

大成 DENTONS

# CPD Bootcamp 2019

## Pre-Trial Injunctive Relief

### Effective Strategies & Procedure



# Ex Parte Injunctions

- **Jurisdiction in the Province of Ontario**
  - *Courts of Justice Act*, s. 101
    - Injunctions & Receivers
- **Preservation of Rights in Pending Litigation; Rule 40 – Interlocutory Injunction or Mandatory Order**
- **Reasons for Moving on an *Ex Parte* Basis**
  - Moving *ex parte* does not provide the respondents with any ability to defeat the point of the motion. Put differently, an on notice motion would tip off the respondent rendering the motion moot or at least less effective
- **Affidavit(s) in support and Undertaking in Damages (Rule 40.03)**

# Ex Parte Injunctions (con'd)

- **Pros and Cons of Moving on an *Ex Parte* Basis**
  - An *ex parte* injunction is only valid for 10 days and then needs to be extended on consent or by Court Order (Rule 40.02)
  - Service on the responding party
  - Extending *ex parte* injunction on consent on a without prejudice basis
  - Negotiating a reasonable timetable for responding materials, cross-examinations on the competing affidavits, facts and argument
- **Special Considerations When Moving on an *Ex Parte* Basis**
  - Disclose all relevant facts or face *grave* consequences (*United States v. Yemec*, 2014 ONCA 274)

# Ex Parte Injunctions (con'd)

- **Is a Sealing or Protective Order Necessary When an *Ex Parte* Injunction or Motion to Extend an *Ex Parte* Injunction is Brought?**
  - *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 SCR 522, 2002 SCC 41 (CanLII)
    - THE TEST
  - *Stelco Inc., Re*, 2006 CanLII 1774 (ONSC)
    - The Court must always be vigilant in maintaining the principle of ensuring that the interests of justice and public awareness and scrutiny ability be maintained by having an open court system. Sealing orders cannot be granted merely because the parties involved agree to have material sealed – or “withdrawn” (withdrawn in the sense of not being relied upon, as was the case here).
  - **Public Access**
    - Public Hearings – s. 135
    - Documents public – s. 137

# Extending an *Ex Parte* Injunction Until Trial

- **Timing, Procedure & Evidence**

- Rule 39.03 examinations;
- Affidavit(s) in support of extending the *ex parte* motion;
- Affidavit(s) responding to the motion to extend the *ex parte* motion;
- Cross-examinations on the affidavits;
- Argument on the motion to extend the *ex parte* motion

# Extending an *Ex Parte* Injunction Until Trial (con'd)

- **Moving Party Strategies**

- The respondent's position has not changed anything:
  - (i) There remains a serious issue to be tried;
  - (ii) The balance of convenience still favours the moving party;
  - (iii) Damages would not be an adequate remedy

# Extending an *Ex Parte* Injunction Until Trial (con'd)

- **Responding Party Strategies on the Motion to Extend**
  - The *ex parte* injunction should not have been granted in the first place. Even if there was a basis for granting the *ex parte* injunction, there is no basis for continuing the *ex parte* injunction until trial:
    - (i) There is no serious issue to be tried
    - (ii) The balance of convenience favours the respondents
    - (iii) Damages would be an adequate remedy

# Defending a Motion to Set Aside an *Ex Parte* Injunction

- **Aggressive & Direct Challenge**

- On occasion, a respondent, in addition to responding to the motion to extend the *ex parte* injunction until trial, will move to set aside the *ex parte* injunction

- **Pragmatic Approach to *Ex Parte* Injunctions**

- While a separate motion is brought to set aside an *ex parte* injunction, from a practical point of view, the motion to extend the *ex parte* injunction & the motion to set aside the *ex parte* injunction are heard at the same time

# Defending a Motion to Set Aside an *Ex Parte* Injunction (con'd)

- However, when a separate motion to set aside the *ex parte* injunction is brought, **it affords the responding party to that motion** (the moving party on the *ex parte* injunction and the motion to extend the *ex parte* injunction) **the opportunity to file responding material**
- It behoves the responding party on a motion to set aside the *ex parte* injunction to defend the basis upon which that party presented its case to the judge on the initial *ex parte* motion
- It is to be noted that the motion to set aside the *ex parte* injunction is **not necessarily always going to come on for hearing before the judge who granted the *ex parte* injunction**
  - **EXCEPTION** = *Commercial List*

# Defending a Motion to Set Aside an *Ex Parte* Injunction (con'd)

- **Treating the Cross-Examination Transcripts as a Proxy for the Examinations for Discovery in the Action**
  - Parties to the action are generally expected to treat the transcripts of the cross-examinations on the affidavits as a proxy for the examinations for discovery in the action (as always, with exceptions)
  - Efficient & Pragmatic way to proceed
    - Courts could encourage it but is unlikely they will force parties to treat the cross-examination transcripts as discovery transcripts

# Seeking a Permanent Injunction at Trial

- Permanent Injunction appropriate remedy to seek at trial when damages are not an adequate remedy
- Permanent Injunction is issued as a Judgment after the Trial Judge has heard evidence
- In theory, it is open to a defendant who loses at trial to argue that a permanent injunction is not an appropriate remedy *but* rather that damages are the appropriate remedy

# Seeking a Permanent Injunction at Trial (con'd)

- **Non-Starter b/c there will have been two injunctions issued before the commencement of the trial**
  - *ex parte* injunction
  - interlocutory injunction
- ***Quia Timet* injunction sometimes sought**
  - Sought when there is high likelihood that if the defendant's activity is not enjoined, the plaintiff will sustain significant harm that cannot be compensated for by an award of damages
    - *Hipwell et al v Virden (Town of) et al* 1987 CanLII 6919 (MB QB)
    - *Mendez et al v Palazzi et al* 1976 CanLII 718 (ONSC)
    - *Skeena Resources Limited v Eliat Exploration Ltd.* 2016 BCSC 1076 (CanLII)

# Seeking a Permanent Injunction at Trial (con'd)

- ***Quia Timet* injunction sometimes sought (con'd)**
  - In order to establish that *quia timet* injunction is appropriate → the plaintiff needs to carefully draw out the defendant's fangs and establish how determined the defendant was (*or still is*) to embark on a course of action or activity calculated to inflict significant imminent harm to the plaintiff
  - Not uncommon for a defendant at trial to attempt to ameliorate his/her conduct previously enjoined by an *ex parte* and interlocutory injunction
    - **Plaintiff's Task** = to demonstrate to the trial judge that the defendant has not changed his/her intentions which, at base, remain the same, *namely*, to cause irreparable harm to the plaintiff

# Thank you

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