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INJUNCTIONS
and
SPECIFIC PERFORMANCE
The Honourable Mr. Justice Robert J. Sharpe
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What's New in this Update:

Injunctions – Jurisdiction

The provision in Ontario's anti-SLAPP regime, *Courts of Justice Act*, s. 137.1(5) precluding a party from bringing any steps after an anti-SLAPP motion has been made, does not oust the court's inherent jurisdiction to issue an interlocutory injunction: *40 Days for Life v. Dietrich*, 2023 ONSC 5879 (Ont. Div. Ct.).

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The UK Supreme Court explained that while the established categories retain their importance, "injunctions may be issued in new circumstances when the principles underlying the existing law so require": W*olverhampton City Council & Ors v. London Gypsies and Travellers & Ors*, [2023] UKSC 47 at para. 22.

Interlocutory injunctions – strength of case

Where the plaintiff seeks "intrusive, draconian forms of relief" limiting the defendant's capacity to carry on business or earn a livelihood, the strong prima facie case test applies: *Dymon Storage Corporation v. Nicholas Caragianis*, 2022 ONSC 5883 (Ont. S.C.J.) at para. 24, leave to appeal refused 2023 ONSC 1295 (Ont. Div. Ct.).

Where an interlocutory injunction requires a non-burdensome element of positive action but in essence is prohibitive, the plaintiff will not be required to establish a strong prima facie case: *Loginradius Inc. v. Gupta*, 2024 BCSC 1256 (B.C. S.C.).

Interlocutory injunctions – irreparable harm

A landowner challenging an expropriation does not suffer irreparable harm as the statute provides for compensation: *Vachon (Succession) c. Canada (Procureur général)*, 2023 FC 1582 (F.C.).

Interlocutory injunctions - balance of convenience

The public interest consideration may be relevant to either irreparable harm or the balance of convenience. An Alberta case holds: "Where an applicant does not assert the public interest, the respondent's assertion of the public interest is only to be considered at the third stage [balance of convenience] of the tripartite test. Only when an applicant asserts the public interest, the typical example being government or a governmental authority, is the public interest considered at both the second and third stages of the tripartite test": *Garcia-Ahmadi v. Alberta (Director of Safe Roads)*, 2023 ABKB 713 (Alta. K.B.) at para. 2.

***Mareva* injunctions**

A party cannot escape the test for a Mareva injunction by characterizing the claim as one for an injunction restraining the transfer or encumbering of assets: *Ballantry Construction Management Inc. v. GR (CAN) Investment Co. Ltd.*, 2024 ONSC 2129 (Ont. S.C.J.) at para. 34.

Where a debtor empties his bank accounts shortly after judgment is awarded against him and files no evidence to explain what became of

the funds, an adverse interest may be drawn that there are funds that would be subject to a *Mareva* injunction: *Wu v. Ma*, 2024 BCCA 196 (B.C. C.A.).

Interlocutory injunctions – appeals

An appellate court has a discretion to entertain a moot appeal from an interim injunction order: *Ellingson v. Hall*, 2023 ABCA 245 (Alta. C.A.).

Injunctions at the suit of the Attorney General

Injunctions may be granted at the suit of the Attorney General to restrain vexatious individuals from attending at a courthouse or from harassing court staff or judges: *British Columbia (Attorney General) v. Randhawa*, 2024 BCSC 421 (B.C. S.C.).

Injunctions and homelessness

An injunction to prevent the dismantling of a homeless encampment because of public safety was because of public safety concerns and because the municipality had shelter space available: also *Church of Saint Stephen et al. v. Toronto*, 2023 ONSC 6566 (Ont. S.C.J.).

An injunction prohibiting encampments is contrary to s. 7 of the Charter when the number of homeless persons exceeds the number of accessible shelter beds: *The Regional Municipality of Waterloo v. Persons Unknown and to be Ascertained*, 2023 ONSC 670 (Ont. S.C.J.).

Statutory injunctions

The UK Supreme Court held that proceedings under a statute authorizing the court to enjoin criminal behaviour are civil in nature and that the criminal standard of proof beyond a reasonable doubt does not apply: *Jones v Birmingham City Council & Anor (Rev1)*, [2023] UKSC 27.

It has been held in British Columbia that where a municipality seeks an interlocutory injunction to enforce a by-law, it must prove a "clear breach" or a strong prima facie case on the merits: *City of Port Coquitlam v. Ground X Site Service Ltd.*, 2024 BCSC 1348 (B.C. S.C.) at paras 17-27. Compare *Layton v. Canadian Dental Hygienists Association*, 2024 ONSC 2627 (Ont. S.C.J.), holding that the lower serious question to be tried standard applies.

A private party was held to have standing to sue for a statutory injunction to enforce municipal by-laws but was refused an injunction as the private party had not shown irreparable harm of that the balance of convenience favoured an injunction: *Layton v. Canadian*

Dental Hygienists Association, 2024 ONSC 2627 (Ont. S.C.J.).

The Corporation of the Town of Wasaga Beach v. Persons Unknown, 2023 ONSC 4929 (Ont. S.C.J.) at paras 38-9, citing Retirement Homes Regulatory Authority v. In Touch Retirement Living for Vegetarians/ Vegans Inc., 2019 ONSC 3401 (Ont. S.C.J.) at para. 47 states the test for a statutory injunction as follows:

> (a) The Court's discretion is more fettered, and the factors considered by a court when considering equitable relief will have more limited application;
> (b) An applicant will not have to prove that damages are inadequate or that irreparable harm will result if the injunction is refused;
> (c) Proof of damages or proof of harm to the public is not an element of the legal test;
> (d) There is no need for other enforcement remedies to have been pursued;
> (e) The Court retains a discretion as to whether to grant injunctive relief. Hardship from the imposition and enforcement of an injunction will generally not outweigh the public interest in having the law obeyed. However, an injunction will not issue where it would be of questionable utility or inequitable; and
> (f) It remains more difficult to obtain a mandatory injunction.

Constitutional case – interlocutory injunctions

"There is no presumption of constitutionality anywhere in the test for interim relief, whether at the first or third stage, and any argument to the contrary was laid to rest by the Supreme Court in *Metropolitan Stores*": *AC and JF v. Alberta*, 2021 ABCA 24 (Alta. C.A.) at para. 35.

A Saskatchewan case granting an interlocutory injunction to restrain the implementation of a policy restricting the rights of students seeking to engage in gender identity holds that "[t]he government is not "legally entitled to simply and completely insulate its actions until a final judicial determination... [I]t does not simply get a free pass at this stage of the inquiry [as to] do such would see the Court not fulfilling its constitutional role and not ensuring governmental action is carried out legally and on a defendable basis": *UR Pride Centre for Sexuality and Gender Diversity v. Saskatchewan (Minister of Education)*, 2023 SKKB 204 (Sask. K.B.) at para. 116.

An interlocutory injunction was granted to restrain the enforcement of a law restricting public consumption of drugs challenged as violating s. 7 of the Charter: *Harm Reduction Nurses Association v. British Columbia (Attorney General)*, 2023 BCSC 2290 (B.C. S.C.), leave to

appeal refused, 2024 BCCA 87 (B.C. C.A.).

The Federal Court of Appeal granted an injunction pending the appeal of a trial decision dismissing a Charter challenge to a mandatory drug and alcohol testing program": *Power Workers' Union v. Canada (Attorney General)*, 2023 FCA 215 (F.C.A.).

Jewish Community Council of Montreal v. Canada (Attorney General), 2024 FC 1163 (F.C.) granted an interlocutory injunction to restrain enforcement of federal guidelines on the humane slaughter of animals alleged to interfere with kosher practices and religious freedom.

An injunction prohibiting encampments was refused as being contrary to s. 7 of the Charter when the number of homeless persons exceeds the number of accessible shelter beds: *The Regional Municipality of Waterloo v. Persons Unknown and to be Ascertained*, 2023 ONSC 670 (Ont. S.C.J.).

An interlocutory injunction to prevent the dismantling of a homeless encampment was refused because of public safety concerns and because the municipality had shelter space available: *Church of Saint Stephen et al. v. Toronto,* 2023 ONSC 6566 (Ont. S.C.J.).

Constitutional cases – exemptions and suspensions

A British Columbia judge granted the Federation of Law Societies an exemption, pending a constitutional challenge, from a provision in the Income Tax Act that would require lawyers to report certain suspicious transactions: *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2023 BCSC 2068 (B.C. S.C.).

"Exemptions from such legislation [highway safety] should not be granted unless there are compelling circumstances": *Thibault v. Attorney General of Ontario*, 2024 ONSC 3168 (Ont. S.C.J.) at para.76.

Shrieves v. British Columbia (Attorney General), 2024 BCSC 889 (B.C. S.C.) granted the applicant in a judicial review application an exemption from the enforcement of rule enacted by the Insurance Council of British Columbia.

Law Society and other legal organizations were refused an injunction suspending transitional provisions of a statute establishing a new statutory authority to govern the profession. The legislation would not come into effect until the transitional provision, establishing a process to consult the legal organizations on the implementation of the legislation had been completed. The court held that the constitutional challenge to the substantive provisions could be heard before the legislation came into effect, and that the transitional provisions

did not cause the applicants irreparable harm, and that the balance of convenience did not favour suspending the transitional provisions: *Law Society of British Columbia v. British Columbia*, 2024 BCSC 1292 (B.C. S.C.).

Injunctions – property rights

Witmar Holdings Ltd. v. Stober Construction Ltd., 2023 BCSC 1378 (B.C. S.C.), an overhanging crane case, granted a time limited interlocutory injunction in the hope that it would "provide the parties with an incentive to reach a negotiated agreement" (at para. 52).

Injunctions – property rights and protests

University of Toronto (Governing Council) v. Doe et al., 2024 ONSC 3755 (Ont. S.C.J.), granted an injunction to end a 50-day encampment on its central campus protesting the treatment of Palestinian residents. The encampment organizers assumed the power to determine who could and could not enter the occupied area. Koehnen J. stated (at paras. 15, 136 and 175):

> In our society we have decided that the owner of property generally gets to decide what happens on the property. If the protesters can take that power for themselves by seizing Font Campus, there is nothing to stop a stronger group from coming and taking the space over from the current protesters. That leads to chaos. Society needs an orderly way of addressing competing demands on space. The system we have agreed to is that the owner gets to decide how to use the space.
>
> . . .
>
> However laudable their cause, protesters do not have the right to take property from its owner and put it into the hands "of an ad hoc, self-appointed, albeit well-meaning, group of individuals".
>
> . . .
>
> [The university] is not preventing the protesters from expressing their views on campus; it is preventing the protesters from silencing other voices on Front Campus.

The injunction provided that the encampment had to end but that the protesters were free to demonstrate on campus except for between the hours of 11 pm to 7 am. That order was held to be consistent with Charter values as in preserved the full right to protest.

Compare *Medvedovsky c. Solidarity for Palestinian Human Rights McGill (SPHR McGill)*, 2024 QCCS 1518 (C.S. Que.), refusing an interim injunction on short notice sought by two students not only to dismantle an encampment but to prohibit all demonstrations within 100 metres of university buildings.

Injunctions – defamation

"Our society's commitment to freedom of expression is reflected in both the common law and the Charter. The high value placed on freedom of expression dictates that in the early stages of a defamation action, an interlocutory injunction restraining expression should not be granted except in clear cases. This is especially the case where the expression in question relates to a matter of public interest such as police conduct. A low threshold for granting interlocutory injunctions in defamation cases would chill expression and impoverish public debate": Peterson v. McNallie, 2024 ABKB 127 (Alta. K.B.) at para. 28.

Yu v. 16 Pet Food & Supplies Inc., 2023 BCCA 397 (B.C. C.A.), formulates the test as follows at paras. 71-72:

> 1. The applicant must demonstrate that the impugned words are manifestly defamatory such that a jury finding otherwise would be considered perverse. To do so, the applicant must establish that:
> a. the impugned words refer to them, have been published, and would tend to lower their reputation in the eyes of a reasonable observer; and
> b. it is beyond doubt that any defence raised by the respondent is not sustainable.
> 2. If the first element has been made out, the court should ask itself whether there is any reason to decline to exercise its discretion in favour of restraining the respondent's speech pending trial.
> The second aspect of the test should take account of the full context before the court. Without intending to provide an exhaustive list of considerations, at the second stage, the court can consider factors such as the credibility of the impugned words, the existing reputation of the applicant, whether the applicant will suffer irreparable harm and whether the respondent is likely to continue to publish the impugned words.

Injunctions and medical treatment

An Alberta court granted the father of an adult child who had been medically approved for MAID public interest standing to challenge the approval, but set aside an ex parte injunction to restrain the administration of MAID on the ground that the adult child's autonomy in medical-decision making had to be given priority: "The choice to live or die with dignity is [the patient's] alone to make": *WV v. MV*, 2024 ABKB 174 (Alta. K.B.)at para. 152.

Anti-suit injunctions

Anti-suit injunctions may be granted when appropriate in family law cases on the basis of the court' personal jurisdiction over the litigants: *Pan v. Zhao*, 2024 ONSC 1328 (Ont. S.C.J.).

In view of the statutory provision precluding injunctions against foreign states, an anti-suit injunction will not be issued against a foreign state: *UK P & Club NV & Anor v. Republica Bolivariana De Venezuela*, [2023] EWCA Civ 1497.

Contempt – sentencing

The English courts summarized the correct approach to sentencing as follows in Attorney General v. Crosland, [2021] UKSC 15; [2021] 4 WLR 103 at para. 44; Breen & Ors v. Esso Petroleum Company Ltd., [2022] EWCA Civ 1405 at para. 6; Liverpool Victoria Insurance Co. Ltd. v. Khan, [2019] EWCA Civ 392 paras 57 to 71:

> 1. The court should adopt an approach analogous to that in criminal cases where the Sentencing Council's Guidelines require the court to assess the seriousness of the conduct by reference to the offender's culpability and the harm caused, intended or likely to be caused.
> 2. In light of its determination of seriousness, the court must first consider whether a fine would be a sufficient penalty.
> 3. If the contempt is so serious that only a custodial penalty will suffice, the court must impose the shortest period of imprisonment which properly reflects the seriousness of the contempt.
> 4. Due weight should be given to matters of mitigation, such as genuine remorse, previous positive character and similar matters.
> 5. Due weight should also be given to the impact of committal on persons other than the contemnor, such as children of vulnerable adults in their care.
> 6. There should be a reduction for an early admission of the contempt to be calculated consistently with the approach set out in the Sentencing Council's Guidelines on Reduction in Sentence for a Guilty Plea.
> 7. Once the appropriate term has been arrived at, consideration should be given to suspending the term of imprisonment. Usually the court will already have taken into account mitigating factors when setting the appropriate term such that there is no powerful factor making suspension appropriate, but a serious effect on others, such as children or vulnerable adults in the contemnor's care, may justify suspension.

The conscientious motives of a protester do not justify violating court orders with impunity but "greater clemency is normally required to be shown in cases of civil disobedience than in other cases."

Contempt -defences

A person who believes they should be exempted from an injunction on account of their Indigenous status or because the injunction fails to take Indigenous issues into account is entitled to ask the court for an exemption. However, they are not entitled to decide unilaterally that they are not subject to the order: "Far from being reasonable, that is the essence of contempt of court – it is an assertion that a person or group is entitled to decide whether they are beyond the court's powers". A 28-day sentence for deliberate defiance of the injunction was not inappropriate: *R. v. Leyden*, 2024 BCCA 227 (B.C. C.A.) at paras 55-6. See also R. v. Nelson, 2024 BCCA 72 (B.C. C.A.).

An Indigenous Chief argued that he was merely enforcing the Wet'suwet'en law of trespass when he acted in violation of an injunction. The plea was rejected on the ground that the Chief knew that he was violating the court's order and that he could not collaterally attack it as a defence to contempt: *Coastal Gaslink Pipeline Ltd. v. Huson*, 2024 BCSC 509 (B.C. S.C.).

Injunctions against persons unknown

"Newcomer" injunctions have frequently been granted in the UK to restrain the establishment of encampments by Travellers (formerly know as "Gypsies"). After an exhaustive review of the case law on granting injunctions against unknown persons, UK Supreme Court laid down the following principles to govern the award of such injunctions in *Wolverhampton City Council & Ors v London Gypsies and Travellers & Ors*, [2023] UKSC 47 at para. 238:

> (i) The court has jurisdiction (in the sense of power) to grant an injunction against 'newcomers', that is, persons who at the time of the grant of the injunction are neither defendants nor identifiable, and who are described in the order only as persons unknown. The injunction may be granted on an interim or final basis, necessarily on an application without notice.
> (ii) Such an injunction…will be effective to bind anyone who has notice of it while it remains in force…It is inherently an order with effect contra mundum.
> (iii) In deciding whether to grant a newcomer injunction and, if so, upon what terms, the court will be guided by principles of justice and equity and, in particular:
> (a) that equity provides a remedy where the others available under the law are inadequate to vindicate or protect the rights in issue.
> (b) That equity looks to the substance rather than to the form.
> (c) That equity takes an essentially flexible approach to the formulation of a remedy.

(d) That equity has not been constrained by hard rules or procedure in fashioning a remedy to suit new circumstances.

. . .

(iv) In…the context of trespass and breach of planning control by Travellers will be likely…require an applicant:

(a) to demonstrate a compelling need for the protection of civil rights or the enforcement of public law not adequately met by any other remedies (including statutory remedies) available to the applicant.

(b) to build into the application and into the order sought procedural protection for the rights …of the newcomers…sufficient to overcome the potential for injustice arising from the fact that, as against newcomers, the application will necessarily be made without notice to them [including advertising the intended application], …provision for liberty to persons affected to apply to vary or discharge the order without having to show a change of circumstances, [and] temporal and geographical limits on the scope of the order so as to ensure that it is proportional to the rights and interests sought to be protected.

(c) to comply in full with the disclosure duty which attaches to the making of a without notice application…

(d) to show that it is just and convenient in all the circumstances that the order sought should be made.

Criminal Contempt

A court may make a criminal contempt finding despite the fact that Attorney General declined to initiate proceedings: *Vancouver Fraser Port Authority v. Doe*, 2021 BCSC 1109 (B.C. S.C.).

Specific performance – supervision

Specific performance was refused where the lot to be sold was unique but where the contract also required the defendant to build a house and there was no trust between the parties so that it was likely that court supervision would be required: *Gillson Homes Ltd. v. Chopra*, 2024 ABKB 82 (Alta. K.B.).

Specific performance – third party approvals

Specific performance was refused where the consent of a First Nations Band would be required to obtain subdivision approval: *van Dishoeck v. Centre Stage Holdings Ltd.*, 2023 BCSC 1500 (B.C. S.C.).

Specific performance – damages

Where the plaintiff asserts an arguable claim for specific performance but is not awarded that remedy, the date for assessment of

damages is not the date of breach but rather the date of trial or an earlier date by which the plaintiff lost the right to claim specific performance: *Inmet Mining Corp. v. Homestake Canada Inc.*, 2003 BCCA 610 (B.C. C.A.) at para. 164; *van Dishoeck v. Centre Stage Holdings Ltd.*, 2023 BCSC 1500 (B.C. S.C.) para. 182.