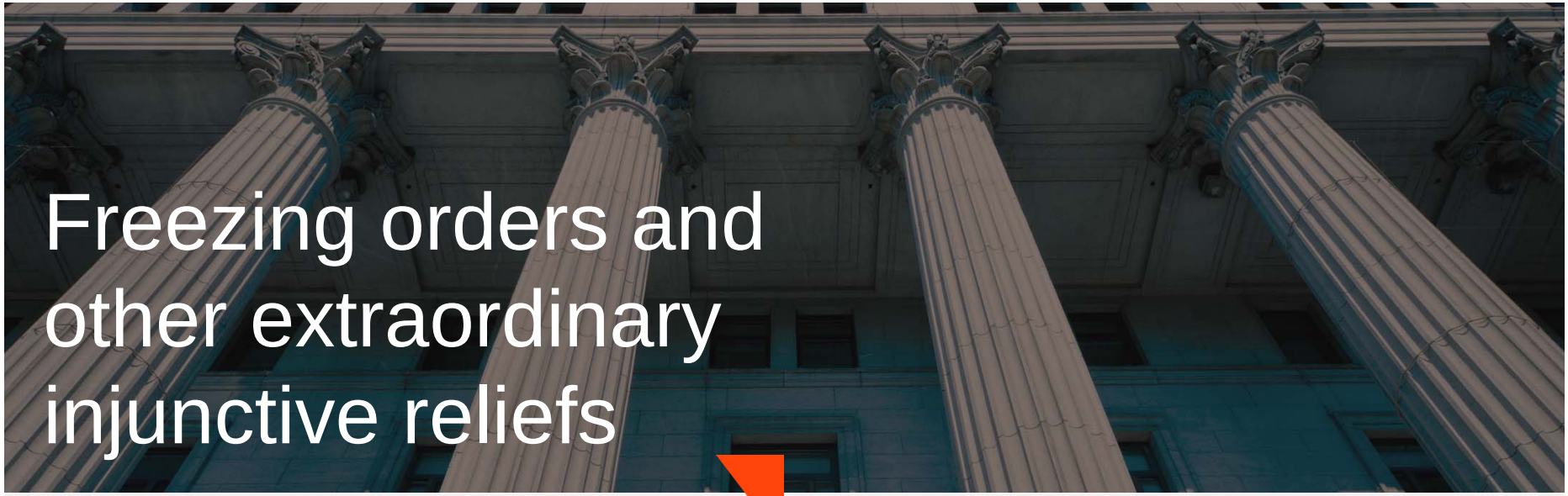

Freezing orders and other extraordinary injunctive reliefs

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Injonctions in Canada

- The criteria to be met in order for the issuance of an injunction in Canada are the following:
  A. The applicant has a **serious issue** to be tried, or **a strong *prima facie* case**;
  B. The applicant will suffer **irreparable harm** if the injunction is not granted;
  C. The **balance of convenience** favors the applicant; and
  D. Urgency (for immediate injunctive relief)

Other extraordinary injunctive relief

- Although injunctions are already considered to be an extraordinary remedy, Canadian Courts also recognize the possibility to issue injunctive relief of an even greater magnitude, such as:
  1. Anton Piller Orders;
  2. Norwich Orders;
  3. *Mareva* injunctions (also known as freezing orders)

Anton Piller Orders

- Qualified as the “Nuclear Weapon” of commercial litigation, **an Anton Piller order** allows a party to access the home or office, on an *ex parte basis* and without notice, to seize documents or information when the following criteria are satisfied:
  A. The plaintiff has a **strong *prima facie* case**;
  B. The **damage** to the plaintiff of the defendant’s alleged misconduct must be **very serious**;
  C. There must convincing evidence that the defendant has in its possession **incriminating documents or things**;
  D. There must be convincing evidence that the defendant may **destroy such material before the discovery process**.

Norwich Orders

- A **Norwich order** is an exceptional pre-trial remedy that permits discovery <u>of third parties</u> to obtain information about a wrongdoer, often before a statement of claim is even issue, when the following criteria are satisfied:
  A. A person seeking a *Norwich* order must show a ***bona fide* claim** against the unknown alleged wrongdoer;
  B. The third party from whom discovery is sought must be in some way **involved in the matter under dispute**;
  C. The third party from whom discovery is sought must be the **only practical source** of information available to the applicants;
  D. The persons from whom discovery is sought must be **reasonably compensated** for their expenses arising out of compliance with the discovery order in addition to their legal costs;
  E. The **public interests** in favour of disclosure must outweigh the legitimate privacy concerns.

Mareva Injunctions (Freezing Orders)

- Commonly referred to as “freezing orders”, *Mareva* injunctions constitute one of the most powerful weapons in a litigator’s arsenal.
- Usually granted on an ***ex parte*** basis, its purpose is to freeze some or all of the defendant’s assets before judgment on the merits.
- 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”.

Mareva Injunctions (Freezing Orders)

- *Mareva* injunctions do not cause a party to be dispossessed of its assets; it is rather an *in personam* order made on a party to prohibit the disposal of certain of its assets on an interlocutory basis.
- 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.

The Evolution of the Freezing Order in Canada

- First recognized in England in 1975, its name is coined from the decision *Mareva Compania Naviera S.A.* rendered by none other than Lord Denning.
- It is an innovative remedy "*conceived to fend off the depredations of shady mariners operating out of far-away havens, usually on the fringe of legally organized commerce*"

Legal framework in Canada

- Its use was confirmed by the Supreme Court of Canada in 1985 in *Aetna Financial Services* v. *Feigelman*, [1985] 1 SCR 2
- There is no unanimous formulation of the test for granting a Mareva injunction throughout Canada, but Courts tend to follow Lord Denning's guidelines in : *Third Chandris Shipping Corp.* v. *Unimarine S.A.,* [1979] 2 All E.R. 972

Guidelines for granting a Mareva injunction

These guidelines are the following:

1. The plaintiff should make **full and frank disclosure** of all matters in his knowledge which are material for the judge to know.
2. 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.
3. The plaintiff should give some **grounds for believing that the defendants have assets here**.
4. The plaintiff should give some grounds for believing that there **is risk of the assets being removed** before the judgment or award is satisfied.
5. The plaintiff must give an **undertaking as to damages**.

Worldwide *Mareva* Orders

- Initially, the courts used to limit the scope to the freezing of assets within the jurisdiction of the issuing court.
- However, to ensure the effectiveness of the *Mareva* injunction against these fraudulent schemes, Canadian courts have confirmed that they have the authority to freeze a defendant's assets worldwide based on the merits of the case.
- This extra-jurisdictional power is justified by the fact that a Mareva injunction is an order *in personam* against the defendant which compels him to not dispose of its assets. It is not an attachment *in rem*, and no charge is created on the defendant's assets.

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

- The Supreme Court of Canada upheld a worldwide injunction against Internet giant Google
- Confirms the jurisdiction of Canadian courts to issue injunctions with extraterritorial effects and against someone who is not a party to an underlying lawsuit
- the “same logic underlies *Mareva* injunctions, which can also be issued against non-parties”

Google v. *Equustek Solutions,* [2017] SCR 34

- Equustek Solutions Inc. alleges that a company called Datalink began to re-label one of their products and pass it off as its own for online sale
- Equuestek asked Google to remove Datalink's websites from its search results
- Google partially agreed to do, only removing individual webpages from the searches conducted on the Canadian version of the search engine (*google.ca)*.
- As most of Datalink's sales occurred outside of Canada, Equuestek was unsatisfied and brought an application for an injunction requiring Google to de-index Datalink's websites from the results of all Google searches worldwide

Google v. *Equustek Solutions,* [2017] SCR 34

- Google mostly based its ground of appeal on the arguments that :
  1. the injunction is not necessary to prevent irreparable harm to Equuestek and is not effective;
  2. that as a non-party it should be immune from the injunction; and
  3. that there is no necessity for the extraterritorial reach of the order.

Google v. *Equustek Solutions,* [2017] SCR 34

- In response to the first and second argument :
  - The injunction in this case flows from the necessity of Google's assistance to prevent the facilitation of Datalink's ability to defy court orders and do irreparable harm to Equuestek.
  - Without the injunctive relief, Google would have continued to facilitate that ongoing harm.
- In response to Google's final argument :
  - "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"

Google LLC v. *Equustek Solutions Inc*., Case No. 5:17-cv-04207-EJD, 2017 WL 5000834 (N.D.Cal. Nov 2, 2017)

- Google subsequently filed for preliminary injunctive relief before the United States District Court of the Northern District of California in to declare that the Canadian order was unenforceable
- Equustek, did not appear in the US proceedings, which lead the United States District Court to grant Google's motion for preliminary relief on an *ex parte* basis, thus creating conflicting judgments in Canada and in the United States.

Conclusion (part 1)

- Canadian Courts have proved to be flexible and innovative when issuing injunctive orders to protect the rights of parties involved in complex commercial litigation.
- In addition to recognising the validity of *Mareva* injunctions in Canada, Canadian Courts have unabashedly expanded the scope of their orders on a worldwide scale.
- Although the *rationale* used by Canadian Courts is fairly straight-forward, (i.e. *in personam* remedy which enjoins a party anywhere in the if there is a real and substantial connection with the concerned jurisdiction), the effects of a worldwide injunction lead to various questions.

Conclusion (part 2)

- Example of unanswered questions:
  - How should a foreign Tribunal react to the issuance of a worldwide injunction issued from Canada?
  - Does the fact that *Mareva* orders are not available in the foreign jurisdiction automatically lead to a refusal to enforce a Canadian *Mareva* order?
  - Can a third party be affected by a worldwide *Mareva* order despite not having been called to participate in the Canadian proceedings?
- This situation has already lead to the issuance of conflicting judgments in the Google and Equustek matters in both Canada and the United States, and a confusion as to how parties should conduct themselves in a cross-border litigation setting.

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