s'agit, je le répète, d'une réparation. C'est sans doute la raison pour laquelle, tant devant le juge en cabinet que devant la Cour d'appel, le ministère public a présenté l'affaire comme étant une demande d'injonction interlocutoire dans le cadre d'une demande d'assignation pour outrage criminel[53]. À cet égard, je souscris respectueusement à la conclusion de la juge Greckol selon laquelle il n'appartient pas à la Cour d'appel de reformuler la thèse du ministère public comme s'il s'agissait d'une demande d'injonction interlocutoire au civil en attendant qu'une injonction permanente soit accordée. Le ministère public était tenu d'établir une forte apparence de droit quant à l'existence d'un outrage criminel au tribunal.

[26] J'ajouterais ceci. Dans l'analyse qui précède, il est implicite que, dans certaines circonstances, une injonction interlocutoire peut être demandée et délivrée pour empêcher une conduite prétendument criminelle. Je ne me prononcerai toutefois pas ici sur la façon dont il faudrait définir ces circonstances. Je tiens toutefois à préciser que l'issue du présent appel ne devrait pas être interprétée comme signifiant que l'injonction est une réparation courante et facile à obtenir dans les affaires criminelles, ou que — même si le ministère public avait été en mesure d'établir en l'espèce une forte apparence de droit quant à l'existence d'un outrage criminel — une injonction aurait pu être prononcée.

D. *Le ministère public a-t-il droit à une injonction interlocutoire mandatoire?*

[27] La décision d'accorder ou de refuser une injonction interlocutoire relève d'un pouvoir discrétionnaire, et les cours d'appel ne doivent pas modifier la décision en découlant simplement parce qu'elles

[52] Motifs de la Cour d'appel, par. 7.

[53] Motifs de la Cour d'appel, par. 25-26; motifs du juge en cabinet, par. 7.

Metropolitan Stores,[54] the Court endorsed this statement of Lord Diplock in *Hadmor Productions Ltd. v. Hamilton*[55] about the circumstances in which that exercise of discretion may be set aside. Appellate intervention is justified only where the chambers judge proceeded "on a misunderstanding of the law or of the evidence before him", where an inference "can be demonstrated to be wrong by further evidence that has [since] become available", where there has been a change of circumstances, or where the "decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge . . . could have reached it".[56] This principle was recently affirmed in *Google*.[57]

[28] In this case, and as I have explained, the first stage of the modified *RJR — MacDonald* test required the Crown to satisfy the chambers judge that there was a strong likelihood on the law and the evidence presented that it would be successful in proving CBC's guilt of criminal contempt of court. This is not an easy burden to discharge and, as I shall explain, the Crown has failed to do so here.

[29] In *United Nurses of Alberta*, McLachlin J. (as she then was) described the elements of criminal contempt of court in these terms:

To establish criminal contempt the Crown must prove that the accused defied or disobeyed a court order in a public way (the *actus reus*), with intent, knowledge or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court (the *mens*

[54] pp. 154-55.
[55] [1982] 1 All E.R. 1042, at p. 1046 (H.L.).
[56] See also *B.C. (A.G.) v. Wale*, [1987] 2 W.W.R. 331 (B.C.C.A.), aff'd [1991] 1 S.C.R. 62; *White Room Ltd. v. Calgary (City)*, 1998 ABCA 120, 62 Alta. L.R. (3d) 177; *Musqueam Indian Band v. Canada (Minister of Public Works and Government Services)*, 2008 FCA 214, 378 N.R. 335, at para. 37, leave to appeal refused, [2008] 3 S.C.R. viii.
[57] para. 22.

auraient exercé ce pouvoir différemment. Dans l'arrêt *Metropolitan Stores*[54], la Cour a fait sienne l'affirmation de lord Diplock dans *Hadmor Productions Ltd. c. Hamilton*[55] concernant les circonstances dans lesquelles l'exercice de ce pouvoir discrétionnaire peut être infirmé. Une intervention en appel est justifiée uniquement lorsque le juge en cabinet a pris une décision qui [TRADUCTION] « repose sur une erreur de droit ou sur une interprétation erronée de la preuve produite devant lui », lorsque « le caractère erroné [d'une conclusion] peut être démontré par des éléments de preuve supplémentaires dont on dispose au moment de l'appel », lorsque les circonstances ont changé, ou lorsque la « décision du juge d'accorder ou de refuser l'injonction est à ce point aberrante qu'elle doit être infirmée pour le motif qu'aucun juge raisonnable [. . .] [n']aurait pu la rendre »[56]. Ce principe a récemment été confirmé dans *Google*[57].

[28] En l'espèce, comme je l'ai expliqué, la première étape de la version modifiée du test établi dans *RJR — MacDonald* exigeait que le ministère public convainque le juge en cabinet qu'il y avait une forte chance au regard du droit et de la preuve présentée qu'il réussirait à prouver la culpabilité de la SRC pour outrage criminel au tribunal. Il n'est pas facile de s'acquitter d'un tel fardeau et, comme je l'expliquerai plus loin, le ministère public n'a pas réussi à le faire en l'espèce.

[29] Dans l'arrêt *United Nurses of Alberta*, la juge McLachlin (maintenant juge en chef) a décrit les éléments de l'outrage criminel au tribunal de cette façon :

Pour démontrer l'outrage criminel, le ministère public doit prouver que l'accusé a transgressé une ordonnance d'un tribunal ou y a désobéi publiquement (l'*actus reus*), tout en voulant que cette désobéissance publique contribue à miner l'autorité de la cour, en le sachant ou sans s'en

[54] p. 154-155.
[55] [1982] 1 All E.R. 1042, p. 1046 (H.L.).
[56] Voir aussi *B.C. (A.G.) c. Wale*, [1987] 2 W.W.R. 331 (C.A. C.-B.), conf. [1991] 1 R.C.S. 62; *White Room Ltd. c. Calgary (City)*, 1998 ABCA 120, 62 Alta. L.R. (3d) 177; *Musqueam Indian Band c. Canada (Minister of Public Works and Government Services)*, 2008 CAF 214, 378 N.R. 335, par. 37, autorisation d'appel refusée, [2008] 3 R.C.S. viii.
[57] par. 22.

rea). The Crown must prove these elements beyond a reasonable doubt.[58]

[30] As to the *actus reus* — that is, as to whether the Crown could demonstrate a strong *prima facie* case that CBC "defied or disobeyed [the publication ban] in a public way"[59] by leaving the victim's identifying information on its website — the chambers judge rejected the Crown's submission that s. 486.4(2.1)'s terms "publish[ed]" and "transmit[ted]" should be "broad[ly]" interpreted.[60] In his view, the meaning of that text was not so obvious that the Crown could "likely succeed at trial" in showing that s. 486.4(2.1) would capture the impugned articles on CBC's website, since they had been posted *prior* to the issuance of a publication ban. In other words, and as CBC argued before the chambers judge, the statutory text might also be reasonably taken as prohibiting only publication which occurred for the first time *after* a publication ban.

[31] Significantly, the majority at the Court of Appeal conceded that "either position is arguable".[61] In my respectful view, that was, in substance, an acknowledgment that the Crown had not shown a strong *prima facie* case of criminal contempt. Before us, the Crown urged this Court to infer that the majority nevertheless "leaned" towards the Crown's preferred interpretation of "publish[ed]" when it stated that to see the matter otherwise would "significantly limit the scope of many legal rights and obligations that depend on making information available to third parties [and] [i]f publishing is a continuous activity, then it is also arguable that [CBC] is wilfully disobeying the court order".[62] But, even allowing that this may be so, the Crown's burden was not to show a case for criminal contempt that "leans" one way or another, but rather a case, based on the law

[58] p. 933 (emphasis added).
[59] Chambers judge's reasons, at para. 12.
[60] para. 33.
[61] C.A. reasons, at para. 10.
[62] C.A. reasons, at para. 10; transcript, at pp. 65 and 70-71.

soucier (la *mens rea*). Le ministère public doit prouver ces éléments hors de tout doute raisonnable[58].

[30] Pour ce qui est de l'*actus reus* — c'est-à-dire la question de savoir si le ministère public pouvait établir une forte apparence de droit selon laquelle la SCR a [TRADUCTION] « transgressé [l'interdiction de publication] ou y a désobéi publiquement »[59] en laissant sur son site Web les renseignements identifiant la victime —, le juge en cabinet a rejeté l'argument du ministère public voulant que les mots « *publish[ed]* » et « *transmitt[ed]* » de la version anglaise du par. 486.4(2.1) devaient recevoir une interprétation « large »[60]. À son avis, le sens de ce texte n'était pas évident au point où le ministère public « aurait vraisemblablement eu gain de cause au procès » pour démontrer que le par. 486.4(2.1) viserait les articles qu'elle reprochait à la SRC d'avoir affichés sur son site Web, puisqu'ils avaient été affichés *avant* la délivrance de l'interdiction de publication. Autrement dit, et comme la SRC l'a soutenu devant le juge en cabinet, le texte de loi pourrait aussi être raisonnablement interprété comme interdisant seulement les publications diffusées pour la première fois *après* la délivrance d'une interdiction de publication.

[31] Je souligne que les juges majoritaires de la Cour d'appel ont reconnu que [TRADUCTION] « les deux thèses sont défendables »[61], ce qui, à mon avis, constituait essentiellement une reconnaissance que le ministère public n'avait pas établi une forte apparence de droit quant à l'existence d'un outrage criminel. Ce dernier a demandé à la Cour de conclure que les juges majoritaires de la Cour d'appel avaient néanmoins « penché » vers l'interprétation du mot anglais « *publish[ed]* » qu'il privilégie lorsqu'ils ont affirmé que de voir l'affaire autrement « réduirait de façon importante la portée de nombreux droits et obligations qui dépendent de l'accès pour des tiers à des renseignements [et que] [s]i la publication est une activité continue, on peut aussi soutenir que [la SRC] désobéit volontairement à l'ordonnance de la cour »[62]. Or, même si on admettait que tel puisse

[58] p. 933 (je souligne).
[59] Motifs du juge en cabinet, par. 12.
[60] par. 33.
[61] Motifs de la Cour d'appel, par. 10.
[62] Motifs de la Cour d'appel, par. 10; transcription, p. 65 et 70-71.

and evidence presented, that has a *strong likelihood* of success at trial. And, again with respect, I see nothing in the chambers judge's reasons or, for that matter, in the majority reasons which persuades me that the chambers judge, in refusing the interlocutory injunction sought here, committed any of the errors described in *Hadmor* as justifying appellate intervention.

[32] My finding on this point is determinative, and obviates the need to consider *mens rea*, or the other two stages of the *RJR — MacDonald* test.

V. Conclusion

[33] I would allow this appeal.

Appeal allowed.

Solicitors for the appellant: Reynolds, Mirth, Richards & Farmer, Edmonton; Canadian Broadcasting Corporation, Toronto.

Solicitor for the respondent: Justice and Solicitor General, Appeals, Education & Prosecution Policy Branch, Calgary.

Solicitors for the interveners: Linden & Associates, Toronto.

être le cas, le fardeau du ministère public n'était pas de présenter une preuve d'outrage criminel qui « penche » dans un sens ou dans l'autre, mais plutôt une preuve qui, au regard du droit et des éléments de preuve présentés, avait une *forte chance* d'entraîner son succès au procès. En outre, rien dans ses motifs — ni d'ailleurs dans les motifs des juges majoritaires — ne me convainc que, lorsqu'il a rejeté la demande d'injonction interlocutoire en l'espèce, le juge en cabinet a commis une des erreurs décrites dans l'arrêt *Hadmor* qui justifierait une intervention en appel.

[32] Ma conclusion sur ce point étant déterminante; il est inutile que j'examine tant la *mens rea* que les deux autres étapes du test établi dans l'arrêt *RJR — MacDonald.*

V. Conclusion

[33] Je suis d'avis d'accueillir le pourvoi.

Pourvoi accueilli.

Procureurs de l'appelante : Reynolds, Mirth, Richards & Farmer, Edmonton; Société Radio-Canada, Toronto.

Procureur de l'intimée : Justice and Solicitor General, Appeals, Education & Prosecution Policy Branch, Calgary.

Procureurs des intervenants : Linden & Associates, Toronto.

TAB 4

At para 26

COURT FILE NO.: 99-CV-179494
DATE: 20030107

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
CANADIAN IMPERIAL BANK OF COMMERCE	)	Lincoln Caylor and Bianca Lanene, for the Plaintiff (Responding Party)
	)	
Plaintiff (Responding Party)	)	
	)	
- and -	)	
	)	
CREDIT VALLEY INSTITUTE OF BUSINESS AND TECHNOLOGY, LAWRENCE MPAMUGO, KATHLEEN MPAMUGO, STEVEN MPAMUGO, ERNEST MPAMUGO, PAULINE MPAMUGO, JUSTINE MPAMUGO, MARYGOLD TECHNOLOGIES INCORPORATED and BLACK CROWN INTERNATIONAL LIMITED	)	Brian Shiller and Alan Gold, for the Defendants (Moving Parties)
	)	
Defendants (Moving Parties)	)	
	)	
	)	**HEARD:** December 3, 2002

MOLLOY J.

REASONS FOR DECISION

A. NATURE OF THE MOTION

[1] The defendants Lawrence, Kathleen, Steven and Pauline Mpamugo seek a variation of injunction orders previously made against them to permit payment of various expenses, including ongoing living expenses and legal fees for civil and criminal counsel.

B. FACTUAL BACKGROUND

[2] This action was commenced by the Canadian Imperial Bank of Commerce ("CIBC") in November 1999. The statement of claim alleges a conspiracy by Lawrence Mpamugo and others to defraud the CIBC of over $13 million. The alleged fraudulent scheme involved numerous individuals applying to CIBC for student loans to attend Credit Valley Institute of Business and Technology ("Credit Valley"), a vocational school operated by Lawrence Mpamugo. CIBC advanced over $6 million directly to Credit Valley as tuition for what it believed to be legitimate students. However, those "students" did not actually go to school and there is compelling evidence from the CIBC investigation that the school is fictitious, being nothing more than a front to obtain funds under the student loan program. The defendants concede that the plaintiff has presented a *prima facie* case of fraud and, apart from general blanket denials, have not put forward any evidence to rebut it.

[3] Lawrence Mpamugo is also facing criminal charges of fraud in connection with the same scheme. Following the preliminary inquiry, he was committed to trial. The criminal trial has not yet been scheduled but is anticipated to begin in the spring of 2003.

[4] Upon commencing this action, CIBC applied *ex parte* and obtained interim injunctive relief freezing accounts of the defendants at the CIBC, Canada Trust, Royal Bank of Canada, The Bank of Nova Scotia and TD Waterhouse and restraining the defendants from dealing with real property located at Queens Avenue, Scarlett Road and Wallenberg Crescent: Order of Lissaman J. dated November 3, 1999.

[5] CIBC then applied, upon notice to the defendants, to extend that injunction. On December 8, 1999, Cameron J. made an Order essentially extending the injunctive relief granted by Lissaman J. until judgment, or further order of the Court, subject to certain exceptions. Two of the properties covered by the injunction (Queens Avenue and Scarlett Road) are apartment buildings. Cameron J.'s Order permitted Kathleen Mpamugo (the wife of Lawrence Mpamugo) to open a new account for the receipt of rent and payment of expenses in connection with these two properties. Both Kathleen and Lawrence were also permitted to open one new account each, which would not be subject to the injunction. This would enable them to deposit their earnings from employment or other legitimate sources and pay their ordinary living expenses out of those funds. Lawrence Mpamugo was required to disclose to the plaintiff the source of any funds going into his account.

[6] At the present time, both Lawrence Mpamugo and his wife Kathleen are unemployed. They have two children: Steven (aged 20) and Pauline (aged 19). Both are students at the University of Toronto. Pauline does not work; Steven works part-time at the Bay, earning $40.00 a week. In support of this motion for a variation of the injunction order, Lawrence Mpamugo has filed affidavits in which he states that over the past three years he has borrowed money and sold inherited properties in Nigeria to pay legal fees for this civil case and to fund the defence of the criminal charges against him. He says that he and his family are now broke and

have no source of income to live on. He further claims that he has no assets other than those frozen by the injunction and household furnishings and jewellery worth less than $2000.00.

[7] In his affidavit sworn in May 2002, Mr. Mpamugo sought an order authorizing payments in the following approximate amounts:

- $27,000 for expenses incurred on the Scarlett Road property (primarily property tax arrears and utility bills)
- $11,000.00 estimated as the cost of repairs and renovations needed at the Scarlett Road property
- $29,000.00 for tax arrears and unpaid utility bills at the Queens Avenue property
- $24,000.00 estimated for the cost of various repairs at the Queens Avenue property
- $43,000.00 estimated as the cost of removing and replacing all asphalt at the Queens Avenue property
- $15,000.00 for outstanding management fees for Queens Avenue
- $2000.00 estimated for legal fees to evict tenants in one apartment who have not paid rent since January 2001
- $8000.00 for tax arrears on the Wallenberg Crescent property (the family home)
- $94,000.00 for legal fees to Edward Greenspan in respect of the preliminary inquiry
- $50,000.00 by way of a retainer to Alan Gold for the continued defence of the criminal charges
- $75,000.00 by way of retainer to legal counsel in this civil action
- $5220.00 per month for living expenses for the family

[8] At the initial return of this motion, Brennan J. made an interim order authorizing the release of $3500.00 per month for the family's living expenses. The balance of the motion was adjourned to permit cross-examinations.

[9] In a supplementary affidavit sworn in November 21, 2002, Mr. Mpamugo swears that the family is unable to survive on $3500.00 per month. He now seeks an allowance of $6,855.00 per month plus a one-time emergency payment of $2320.00 to cover the cost of winter clothing for the four family members. In addition, he seeks the release of funds to pay university expenses for Steven and Pauline, including about $9500.00 for tuition, $141.00 per month each for

transportation to and from school (they live in Mississauga and attend the University of Toronto), the cost of two laptop computers and approximately $2600.00 for books.

[10] At the close of argument before me on December 3, 2002, I authorized payments out of Credit Valley's Royal Bank account #1003045 (located at Dundas St. and Highway 10) to cover transit passes for Steven and Pauline for the month of January 2003 and tuition and books for both of them for the current academic year. Also, from the same account, I directed payment of $25,000.00 to Shiller Layton Arbuck as a retainer in this civil action and $70,000.00 to Alan Gold to cover a retainer in the criminal proceeding and the already incurred $20,000.00 cost of transcripts from the preliminary hearing. At the request of the plaintiff, and on the consent of the defendants, I transferred this action into case management. Management of the action has been assigned to Master MacLeod and counsel were directed to arrange a case conference before the Master in the New Year. I reserved decision on the balance of the issues.

C. ASSETS FROZEN BY THE INJUNCTION

[11] CIBC's total claim for damages in this action is about $13 million, of which $6 million represents funds advanced directly to Credit Valley. As a result of the injunctive relief, CIBC is aware of assets of the defendants with an approximate value of $5.7 million, of which at least $4 million is directly traceable to funds advanced by CIBC. Those assets are caught by the injunction order.

[12] The known assets directly traceable to the CIBC funds and frozen by the injunction (in approximate amounts) are:

- $2 million in an account at CIBC in the name of Credit Valley
- $500,000 in an account at Canada Trust in the name of Pauline Mpamugo
- $500,000 in an account at Canada Trust in the name of Steven Mpamugo
- $530,000, the amount for which the Queens Avenue property was purchased in 1999
- $445,000, the amount for which the Scarlett Road property was purchased in 1999
- $140,000, approximate value of Mr. Mpamugo's Canadian and US accounts at TD Waterhouse

[13] In addition, the following assets have been frozen (in approximate amounts):

- $300,000, estimated value of family home at Wallenberg Crescent
- $161,000 in a GIC with the TD Bank, which Mr. Mpamugo says came from income he received since 1993 for work unrelated to Credit Valley

- $492,000.00 in an account at Scotia Bank in the name of Credit Valley (Kirwin and Highway 10 – account # 0126411), which Mr. Mpamugo says came from Scotia Bank advances for student loans and/or income received for unrelated work done by the defendant company Marygold, which Mr.Mpamugo controls

- $666,000 in an account at the Royal Bank in the name of Credit Valley (Dundas and Highway 10 – account # 1003045), which Mr. Mpamugo says are funds advanced by Royal Bank for student loans and earnings of Marygold for unrelated work.

D. CASE LAW

[14] There is surprisingly little Canadian case law on the test for determining whether to permit payments out of accounts or assets frozen by interlocutory *Mareva* or proprietary injunctions. There is, however, a body of case authority from the English Courts which is of considerable assistance.

[15] It is important at the outset to distinguish between the proprietary injunction and the *Mareva* injunction. A proprietary injunction is granted to preserve an asset in the possession of a defendant, which the plaintiff says belongs to the plaintiff, or is subject to a trust in favour of the plaintiff. It is typically sought in cases of alleged theft, conversion or fraud where the defendant, by some wrongdoing, comes into the possession of the plaintiff's property. The purpose of the injunction is to preserve the disputed property until trial so that the property will be returned to the plaintiff if successful at trial, rather than used by the defendant for his own purposes.

[16] A *Mareva* injunction does not require the plaintiff to show any ownership interest in the property subject to the injunction and does not require the plaintiff to establish a case of fraud or theft. It is a recognized exception to the rule established in *Lister v. Stubbs* (1890), 45 Ch. D. 1 that the court has no jurisdiction to attach the assets of a debtor for the protection of a creditor prior to the creditor obtaining judgment. Because of the exceptional nature of the relief, the test on the merits for obtaining a *Mareva* injunction is more onerous than for other injunctive relief and requires that the plaintiff establish a strong *prima facie* case: *Chitel v. Rothbart* (1983), 39 O.R. (2d) 513 at 522 and 532 (C.A.). In addition to the other requirements for an injunction, the plaintiff must show that the defendant is taking steps to put his assets out of the reach of creditors, either by removing them from the jurisdiction of the court or by dissipating or disposing of them other than in the normal course of business or living: *Chitel v.Rothbart* at p. 532-533.

[17] The purpose of the *Mareva* injunction is a limited one. It is meant to restrain a defendant from taking unusual steps to put his assets beyond the reach of the plaintiff in order to thwart any judgment the plaintiff might eventually obtain. It is not meant to give the plaintiff any priority over other creditors of the defendant, nor to prevent the defendant from carrying on business in the usual course and paying other creditors. The nature of the *Mareva* is such that it is typically sought and granted, in the first instance, without notice to the defendant, but then is subject to a motion by the defendant to vary the injunction to permit payments in the usual course of business

or living. As was noted by the English Queen's Bench in *Iraqi Minister of Defence v. Arcepey Shipping Co. S.A.*, [1980] 2 W.L.R 480 at 485-486:

> ...the point of the Mareva jurisdiction is to proceed by stealth, to pre-empt any action by the defendant to remove his assets from the jurisdiction. To achieve that result the injunction must be in a wide form because, for example, a transfer by the defendant to a collaborator in the jurisdiction could lead to a transfer of assets abroad by that collaborator. But it does not follow that, having established the injunction, the court should not thereafter permit a qualification to it to allow a transfer of assets by the defendant if the defendant satisfies the court that he requires the money for a purpose which does not conflict with the policy underlying the Mareva jurisdiction.
>
> . . . For my part, I do not believe that the Mareva jurisdiction was intended to rewrite the English law of insolvency in this way. Indeed it is clear from the authorities that the purpose of the Mareva was not to improve the position of the claimants in an insolvency but to prevent the injustice of a foreign defendant removing his assets from the jurisdiction which might otherwise have been available to satisfy a judgment.

[18] This principle has been endorsed by the Supreme Court of Canada (referring with approval to the *Iraqi Ministry of Defence* decision) in *Aetna Financial Services Ltd. v. Fegelman* (1985), 15 D.L.R. (4th) 161 at 177. Thus, even where the *Mareva* injunction may have been originally granted in a broad and sweeping form, this is in contemplation that it will likely later be modified to permit the defendant to maintain his normal standard of living and to meet legitimate debt payments accruing in the normal course. It is common for such exemptions to include the payment of ordinary living expenses and reasonable legal expenses to defend the lawsuit: *University of British Columbia v. Conomos*, [1989] B.C.J. No. 2269 (B.C.S.C.); *Kelly v. Brown*, [1990] O.J. No. 419 (Ont.Ct.Gen.Div.); *National Bank of Canada v. Melnitzer*, [1997] O.J. No. 2424(Ont.Ct.Gen.Div.); *Pharma-Investment Ltd. v. Clark*, [1997] O.J.No.1334 (Ont.Ct.Gen.Div.); *Halifax plc v. Chandler*, [2001] E.W.J. No. 5249 (R.C.J.C.A.).

[19] The English cases apply a preliminary test before granting relief from a *Mareva* injunction. Under those authorities, before an Order will be made permitting payment of expenses out of funds frozen by a *Mareva* injunction, the defendant must satisfy the court that he has no other assets from which to make the payments: *Halifax plc v. Chandler*, at para 17; *Ostrich Farming Corporation v. Ketchell*, December 10, 1997, English Court of Appeal (Civil Division), per Roch and Millett LJJ. Although I could find no Canadian authority explicitly adopting that test, I believe it is implicit in many of the decisions. It is really only logical that this should be the case. Suppose, for example, that a defendant has one account in the jurisdiction containing $100,000.00 and it is properly frozen by a *Mareva* injunction at the behest of a plaintiff who has a claim exceeding that amount and who has shown that the defendant is trying to put the funds beyond the reach of the court. If that was the defendant's only source of funds, one can easily see the rationale of permitting his ordinary living expenses to be paid out of

the account. If, however, the defendant has millions of dollars in other accounts not covered by the *Mareva* injunction, it is not reasonable to first deplete the assets that are covered by the injunction before having recourse to the other funds. Accordingly, I find it is appropriate to apply that preliminary test in this case.

[20] Additional considerations apply to a defendant's motion to vary a proprietary injunction. It is one thing to permit payment of ordinary expenses out of money belonging to the defendant but which is frozen by a *Mareva* injunction. It is another thing altogether to permit the defendant to use the plaintiff's money for the purpose of attempting to defeat the plaintiff's claim, or to delay the plaintiff from obtaining judgment. The reason for the distinction is well stated by Lord Justice Millett in *Ostrich Farming Corporation v. Kendall* as follows:

> The courts have always recognized a clear distinction between the ordinary Mareva jurisdiction and proprietary claims. The ordinary Mareva injunction restricts a defendant from dealing with his own assets. An injunction of the present kind, at least in part, restrains the defendants from dealing with assets to which the plaintiff asserts title. It is not designed merely to preserve the defendant's assets so as to be available to meet a judgment; it is designed to protect the plaintiff from having its property expended for the defendant's purposes.

[21] The test to be applied in determining whether a defendant ought to be permitted to make payments out of funds subject to a proprietary injunction begins (as does the variation of a *Mareva* injunction) with a consideration of whether the defendant has established on proper evidence that he has no other assets available to him to pay the expenses. If the defendant passes that hurdle, the court must engage in a balancing exercise "as to whether the injustice of permitting the use of the funds by the defendant is out-weighed by the possible injustice to the defendant if he is denied the opportunity of advancing what may of course turn out to be a successful defence": *Halifax plc v. Chandler* at para 17.

[22] Mr. Caylor (for the plaintiff) argues that in cases where the defendant seeks to use funds subject to a proprietary injunction, there is an additional hurdle he must cross before the court will engage in this balancing of interests process: he must show an arguable case rebutting the plaintiff's position that the funds in question are the property of the plaintiff. Mr. Caylor relies on the decision of Millett LJ in *Ostrich Farming Corporation v. Kendall* as support for that proposition, and indeed that is the test advanced by His Lordship as stated at page 5 of the decision:

> It cannot be sufficient for a defendant to establish that he has no other funds with which to conduct his own defence. For even if that be so, he must in addition show that there is an arguable case for his having recourse to the funds in question. If he cannot show an arguable claim in his part to the funds, he has no right to use the money. A trustee has no right to have recourse to trust money to defend himself against a claim for breach of trust unless he has an arguable case

> for saying he has a beneficial interest in the funds in question. No man has a right to use someone else's money for the purpose of defending himself against legal proceedings. Just as the Court's jurisdiction to grant the injunction in the first place depended on the plaintiff's establishing an arguable case that the money belonged to it, so its willingness to permit the defendant to have recourse to the money depends upon his establishing an arguable claim to the money.

And further, at page 6:

> The plaintiff has put forward a strongly arguable case for saying that the money belongs beneficially to the plaintiff. The defendants ought not to have access to those moneys for the purpose of their legal costs unless they establish, first, that they have no other funds out of which to pay those costs, and secondly, that they have an arguable case for denying that the money belongs to the plaintiff company. For that purpose they must put in evidence and condescend to particulars. If they do so, and only then, will the court enter into the difficult balancing exercise which other judges have described, in which the court must weigh up the relative strength of the two cases, consider the nature of the defence which has been put forward and all the other circumstances of the case.

[23] The other judge in *Ostrich Farming*, Roch LJ, does not go as far as Millett LJ. in this regard, although agreeing in the result. Roch LJ. agreed with Millett LJ that the first stage requires the defendant to establish on proper evidence that he has no other funds available to him. However, Roch LJ., upon being satisfied that the defendant had met the first stage, would then engage in the balancing process, which would include as one of the considerations the relative strengths of the plaintiff's and defendant's cases. He stated, at page 7:

> Once that hurdle is cleared [referring to the defendant showing no other assets], the court can make an order allowing the defendant to use part of the funds (the equitable ownership of which is claimed by the plaintiff) for the defendant's legal expenses. That power in the court is a discretionary power. The court in deciding whether to exercise that power, must weigh the potential injustice to the plaintiff of permitting the funds which may turn out to be the plaintiff's property to be diminished so that the defendant can be legally represented, against the possible injustice to the defendant of depriving him of the opportunity of having the assistance of professional lawyers in advancing what may, at the end of the day, turn out to be a successful defence.
>
> To perform this process, which Sir Thomas Bingham in the case of *Sundt Wrigley & Co. v. Alan Charles Wrigley* (unreported) described as a "careful and anxious judgment", the judge must have evidence so that he can consider all relevant circumstances and, in particular, so that he can weigh the relative strengths of the plaintiff's claim to the property in the funds held by the defendant and the defendant's defence to that claim.

[24] It would appear that earlier case authority in England supports the test applied by Roch LJ, rather than the more stringent requirements described by Millett LJ: *e.g. Xylas v. Khanna*, [1992] E.W.J. No. 1486 (C.A.); *Fitzgerald v. Williams*, [1996] QB 657, [1996] 2 All ER 171, [1996] 2 WLR 447 (C.A.); and *Sundt Wrigley & Co. v. Wrigley* [1993] E.W.J. No. 4430 (C.A.). In *Sundt Wrigley & Co. v. Wrigley*, a deputy judge of the Queen's Bench had permitted a defendant to pay his legal expenses out of funds to which the plaintiff had asserted a proprietary claim. The plaintiff appealed. The Court of Appeal held that the judge below had not erred in the exercise of his discretion and dismissed the appeal. One of the arguments advanced by the plaintiff was that the judge in the first instance had failed to give appropriate weight to the merits of the case. In dealing with that argument, the Master of the Rolls (Sir Thomas Bingham, who also wrote the main judgment in *Fitzgerald v. Williams*) noted the difficulty and undesirability of a detailed examination of the merits based on affidavit evidence at an interlocutory stage. He then held at paragraph 32:

> In the exceptional case where a proprietary claim is made to enjoined funds and the plaintiff is able within the reasonable confines of an interlocutory hearing to demonstrate a strong probability that the proprietary claim is well-founded then that may properly affect the Court's decision whether the defendant should be free to draw on those funds to finance his defence. Given the Court's traditional tendency to protect the integrity of a trust fund that is a fact which in such circumstances need not, and indeed probably should not, be ignored. That is not this case, however, and I do not want to encourage the belief that prolonged examination on the merits at an interlocutory stage should be other than exceptional.

[25] I was not directed to, and am not aware of, any Canadian authority directly on point. However, in my view, the balancing of interests test applied by the English courts in this situation is consistent with the respective purposes underlying the proprietary and *Mareva* injunctions as identified by Canadian courts and is therefore an appropriate test to apply here. With respect to the consideration of the merits of the defendants' case, I am inclined to the view expressed by Roch LJ. and by the Master of the Rolls in *Sundt Wrigley & Co. v. Wrigley* that the relative merits of the plaintiff's case and the defence advanced by the defendant is a relevant consideration when balancing the competing interests of the parties. However, I would not go so far as to make it a pre-requisite for the defendant to demonstrate an arguable case on the merits before the Court should engage in the balancing of interests process. This is subject, however, to one caveat. Where the plaintiff has frozen assets and advanced an arguable case that those assets are subject to a proprietary claim by the plaintiff, there is an onus on the defendant to put forward credible evidence as to the source of the subject assets if the defendant seeks to use the funds for his own purposes. It is only where the defendant can demonstrate that the assets are from a source other than the plaintiff that the usual rules for variation of a *Mareva* will apply. Otherwise, his right to use the funds will be subject to the balancing of interests in the exercise of the court's discretion.

[26] Accordingly, the test to be applied is as follows:

(i) Has the defendant established on the evidence that he has no other assets available to pay his expenses other than those frozen by the injunction?

(ii) If so, has the defendant shown on the evidence that there are assets caught by the injunction that are from a source other than the plaintiff, *i.e.* assets that are subject to a *Mareva* injunction, but not a proprietary claim?

(iii) The defendant is entitled to the use of non-proprietary assets frozen by the *Mareva* injunction to pay his reasonable living expenses, debts and legal costs. Those assets must be exhausted before the defendant is entitled to look to the assets subject to the proprietary claim.

(iv) If the defendant has met the previous three tests and still requires funds for legitimate living expenses and to fund his defence, the court must balance the competing interests of the plaintiff in not permitting the defendant to use the plaintiff's money for his own purposes and of the defendant in ensuring that he has a proper opportunity to present his defence before assets in his name are removed from him without a trial. In weighing the interests of the parties, it is relevant for the court to consider the strength of the plaintiff's case, as well as the extent to which the defendant has put forward an arguable case to rebut the plaintiff's claim.

E. ANALYSIS

(i) *Available Assets Not Frozen by Any Injunction*

[27] I turn now to a consideration of whether the defendant in this case is entitled to a variation of the injunction to permit payment of the expenses he seeks. The first step of the analysis is to determine whether the defendant has assets he could use to pay these expenses other than the assets frozen by the injunction. This is a preliminary step in the consideration both in respect of the funds to which the plaintiff asserts a proprietary claim and the funds that are assets of the defendant and subject only to a *Mareva* type injunction. I have come to the conclusion, although not without some misgivings, that the defendant has satisfied this test.

[28] Mr. Mpamugo filed an affidavit in May 2002 in which he listed certain assets and swore that those were the only assets he owned. On cross-examination in August, he stated that he was not aware of any other bank accounts but undertook to review "the disclosure" (referring to the Crown's disclosure material in the criminal proceedings) to be sure. In November 2002, Mr. Mpamugo filed a supplementary affidavit in which he disclosed for the first time two other bank accounts in the name of Credit Valley, one at the Scotia Bank and the other at the Royal Bank. The total funds in the two accounts exceed $1 million. He also disclosed for the first time a GIC in his name with a value of approximately $161,000.00. The existence of these assets was known to the Crown and referred to in the disclosure material. It is difficult to accept that Mr. Mpamugo had simply forgotten about more than $1 million and tempting to conclude that he only disclosed it because he knew the police were aware of it and it was therefore inevitable that

the plaintiff would find out about it eventually. Further, it was frozen by the injunctions in any event and frozen assets not readily traceable to the plaintiff's funds would be more likely to be released by the court for use in funding his defence and other expenses. The timing of Mr. Mpamugo's disclosure of these assets is therefore suspiciously convenient for him. That said, the existence of these additional assets is now known and I have no other evidence to rebut the defendant's sworn evidence that he has now disclosed all of his assets and that everything he has is frozen by the injunction. It is always difficult for a party to prove a negative, and particularly difficult to prove the non-existence of something. It is not unusual for the evidence on this kind of point to consist entirely of a sworn statement that there are no such assets. While the credibility of the defendant's evidence in this regard is suspect, I am not prepared on a motion of this nature to simply dismiss his evidence entirely without some evidence that there are assets elsewhere. For purposes of this motion, therefore, I hold that the defendant has established the first part of the test and that, apart from assets frozen by the injunction, he has no means to pay his ordinary living expenses and legal fees.

(ii) *Assets Subject to the Proprietary Injunction*

[29] It is clear that all of the assets listed in paragraph [12] above are directly traceable to funds advanced by CIBC and to which CIBC has asserted a proprietary claim. CIBC has shown a strong *prima facie* case that these assets are rightfully the property of CIBC, which is unanswered by the defendant apart from a general denial.

[30] Further, the plaintiff has established that although it advanced $6 million to the defendants, only approximately $4 million of that has been accounted for. The defendant has not provided any explanation as to the location of the missing funds. In these circumstances, it is particularly incumbent on the defendant to demonstrate that any other assets in his name were not acquired with the plaintiff's money.

[31] The defendant has asserted that the family home at Wallenberg Crescent was purchased years before the advances by the CIBC and is therefore beyond the plaintiff's proprietary claim. It would appear that there is no mortgage on the house. There was a suggestion during argument that the mortgage was discharged using funds from the plaintiff. However, there was no evidence on the point one way or the other. For the time being, there has been no request to either sell or encumber the Wallenberg Crescent house to raise funds for the defendants. That point may well be reached as it would appear that at the defendant has at least some equity in the property which is not subject to the proprietary injunction and those assets must be depleted first before the defendant is entitled to access funds subject to the proprietary injunction. However, if the defendant intends to do so in the future, he will be required to demonstrate that none of the CIBC's funds went into that property.

[32] The defendant recently disclosed a GIC in his name at the TD Bank which he says came from money he earned between 1993 and 1999 and is not money received from the CIBC. He produced no documentation to support that proposition. For present purposes, he has failed to

discharge his onus of demonstrating that the source of this asset was other than the CIBC. I will treat it as if it were subject to the proprietary injunction.

[33] The defendant also recently disclosed bank accounts at the Scotia Bank and at the Royal Bank which he has sworn contain no funds advanced by CIBC. It is clear that at least some of the funds in those two accounts were advanced by those two other banks in respect of student loan advances for tuition.

[34] In respect of the Scotia Bank account, Mr. Mpamugo produced as an exhibit to his November affidavit a bank statement for the period from May 31 to June 30, 1999. That statement shows an opening balance of $232,257.87 and five deposits over that month totaling $122,000.00. Mr. Mpamugo testified under cross-examination (at page 109) that all of those deposits came from money earned by one of his companies (the defendant Marygold) from "computer systems, peripherals and accessory sales, and from installation of network systems, computer repairs, service and maintenance". No supporting documentation of any kind has been provided. With respect to the opening balance as of May 30, 1999, Mr. Mpamugo said that 60% of those funds were also earned by Marygold. Of the remaining 40%, he testified that some of the money was from tuition paid by students of Credit Valley and some of it was student loan advances for tuition from Scotia Bank. Again, Mr. Mpamugo provided no documentation whatsoever to support his position. Further, his evidence was extremely vague and totally devoid of details.

[35] I think it quite likely that some, and perhaps even all, of the money in this account comes from sources unrelated to the CIBC. However, Mr. Mpamugo has failed to bring forward any credible evidence to corroborate his testimony, although if his testimony is truthful such documentation must surely exist. I understand that many of Mr. Mpamugo's documents are now in the hands of the police and that there may have been difficulties in obtaining source documents from the financial institutions involved. However, there was ample time to obtain such documentation and I am not prepared to accept Mr. Mpamugo's uncorroborated evidence as to the source of the funds in this account. Therefore, until such supporting evidence is forthcoming, I will treat the funds in the Scotia Bank account as subject to the proprietary injunction.

[36] In respect of the Royal Bank account, Mr. Mpamugo produced the bank statement for the month from June 7, 1999 to July 7, 1999. There is an opening balance of $568,235.02 and a closing balance of $655,522.95. The total of all deposits during the month is approximately $150,000.00. Mr. Mpamugo testified on cross-examination that the account was opened in January 1999 and that 50% of the funds in the account are from earnings by Marygold, with the remaining 50% being tuition received directly from students and student loan advances by the Royal Bank for tuition. However, Mr. Mpamugo conceded on cross-examination that all of the deposits for the month shown on the statement are preceded by the entry "RB STUDENT TUIT" and that those amounts were student loan advances from the Royal Bank. There were no other deposits during the month. Therefore, at least $150,000.00 (plus interest earned on that amount since July 1999) is from a source other than CIBC and is not subject to the proprietary

injunction. With respect to the balance of the funds, Mr. Mpamugo produced no documentation of any kind and again his evidence was vague and devoid of particularity. As is the case with the Scotia Bank account, Mr. Mpamugo has failed to satisfy me on credible evidence that any of the funds in the account represent business earnings by Marygold or actual tuition paid by legitimate students directly to Credit Valley. Therefore, apart from the $150,000.00 from Royal Bank funds, for purposes of this motion I will treat the funds in this account as subject to the proprietary injunction.

(iii) ***Payments Out of Funds Not Subject to the Proprietary Claim***

(a) The available funds

[37] There is at least $150,000.00 at the Royal Bank which is frozen by the *Mareva* injunction but not subject to a proprietary claim. The defendants are clearly entitled under the case law to the use of that money to pay legitimate living and business expenses. I have already ordered the release of $70,000.00 to Alan Gold out of these funds, to pay for transcripts of the preliminary inquiry and a $50,000.00 retainer. I have also authorized payment of a retainer of $25,000.00 to Shiller, Layton, Arbuck in respect of the defence of this civil action, the payment of university tuition and books for the two children for this academic year and the cost of transit passes for them for January 2003. There is an interim order in place giving the family $3500.00 per month for living expenses, although I am unclear which account that is coming from. Finally, the defendants have been receiving the rental income from and managing the apartment properties on Queens Avenue and Scarlett Road.

[38] It is apparent that the payments I have already ordered will exhaust the only funds that have clearly been shown to be from a source other than the plaintiff. However, it is likely that the defendant can demonstrate that other funds in the Scotia Bank and Royal Bank accounts, and possibly the GIC, are also not CIBC funds. It is important to clearly distinguish between those assets which are subject only to the ordinary *Mareva* injunction from those which are also subject to the proprietary injunction. I therefore direct that a separate account be established by the defendant Lawrence Mpamugo, ideally (although not necessarily) at a branch of the CIBC, into which shall be transferred any funds not traceable to the monies advanced by the CIBC. I will refer to that account hereafter as "the Expense Account". Mr. Mpamugo shall give the plaintiff full particulars of the Expense Account and monthly account statements shall be forwarded to counsel for the plaintiff. An amount equal to all deposits into the Royal Bank account with the explanation code identifying them as student loan tuition advances, plus interest accrued thereon, shall be immediately transferred to the Expense Account (less any amounts already paid pursuant to the order I made on December 3, 2002). Further amounts may be transferred into the Expense Account with the consent of the plaintiff. It is very much to Mr.

Mpamugo's advantage to identify funds or assets which are not properly subject to the proprietary injunction and have those funds transferred to the Expense Account, as there are fewer strictures on the release of funds not covered by the proprietary injunction. He should first present supporting material to counsel for the plaintiff. The written consent of counsel for the plaintiff, along with a copy of my Order herein, shall be sufficient authority for any bank or financial institution to transfer funds into the Expense Account. If the parties are unable to agree, there shall be a reference to the Master to determine the amount of any funds to be transferred into the Expense Account. Once the account is set up, all payments authorized to be made only out of monies not subject to the proprietary injunction, shall be paid out of the Expense Account. The defendant Lawrence Mpamugo shall keep accurate accounts of all deposits and expenditures in respect of the Expense Account, which accounts are subject to review by the Master if requested by the plaintiff.

[39] The *Mareva* injunction is an extraordinary remedy and is not meant to interfere with the legitimate payment of expenses by the defendant. Provided the expenses are truly legitimate, it is not, in my view, proper to scrutinize their appropriateness too closely. It is, after all, the defendant's money and, unless he is intending to use it for purposes inconsistent with the purpose of the *Mareva,* he should be free to choose which expenses he will pay and which he will not. Here, however, there is a complicating factor in that the funds free from the proprietary injunction will not be sufficient to cover all of the expenses Mr. Mpamugo seeks leave of the court to pay. It is not appropriate for the defendant to pay for non-essential expenses out of the *Mareva* injunction funds and then to seek payment of essential expenses out of the proprietary injunction funds. I am therefore inclined to scrutinize such requests for exemption more closely than would usually be the case for funds that are not subject to a proprietary injunction.

(b) Living Expenses

[40] In the normal course, a defendant seeking relief from a *Mareva* injunction is entitled to maintain the same standard of living the family maintained prior to the granting of the injunctions. Here, the defendant seeks approximately $6800.00 per month as living expenses, plus $2320.00 to purchase winter clothing plus the cost of putting two children through university. The proposed monthly budget plus tuition, books and transportation for the two children would require about $100,000.00 per year of after-tax income. The principal difficulty in evaluating the reasonableness of that request is that I have no information as to the family's standard of living prior to any monies being advanced by the CIBC. Luxuries that are affordable only because of monies wrongfully obtained from the plaintiff should not be counted as part of the normal standard of living. In the absence of that information, it is difficult to determine the appropriate amount to be allowed. I note from the defendant's proposed budget that the combined expense of vehicle insurance, lease payments and maintenance is over $2500 per month. That seems excessive in the circumstances, particularly given the fact that nobody in the family is employed, and I would consider it a luxury. The other living expenses do not appear to be out of line. In these circumstances, I would have been prepared to permit a payment of $4000.00 per month for the family's living expenses out of the Expense Account, provided there were sufficient funds in the account to cover it. Since it may be the case that there will not be

sufficient money in the Expense Account for this purpose, I will also deal below with the payment of living expenses out of the funds frozen by the proprietary injunction.

[41] My conclusion that $4000.00 would be an appropriate amount for living expenses is based on the failure of the defendant to provide evidence as to his standard of living prior to the CIBC advancing any funds. However, if documentation is produced indicating that the family did indeed have disposable income in excess of $50,000.00, this issue can be revisited.

(c) Legal Expenses

[42] Mr. Mpamugo seeks the release of sufficient funds to cover his legal fees for the defence of the criminal charges against him. I have already authorized payment of $20,000.00 for the transcripts of the preliminary hearing and a $50,000.00 retainer to Mr. Gold. The criminal charges are serious in nature and if Mr. Mpamugo is convicted he could be looking at a period of incarceration that is not inconsequential. It would be difficult for Mr. Mpamugo to represent himself at trial. The documentation is voluminous and the issues relatively complex. I consider the ongoing cost of criminal counsel to be a high priority.

[43] Mr. Caylor, for the plaintiff, argues that Mr. Mpamugo should not be entitled to retain counsel of the highest calibre, but rather should be restricted to counsel with a more modest hourly rate than Mr. Gold. I disagree. First of all, the right to counsel of choice should not be lightly interfered with, particularly where serious criminal charges are involved. Secondly, a higher hourly rate for lead counsel does not necessarily translate into a higher overall fee for the trial. Mr. Gold's expertise will likely enable him to accomplish more in less time than would be the case for less experienced counsel. Thirdly, there will be a process involved to ensure that the fees are reasonable, as dealt with in more detail below. Finally, insofar as funds subject only to the *Mareva* injunction are concerned, there should be no fetter on how expensive a defence Mr. Mpamugo chooses to mount. To the extent the amount of the legal costs is an issue at all, it is only because the non-proprietary claim assets are limited and insufficient to cover everything requested by the defendant. Since those funds are limited, however, only reasonable legal costs will be permitted. Mr. Mpamugo is entitled to retain Mr. Gold. It is understood that the full cost of the defence on the criminal charges will far exceed the amount of the retainer. Mr. Gold shall render accounts from time to time. Any account should be sent first to Mr. Mpamugo. If he approves the amount of the account, it should then be sent to counsel for the plaintiff. If the plaintiff consents, through its counsel, Mr. Gold's account can be paid out of Expense Account. Counsel for the plaintiff may request back-up documentation from Mr. Gold, and such shall be provided as long it can be done without compromising the defence or breaching solicitor and client privilege. If counsel are unable to agree on any issue in respect of the payment of the account, that issue shall be referred to the Master for determination. In deciding whether the amounts charged by Mr. Gold are recoverable, the Master shall apply the usual tests for assessment of an account by a solicitor to his own client.

[44] Mr. Mpamugo also seeks leave to pay the account of Mr. Edward Greenspan, who represented him at the preliminary inquiry. Those services have been fully rendered and Mr.

Greenspan is no longer acting. There are insufficient assets to warrant payment of that account at this time. That is particularly so since the account has not been assessed and I am not in a position to determine if it is reasonable.

[45] I have already ordered the release of $25,000.00 by way of retainer to defence counsel in this civil action. The defendant shall follow the same process for obtaining approval to pay the accounts of civil counsel out of the Expense Account as I outlined above for the payment of Mr. Gold's accounts.

(d) University Expenses

[46] On December 3, 2002 I ordered the release of sufficient funds to pay the university tuition and books for Steven and Pauline, as well as transit passes for January. I hereby authorize a further payment out of the Expense Account to cover transit passes for February 2003. I approved the university expenses for this academic year because both Steven and Pauline are already into the school year and would lose their year if the payment could not be made. However, in the absence of evidence that the family's previous disposable income was over $50,000.00 per year, I am not prepared to continue payment of the university expenses in future years. Also, there is no reason that Steven and Pauline should not contribute to their own support through part-time work. I have provided for transit passes to the end of February, which should give them time to raise the funds themselves for transportation costs thereafter. The cost of two laptop computers is a luxury that cannot be justified on the basis of the material before me. The anticipated costs of both civil and criminal counsel shall have priority over payment of future university expenses for Steven and Pauline. However, if the Expense Account balance reaches a point where it would appear that the legal costs can be covered with enough money left over to pay for university for one or both children, a further motion may be brought for a variation of my Order. I am not seized. The motion may be brought in the ordinary course before any judge of this Court.

(e) Wallenberg Crescent Tax Arrears

[47] There are property tax arrears in respect of Wallenberg Crescent in the approximate amount of $8000.00. Tax arrears may be paid out of funds in the Expense Account.

(iv) ***Use of the Assets Frozen by the Proprietary Injunction***

(a) The Apartment Buildings at Scarlett Road and Queen Avenue

[48] The apartment buildings at Scarlett Road and Queen Avenue were purchased with cash received from the CIBC and are subject to the proprietary injunction. In an affidavit sworn in November 1999, the defendant Kathleen Mpamugo swore that the total monthly income from the two properties was approximately $8000.00 and that the total monthly expenses to maintain them were $4500.00. The defendants were authorized under the December 1999 Order of Cameron J. to open a separate account for these properties and to deposit all rental income and pay all expenses out of that account. Although the account was opened, it was not operated on a

consistent basis. Some of the rental cheques were cashed through other accounts or at Money Mart. Some payments were allegedly made in cash. It would appear no records were kept, or at least none were produced. It is unclear what, if any, expenses were paid. There are no mortgages on the property. The tax arrears have grown to sizeable proportions, to an extent that suggests no property taxes were paid at all. There are also utility arrears and Mr. Mpamugo stated in his affidavit that both properties are in a poor state of repair. By the time of Mr. Mpamugo's affidavit in support of this motion in May 2002, there would have been $240,000.00 of income from these properties. It is largely unaccounted for. Although Mr. Mpamugo now swears that the apartment buildings have been operating at a loss, I am hard pressed to understand how that can be the case since there is substantial revenue and virtually no expenses have been paid. At the very least, the properties would appear to have been mismanaged. Alternatively, revenue from the properties may have been used by the defendants for other purposes.

[49] It would appear from Mr. Mpamugo's affidavit that there are in fact some repairs and maintenance that need to be done. Some of these are priority items because health and safety of tenants may be at risk. Property tax arrears also need to be addressed on an urgent basis. However, it is clear to me that the defendants cannot be trusted to run the buildings and to account properly for the income and expenses. Accordingly, a receiver shall be appointed to receive the rental income and oversee the management of both properties. If the parties cannot agree on the terms of the order appointing the receiver/manager, I can be spoken to. The receiver shall be authorized to retain counsel and take such steps as are necessary to terminate the lease of any tenant who is in default. The receiver shall also be authorized to pay the normal operating expenses for the properties, including routine repairs and maintenance. All issues relating to the conduct of the receivership are hereby referred to the Master. Substantial repairs, or work that is capital in nature, should only be undertaken if both parties consent or if ordered by the Master. Repairs required as a health or safety matter or payments to prevent the loss of the property due to tax arrears are appropriately made on an urgent basis out of the proprietary injunction assets even if the income from the property is not sufficient to cover them. Otherwise, I would expect that the costs of running the buildings would be recoverable from the revenue received. If, however, the rental revenue is not sufficient to cover the expenses, the expenses may be paid out of proprietary assets.

(b) Payment of Expenses Out of Proprietary Assets

[50] I have a discretion in respect of whether payments should be made out of the assets frozen by the proprietary injunction in the event there are insufficient funds in the Expense Account to cover them. In exercising that discretion I must be mindful that the plaintiff has not yet proven its entitlement to the assets in question and there is an underlying unfairness to the defendant in tying up his assets prior to the plaintiff proving its case at trial. On the other hand, there is unfairness to the plaintiff if I permit the defendant to use the funds for his own purposes, including funding his defence of this case, only to discover at the end of the action that the money belonged to the plaintiff all along. There is a fundamental unfairness in requiring the plaintiff to fund the defence of its own case against the defendant and to provide the defendant

and his family with all of their living expenses for the time it takes to get this case to trial, if the defendant did in fact defraud the plaintiff of the amounts claimed. In this situation, I find the relative strength and weakness of the parties' cases to be very influential. The plaintiff has put forward evidence establishing a strong *prima facie* case of fraud. Apart from a bald denial, the defendant has not put forward any defence at all. The evidence before me therefore overwhelmingly favours the plaintiff.

[51] It is with this in mind that I turn to the particular expenses which the defendant now wants to pay and I consider the disadvantage to the defendants if the payment is not made against the unfairness to the plaintiff in requiring the payment to be made out of monies which would appear to belong to the plaintiff.

[52] The university expenses for Steven and Pauline shall not be payable out of the proprietary assets. There is no unfairness to the defendants if the money in fact belongs to the plaintiff. The disadvantage to the Steven and Pauline if their father is ultimately successful at trial is that their university education will have been interrupted or delayed by the period of time it takes to complete the action. Alternatively, they can continue at school and pay for their own education costs. This is not a disadvantage that outweighs the unfairness to the plaintiff of paying the expenses out of its money. It is virtually certain that such amounts would ever be recovered from Mr. Mpamugo if the plaintiff is ultimately successful at trial.

[53] Likewise, the cost of legal counsel to defend this civil action is, in my opinion, an expense that should not be payable out of the proprietary assets. An initial retainer has been paid, which should suffice to take care of the more complex interlocutory and pleading stages. Mr. Mpamugo is obviously an intelligent and highly educated individual who, although not legally trained, would be more capable than most to manage much of the defence of the civil action on his own if necessary. He is also the one who is most intimately familiar with all aspects of the case and although the documents may be voluminous, they would not likely be unfamiliar to him. To the extent there are funds in the Expense Account, reasonable legal costs of civil defence counsel may be covered. However, I am not prepared at this time to order payment of those costs out of the proprietary funds. If evidence is presented by the defendant showing an arguable case on the merits in defence to the plaintiff's claim, this matter may be returned for reconsideration before any judge. I am not seized.

[54] The situation is somewhat different with respect to the defence of the criminal charges. The criminal trial is expected to be scheduled for the spring of 2003. It would be a formidable task for a lay person to mount a defence to these charges within that period of time. Further, there is more at stake in respect of the criminal charges given the criminal record that would follow if convicted and the risk of a lengthy period of incarceration. These factors, in my view, tip the balance slightly in favour of the defendant. Therefore, if there are no funds available from the Expense Account to pay Mr. Gold's accounts when due, payment may be made from other assets, subject to the same review process to ensure the accounts are reasonable.

[55] I am not prepared to permit the payment of Mr. Greenspan's account out of the proprietary assets. The consequence to the defendant of not paying that account in a timely way are not sufficiently dire to counteract the unfairness to the plaintiff if the account is paid out of the plaintiff's money.

[56] Living expenses should be paid first out of the Expense Account. If that account is depleted, I am inclined to the view that the defendants ought to be able to support themselves. I realize that both Mr. and Mrs. Mpamugo are unemployed at the present time. However, it would appear that they are both employable and capable of working in some sort of employment. However, in the event there are insufficient funds in the Expense Account after payment of legal fees, and to ease the transition period so as to give the family time to adjust to their new circumstances and an opportunity to seek and obtain jobs, I will authorize payment of up to $4000.00 per month out of other assets for the months of January, February, March and April 2003, payable on the first day of each month or as may be agreed to by the parties.

[57] To the extent there are insufficient funds in the Expense Account to pay property tax and/or property tax arrears on the Wallenberg Crescent property, they may be paid out of proprietary funds, provided the plaintiff consents.

F. SUMMARY OF RULINGS and COSTS

[58] To summarize:

(i) I am satisfied on the material before me that the defendants have no assets with which to pay their ordinary living expenses other than those frozen by the injunctions previously granted;

(ii) I am satisfied on the material before me that there is at least $150,000.00 plus accrued interest in the Royal Bank account which is not traceable to any funds advanced by the CIBC;

(iii) The defendant Lawrence Mpamugo shall open a new account ("the Expense Account"), preferably (but not necessarily at a branch of the CIBC), into which shall be deposited such of the funds frozen by the injunctions as have been demonstrated to be covered only by the ordinary *Mareva* and are not subject to the CIBC's proprietary claim. Full particulars of the new account and monthly account statements from the bank shall be delivered to counsel for the plaintiff.

(iv) Once the Expense Account is set up, all payments authorized to be made only out of monies not subject to the proprietary injunction, shall be made from that account.

(v) An amount equal to $150,000.00, plus accrued interest from July 7, 1999, less any amounts already paid pursuant to my Order of December 3, 2002, shall be transferred from the Royal Bank account to the Expense Account.

(vi) The written consent of counsel for the plaintiff, together with this Order, shall be sufficient authorization for any bank or financial institution to transfer any further amounts into the Expense Account.

(vii) Any dispute between the parties as to the amount of any funds to be transferred to the Expense Account is referred to the Master;

(viii) The defendant Lawrence Mpamugo shall keep accurate accounts as to all deposits to and expenditures from the Expense Account, which accounts are subject to review by the Master if requested by the plaintiff.

(ix) Transit passes for Steven and Pauline Mpamugo for the month of February 2003 may be purchased from funds in the Expense Account;

(x) Accounts rendered from time to time by Alan Gold for services rendered in defence of the criminal charges shall first be sent to Mr. Mpamugo for approval, and once approved by him, shall be forwarded to counsel for the plaintiff. Upon the written confirmation by counsel for the plaintiff that an account is reasonable, the account may be paid out of the Expense Account. Failing such consent, either Mr. Gold or the defendants may move before the Master and the Master shall determine whether the account is reasonable, applying the usual tests for assessment of an account from a solicitor to his own client. The plaintiff, the defendants and Mr. Gold shall be parties entitled to notice of such a motion.

(xi) Accounts for services rendered by counsel for the defendants in this civil action shall be payable out of the Expense Account, subject to the same process of approval as set out above for Mr. Gold's accounts.

(xii) To the extent there are funds available after payment of any accounts for legal services rendered and in the process of approval under paragraphs (x) and (xi) above, the defendants may draw a living allowance from the Expense Account to a maximum of $4000.00 per month. The Order of Brennan J. dated May 29, 2002 is set aside.

(xiii) Upon filing further affidavit evidence with supporting documentation showing a disposable family income (after tax) in excess of $50,000.00 for the period prior to the advance of any student loan funds by the CIBC, the defendants may re-apply to this Court to increase the living allowance and/or to vary my order to provide for payment of some or all of the university expenses for Steven and Pauline Mpamugo for future academic years out of the Expense Account. Also, if the Expense Account is increased to an amount that permits the payment of all legal fees with money left over, a motion may be brought to vary this order to provide for the payment of university costs.

(xiv) A receiver is appointed to receive all income and manage the properties at Scarlett Road and Queen Avenue. The conduct of the receivership is referred to the Master. To the extent that income revenue from the properties is insufficient to cover any costs in respect of running the properties, such costs may be paid out of funds subject to the proprietary injunction. Paragraph 7 of the Order of Cameron J. dated December 9, 1999 is set aside. Any funds remaining in the account referred to in paragraph 7 of the said Order of Cameron J. shall be paid to the receiver, along with all documentation in the possession or control of the defendants relating to the management of the properties. I can be spoken to with respect to the precise terms of the receivership Order if the parties cannot agree.

(xv) Tax arrears in respect of Wallenberg Crescent may be paid out of the Expense Account. If there are insufficient funds in the Expense Account, and if the plaintiff consents, tax arrears and ongoing taxes in respect of Wallenberg Crescent may be paid out of other assets frozen by the proprietary injunction.

(xvi) If there are insufficient funds in the Expense Account to pay any account of Mr. Gold that has been approved for payment, payment may be made out of the funds frozen by the proprietary injunction.

(xvii) If there are insufficient funds in the Expense Account to pay the living expense allowance of $4000.00 per month to the defendants, payment of up to $4000.00 per month may be made out of the proprietary claim assets for the months of January, February, March and April 2003, payable on the first day of each month or as may be agreed by the parties.

(xviii) Apart from payments authorized by this Order, the injunction set out in the Order of Cameron J. shall continue.

[59] Costs are left to the trial judge.

MOLLOY J.

Released: January 7, 2003

COURT FILE NO.: 99-CV-179494
DATE: 20030107

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

CANADIAN IMPERIAL BANK OF COMMERCE

Plaintiff (Responding Party)

- and –

CREDIT VALLEY INSTITUTE OF BUSINESS AND TECHNOLOGY, LAWRENCE MPAMUGO, KATHLEEN MPAMUGO, STEVEN MPAMUGO, ERNEST MPAMUGO, PAULINE MPAMUGO, JUSTINE MPAMUGO, MARYGOLD TECHNOLOGIES INCORPORATED and BLACK CROWN INTERNATIONAL LIMITED

Defendants (Moving Parties)

REASONS FOR DECISION

MOLLOY J.

Released: January 7, 2003

TAB 5

At para 25

CITATION: Luong v. Trinh, 2014 ONSC 693
COURT FILE NO.: CV-10-408767
DATE: 20140210

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
NHUAN LUONG, by her Litigation Guardian the PUBLIC GUARDIAN AND TRUSTEE	)	*Tony Nguyen*, for the Applicant
Applicant	)	
– and –	)	
MY HA TRINH	)	*Saba Ahmad*, for the Respondent
Respondent	)	
	)	**HEARD:** January 17, 2014

T. MCEWEN J.

REASONS FOR DECISION

[1] The Respondent, My Ha Trinh (the "Respondent"), seeks to vacate the *ex parte* Mareva Injunction originally granted by Chapnik J. on October 4, 2010, and thereafter extended. The Respondent submits that the injunction was issued on the basis of misrepresentations and non-disclosure contained in the original *ex parte* application. The Respondent initially filed materials asking that the Mareva Injunction be vacated or varied. At the hearing, however, the Respondent took the position only that it should be immediately vacated.

OVERVIEW

[2] The Applicant, Nhuan Luong (the "Applicant"), is an 87 year old woman with nine children including the Respondent. In 1979, she immigrated to Canada with her husband as part of the boat person exodus from Vietnam. In 1982, six of the siblings, including the Respondent, purchased a home at 75 Tecumseth Street (the "home"). Various family members have resided in the home. The Applicant's husband passed away in 1992, and the Applicant suffered a stroke in 1998. Between 2003 and 2009, the Applicant and Respondent generally resided in the home together. Commencing in approximately 2005, the Applicant's health began to deteriorate and

the Respondent took on additional roles as caregiver. It is during this time that the Applicant and various other siblings of the Respondent claim that the Respondent became abusive towards the Applicant and began to engage in erratic and violent behaviour. This lead to a confrontation between the Respondent and some of her siblings. The Respondent sold her interest in the home to her sibling, Steven Trinh, for $60,000 in or about July 2009. The Respondent was thereafter essentially forced from the home as she and her siblings could not get along. Subsequently, according to the Applicant's affidavit filed at the hearing before Chapnik J., the Applicant noticed that approximately $300,000 that she had kept in the home was missing. She also believes that the Respondent had stolen other money from her in the past. The Applicant's claim was supported by allegations that the Respondent had amassed approximately $470,000 in cash and investments that she could not possibly have accrued on her own without stealing from the Applicant.

[3] Chapnik J. granted the Interim and Interlocutory Mareva Injunction that ordered, amongst other things, that the Respondent be restrained from accessing funds from her accounts at the Bank of Montreal, TD Waterhouse, TD Canada Trust and safety deposit boxes. This was subject to her being allowed to withdraw funds of $5,000. The Respondent was also ordered to return certain personal property and funds allegedly belonging to the Applicant.

[4] Unfortunately, since the Mareva Injunction was granted the matter has become derailed. The Respondent has changed legal representation on three occasions. The Applicant's solicitor obtained an order removing himself as solicitor of record but thereafter reappeared after the court appointed the Public Guardian and Trustee as litigation guardian for the Applicant. The Respondent has been living in homeless shelters and essentially without funds, subject to the recent order of Matheson J. dated October 8, 2013. That order allowed monthly payments of $2,500 for legal fees and $300 for living expenses for four months. The Respondent also has mental health issues and has been diagnosed as having a bipolar disorder.

[5] By Orders of Corrick J. dated June 1, 2011, and Whitaker J. dated December 19, 2011, $45,000 was paid out to the Applicant for living expenses on a without prejudice basis.

THE RESPONDENT'S POSITION

[6] The Respondent submits that the Mareva Injunction ought to be set aside on the basis that the Applicant failed to meet the obligation of full and frank disclosure at the Mareva Injunction hearing. She submits that the Applicant did not have a strong *prima facie* case, and therefore should not have been entitled to the relief sought.

[7] The Respondent relies on a number of problems with the Applicant's affidavit, including her capacity to swear the affidavit, as well as other inconsistencies and inaccuracies contained in the affidavit.

[8] The major thrust of the Respondent's argument involves the following:

- The Applicant neither reads nor writes English, and within four months of her signing the affidavit she was assessed for dementia at the University Health Network Memory Clinic. The assessor reported that the Applicant did not fully appreciate information communicated to her;
- The estimate of the Applicant's net worth of $604,000 was loosely calculated and, at best, guess work;
- Notwithstanding the evidence of the Applicant, there is no credible evidence that the Respondent would flee given her history in the community;
- The Applicant's undertaking concerning damages was worthless;
- The Respondent's income for the past 30 years (paragraph 34 of her affidavit), estimated to be approximately $129,000, was in fact false. The Respondent had earned more income than this, and certain investment income was not accounted for;
- The estimate of the Respondent's balance in her bank accounts of approximately $470,000 (paragraph 25) was inflated by approximately $100,000;
- Disclosure was not made to the court of the fact that in 2009, the Respondent received $60,000 with respect to the sale of her share of the home;
- The Respondent had significant financial holdings prior to 2006, when the Applicant (paragraph 30) swore that $300,000 was taken by the Respondent;
- It was not disclosed to the court that the Respondent had essentially been evicted from the home and would have nowhere to live and have no access to funds except for the $5,000 allowance. This rendered her virtually penniless, homeless and vulnerable;
- Evidence of historical thefts were not well made out in the evidence and have not held up to scrutiny; and
- Others had access to the home, and therefore had access to the hidden money;

[9] Based on the above, the Respondent submits that the Mareva Injunction ought to be vacated and that a hearing to assess her own damages be conducted.

THE APPLICANT'S POSITION

[10] The Applicant submits that the Mareva Injunction was properly obtained and submits as follows:

- Between 2005 and 2009, the Respondent began to engage in increasingly violent and bizarre behaviour that threatened the Applicant's health and safety. This is borne out by photos taken of the house that show it being in complete disarray;
- There is a history of the Respondent taking money from the Applicant even prior to 2006;
- The Respondent could not possibly have saved the money she claims given her historical earnings even if her estimates are accurate;
- In addition to the allegation of the theft of money, it is not disputed that the Respondent took personal documentation from the Applicant, including health and bank cards, the Applicant's jewellery and $13,000 in cash from the house;
- The Respondent violated the Court Order restricting her from accessing the CIBC safety deposit box;
- The Respondent's siblings (the Applicant's children) support the application and claim that the Respondent admitted to taking monies;
- At the time that the Applicant swore the affidavit she was competent and able to give instructions, and there is no evidence to the contrary;
- No one disputes that the Applicant kept large amounts of cash at the home and that it has now disappeared. Given the fact that the Respondent was the primary occupant along with the Applicant, and given her significant savings, there is a strong *prima facie* case that she is the one who took the funds; and
- While the Applicant may have misstated the Respondent's savings by approximately $100,000, they are still significant and not capable of proper explanation.

[11] In the circumstances, the Applicant submits that the Respondent has not proven that the frozen funds belong to her nor has she properly explained how she could have amassed the funds in any event.

[12] The Applicant concedes, however, that the $60,000 paid to the Respondent ought to be paid to her less any monies that she has received pursuant to the order of Matheson J.

THE CASE LAW

[13] In the case of *Chitel et al. v. Rothbart et al.* (1983), 39 O.R. (2d) 513 (C.A.), the Court of Appeal conducted an in-depth analysis of the law concerning Mareva Injunctions and set out principles that must be followed by courts in exercising their jurisdiction to grant such relief. Speaking for the court, at p. 528, MacKinnon A.C.J.O. adopted the fundamental guidelines stated by Lord Denning as follows:

> At the commencement of the outline of his guidelines in this case, Lord Denning issued an uncharacteristic caveat: "Much as I am in favour of the Mareva injunction it must not be stretched too far lest it be endangered." He then stated his guidelines summarized as follows (pp. 984-85):
>
> (i) The plaintiff should make full and frank disclosure of all matters in his knowledge which are material for the judge to know. ... (ii) The plaintiff should give particulars of his claim against the defendant, stating the ground of his claim and the amount thereof, and fairly stating the points made against it by the defendant. (iii) The plaintiff should give some grounds for believing that the defendants have assets here. ... (iv) The plaintiff should give some grounds for believing that there is risk of the assets being removed before the judgment or award is satisfied. ... (v) The plaintiffs must ... give an undertaking in damages.

[14] This was further quoted with approval again by the Court of Appeal in *R. v. Consolidated Fastfrate Transport Inc.* (1995), 24 O.R. (3d) 564 (C.A.).

[15] Subsequently, in *United States of America v. Friedland*, 1996 CanLII 8213 (Ont. S.C.), Sharpe J. provided the following guidance:

> 26 It is a well established principle of our law that a party who seeks the extraordinary relief of an ex parte injunction must make full and frank disclosure of the case. The rationale for this rule is obvious. The Judge hearing an ex parte motion and the absent party are literally at the mercy of the party seeking injunctive relief. The ordinary checks and balances of the adversary system are not operative. The opposite party is deprived of the opportunity to challenge the factual and legal contentions advanced by the moving party in support of the injunction. The situation is rife with the danger that an injustice will be done to the absent party. As a British Columbia judge noted recently:
>
> > There is no situation more fraught with potential injustice and abuse of the Court's powers than an application for an ex parte injunction.
>
> (Watson v. Slavik, [1996] B.C.J. No. 1885, August 23rd, 1996, paragraph 10.)
>
> 27 For that reason, the law imposes an exceptional duty on the party who seeks ex parte relief. That party is not entitled to present only its side of the case in the best possible light, as it would if the other side were present. Rather, it is incumbent on the moving party to make a balanced presentation of the facts in law. The moving party must state its own case fairly and must inform the Court of any points of fact or law known to it which favour the other side. The duty of full and frank disclosure is required to mitigate the obvious risk of injustice inherent in any situation where a Judge is asked to grant an order without hearing from the other side.
>
> 28 If the party seeking ex parte relief fails to abide by this duty to make full and frank disclosure by omitting or misrepresenting material facts, the opposite party is entitled to have the injunction set aside. That is the price the Plaintiff must pay for failure to live up to the duty imposed by the law. Were it otherwise, the duty would be empty and the law would be powerless to protect the absent party.
>
> 29 These principles are so well established in the law that it is hardly necessary to cite supporting authority. They find expression in the Rules of Court. Rule 39.01(6) provides:

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

30 The principle has been affirmed and reaffirmed by judicial decision. In the leading Ontario case on Mareva injunctions, Chitel v. Rothbart (1982) 39 O.R. (2d) 513, a judgment of the Court of Appeal, Associate Chief Justice MacKinnon stated, at page 519:

> There is no necessity for citation of any authority to state the obvious that the plaintiff must, in securing an ex parte interim injunction, make full and frank disclosure of the relevant facts, including facts which may explain the defendant's position if known to the plaintiff. If there is less than this full and accurate disclosure in a material way or if there is a misleading of the court on material facts in the original application, the court will not exercise its discretion in favour of the plaintiff and continue the injunction.

31 The duty of full and frank disclosure is, however, not to be imposed in a formal or mechanical manner. Ex parte applications are almost by definition brought quickly and with little time for preparation of material. A plaintiff should not be deprived of a remedy because there are mere imperfections in the affidavit or because inconsequential facts have not been disclosed. There must be some latitude and the defects complained of must be relevant and material to the discretion to be exercised by the Court. (See Mooney v. Orr, (1994) 100 B.C.L.R. (2d) 335; Rust Check v. Buchowski (1194) 58 C.P.R. (3d) 324.

32 On the other hand, a Mareva injunction is far from a routine remedy. It is an exception to the basic rule that the Defendant is entitled to its day in court before being called upon to satisfy the Plaintiff's claim or to offer security for the judgment. This is clear from the decision in Chitel v. Rothbart, supra. It was emphasized by the decision of the Supreme Court of Canada in Aetna Financial Services v. Feigelman [1985] 1 S.C.R. 2, where Justice Estey referred to what he described as "the simple proposition that in our jurisprudence, execution cannot be obtained prior to judgment and judgment cannot be obtained prior to trial".

[16] The law concerning whether a court should permit payments out of accounts or assets frozen by an interlocutory Mareva Injunction was analyzed by Molloy J. in *Canadian Imperial*

Bank of Commerce v. Credit Valley Institute of Business and Technology, 2003 CanLII 12916. Justice Mallow stated the following:

> 25. I was not directed to, and am not aware of, any Canadian authority directly on point. However, in my view, the balancing of interests test applied by the English courts in this situation is consistent with the respective purposes underlying the proprietary and *Mareva* injunctions as identified by Canadian courts and is therefore an appropriate test to apply here. With respect to the consideration of the merits of the defendants' case, I am inclined to the view expressed by Roch LJ. and by the Master of the Rolls in *Sundt Wrigley & Co. v. Wrigley* that the relative merits of the plaintiff's case and the defence advanced by the defendant is a relevant consideration when balancing the competing interests of the parties. However, I would not go so far as to make it a pre-requisite for the defendant to demonstrate an arguable case on the merits before the Court should engage in the balancing of interests process. This is subject, however, to one caveat. Where the plaintiff has frozen assets and advanced an arguable case that those assets are subject to a proprietary claim by the plaintiff, there is an onus on the defendant to put forward credible evidence as to the source of the subject assets if the defendant seeks to use the funds for his own purposes. It is only where the defendant can demonstrate that the assets are from a source other than the plaintiff that the usual rules for variation of a *Mareva* will apply. Otherwise, his right to use the funds will be subject to the balancing of interests in the exercise of the court's discretion.
>
> 26. Accordingly, the test to be applied is as follows:
>
> (i) Has the defendant established on the evidence that he has no other assets available to pay his expenses other than those frozen by the injunction?
>
> (ii) If so, has the defendant shown on the evidence that there are assets caught by the injunction that are from a source other than the plaintiff, *i.e.* assets that are subject to a *Mareva* injunction, but not a proprietary claim?
>
> (iii) The defendant is entitled to the use of non-proprietary assets frozen by the *Mareva* injunction to pay his reasonable living expenses, debts and legal costs. Those assets must be exhausted before the defendant is entitled to look to the assets subject to the proprietary claim.

> (iv) If the defendant has met the previous three tests and still requires funds for legitimate living expenses and to fund his defence, the court must balance the competing interests of the plaintiff in not permitting the defendant to use the plaintiff's money for his own purposes and of the defendant in ensuring that he has a proper opportunity to present his defence before assets in his name are removed from him without a trial. In weighing the interests of the parties, it is relevant for the court to consider the strength of the plaintiff's case, as well as the extent to which the defendant has put forward an arguable case to rebut the plaintiff's claim.

ANALYSIS

[17] I am troubled by the circumstances in which the Mareva Injunction was obtained. My concern stems mainly from the fact that the court was misinformed about the amount of the Respondent's assets (exaggerated by approximately $100,000) and her historical income (which was set at an artificially low level). The court was also informed that the Applicant had periods of unemployment, the lengths of which were exaggerated. The court also did not receive disclosure about the fact that the Respondent received $60,000 for the sale of her interest in the home. At this motion, the Applicant did not dispute the fact that these inaccuracies were presented to Chapnik J.

[18] I am also concerned about the fact that the main thrust of the application for a Mareva Injunction appears to be the theft of the $300,000. Prior to 2006, however, the Respondent had amassed certain assets and there is little or no evidence that her assets increased appreciably after the alleged theft of the Applicant's funds. This would support the Respondent's argument that she did not take the monies and that her assets had nothing to do with the alleged theft.

[19] Conversely, I am mindful of the Applicant's claims of abuse and the evidence of the squalid living conditions (which in fairness the Respondent disputes) that were in existence in or about 2009. Further, even if the Respondent's evidence is accepted with respect to her historical earnings, I also have difficulty understanding on the record before me how she could have amassed her current level of assets. When one does an analysis of her historical earnings it is difficult to reconcile how she could have saved approximately $370,000 after accounting for taxation and living expenses. There is also uncontradicted evidence of the Respondent taking the Applicant's personal belongings, including documentation and jewellery, as well as violating the Court Order concerning access to the safety deposit box. Given the history of the Applicant and the Respondent living together, their hoarding tendencies and the evidence that the Respondent did maintain large of amounts of cash in safety deposit boxes, it is also very possible that the Respondent took funds from the Applicant and did not deposit them in any bank or financial institution.

[20] All that being said, it is clear that after 2009, the Respondent found herself in dire circumstances given the fact that she had sold her interest in the home, was no longer welcome

there and had virtually no accedes to her savings as a result of the Mareva Injunction. Unfortunately, as noted above, the Respondent did not meaningfully move to set aside or vary the Mareva Injunction in a timely fashion, although perhaps this is not surprising given her difficult personal circumstances with respect to housing, funding and mental health.

[21] The Applicant now concedes that the Respondent is entitled to at least $60,000 less payments made pursuant to Matheson J.'s Order. The Respondent's solicitor submits that the Respondent is not interested in simply receiving this amount. She submits that the circumstances of this case justify the Mareva Injunction being set aside completely, followed by a hearing concerning the damages incurred by the Respondent. She further submits that the receipt of the $60,000 would jeopardize the Respondent's access to social assistance benefits that she currently receives. If the court were to find that only $60,000 should be released, the Respondent prefers that the funding Order of Matheson J. continue, and that all monies continue to be frozen.

[22] In my view, neither of the proposals made by the parties is satisfactory.

[23] With respect to the Respondent's submission, I am not of view that the Mareva Injunction should be set aside in its entirety at this time. It is difficult to properly analyze all of the various disputed evidence based on the record before the court. While the Respondent raises compelling arguments concerning the weaknesses in the original application for a Mareva Injunction, there are still compelling concerns raised by the Applicant with respect to the Respondent's participation in the disappearance of the Applicant's monies based on what I have outlined above. Further, the effect of any order that I make upon the Respondent's entitlement to social assistance is not a valid or proper consideration. The case must be considered on its merits.

[24] The Respondent is entitled to at least the payment of $60,000. There is also evidence that the monies that the Respondent had prior to 2003 would have included monies earned by her given her track record of earnings and savings. Based on the current record there is no compelling evidence that all of the monies that she received prior to 2003 came from the Applicant. In fact, the Applicant, in her own affidavit used at the original application, did not even make this assertion. At paragraph 36 she swore that she was of the opinion and belief "that some, if not all, of the money in My Ha's various bank accounts belongs to me".

[25] Therefore, I find that the Respondent has satisfied the court that some assets should be released. She has put forward credible evidence that she legitimately accrued at least some of the subject assets on her own, and that they could not possibly be the property of the Applicant. The thorny issue concerns the amount that ought to be released based on the record and pending a further determination at trial that will involve a more fulsome record including *viva voce* evidence.

[26] Although the number is not precise, it appears as though the total amount of the monies traced to the Respondent is between $360,000 and $390,000. As I have noted, $45,000 has been paid out to the Applicant for living expenses on a without prejudice basis. It is apparent,

however, from the examination of My Binh Trinh, the Respondent's sister, that most of those monies were used to pay the Applicant's legal fees.

[27] Based on all of the evidence that has been presented at this motion, it is my view that the $60,000 that the Applicant received from the sale of her interest in the house should be released to the Respondent without any deduction as per the Order of Matheson J., as the amounts paid to date have been exceedingly modest.

[28] Additionally, I order the release of $75,000 (for a total of $135,000) based on the evidence adduced that the Respondent did have earnings and savings prior to the alleged theft of the $300,000 that would have reasonably resulted in her ability to save at least an amount in this range. While it is impossible to come up with any sort of precise figure, it is my view that the aforementioned figure is reasonable given the Respondent's work and savings history. In analyzing the entire matter, I am also struck by the fact that the Applicant, and the siblings that support her, take great issue with the Respondent's ability to save considerable amounts of money; however, they have no difficulty putting forth the proposition that the Applicant would have been able to save approximately $600,000 during her lifetime. They assert this notwithstanding the fact that the lifestyles and types of employment enjoyed by both the Applicant and the Respondent have been similar for many years.

[29] I should note that the Applicant also argued that based on the decision of Newbould J. in *Enbridge Gas Distribution Inc. v. Marinaccio*, 2011 ONSC 2313, the motion ought to be dismissed since, in this case, as was the case in *Enbridge*, any difficulties with the injunction ought to be dealt with by way of appeal since there are no new facts today that are materially different from the situation at the time that the Mareva Injunction was granted. With the exception of the undertaking concerning damages, I disagree. Based on my analysis, significant new facts of been adduced, particularly with respect to the $60,000 payment and errors concerning the Respondent's work history, earnings and savings that have now been corrected, at least to a great degree.

[30] Lastly, I should also note that the Applicant brought a cross-motion seeking additional funding. I dismiss that motion. It was not vigorously pursued by the Applicant, nor was any supporting case law presented. Further, the Applicant has already received $45,000 from the frozen funds and in my view, no further order should be made in this regard at this time. This is particularly so because the funds were obtained for living expenses, and some, at least, have been used to pay legal expenses as per the above noted evidence.

DISPOSITION

[31] For the reasons above, a variation of the Injunction ought to be granted and the Respondent should receive the amount of $135,000 from the frozen funds. I appreciate that this may cause some logistical difficulties given the way the funds are currently deposited. If the parties cannot resolve this issue I may be spoken to.

[32] The Applicant's cross-motion for additional funding is dismissed. The issue of converting the application to an action was not pursued at the motion.

[33] Having heard submissions with respect to the issue of costs, I further order that the Applicant pay the Respondent her costs in the amount of $10,000.

[34] Lastly, I should note that this is a matter that calls out for mediation, or failing settlement, a speedy trial. If the parties desire, I can be spoken to at a 9:30 a.m. appointment.

T. McEwen J.

Released: February 10, 2014

CITATION: Luong v. Trinh, 2014 ONSC 693
COURT FILE NO.: CV-10-408767
DATE: 20140210

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

NHUAN LUONG, by her Litigation Guardian the PUBLIC GUARDIAN AND TRUSTEE

Applicant

– and –

MY HA TRINH

Respondent

REASONS FOR DECISION

T. McEwen J.

Released: February 10, 2014

ASTRAZENECA CANADA INC.
Plaintiff

-and-

SAMEH SADEK also known as Sam Sadek et al.
Defendants

Court File No. CV-18-602745-00 CL

ONTARIO
SUPERIOR COURT OF JUSTICE
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RCP-E 4C (May 1, 2016)