Monique Jilesen

Sahar Talebi

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5-Year Retrospective: Injunctive Relief

Over the last five years, the Commercial List has seen a significant number of cases involving various forms of injunctive relief. Given its specialized mandate to address the challenges of complex commercial litigation, it is unsurprising that the Commercial List continues to manage urgent and complex cases requiring injunctive remedies with considerable frequency and sophistication. Recent trends in Commercial List injunction jurisprudence demonstrate that the Court remains agile in applying injunctive remedies to address evolving commercial disputes and related concerns. Consistent with this approach is the Court's increasingly robust use of interim injunctions to protect confidential and proprietary information from dissemination, as well as *Mareva* injunctions and ancillary production orders to prevent asset dissipation and evidence destruction, particularly in commercial fraud cases.
These are the most common types of injunctions the Court heard in recent years:

- ***Mareva* Injunctions**: Freezing the responding party's assets to prevent dissipation before judgment.
- ***Anton Piller* Orders**: Allowing parties to seize and preserve evidence to prevent destruction or concealment of relevant materials prior to trial.
- **Oppression-Related and Corporate Governance Injunctions**: Restraining or directing corporate actions pending determination of oppression or related corporate remedies.
- **Negative Covenant or Restrictive Covenant Injunctions**: Typically restraining competition, solicitation, or misuse of confidential information.
- **Other Interlocutory and Interim Prohibitory or Mandatory Injunctions**: Restraining specified conduct pending trial or requiring a party to take certain positive steps.

Case Commentary

The Commercial List's injunction decisions over the last five years reveal important practical and legal considerations as to how the Court approached and determined injunctive relief while balancing the realities of day-to-day business operations

and adjudicating complex commercial disputes.

Below are key insights and developments arising from recent injunction jurisprudence.

1. Arbitration-Compatible Injunctive Relief and the Modified Injunction Test

Since the Supreme Court of Canada's decision in *RJR-MacDonald Inc v Canada*, the legal test for granting an interlocutory injunction has been a generally stable and settled area of law. However, given the extraordinary and urgent nature of injunctions, courts continue to take a contextual approach to determining the appropriate framework for assessing injunction applications. The Commercial List's decision in *NorthStar Earth & Space Inc v Spire Global Subsidiary Inc* serves as a recent and instructive example of this contextual approach in the arbitration setting.

In *NorthStar*, the Commercial List granted an interim injunction in circumstances where the Court was asked to provide interim relief pending arbitration under the *International Commercial Arbitration Act*. NorthStar had contracted with Spire to manufacture, launch, and bring satellites into commercial operation. Due to performance issues, NorthStar commenced arbitration and sought an urgent injunction to prevent the deorbiting or decommissioning of the satellites until the arbitration concluded.

In considering the appropriate merits threshold, the Court held that under the Model Law applicable to international commercial arbitrations, the party requesting interim measures need only satisfy the tribunal that there is a "reasonable possibility" of success on the merits, rather than the usual requirement of a "strong *prima facie* case" for mandatory injunctions. The Court reasoned this relaxed standard falls somewhere on the spectrum between a "serious issue to be tried" and a "strong *prima facie* case," though closer to the former.

2. The Merits Threshold: Focusing on Practical Effects

Interlocutory injunctions can provide immediate and urgent relief by requiring a party to do, or refrain from doing, a specific act pending the outcome of proceedings. Determining whether an injunction is mandatory or prohibitory can be complicated and nuanced, depending on the nature, breadth, and impact of the order sought.

In the commercial context, courts consistently look beyond the language of the order sought and analyze the practical consequences of the injunction, including whether those consequences are intrusive in their impact, effectively

compelling affirmative performance. If so, they apply the elevated strong *prima facie* standard used for mandatory injunctions.

In *Vaultose Digital Asset Services Inc v Kunz*, the Commercial List reaffirmed the importance of assessing the practical consequences of the injunction sought to determine the appropriate merits threshold. The plaintiff sought an interim and interlocutory worldwide injunction restraining the defendants from the misuse of confidential information. In determining the appropriate standard, the Court assessed the real-world impact of the relief sought by the plaintiff, finding the strong *prima facie* case test was appropriate given the breadth of the order and its intrusive consequences for the defendants — which included an injunction that would render useless years of professional experience gained, limit the defendants' ability to earn a living, and require them to terminate a significant portion of their business.

This principle was further applied in *The Matter Corporation v Southside Construction Management Limited*, where the Court considered whether the relief sought was, in substance, mandatory or prohibitory. The Court held that where the relief sought, "even to the extent that it is limited to require the defendants to give notice, is in substance, a request for a mandatory order because the overall effect of the injunction would be to require the defendants to do something, as opposed to refrain from doing something," it invokes the higher strong *prima facie* case standard.

These cases serve as a reminder that when bringing an injunction in a commercial context, parties should engage in a pragmatic analysis of their case, focusing on practical implications rather than getting caught up in technical classifications and labels.

3. Interlocutory Remedies as Robust Legal Tools Tackling Commercial Fraud

During times of increased fraud, the Commercial List has demonstrated a willingness to consider urgent fraud-related relief, combining measures and granting a coordinated suite of remedies where appropriate. A significant example is *Wayne Safety Inc v Gendelman*, where the Commercial List granted an exceptional package of interlocutory remedies on an urgent basis, including a *Mareva* injunction, an *Anton Piller* order, *Norwich* orders, and certificates of pending litigation.

The case involved allegations against an employee perpetrating a large-scale, ongoing fraud exceeding $5.2 million by diverting funds via electronic transfers to companies and

bank accounts. In granting the *Mareva* relief, the Court found compelling evidence of a systematic misappropriation scheme involving manipulation of supplier data and diversion of funds. The Court was satisfied that the evidence disclosed "a strong *prima facie* case of fraud by Gendelman to the extent of at least $5.2 million and counting."

With respect to the *Anton Piller* order, the Court found a real risk that evidence would be destroyed or concealed absent immediate preservation, justifying the order under supervision of an Independent Supervising Solicitor. The Court also held that a *Norwich* order providing for discovery from financial institutions and other third parties was warranted and necessary to trace the funds and identify recipients.

Similarly, in *Trustar Underwriting Inc v Moses*, the Commercial List granted a *Mareva* injunction and continued the *Norwich* relief in a case involving misappropriation of insurance premiums and fraudulent transfers. The Court relied upon the principle set out by Perell J. in *Wang v Feng* that "where there is a strong case that the defendant has defrauded the plaintiff the law's reluctance to allow prejudgment execution yields to the more important goal of ensuring that the civil justice system provides a just and enforceable remedy against such serious misconduct."

These cases demonstrate that various injunctive remedies can individually serve as powerful legal tools to address civil fraud. However, as the Commercial List has shown, sometimes an extraordinary combination of injunctive remedies is necessary to prevent harm in an effective and meaningful manner while the case proceeds through litigation.

4. The Irreparable Harm Hurdle

When seeking an injunction, the legal test requires the moving party to demonstrate that damages will not provide adequate relief. However, identifying and proving irreparable harm in the commercial context can be particularly challenging. The Commercial List has continued to engage with unique and sometimes sector-specific factors, providing useful guidance on assessing irreparable harm in commercial disputes.

Recent decisions have accepted the following as examples of irreparable harm:

- **Significant Loss of Employment and Material Risk of a Business Shutting Down**: In *Max Aicher (North America) Realty Inc v Stelco Inc*, the Court found irreparable harm where evidence showed that termination of water services would force the plaintiff to "shut down,

terminate employees and cease doing business."

- **Corporate Actions and Governance Involving Steps Difficult or Impossible to Reverse**: In *The Matter Corporation v Southside Construction Management Limited*, the Court held that "governance disputes can involve irreparable harm, because once an entity takes a step... that step is difficult or impossible to undo." The Court quoted the principle that "irreparable harm would ensue if the transaction were completed and rendered irreversible."
- **Evidence of Asset Dissipation in Cases Involving Fraud**: In *PPI Management Inc v Zhou*, the Court recognized that "in cases where a strong *prima facie* case for fraud has been established, it has been recognized that if the known assets of the defendant are not secured, the plaintiff will likely not be able to collect on a money judgment if successful." Courts have consistently recognized that the risk of dissipation may be inferred from patterns of transfers, non-cooperation, or moving assets across jurisdictions.
- **Permanent Loss or Degradation of Unique Assets, Data, or Capabilities**: In *NorthStar Earth & Space Inc v Spire Global Subsidiary Inc*, the Court found irreparable harm where satellites would be deorbited or decommissioned, making resumption of operations "impossible." The Court emphasized that "NorthStar may forever be prevented from obtaining any data from the Satellites that it has invested over US $14.5 million in, even if successful at the Arbitration."
- **Loss of a Business or Significant Line of Business**: In *2859824 Ontario Limited v Gen Digital Inc*, the Court held that conduct which threatens to extinguish a counterparty's business "unequivocally gives rise to 'irreparable harm' and can and should be enjoined." The Court rejected the argument that because economists can calculate a value for lost business, such harm is not irreparable.
- **Misuse of Confidential Information and Breach of Negative Covenants**: In *Vaultose Digital Asset Services Inc v Kunz*, the Court noted that contractual "irreparable harm clauses have been found sufficient on their own to satisfy courts of irreparable harm." Where parties have stipulated that breach would cause irreparable harm, "at the very least, the defendant should be held to its concessions of irreparable harm."

- **Reputational Harm**: In *The Morgan Investments Group v ADI Development Group Inc*, the Court accepted that “reputational harm is harm that cannot be quantified.”

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