MAREVA INJUNCTIONS IN CROSS-BORDER LITIGATION : A CANADIAN PERSPECTIVE

1. INTRODUCTION: DEFINITION OF THE *MAREVA* INJUNCTION

Commonly referred to as a "freezing orders", *Mareva* injunctions constitute one of the most powerful weapons in a civil litigator's arsenal.[1] As its description implies, its purpose is to freeze some or all of the defendant's assets before judgment on the merits.[2]

Due to its particular nature, *Mareva* injunctions are mostly used in the context of debt recovery, particularly when there are allegations of fraud, embezzlement or dissipation of assets. Its objective is to alleviate any possibility that the defendant removes its assets from the jurisdiction in which the matter is tried in order to become "judgment proof".[3]

While *Mareva* injunctions are available at all stages of the proceedings, such as when the judgment on the merits has been rendered but has not yet been executed, they are usually granted on an *ex parte* basis at the onset of litigation.

Practically speaking, *Mareva* injunctions do not cause a party to be dispossessed of its assets; it rather prohibits a party from disposing of certain of its assets on an interlocutory basis.[4] The enforceability of such orders lies in the fact that a person who does not comply with this order may be charged with contempt of court.[5]

In this article, the author will attempt to provide a succinct overview of the *Mareva* injunction and its potential use in cross-border litigation. Section 2 will thus discuss the historical origins of the *Mareva* injunciton; section 3 will discuss certain particularities of its legal framework in Canada; and, section 4 will examine the certain legal aspects in which *Mareva* orders can be used in cross-border litigation.

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[1] David A. CRERAR, "Mareva Freezing Orders and Non-Party Financial Institutions : A Practical Guide", (2006) 21 B.F.L.R. 169, p. 2.

[2] *Id.*

[3] *Cosimo Borrelli, in his capacity as trustee of the SFC Litigation Trust* v. *Allen Tak Yuen Chan*, 2017 ONSC 1815, par. 59.

[4] Danielle FERRON, Mathieu PICHÉ-MESSIER and Lawrence A. POITRAS, « L'injonction et les ordonnances Anton Piller, Mareva et Norwich », 1st ed., LexisNexis 2009, p. 217.

[5] *Carey* v. *Laiken*, 2015 CSC 17.

2. GENESIS OF THE MAREVA INJUNCTION

First recognized in England in 1975, the *Mareva* injunction was initially "conceived to fend off the depredations of shady mariners operating out of far‑away havens, usually on the fringe of legally organized commerce".[6] Its name is coined from the decision *Mareva Compania Naviera S.A.* rendered by none other than Lord Denning.[7] Despite the innovative nature of the procedure - as it is an exception to the general rule for a court to not attach the assets of a debtor prior to obtaining judgment[8]- Lord Denning recognized its necessity in the following manner:

> "If it appears that the debt is due and owing - and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment - the Court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets."[9]

Despite several *Mareva* injunctions having been rendered by various Canadian Courts of first instance further to its introduction by Lord Denning in 1975, it is only in 1985 that such orders were officially recognised in Canadian law by the Supreme Court of Canada in the *Aetna Financial Services* v. *Feigelman* matter.[10] In that case, the Supreme Court of Canada was called to determine if it should uphold a freezing order prohibiting the appellant company from moving certain assets out of the Province of Manitoba. Although it recognised that *Mareva* injunctions could be issued in Canada, the Supreme Court of Canada quashed the order rendered in that matter on the basis that the criteria for issuing the *Mareva* injunction were not met.

The *Mareva* injunction is now clearly established in the Canadian commercial litigation landscape.[11] Nevertheless, the *Mareva* injunction has evolved

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[6] *Nippon Yusen Kaisha* v. *Karageorgis*, [1975] 3 All E.R. 282, *Mareva Compania Naviera S.A.* v. *International Bulkcarriers Ltd.*, [1980] 1 All E.R. 213.

[7] *Mareva Compania Naviera SA* c. *International Bulkcarriers*, [1980] 1 ALL E.R. 213, [1975] 2 Lloyd's L.R. 509 (C.A.).

[8] *Lister & Co.* V. *Stubbs*, (1890) 45 Ch. D. 1. ; *Canadian Imperial Bank of Commerce* v. *Credit Valley Institute of Business and Technology*, 2003 CanLII 12916 (ON SC), par. 16.

[9] Note 17, 510 (C.A.).

[10] *Aetna Financial Services* v. *Feigelman*, [1985] 1 SCR 2. The first identified case in Canada occured in 1979 : *Manousakis* v. *Manousakis*, [1979] B.C.J. No. 2003, 10 B.C.L.R. 21 (S.C.). However, it is only since 1982 that *Mareva* injunction have been clearly recognized by Canadian courts.

[11] *Id.*, note 1.

considerably over time in reaction to the ever-changing realities of commerce and of globalization.[12]

Indeed, the possibility to now wire transfer millions of dollars from one country to another in the blink of an eye, combined with the speed and complexity of international trade, makes it easier than ever to dissipate assets. In this context, how have the courts adapted so that the *Mareva* injunction preserves its effectiveness? Drawing on English case law, Canadian courts now tend to give extraterritorial scope to freezing orders, as will be further discussed below. Before doing so, it is important to refer to the legal framework governing *Mareva* injunctions in Canada.

3. LEGAL FRAMEWORK IN CANADA

3.1. Chitel v. *Rothbart : general guidelines*

The English case *Third Chandris Shipping Corp.* v. *Unimarine S.A.*, also rendered by Lord Denning, serves as the basis for the criteria to issue a *Mareva* injunction in Canada.[13] In this case, the plaintiffs sought a *Mareva* injunction to prevent the defendants from removing the sums owed to them under several charter contracts. Although the application for a freezing order was dismissed, Lord Denning nonetheless formally established the legal framework for granting this particular type of injunction.[14] In 1982, the Ontario Court of Appeal in *Chitel* v. *Rothbart* rephrased the following five guidelines developed in *Third Chandris.*

> [The applicant must]:
>
> i) make full and frank disclosure of all matters in its knowledge which are material for the judge to know;
>
> ii) give particulars of its claim against the defendant, stating the ground of its claim and the amount thereof, and fairly stating the points made against it by the defendant;
>
> iii) provides grounds for believing that the defendant has assets in the jurisdiction;

[12] See, John CONACHER HARRISSON, « The Mareva Injunction : A Comparative and Critical Analysis », LL.M. thesis, Montréal, Institut de droit comparé, McGill University, 1992, p. 5.

[13] [1979] 2 All E.R. 972, [1979] 2 Lloyd's L.R. 184 (C.A.).

[14] Note 3.

iv) provides grounds for believing that there is a risk of the assets being removed from jurisdiction or dissipated in order to frustrate judgment; and

v) provide an undertaking in damages in case it fails in its claim or the injunction eventually is deemed to have been unjustified.[15]

The moving party must also establish the other conditions for obtaining an interlocutory injunction, namely that it would suffer irreparable harm if the relief is not granted; and that the balance of convenience favours granting the injunction.[16]

With regard to the irreparable harm criterion, as the Ontario Superior Court recently indicated: "the normal basis for irreparable harm in cases of this kind is that, if the respondent's assets are not secured, there will be no way for the applicant to collect on a money judgment".[17]

As for the balance of convenience, it usually always leans toward the granting of the injunction, because the order may always be tailored to allow the defendants to use its assets for reasonable living or commercial expenses, and legal fees.[18]

3.2. Risk of assets dissipation

The proof of a serious risk that the responding party will remove property or dissipate assets before the granting of a potential judgment can be proven by drawing an appropriate inference based upon the presence of numerous factors: a responding party's attempt to "cover up his/her tracks", a responding party's attempt to destroy, hide or alter evidence, and any conduct demonstrating the

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[15] *Chitel* v. *Rothbart*, [1982] O.J. No. 3540 ; *Third Chandris Shipping Corp.* v. *Unimarine S.A*, [1979] 2 All E.R. 972, 976, 984-985, [1979] 2 Lloyd's L.R. 184 (C.A.). N.B. Elements (i), (ii) an (v) of Lord Denning's guidelines are lifted from the traditional test for an interlocutory injunction.

[16] N.B. "Is there a serious issue to be tried", is usually another condition that must be satisfied for obtaining an interlocutory injunction. However, this criterion wass replaced by "strong prima *facie case*" while applying for a *Mareva* injunction. *Manitoba (Attorney General)* v. *Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110 ; *RJR — MacDonald Inc*. v. *Canada (Attorney General)* [1994] 1 S.C.R. 311 ; *American Cyanamid Co.* v. *Ethicon Ltd.*, [1975] A.C. 396. This test is summarized in Paul M. Perell & John W. Morden, "The Law of Civil Procedure in Ontario" (2nd ed.) (Ontario: LexisNexis, 2014) at 219.

[17] *East Guardian SPC* v. *Mazur* [2014] O.J. No. 5377.

[18] *Ontario Professional Fire Fighters Assn.* v. *Atkinson*, 2019 ONSC 3877, par. 26.

traditional “badges of fraud”.[19] This list of factors isn’t exhaustive and is likely to evolve in order to integrate any other relevant element that may help litigators establish the fourth criterion of Lord Denning’s guidelines. The possibility of proving the risk of dissipation or removal by inference rather than by direct evidence is a useful perk for Canadian litigators, particularly when this type of proof is unavailable or at the earlier stages of trial. The importance of this criterion in the granting of a *Mareva* injunction has been repeatedly pointed out:

> it is only if the purpose of the defendant when removing assets from the jurisdiction or the dissipating or disposing of them is for the purpose of avoiding judgment that a Mareva injunction should be issued. I think that this view is consistent with Estey J.'s statement that the overriding consideration is the threat "to defeat his adversary".[20]

3.3. Mooney v. Orr : flexible approach to the Mareva injunction

A jurisprudential trend has developed in the province of British Columbia which consists in refusing to adopt the usual framework that conditions the issuance of *Mareva* injunctions, creating important divergences of interpretation.[21] Guided by the decision *Mooney* v. *Orr*, this current was formed after Justice Huddart's statement that the facts of this particular case deserved a *Mareva* injunction even though the criteria weren’t fulfilled in this context.[22]Later, the British Columbia Court of Appeal adopted the criteria formulated by Huddart J. in *Mooney* v. *Orr*, which are as follows :

> Applying this line of authority to this application, to succeed the plaintiff must establish that:
>
> (1) it has a strong prima facie or good arguable case;
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> (2) the defendants have assets within the jurisdiction of British Columbia (as it is a domestic injunction that is being sought); and

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[19] *Ontario Professional Fire Fighters Assn.* v. *Atkinson*, 2019 ONSC 3877, par. 8 ; *2092280 Ontario Inc.* v. *Voralto Corp.*, 2018 ONSC 2605, paras, 22-23 ; *Sibley & Associates LP* v. *Ross*, 2011 ONSC 2951, paras. 64, 66.

[20] *R.* v. *Consolidated Fastfrate Transport Inc.*, 24 O.R. (3d) 564 [1995] O.J. No. 1855 ; *Clark et al.* v. *Nucare PLC*, 2006 MBCA 101, par. 41-43 ; *Marine Atlantic Inc.* v. *Blyth* (1993), 1993 CanLII 9338 (FCA), 113 D.L.R. (4th) 501 (F.C.A.) ; *Scotia Wholesale Ltd. and Flynn* v. *Magliaro* (1987), 81 N.S.R. (2d) 201 (S.C.,A.D.).

[21] *Id*., note 3, p. 225.

[22] *Mooney* v. *Orr*, [1994] B.C.J. No. 2322.

> (3) a consideration of the interests of both parties favours the granting of this Mareva injunction relief.[23]

From the outset, we can notice that these criteria remove the requirement of proving a risk of the assets being removed from jurisdiction or dissipated in order to frustrate judgment.[24]This approach has been strongly criticised on the grounds that it distorted the exceptional nature of the *Mareva* injunction.[25]We agree with that opinion, and we endorse Chief Justice Richard J. Scott's words that a "*Mareva* injunction [isn't] available simply as a form of security. This trivializes the remedy. It diverts the focus from the exceptional and potentially harsh ramifications of such remedy".[26] Huddart J. was already apprehensive of the critics at the time, and addressed them directly in *Mooney* v. *Orr*.[27] Although we prefer to refer the reader directly to these reasons, they remain very enlightening since they are a strong plea for a flexible approach regarding the issuance of the *Mareva* injunction.

3.4. The guidelines of Chitel v. Rothbart are not a test stricto sensu

The aforementioned current seems to have been echoed in Ontario, where the Divisional Court in *SFC Litigation (Trustee of)* v. *Chan* examined the role of the guidelines set out in *Chitel* v. *Rothbart* over 35 years ago. It clarifies that courts have a wide discretion in awarding *Mareva* injunctions, and are not constrained by those guidelines.[28]This decision could also have an impact on cross-border litigation, because the majority held that the third guideline in *Chitel*, which requires that the applicant provides grounds for believing that the defendant has assets in Ontario, is not a *sine qua non* condition for the issuance of a *Mareva* injunction. In other words, an Ontario court could grant a *Mareva* injunction even when the defendant has no assets in Ontario.

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[23] *Leaton Leather & Trading Co.* v. *Ngai*, [1997] B.C.J. No. 645, para. 11.

[24] Robert J. SHARPE, *Injunctions and Specific Performance*, Aurora, Canada Law Book, 2007, p. 2-72 : "a *Mareva* injunction may be granted even where there is no deliberate attempt to flout the process of the court."

[25] Note 3, p. 227

[26] *Clark et al.* v. *Nucare PLC*, 2006 MBCA 101, par. 44 ; Note 3. See also *Trade Capital Finance Corp* v. *Cook*, 2017 ONSC 1857 & *Trade Capital Finance Corp.* v. *Cook*, 2017 ONCA 281 which explain that the *Mareva* injunction isn't a form of security.

[27] Par. 56-59

[28] https://www.dentons.com/en/insights/articles/2017/may/9/mareva-injunctions-update-from-the-divisional-court-on-the-chitel-v-rothbart-guidelines

3.5. The Mareva injunction in the Province of Québec

Finally, it is relevant to mention that the *Mareva* injunction is less frequently used in Québec civil law. This is partly due to the possibility of executing a seizure before judgment, which is however of a very different nature than the *Mareva* injunction.[29] Such seizures of assets before judgment are also issued under relatively simplified criteria compared to those pertaining to *Mareva* orders.

Although rare, Quebec Courts still have issued *Mareva* orders, and typically analyse the same criteria as those used historically for injunction orders, i.e.: the appearance of right, irreparable harm, and the balance of inconvenience.[30]

4. THE WORLDWIDE *MAREVA* IN CROSS-BORDER LITIGATION

4.1. Context and utility of the Mareva injunction in cross-border litigation

Initially, Canadian Courts limited the scope of *Mareva* orders to the freezing of assets within the jurisdiction of the issuing court. However, to ensure the effectiveness of the *Mareva* injunction against fraudulent behaviour, Canadian Courts have confirmed that they have the authority to freeze a defendant's assets on an extraterritorial basis.[31] This is explained by the fact that a *Mareva* injunction is an order *in personam* against the defendant which compels it to not dispose of its assets. It is not an attachment *in rem*, and no lien is created on the defendant's assets.[32]

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[29] Sect. 516-523 C.C.P. ; On the subject of the conceptual differences between the seizure before judgment and the *Mareva* injunction, see Note 3, p. 247-256.

[30] Sect. 511 CCP ; Mathieu Piché-Messier, Catherine Lussier, Laurence Burton, « Développements récents : les ordonnances d'injonction de type Anton Piller, Mareva et Norwich en matière de fraude commerciale », (2014) 44 RDUS 127, 153 ; Desjardins Assurances générales inc. c. 9330-8898 Québec inc., 2019 QCCA 523, para. 42-52 ; Québec (Sous-ministre du Revenu) c. Weinberg, 2007 QCCS 4288 ; Thibault c. Empire (L'), compagnie d'assurance-vie, 2012 QCCA 1748 ; 4463251 Canada inc. c. Duo-Regen Technologies Canada inc., 2011 QCCS 4043 ; CIBC c. Samson, 2008 QCCS 1320 ; Procureur Général du Canada c. Lupien, 2007 QCCS 2302 ; Cloutier c. Cloutier, 2010 QCCS 4270 ; 8032661 Canada inc. c. Moushaghayan, 2015 QCCS 5721 ; Trudeau c. Thibert, 2015 QCCA 1486 ; Ishizuka c. Robertson, 2009 QCCS 4541 ; 9351-0576 Québec inc. c. Rodrigue, 2017 QCCS 6203 ; Pharmacie Sébastien Aubin et Nadine Lacasse Pharmaciens inc. c. Prud'homme, 2017 QCCS 4244 ; Tuttle Dozer Works Inc. c. Gyro-Trac inc., 2007 QCCS 5133 ; Droit de la famille - 132485, 2013 QCCS 4417.

[31] *Id.* ; note 1 ; *Id.*, note 3 ; Vaughan BLACK et Edward BABIN, « Mareva Injunctions in Canada : Territorial Aspects », (1997) 28 Can. Bus. L.J. 430, 431 ;

[32] Note 8, 745

4.2. Understanding the legal basis of the worldwide Mareva : the example of Google v. Equustek Solutions

Canadian case law has not yet addressed in detail the crucial issue of the effect of extraterritorial *Mareva* injunctions on third parties outside the country.[33] However, a similar question arose in *Google Inc.* v. *Equustek Solutions Inc.* where the Supreme Court of Canada upheld a worldwide injunction against the Internet giant Google.[34] This decision has confirmed once and for all the possibility for Canadian courts to issue injunctions with extraterritorial effects.

This decision concerns an injunction which was rendered against Google, a third party in the proceedings. The injunction was ordered in connection to the plaintiff's principal action, in which it sought to prohibit the defendant from passing off products and selling them online. The plaintiff thus obtained various injunctions, which eventually proved to be ineffective as the defendant continued to operate from an unknown location, selling products on Internet to customers around the world. The plaintiff thus asked Google to remove the defendant's websites from its search results, which Google partially agreed to do, but only for its Canadian online search engine(*google.ca)*.

Since most of the defendant's sales occurred outside of Canada, the plaintiff brought forth an application for an injunction to require that Google removes the defendant's website on all of its worldwide search engines.[35]

By a majority of seven judges, the Supreme Court upheld the decisions of the courts of first instance and appeal, both of which granted the worldwide injunction against Google. The Supreme Court of Canada recognized *in personam* jurisdiction over the Californian company, because the latter held business in the British Columbia. Google argued *inte alia* that as a third party to these proceedings, it should be immune from the injunction; and that there is no necessity for the extraterritorial reach of the order.[36]

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[33] Note 3

[34] 2017 SCR 34

[35] https://mcmillan.ca/mobile/The-New-Frontier-of-Jurisdiction-Supreme-Court-of-Canada-Upholds-Worldwide-Injunction-Against-Google

[36] RJR — MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311 : is there a serious issue to be tried; would the person applying for the injunction suffer irreparable harm if the injunction were not granted; and is the balance of convenience in favour of granting the interlocutory injunction or denying it.

In response to these arguments, the Supreme Court of Canada ruled that the injunction was necessary to prevent the facilitation of the defendant's ability to defy court orders and cause irreparable harm to the plaintiff. Indeed, and as the Supreme Court of Canada opined, without the injunctive relief, Google would have continued to facilitate that ongoing harm.[37] In *obiter*, the Court also states that the "same logic underlies *Mareva* injunctions, which can also be issued against non-parties".[38] In this regard, the Court also makes a direct reference to banks and other financial institutions, whose assistance is necessary to avoid the dissipation of assets. Succinctly, the Justice Abella recalls that it has long been a well-known fact that an injunction may sometimes bind a third party.[39]

The Supreme Court of Canada further addressed Google's argument contesting the extraterritorial scope of an injunction, opining that "when a court has *in personam* jurisdiction, and where it is necessary to ensure the injunction's effectiveness, it can grant an injunction enjoining that person's conduct anywhere in the world".[40]

5. RECOMMENDED READING SOURCES

David A. CRERAR, "Mareva Freezing Orders and Non-Party Financial Institutions : A Practical Guide", (2006) 21 B.F.L.R. 169.

Danielle FERRON, Mathieu PICHÉ-MESSIER and Lawrence A. POITRAS, « L'injonction et les ordonnances Anton Piller, Mareva et Norwich », 1st ed., LexisNexis 2009.

Vaughan BLACK et Edward BABIN, « Mareva Injunctions in Canada : Territorial Aspects », (1997) 28 Can. Bus. L.J. 430.

Robert J. SHARPE, Injunctions and Specific Performance, Aurora, Canada Law Book, 2015.

[37] Para 35

[38] Para. 33

[39] *MacMillan Bloedel Ltd.* v. *Simpson*, [1996] 2 S.C.R. 1048

[40] Para. 38

Paul MITCHELL, “The Mareva Injunction in Aid of Foreign Proceedings”, (1996) *Osgoode Hall Law Journal* 34.4 741.

Stephan G.A. PITTEL & Andrew VALENTINE, “The Evolution of Extra-territorial Mareva Injunction in Canada : Three issues”, (2006) 2 *J. Priv. Int.L* 339.