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Primer on Permanent, Mandatory and Interlocutory Injunctions

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(1) OVERVIEW [1]

Injunctions are extraordinary remedies. Given their equitable nature, they are very flexible and an invaluable tool for litigators. An interlocutory injunction, if granted, can have a dramatic impact on a case. It is therefore important for lawyers to understand the basics of injunctions.

There are different forms of injunctive relief. Generally speaking, an injunction can be prohibitive or mandatory, permanent, interim or interlocutory.

A prohibitive (or prohibitory) injunction is an order that restrains the defendant from committing a specified act. It is the most common form of injunction.

A mandatory injunction is an order that requires the defendant to act positively.

A permanent injunction is permanent relief granted after a final adjudication of the parties' legal rights. Such final relief can be prohibitive or mandatory in nature.

An interim injunction is a pre-trial form of relief. It can be made *ex parte* or on notice. Argument on the motion is generally quite limited and if an order is made for interim injunctive relief, the order is typically for a brief period of time.

An interlocutory injunction is also a pre-trial form of relief, imposed in ongoing cases. It is normally enforceable until the conclusion of the trial or some other determination of the action. Interlocutory injunctive relief typically follows more thorough argument than that for an interim injunction, by both parties, and is generally for a longer duration than an interim injunction. There are interlocutory prohibitive injunctions and interlocutory mandatory injunctions.

In addition, there are some pre-judgment remedies in the nature of an injunction for which specific tests have been developed in the case law, such as *Mareva* injunctions, *Anton Piller* orders and *Norwich* orders. A discussion of these extraordinary remedies is beyond the scope of this paper.

(2) PERMANENT INJUNCTIONS

To obtain a permanent injunction, a party is required to establish: (1) its legal rights; and (2) that an injunction is an appropriate remedy. See, e.g., *1711811 Ontario Ltd. v Buckley Insurance Brokers Ltd.*, 2014 ONCA 125 at paras. 77-80 and *Cambie Surgeries Corp. v British Columbia (Medical Services Commission)*, 2010 BCCA 396 at paras. 27-28.

Permanent relief can only be granted after a final determination of the underlying substantive claim on a balance of probabilities. However, even after such final determination, it does not follow that an injunction will be an automatic or appropriate remedy. Given that an injunction is an equitable remedy, its granting is discretionary and subject to the equitable considerations that govern the exercise of that discretion.

In deciding whether an injunction is an appropriate remedy in a particular case, the following considerations are relevant:

– Are the wrong(s) that have been proven sufficiently likely to occur or recur in the future? If not, a permanent injunction is likely not an appropriate remedy.

– Is there an adequate alternative remedy? In most cases, the question will be whether the claim can be adequately remedied by an award of damages.

Damages may be found to be an inadequate remedy in the following circumstances, among others: (a) the damage is impossible to repair; (b) the damage is not easily susceptible to be measured in economic terms; (c) the harm caused is not a financial one; (d) monetary damages are unlikely to be recovered; (e) an award of damages is inappropriate in light of the importance of the interest in issue; and (f) the harm has not yet occurred or the wrong is continuing.

If there is an adequate alternative remedy, the claimant should pursue such remedy.

– Are there any applicable equitable discretionary considerations affecting the claimant's entitlement to an injunction? Such equitable discretionary considerations include delay, unclean hands, acquiescence, hardship or impossibility of performance. These considerations will be weighed by the court to inform its discretion as to whether to deny the injunctive relief.

If it is determined that an injunction is an appropriate remedy, the terms of the order should be drafted so as to be no wider than what is necessary to provide an adequate remedy for the wrong that has been proven and to protect the plaintiff's rights.

It is important to remember that the test for determining whether an interim or interlocutory injunction should be granted (serious issue to be tried, irreparable harm and balance of convenience) is irrelevant to the analysis of whether a permanent injunction should be granted.

Special Considerations Related to Permanent Mandatory Injunctions

A permanent mandatory injunction requires a defendant to take positive steps, such as undertaking some work to restore any damage caused by the defendant, or continuing to perform certain obligations.

The distinction between mandatory and prohibitive injunctions has been questioned in the case law, but courts usually proceed more cautiously when dealing with a request for a mandatory injunction.

The test to grant a permanent mandatory injunction is the same as the one for permanent prohibitive injunctions, but courts will often consider the following factors when determining whether a permanent mandatory injunction constitutes an appropriate remedy:

– The expenses to be incurred by the defendant under a mandatory order, balanced against the damage to the plaintiff (i.e. a balance of burden and benefit). Thus, if the costs to be incurred by the defendant to repair a property would greatly exceed the value of the property itself, it is unlikely that a mandatory injunction will be granted.

– The defendant's blameworthiness with respect to the current state of affairs. If the defendant deliberately acted in disregard of

the plaintiff's rights, the court will be more likely to grant a mandatory injunction, even if the defendant will have to incur significant costs to comply with the order.

– Whether it is possible to express the defendant's positive obligations under the mandatory injunction in language that is sufficiently precise so as to allow the defendant to know exactly what has to be done to comply with the order.

– Whether, in light of all the circumstances, granting a mandatory injunction would be oppressive to the defendant.

– The need for ongoing judicial supervision. Courts do not usually supervise performance, and ongoing supervision by the court can often lead to relitigation and the expenditure of judicial resources. However, courts have accepted to make orders requiring supervision where necessary, especially in cases involving the enforcement of complex obligations, and have developed techniques to minimize the burden on the court.

(3) INTERLOCUTORY AND INTERIM INJUNCTIONS

Interlocutory Injunctions

The purpose of interlocutory injunctions is to assure that the rights of the plaintiff asserted in the action may be effectually enforced by the court in the event that the action ultimately succeeds. An interlocutory injunction is usually enforceable until the conclusion of the trial or some other determination of the action.

Interlocutory injunctions are normally granted in connection with a pending proceeding, or an intended proceeding, in which a permanent injunction is claimed. However, superior courts have jurisdiction to grant an interlocutory injunction where it is necessary to do so to protect a justiciable right, wherever that right may fall to be determined. Thus, superior courts may grant interim or interlocutory relief where final relief will be granted in another forum, such as an administrative tribunal.

When a court has *in personam* jurisdiction over a person, and where it is necessary to ensure the injunction's effectiveness, the court can grant an injunction enjoining that person's conduct anywhere in the world.

Most of the common law provinces have a statute that provides that the provincial superior court has the power to grant an interlocutory injunction where it is just and convenient to do so (see, e.g., section 101 of the *Courts of Justice Act*, RSO 1990, c C.43). In *RJR—MacDonald Inc. v Canada (Attorney General),* [1994] 1 SCR 311, the Supreme Court of Canada set out a more specific three-part test for determining whether a court should exercise its discretion to grant an interlocutory injunction:

(1) Is there a serious issue to be tried?

At this stage, the court must make a preliminary assessment of the merits of the case. Once satisfied that the case on the merits is neither vexatious nor frivolous, the court should proceed to consider the second and third parts of the test.

There are two exceptions to the general rule that a court should not engage in an extensive review of the merits on a motion for an interlocutory injunction. The first exception arises when the result of the interlocutory injunction will, in effect, amount to a final determination of the action. This will be the case when, for example, the right that the plaintiff is seeking to protect can only be exercised immediately or not at all. The second exception arises when the question in issue can be determined as a pure question of law.

(2) Would the person applying for the injunction suffer irreparable harm if the injunction were not granted?

The adjective “irreparable” refers to the nature of the harm suffered, rather than its magnitude. Irreparable harm includes harm that cannot be quantified in monetary terms, and harm that cannot be cured, including the situation where one party is unlikely to be able to collect damages from the other at the time of a decision on the merits. Irreparable harm is regularly found in cases where the acts complained of would put the party out of business or cause irrevocable harm to the party’s reputation.

(3) Is the balance of convenience in favour of granting the interlocutory injunction or denying it?

At this last stage of the test, the court must determine which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account where relevant. The factors to be considered in assessing the balance of convenience vary in each individual case.

On a motion for an interlocutory injunction, the moving party must, unless the court orders otherwise, gives an undertaking as to damages. This means that the party must undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party (see Rule 40.03 of the Ontario *Rules of Civil Procedure*).

An interlocutory injunction is an equitable remedy and, as a result, it is subject to the principles that govern the grant of equitable decrees and orders. Thus, the claimant’s entitlement to an interlocutory injunction may be affected by equitable discretionary considerations such as delay, unclean hands, acquiescence or hardship. These considerations will be weighed by the court to inform its discretion as to whether to deny interlocutory injunctive relief.

A motion for an interlocutory injunction is usually brought on notice to the other side, sometimes after an interim injunction was granted, either with or without notice to the other side. Interim injunctions and motions without notice are discussed further below.

Special Considerations Related to Interlocutory Mandatory Injunctions

In Canada, the test applicable to the granting of interlocutory mandatory injunctions varies from one common law province to another. While the courts in some provinces apply the test set out in *RJR—MacDonald Inc. v Canada (Attorney General),* [1994] 1 SCR 311 discussed above, the courts in other provinces require plaintiffs to establish “a strong *prima facie* case” at the first stage of the test instead of “a serious issue to be tried”. In Ontario, the “strong *prima facie* case” test is applied in the great majority of cases involving interlocutory mandatory injunctions.

The “strong *prima facie* case” requirement has been interpreted to mean that the plaintiff must not only satisfy the court that there is a serious issue to be tried, but also that it is clearly right and almost certain to be successful at trial (see, e.g., *Barton-Reid Canada Ltd. v Alfresh Beverages Canada Corp.*, [2001] OJ No 4116 at para. 9 (SCJ)).

The courts have recognized that determining whether a particular order is mandatory or prohibitory can be a difficult task. In the contractual context, courts often consider that an order requiring the parties to act in accordance with their contract is prohibitory while an order requiring the parties to act in accordance with a new right never agreed to is mandatory (see *TDL Group Ltd. v 1060284 Ontario Ltd.* (2001), 150 OAC 354 (Div Ct)).[2]

Interim Injunctions

While an interlocutory injunction is normally enforceable until the determination of the action, an interim injunction is generally granted for a short, specific period of time, and the plaintiff needs to return to court at the end of the period to ask for the continuance of the injunction.

The test applicable to interim injunctions is the same as for interlocutory injunctions.

Short interim injunctions are often granted in the context of motions for injunctive relief brought without notice (*ex parte*), but the plaintiff then needs to bring a motion on notice in order to extend the injunction. An interim injunction can also be granted for the purpose of protecting the plaintiff's position pending the hearing of the full argument of a motion for an interlocutory injunction made on notice, while the defendant is given time to file responding material and/or cross-examine on the plaintiff's affidavits. In addition, the court may order an interim injunction if it wants the parties to come back before the court to report on the execution of the order.

Motions for Injunctive Relief Made Without Notice (*Ex Parte*)

A party is justified to move for an injunction without notice only in cases of extraordinary urgency. Such cases arise where the delay necessary to give notice could lead to serious and irreparable injury to the plaintiff. There are two categories of cases where courts have found extraordinary urgency: (1) where there is good reason to believe that, if given notice, the defendant will act so as to frustrate the process of justice before the motion can be determined; and (2) where there is simply not the time or means to provide notice. With respect to this second category of cases, the courts have expressed the view that any notice is better than none, even if it is very short and takes the form of a telephone call.

On a motion brought without notice, the moving party is required to make full and fair disclosure of all material facts. A material fact is a fact which reasonably could or would be taken into account by the judge in deciding whether to grant the injunction, regardless of whether its disclosure would have changed the outcome. A fact does not have to be determinative to be material. The failure to make full and fair disclosure of all material facts may result in the court setting aside the injunction.

An injunction granted without notice is made for a limited time (a maximum of ten days in Ontario: see Rule 40.02(1) of the *Rules of Civil Procedure*). A party affected by the without notice order can present its case on a motion to set aside the order, or on the plaintiff's motion to continue the order.

(4) CONCLUSION

The tests applicable to permanent and interlocutory injunctions outlined above reflect the equitable nature of these remedies: they are general and flexible, and the specific facts of each case play a very important role in their application. Given the importance of injunctions in civil litigation, and the fact that the need for an injunction may require swift action, it is important for lawyers to understand the basics of injunctions, and to be ready to apply the relevant tests to their cases when necessary.

[1] *Materials reproduced with the permission of LexisNexis Canada.* http://lexisnexis.ca/en-ca/products/practice-advisor.page

[2] For a more detailed discussion of the test applicable to interlocutory mandatory injunctions, see Marie-Andrée Vermette, "A Strong *Prima Facie* Case for Rationalizing the Test Applicable to Interlocutory Mandatory Injunctions" (2011) Annual Review of Civil Litigation 367.

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