

Injunctions: The Practical Guide to Law, Procedure and Strategy

Led by experienced litigators and judges, this comprehensive program will give you the tools you need to confidently manage injunctions that arise in your litigation practice. Topics include:

- The *RJR* test: understanding the thresholds in detail
- The practical mechanics of urgent motions - what, where, and how
- How “triage court” will work commencing January 2010
- Injunctions to restrain the departing employee or fiduciary
- Injunctions to stop commercial transactions
- Anton Piller orders - pitfalls and potential payoffs
- The Mareva injunction and related motions
- Norwich orders and Internet Disclosure orders
- Optimizing strategic thinking at each stage of the process
- Expert “Hot Stove” panel to answer questions from *your* practice

Plus! Solidify the knowledge you’ve gained through an interactive small-group workshop that will explore a hypothetical injunction case scenario.

Featured Speakers

The Hon. Justice Robert J. Sharpe, Court of Appeal for Ontario
The Hon. Justice Susan Himel, Ontario Superior Court of Justice
The Hon. Justice Colin L. Campbell, Ontario Superior Court of Justice



DATES & TIME

April 19 - 20, 2010
9:00 a.m. - 5:00 p.m.

LOCATION

Osgoode Professional
Development Centre
1 Dundas St. W., 26th Floor
Toronto, ON

CHAIR

Berkley D. Sells
Fasken Martineau DuMoulin LLP



Injunctions: The Practical Guide to Law, Procedure and Strategy

Injunctions can arise at any time. Are you confident you can make the right calls?

Whether you are faced with a client who feels that urgent action is needed, or have suddenly been served with a short notice injunction to which you must respond, injunction files raise a myriad of substantive and strategic issues – with precious little time to reflect, research or consult. Moreover, in many cases, the outcome of the injunction will be the effective outcome of the litigation; you can't afford to make mistakes. And, the very fact that injunctions are not a day-to-day occurrence for many litigators only makes it more challenging to provide the best representation when they do arise.

To help with these challenges, *Osgoode Professional Development* has assembled an outstanding faculty of senior practitioners and judges to guide you through a two-day intensive examination of the most important aspects of handling injunctions and related interlocutory relief. You'll hear about the latest on the *RJR-MacDonald* test from Mr. Justice Robert J. Sharpe of Ontario's Court of Appeal; you'll also have the opportunity to hear about the mechanics of urgent motions, including the recent changes for 2010, from a judge who will be hearing many such motions in the first instance. The program will cover the substantive tests you must meet, common types of injunctions such as restraining the departing employee or heading off a pending commercial transaction, and specific orders such as Anton Piller, Mareva, and Norwich orders. Plus, you'll have the opportunity to ask an expert panel questions that have arisen from your practice. Along the way, you'll get sample draft orders for many of the most frequently encountered types of injunctions, along with many substantive papers for future reference.

Included, at no extra charge, is the opportunity to be part of a small group workshop led by a senior practitioner, where you can consolidate what you've learned by seeing how the substantive and tactical issues might play out in a realistic case file scenario.

The ability to handle injunctions effectively is an important tool for every commercial litigator. Don't miss this excellent opportunity to boost your skills and knowledge.

Register now by visiting www.osgoodepd.ca, calling 416.597.9724 or 1.888.923.3394, emailing opd-registration@osgoode.yorku.ca or faxing 416.597.9736.

Chair

Berkley D. Sells, Fasken Martineau DuMoulin LLP

Faculty

Michael Barrack, Thornton Grout Finnigan LLP

Alex Cameron, Fasken Martineau DuMoulin LLP

The Hon. Justice Colin L. Campbell
Ontario Superior Court of Justice

Robert B. Cohen, Cassels, Brock & Blackwell LLP

John K. Downing, Miller Thomson LLP

Patrick D. Flaherty, Torys LLP

Peter Griffin, Lenczner Slaght Royce Smith Griffin LLP

The Hon. Justice Susan Himel
Ontario Superior Court of Justice

Adrian C. Lang, Stikeman Elliott LLP

Andrew C. Lewis, Paliare Roland Rosenberg Rothstein LLP

Wendy Matheson, Torys LLP

Kelley McKinnon, Gowling Lafleur Henderson LLP

The Hon. Justice Robert J. Sharpe
Court of Appeal for Ontario

Robert W. Staley, Bennett Jones LLP

Richard B. Swan, Bennett Jones LLP

Daniel Tobok, Computer Forensic Specialist
Digital Wyzdom

Maureen Whelton, Stevensons LLP

Christopher Wirth, Stockwoods Barristers

Seumas M. Woods, Blake Cassles & Graydon LLP

David Wotherspoon, Fasken Martineau DuMoulin LLP

Agenda

Day One – Monday, April 19, 2010

8:15 Registration and Continental Breakfast

9:00 Welcome and Introduction from the Chair

9:05 The Test for an Injunction: Understanding the Thresholds

The Hon. Justice Robert J. Sharpe
Court of Appeal for Ontario

Most litigators know the *RJR-MacDonald* three-pronged test for obtaining an injunction. But courts have continued to refine their approach to each of the three criteria. A well-informed and nuanced understanding of each of the three factors makes it easier to see how the evidence is going to be assessed. Justice Sharpe will review and update the law on such issues as:

- Interpretations of the test since *RJR Macdonald*
- The merits of the case: when is the first branch of the test “serious issue to be tried”, and when might additional scrutiny be called for?
- The effect of a restrictive covenant
- Demonstrating irreparable harm
 - what type of harm is contemplated?
 - when will harm be seen as irreparable?
 - the type and quantity of evidence needed to meet the burden: *Centre Ice* and others
 - illustrative examples of the court’s approach in different contexts
- When and how the balance of convenience comes into play
- What factors sway a court on the balance of convenience

9:50 Now or...Never? The Practical Mechanics of Urgent Motions

The Hon. Justice Susan Himel
Ontario Superior Court of Justice
Andrew C. Lewis, Paliare Roland Rosenberg
Rothstein LLP

When counsel need to bring an injunction immediately, or respond when served, time is precious. You can’t lose time figuring out the mechanics. Moreover, a new motions scheduling and “triage” system will be in place as of January 2010. In this session, a judge of the “triage” court and an experienced practitioner will bring you up-to-date on how the process should work.

A. “Triage” Court (Motions Scheduling Court)

- Background and past triage practices
- The January 2010 reorganization and how the system operates now

B. The “how to” of filing for, or responding to, an injunction

- Who to call, where to go, how to get heard on an urgent basis
- Motions on notice, motions on short notice and motions *ex parte*
- Ensuring complete materials: what to file, what to consider leaving out
- Applicant’s considerations and options
- The respondent’s procedural options
- What is truly “urgent” and what is not – and are there motions in between?
- Emergency procedures for weekends, holidays and outside of business hours

C. Appearing in triage court

- Tips and strategies – what should you be prepared to argue?
- Do’s and don’ts in scheduling court
- How the judge will assess the matter; how counsel can best assist the court

10:35 Refreshment Break

10:50 Injunctions to Restrain the Departing Employee or Fiduciary

Adrian C. Lang, Stikeman Elliott LLP

For commercial, employment and general civil litigators, disputes involving partnership break-ups, departing key employees, and other company-splintering scenarios are commonplace. Very often, these situations give rise to the possibility of injunctive relief, making this among the most common type of injunction. This session will review the key considerations and strategies in such cases.

- The threshold decision: is an injunction the right way to go?
- Managing client expectations and emotions
- Confidential and proprietary information
- Assessing the irreparable harm factor
- What key information will you need?
- Supporting affidavits: strategic choices about what should be in them, and who should swear them
- Non-solicitation versus non-competition covenants
- Is irreparable harm needed if there is breach of an express negative covenant, or if a contract acknowledges that irreparable harm will result from a breach?
- Analysis of selected sample cases
- Sample draft orders

Agenda

11:50 Networking Luncheon

1:00 Injunctions to Stop Commercial Transactions

Seumas M. Woods, Blake Cassels & Graydon LLP
Richard B. Swan, Bennett Jones LLP
Kelley McKinnon, Gowling Lafleur Henderson LLP

Moderator

Berkley D. Sells, Fasken Martineau DuMoulin LLP

In recent years a flurry of commercial cases have attracted significant public attention and the interest of both barristers and corporate lawyers. When should a court intervene to remove a proposed transaction from the hands of shareholders or directors? What strategic and evidentiary decisions must counsel make in moving for, or responding to, an injunction to block a business deal? A panel of top litigators - who have been on both sides of such disputes - will give candid insights from their experience with this type of injunction.

- Injunctions to block takeover bids - lessons from RIM and Gold Reserve
- Injunctions to stop private placements and share issuances - Northwest Value Partners and others
- Injunctions to stop board meetings
- Mandatory orders to compel continued supply or service
- Dealing with sensitive commercial evidence - confidential exhibits and transcripts, sealing orders, and "counsel's eyes only" arrangements
- "Fighting it in the press" - are press releases more than a necessary evil?
- Alternatives to a civil court injunction - regulatory options such as OSC proceedings
- Key elements for the draft order - samples

2:30 Refreshment Break

2:45 Seize the Day – and a Bunch of Important Evidence: Anton Piller Orders

Peter Griffin, Lenczner Slaght Royce Smith Griffin LLP

John K. Downing, Miller Thomson LLP

Patrick D. Flaherty, Torys LLP

Daniel Tobok, Computer Forensic Specialist Digital Wyzdom Inc.

Moderator

Christopher Wirth, Stockwoods Barristers

The incidence of Anton Piller injunctions is increasing as more and more critical evidence resides in electronic form - a form that lends itself to faster and easier movement and possible destruction. But the process

to obtain, enforce and maintain an Anton Piller order is far from simple, with many potential pitfalls for the uninitiated. Experienced counsel on this panel will help explain not only how the process is done, but how to assess when it is truly needed.

- The three-part test to obtain the order: what will meet each criterion?
- What, and who, does the moving party need to have ready to go?
- Examples of the court's willingness/unwillingness to grant Anton Piller injunctions in various case types:
 - fraud
 - trademark/copyright infringement
 - misuse of confidential information
 - business and employment disputes
- Seizure of electronic records
 - understanding the parameters, characteristics, and limitations of various types of media
 - special considerations, do's and don't's when dealing with media/data
- The role and obligations of the independent supervising solicitor (ISS)
- Serving and executing the order: how to manage a tense situation
- The window for respondent's legal advice
 - what should your client do when served?
 - advice for counsel receiving the call: what are your options?
- Dealing with confidential and privileged material
- Assessing the risk: the undertaking for damages and other factors
- Lessons from Anton Pillers gone wrong - *Celenase* and others

4:30 Day One Adjourns

Day Two - Tuesday, April 20, 2010

9:00 The Mareva Injunction

Maureen Whelton, Stevensons LLP

- The test for obtaining a Mareva injunction
- Assessing the facts to determine when a Mareva might be necessary
- Variations on a Mareva theme:
 - the "proprietary" Mareva (*CIBC v. Credit Valley Institute*)
 - fraud cases - the *Mills* injunction
- Elements of the draft order, and samples
- Enforcing a Mareva - dealing with banks, joint accounts, pledged and secured funds, competing creditors

Agenda

- The “world-wide” Mareva
- Responding to a Mareva (“where did you say my retainer funds are coming from?”)
- Discovery or examination of persons in aid of a Mareva

10:00 Refreshment Break

10:15 Tools to Investigate a Cause of Action: Motions Before Pleading

David Wotherspoon, Fasken Martineau DuMoulin LLP
Alex Cameron, Fasken Martineau DuMoulin LLP

A. Norwich Orders

- Background: the history and principle of the Norwich order
- Recent guidance from the Ontario Court of Appeal in *GEA v. Ventra*
- What must be shown to obtain the order
- How critical is it that the information cannot be obtained from another source? To what lengths is the would-be plaintiff expected to go?
- The types of information that can be obtained
- Responding: how can you limit the scope of production/discovery?
- Sample draft orders

B. Internet Disclosure Orders - the Norwich Principles Go Online

- Tracking “John Doe” through cyberspace
- The evolving case law from *Irwin Toy to BMG v. Doe* and beyond
- Impact of privacy legislation
- Cross-border considerations
- Sample order

11:45 Networking Luncheon

1:00 “Injunctions Hot Stove”: A Panel of Senior Counsel on Special Strategic, Tactical, and Legal Issues for Applicants and Respondents

Robert W. Staley, Bennett Jones LLP
Wendy Matheson, Torys LLP
Michael Barrack, Thornton Grout Finnigan LLP

Moderator

The Hon. Justice Colin L. Campbell
Ontario Superior Court of Justice

This panel will offer expert advice on many of the tricky tactical, strategic and practical decisions counsel must make when bringing an injunction (or considering if it's appropriate) and responding

when served. Attendees will have the opportunity to submit their own questions or simple scenarios for discussion and comment by the expert panel. The issues discussed will include such issues as:

- How to manage client expectations
- When should you move *ex parte*, and when should you give notice? What are the important considerations?
- Seeking and opposing interim relief pending the interlocutory motion
- What is the role of cross-examinations on injunctions? Tips to make cross effective
- What options do you have when served with last-minute materials on the courthouse steps?

2:15 Refreshment Break

2:30 Injunction Case Scenario: A Guided Work-through of Process, Law, and Strategy

Facilitators

Maureen Whelton, Stevensons LLP
Berkley D. Sells, Fasken Martineau DuMoulin LLP
Robert W. Staley, Bennett Jones LLP
David Wotherspoon, Fasken Martineau DuMoulin LLP
Robert B. Cohen, Cassels, Brock & Blackwell LLP
Working in small breakout groups, attendees will have the opportunity to work with an experienced practitioner as the group navigates the practical and strategic issues that arise at various stages of a hypothetical injunction situation.

5:00 Wrap Up; Program Concludes

Who Should Attend

- Lawyers with a general litigation practice
- Commercial Litigators
- In-house Counsel

Registration

Injunctions can be stressful – but much easier if you learn from those who have survived and thrived

Register me for: *Injunctions: The Practical Guide to Law, Procedure and Strategy*
 I am unable to attend. Please send me information about ordering program materials.

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Program Changes

We will make every effort to present the program as advertised, but it may be necessary to change the date, location, speakers or content with little or no notice. In the event of program cancellation, York University and Osgoode Hall Law School's liability is limited to reimbursement of paid fees.

Dates & Times

April 19 - 20, 2010

Day One: 9:00 a.m. - 4:30 p.m.

Day Two: 9:00 a.m. - 5:00 p.m.

Please arrive a half hour early on Day One for sign-in and material pick-up.

Dress is business casual.

Cancellations and Substitutions

Substitution of registrants is permitted at any time. If you are unable to find a substitute a full refund (less \$50 administration fee) is available if a cancellation request is received in writing 14 days prior to the program date. No other refund is available.

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