THE INTERLOCUTORY INJUNCTION: SOME COMMENTS AND REFLEXIONS WITH PARTICULAR REFERENCE TO THE PROVINCE OF QUEBEC

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OUTLINE

I THE INTERIM INJUNCTION - PROCEDURAL CONCERNS - NOTICE

The interim, or 'provisional' injunction, as it is termed in Quebec, is granted for a limited period of time, in cases of extreme urgency, pending the hearing on the main interlocutory injunction, while the latter normally remains in force until the trial on the merits or for an indefinite period. In a typical situation, the first interim injunction might issue for a period of several days, terminating on the date of presentation of the petition for the interlocutory injunction, and if the hearing of the petition is subsequently postponed or continued to a later date a new interim injunction might then issue on motion for the subsequent period to remain in force until the new date fixed for the hearing of the interlocutory, and so on, ad infinitum. Finally the last interim injunction could issue at the close of the hearing if the court reserves judgment and takes the matter under advisement, to remain in force until jugement is finally rendered on the petition for an interlocutory injunction, in order to ensure that there is no lacuna between the end of the hearing and the judgment granting or refusing the petition.

Over the years some serious procedural concerns have been expressed in relation to the use of injunctions, parti-

cularly with respect to interim injunctions, and normally in the context of labour relations. (1) For one thing, the courts have often granted injunctions in labour matters on an ex parte basis without notice to the defendant upon the barest allegation by the petitioner that there was no time to give notice. There was also a great temptation to draft petitions in a dramatic and exaggerated fashion and to support them by affidavits of doubtful merit. In addition many injunctions were being granted by judges in chambers, not only without notice, but in exact accordance with the conclusions requested by the attorney for petitioner without modification, a practice which might be the cause of serious injustice.

In response to this widespread dissatisfaction, reactions in different jurisdictions have varied. In Quebec, under the new Code of Civil Procedure in force since 1966, the legislature specifically prohibited the issuance of an interim injunction without notice for a period longer than 10 days. At best this was a partial solution, and it should also be noted that the restriction would only apply to the first interim injunction issued without notice, and that for any

(1) See Labour Relations Law Casebook compiled by the Labour Relations Law Casebook Group, 2nd edition, published by Industrial Relations Center, Queen's University 1974, at pp. 484 et seq; Carrothers, The Labour Inuunction in British Columbia (1956); Carrothers & Palmer, Report of a Study on the Labour Injunction in Ontario (1966).

subsequent renewal of the interim injunction no such time limit would appear to exist. In Ontario, injunction procedures were modified to respond to many of the complaints made. (2) The Ontario legislation specifically prohibits the issuance of an injunction in labour matters on an ex parte basis unless notice cannot be given because the delay would result in irreparable damage or injury, a breach of the peace or an interruption in an essential public service, and unless reasonable notification, by telephone or otherwise, has been given to the persons to be affected, or it is shown that such notice could not have been given. Where the respondents are members of a labour organization, such notification must be given to an officer of the union or a person authorized to accept service of process on behalf thereof under the Ontario Labour Relations Act. Moreover, under the Ontario provisions proof of all material facts for the purpose of dispensing with notice must be made by viva voce evidence. Section 20 of the Ontario Act goes on to say that any misrepresentation or withholding of any relevant fact directly or indirectly by or on behalf of the applicant shall constitute contempt of court. In British Columbia on the other hand, an attempt has been made to replace injunction procedures by remedies

(2) See Ontario Judicature Act, RSO 1970, c. 228, Section 20

before the Labour Relations Board. (3) In Quebec the Bâtonnier of the province spoke out strongly on the question and suggested that no interim injunction should issue without notice to the opposite side, and similar suggestions were made by the Chief Justice of the Quebec Superior Court in 1974 and again in 1976 urging his colleagues to exercise extreme prudence in issuing interim injunctions without notice even for a period of less than 10 days as permitted by law.

The view seems to be gaining ground that some sort of service or notice ought normally to be required before issuing even the first interim injunction, so that virtually all requests in chambers would be made in the presence of the opposite party and succinct argument would be possible by both sides to permit the judge to have a better view of the overall situation. As to the technique of notice, modern methods of communication would obviously permit a rapid notice by telegram, telephone, etc. even if only a few hours notice can be given in very urgent situations, and in many cases, service or delivery of a copy of the petition might be ordered without delaying the matter or causing any serious prejudice to the petitioner. It would appear that in most jurisdictions judges possess a wide discretion for prescribing such methods of service (See for example articles 78,

(3) See Labour Code of British Columbia 1973 (2nd session) c.122 at ss. 31, et seq. as amended by 1974, c. 87, s.22 and 1975, c. 33 s. 8. In Nova Scotia, as well, labour injunctions are rare, having been supplanted by cease and desist orders issued by the Labour Relations Board. In Saskatchewan, under the Queen's Bench Act, the Courts can no longer grant an ex parte injunction in a labour matter.

138, and 141 C.P. in Quebec).

Notwithstanding the foregoing, it would appear that many judges are not necessarily of the same opinion, and that interim injunctions, e.g. in labour matters, do continue to issue on an ex parte basis in some jurisdictions (This would appear to be true, at least until recently, in some areas of Quebec). There may certainly be cases where the initial injunction should issue without notice, or perhaps with notice but without any hearing of viva voce evidence, even though the granting of the initial interim injunction is the crucial stage, and any subsequent decision thereafter would become academic and superfluous, but it would appear to be eminently desirable to conform to the maxim audi alteram partem wherever possible by providing for some form of notice, and if the circumstances truly make any notice impossible, then it would seem that the duration of the initial interim injunction should be limited to the greatest possible extent, even where the law permits such an injunction to issue for a longer period of time (e.g. up to 10 days in Quebec), so that a minimum of prejudice is caused to the respondent by the granting of an ex parte application. It is also true that particularly in the case of labour injunctions the presence of attorney for respondent and his representations may be extremely useful to the judge, for example with regard to

the precise wording of the order to issue, and the presence or absence of respondent at this stage may make the difference between following blindly the conclusions of the petition or limiting the order, particularly where the conclusions of the petitioner with regard to restraint of picketing, etc. are draconian or general and directed e.g. to all persons having knowledge of said order.

As an example of an instance where the initial interim injunction, perhaps granted without notice, is the only real issue, one might consider the hypothetical case of an athlete who has been prohibited from participating in a competition on the grounds that a drug has allegedly been detected in his blood, and the athlete requests an interim injunction in order to participate in the event. In such a case it may be impossible for the court to hear any evidence or even limited argument for the respondent until the event has already taken place. If the judge decides not to issue the interim injunction without having such a hearing, this would presumably mean that he believes that in the absence of notice or a hearing the balance of convenience lies in favour of respondent. If on the other hand, he decides to grant the petition and issues an interim injunction, he would seem to have concluded that even in the absence of notice or in absence of a hearing the balance of convenience lies in favour of the petitioner.

II. AFFIDAVITS OR WITNESSES TO ISSUE AN INJUNCTION?

UNDERTAKINGS TO PAY DAMAGES?

In Quebec, interlocutory injunctions to remain in force until the trial, or until set aside on motion were, until recently, generally not issued except after a full-blown hearing, with witnesses heard on both sides (Provisional or interim injunctions may be issued and renewed from time to time for short periods until the hearing takes place). In England, however, such interlocutory injunctions are issued without hearing any witness, on the basis of affidavits only, filed by both sides (this goes back to the old procedure in Chancery). In Ontario, there may often be, in addition, cross-examination of the applicant on his affidavit. (4) In Ontario the applicant must further include in his affidavit an undertaking to pay any damages suffered by respondent if so ordered at trial. (5)

After much discussion with the Quebec Bar, articles 751 and following of the Quebec Code of Civil Procedure were recently amended (6) to provide that proof in the future would be by affidavits. (7) However, the legislature, in its wisdom, and due to opposition by certain sectors of the Bar, also added

(4) See Rogers and Hately, Getting the Pre-Trial Injunction, (1982) 60 Can. Bar Rev. 1, at pp. 7, 8, 10, 11, 20-23.
(5) Rogers and Hately, supra, pp. 21-22.
(6) Q.S. 1983, c. 28.
(7) See Art. 754.1 C.P.C.

Art. 754.2, which states that, in addition to proof by affidavit,any party may present oral proof, if he so wishes. This compromise, neither fish nor fowl, seems to take away with one hand what has been given with the other, and may not even allow a judicial discretion to refuse an application to present viva voce evidence. It remains to be seen whether the amendments adopted will attain the desired goals of providing a more efficient remedy, with much shorter delays and considerable saving of judicial time.

III THE INTERLOCUTORY INJUNCTION - CRITERIA TO ISSUE - STRONG PRIMA FACIE CASE OR SUBSTANTIAL QUESTION

In issuing an interlocutory injunction (to remain in force during the suit), the first question to be answered appears to be whether the petitioner has made a sufficient case. The requirement was always thought to be a strong prima facie case under English law; but since the House of Lords decision in American Cyanamid Co. v. Ethicon Ltd.(8) the English Courts appear to lean towards requiring only a substantial or serious question to try(9). The new criterion appears to be gaining ground in Canada, particularly in Ontario(10). Cradle Pictures (Canada) Ltd. v. Penner et al(11) held that notwithstanding the American Cyanamid case, Ontario still had the stronger prima facie test. Later decisions have moved closer to the English position(12), and one recent decision seems to straddle the fence(13). The Ontario Divisional Court has taken both views requiring a prima facie case in Teledyne Industries Inc. et al v Lido Industrial Products Ltd.(14), while stating in Yule Inc. v Atlantic Pizza Delight Franchise (1968)Ltd.(15) that it is

(8) (1975) 1 All E.R. 504

(9) See Fellowes v. Fisher (1975) 3 W.L.R. 184 (C.A.); Hubbard v. Pitt (1975) 3 W.L.R. 201 (C.A.); Bryanston Finance Ltd v. de Vries (No.2)(1976) All E.R. 25; Budget Rent a Car International Inc. v. Mamos Slough Ltd.(1977), 121 Sol. J. 374; Indal Ltd. & Brampton Aluminum Products Ltd. v. Halko et al (1976) 1 C.P.C. 121.

(10) See Rogers & Hately, supra, at pp. 13-19.

(11) (1975) 10 O.R. (2d) 444.

(12) See Bernard et al v. Valente et al (1978) 18 O.R. (2d)656; Labelle et al v. Ottawa Real Estate Board et al (1977) 16 O.R. (2d) 502; Toronto Marlboro Major Junior "A" Hockey Club et al v. Tonelli et al (1975) 11 O.R. (2d) 664.

(13) Sheddon v Ontario Major Junior Hockey League (1978)19 O.R. (2d) 1.

(14) (1977) 17 O.R. (2d) 111.

(15) (1977) 17 O.R. (2d) 505.

sufficient to show that the petitioner's case is not frivolous and that there is a substantial question to be tried. It is interesting to note that the same judge was a member of each three man panel in the last two contradictory decisions cited.(16) However, it seems that the rule is stricter in patent cases such as Teledyne, where a long standing practice might be offended if the prima facie test were abandoned; at least, this is what the court said in Yule.

The law thus seems to have evolved in the direction of a more flexible approach, a strong prima facie case being an inappropriate test which might fetter the court's discretion where difficult issues of fact are raised, e.g., via conflicting affidavits and transcripts of cross-examinations. Thus, the first question to be answered may now be, not whether a strong prima facie case has been made, but only whether the petition is not frivolous or vexatious and there is a substantial issue to be tried.(17)

If the first question (whatever it may be) is decided in the affirmative, the court must then determine whether, if plaintiff were successful at trial, a recourse in damages

(16) Both decisions were unanimous. In Teledyne, Griffiths, Rutherford and Steele JJ (per Griffiths J) reversed Boland J who had issued the injunction. In Yule, Cory, Steele and Holland JJ (per Cory J) affirmed Evans CJC who had issued the injunction, applying American Cyanamid and distinguishing Teledyne.

(17) Rogers & Hately, supra, at pp. 9-20; see also the decisions cited therein, at p. 13, from Manitoba, Alberta, B.C. and N.S., a majority of which seem to favour the Cyanamid approach.

against defendant would be adequate. If so, no interlocutory injunction should issue. (18) If not, the Court should then consider whether, if defendant is successful at trial and an interlocutory injunction has issued, defendant's recourse in damages against plaintiff would be an adequate remedy; and if so, the injunction should issue. If there is any doubt, the balance of convenience should decide the issue; and if this is equally balanced, the status quo should be maintained by means of an interlocutory injunction pendente lite. (19)

The U.S. position on the criteria for issuing a preliminary injunction has been enunciated as follows by the U.S. Circuit Courts of Appeal:

> "Granting such relief requires that appellant have shown: (1) a substantial likelihood that it will prevail on the merits; (2) irreparable injury unless the injunction issues; (3) that the threatened injury to it outweighs whatever damage the injunction may cause the parties opposing it; and (4) that granting the injunction would not be against the public interest." (20)

(18) See Hoffman-Laroche Ltd. v. Frank W. Horner Ltd. (1970) C.A. 559 (Que).
(19) See Labelle, supra, note (12)
(20) Knights of Ku Klux Klan v. East Baton Rouge Parish School Bd., 5 Cir. 1978, 578 F 2d 1122, 1125, citing Canal Authority v. Callaway, 5 Cir. 1974, 489 F.2d 567.

> 'A clear showing of either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.' (21)

An article by Professor R. Grant Hammond contains an exhaustive analysis of the law in this area and of the Cyanamid case, as well as a comparative study of the historical background and the present position in U.K., U.S., and Canadian law, and proposes a new model with a variable threshold, to replace the classical test. (22)

(21) Triebwasser & Katz v. American Tel. & Tel. Co., 2 Cir. 1976, 535 F. 2d 1356, 1358. (Emphasis in original).

(22) Interlocutory Injunctions: Time for a new model (1980) 30 U. of T. L.J. 240. See also La Société de Développement de la Baie James et al v. Kanatewat et al (1975) C.A. 166 (Que), particularly Owen J. at p. 183; Hawkins et al v Côté (1966) B.R. 1002; Haddad v. Haute Baie Automobile et al (1973) R.P. 91 (Que); Ville du Lac St-Joseph v. Place Germain Ltée (1975) C.S. 979; Ruby, Landlord and tenant: Interlocutory injunctions (1978) 38 R. du B. 52.

IV 'MAREVA' INJUNCTIONS AND 'ANTON PILLER' ORDERS

These new varieties of injunction, a recent export from England, are being dealt with today by Mr. Justice Tallis.

In Quebec, the Mareva injunction is unnecessary, in view of Art. 733 of the Code of Civil Procedure, under which the judge may authorize the seizure or attachment before judgment of the property of the defendant whenever there is reason to fear that without this remedy the recovery of the debt may be put in jeopardy. The request for such authorization must be supported by a detailed affidavit, and the grounds normally considered sufficient are very similar to those which would justify issuing a Mareva injunction.

As to so-called 'Anton Piller' orders, there may well be a need for this remedy, even in Quebec, where the purpose would be to preserve evidence or conduct an investigation (e.g. in piracy cases) rather than to ensure that any judgment rendered will be capable of execution.

V FAILURE TO ENFORCE - Undertaking by A-G as condition precedent to issuance of injunction.

A major problem which has often arisen in the past is that flagrant violations of injunctions issued by the Court are not pursued via contempt proceedings, or the latter are dropped, sometimes by agreement between the parties as part of an overall settlement. This would seem to bring the courts into disrepute and encourage future violations of similar orders, on the logical ground that contempt proceedings will ultimately be abandoned and that there is no risk in ignoring the orders of the Court. A kind of solution appears to have been attempted by the Federal Court, which might well be emulated elsewhere. Apparently its judges insist upon an undertaking from the petitioner to enforce the injunction if it is granted and a breach should occur, as a condition precedent to the grant of an injunction. This applies where the state is the petitioner, in which case the supporting material includes the written undertaking of the Deputy-Attorney-General or even the Attorney-General himself. In what I believe was the first such case some years ago, the judge stated openly that the solicitor had twenty minutes to produce such an undertaking, failing which the injunction would be refused, and the Minister of Justice's undertaking was produced within the time limit. Apparently the federal Department of Justice

will now require a similar undertaking from the Department for whom they are acting, or they will not apply for the injunction. A breach of such an undertaking would lead to the Court, of its own motion, holding the Deputy as principal in contempt, and his agent as well if the undertaking was per proc. The wording of such an undertaking is normally along the following lines:

> 'This will serve as a formal undertaking that, should the Honourable Court see fit to grant the requested interlocutory injunction, the Deputy Attorney General of Canada on behalf of the Plaintiffs will take all necessary steps to facilitate the enforcement of the injunction.'

The argument has been raised that the Attorney General faced with contempt proceedings might well say that he was acting on behalf of the executive, and as per its instructions; that its decision was taken in the exercise of the royal prerogative; and that all members of the cabinet bear equal responsibility for it. Apart from the constitutional issue involved, it has been suggested that such a situation might lead to a confrontation between the executive and judicial powers and that it is not the judiciary's function to intervene in this fashion. However, the federal Justice Department seems happy with the arrangement whereby it is given an undertaking from the responsible Minister, and is thus in full control of the proceedings, if it decides contempt has occurred and should be punished.

It may be asked whether this kind of arrangement would be appropriate (1) where an injunction is sought by a provincial government or other public authority (2) where it is sought in the private sector. A possible alternative to an undertaking by the petitioner to prosecute in the event of a breach might be an undertaking to report under oath any breach to the judge, leaving it to the latter to go further proprio motu if he so desires.

It has also been suggested that only in cases involving public order should the courts intervene to make settlements impossible once a breach has occurred. What constitutes public order, however, is not clear - is public order involved only in labour matters; or only where the public sector is involved; or is it a matter to be decided in each case? There seems to be less than unanimity in this area. Nonetheless, some judges of courts other than the Federal Court have begun to require undertakings, in public service labour disputes at least, as a condition precedent.