Dispute Resolution

MAREVA INJUNCTIONS CAN STOP FRAUDSTERS COLD

The powerful *Mareva* injunction (or freezing order) is one of the most devastating weapons in the Canadian commercial litigation arsenal. Such an order prevents a party (usually an apparent fraudster) from removing, spending or dissipating assets during litigation to deprive the claimant of the benefits of a judgment. Claimants are well advised to consider applying for such an order before they become immersed in litigation involving fraud or other dishonest conduct, by which time assets may have already been spirited away. If you are the subject of such an order, or a third-party recipient of one, it is crucial to react swiftly and prudently to ensure compliance with it.

A *Mareva* injunction freezes some or all of a defendant's assets, usually well before trial. The order may also require the defendant to provide an affidavit detailing information about their assets. Non-compliance with the order, either in terms of the movement of assets or their non-disclosure, will haunt the credibility of the defendant throughout the litigation and may result in contempt of court proceedings. Similarly, a properly-obtained order at the beginning of a lawsuit reverberates beyond the freezing of the assets itself.

Although a party should not seek a freezing order on purely strategic grounds, freezing a defendant's assets has a persuasive effect on settlement

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negotiations. Secured at the outset of litigation, it offers the possibility of a swift, effective and relatively inexpensive resolution, coupled with real recovery for the victims.

A Rigorous Test

In most Canadian jurisdictions, the traditional for a *Mareva* injunction test requires that the applicant show a strong *prima facie* or good arguable case, and a real risk that the defendant will remove or dissipate assets to avoid judgment.

Some jurisdictions, such as British Columbia, take a more flexible approach. British Columbia courts have consistently stated that they are not “prisoners of a formula", and that a freezing order may be granted wherever justice demands it. That being said, British Columbia courts agree that a freezing order should not be granted based merely on speculation that the plaintiff will ultimately succeed in its claim and have difficulty collecting on its judgment if it is not granted.

World-wide freezing orders

As Canadian courts have developed expertise and confidence in issuing freezing orders, they have extended their reach beyond their domestic jurisdictions: courts may and do grant world-wide freezing orders. Such orders effectively freeze the assets of the defendant wherever situated. The courts have this extraterritorial reach when they have jurisdiction over the defendant, most clearly when the defendant has submitted to their jurisdiction in some way.

So as not to offend principles of international comity, the standard world-wide freezing order expressly permits a foreign third-party recipient, such as a bank, to comply with whatever it reasonably believes to be its contractual or other obligations under the laws of its own jurisdiction.

"...one of the most devastating weapons in the Canadian commercial litigation arsenal."

Flexible and practical procedure

In most circumstances, the applicant for a *Mareva* injunction will file materials starting legal proceedings, with affidavit material setting out their claim and evidence that the defendant's assets may be dissipated before trial. In more urgent cases, the application may be heard by live testimony.

To prevent the defendant removing or disposing of their assets before the order is made, these materials are generally not served on the defendant until after the injunction is granted. In most cases, the application is first heard without notice to the defendant. Canadian court registries are usually accommodating in allowing the application to be heard immediately or

within hours of filing.
The order is almost always limited in time, with leave granted in advance for the defendant to apply for its release or variance. A claimant obtaining an injunction must expect a return to court to face a furious battery of evidence and arguments microscopically dissecting its earlier submissions. It often happens, however, that the freezing order is the beginning of the end for the defendant: negotiation and settlement avoid the return to court.

A *Mareva* injunction may be granted at any time during the litigation, even after judgment has been given. That being said, if litigation has been ongoing and the defendant has complied with the court's processes, it is more difficult to establish the need for a freezing order.

Historically, typical orders froze all the defendant's assets. Now, courts insist upon more nuanced terms. The defendant is generally allowed to move assets in the ordinary course of their business. They are also permitted reasonable living and legal expenses. The order should not freeze assets in excess of the amount claimed in the litigation.

The order will often place a cap on permitted withdrawals by the defendant in a given period. Another method is to provide for a financial institution holding the defendant's assets to create a separate account with a limited accessible amount.

For practical enforcement, the order is served on the financial institutions and other parties who are known to, or likely, hold the defendant's assets. Ideally, these institutions, with specific account numbers, will be listed in the order. But the typical order also contains a blanket prohibition against

dealing with assets, with which even financial institutions that are not listed must comply. The freezing order should also, where possible, be registered against the title of all real estate owned by the defendant.

High rewards, but high risks

Applying for a *Mareva* injunction is a high-stakes exercise, for several reasons.

" ...a high-stakes exercise.."

First, the application is almost always made without notice, to prevent the fraudster defendant from spiriting away their assets before the freezing order is granted. Applicant's counsel is therefore required to make full and frank disclosure of all material facts, and the applicable law, to the court. As there is often very little time to prepare the materials, and as such information is often murky at best in a fraud scenario, it is often a challenge for counsel to uncover sufficient facts to discharge that duty. Even innocent non-disclosure can result in the setting aside of the order. A marked failure in disclosure may well attract judicial castigation, as well as a full-indemnification costs award payable by the applicant.

Second, as with most injunctions, the applicant must provide an undertaking to the court to compensate the defendant for any damage caused by the order, if it is later determined that it should not have been granted. When a party's assets are substantially frozen, there is a real risk of significant damage, for which the applicant could be liable.

Finally, a freezing order that is improperly or sloppily obtained, or one

that is drafted too broadly or imprecisely, will cost the party, and its counsel, heavily in terms of credibility with the court. Canadian jurisprudence contains many judicial chastisements of parties seeking freezing orders for an ulterior purpose. A freezing order that is later set aside can hobble the claimant from the outset of litigation, rather than empowering it.

What if you are served with a Canadian freezing order?

The defendants whose assets are the subject of freezing orders tend to be rogues. Indeed, fraudulent conduct by the defendant is usually the main factor in the court granting the order. It is frequently futile and naïve to expect such a defendant to respect the order. A claimant obtaining a freezing order thus enforces it primarily by serving it on persons and institutions that hold funds for the defendant, most commonly banks, credit unions and other financial institutions. Financial institutions should be prepared to respond to such orders at any time.

A financial institution is often stuck between a rock and a hard place when served with a freezing order. On one hand, it has duties to its client, and may wish to preserve that business relationship. On the other, it faces serious sanctions if it does not comply with the order, even one from outside its jurisdiction. If it has a physical or business presence in the jurisdiction of the issuing court, it could even face contempt proceedings. However, there is good news for financial institutions caught in such a bind. Initially, the courts held that a bank that did not take adequate care to freeze funds as required could be liable to the claimant for damages if the defendant absconded with the funds that ought to have been frozen. Happily for financial institutions, the courts later reversed that decision,

and held that a bank will not be liable if it innocently fails to freeze funds. The news is not all rosy, however, the courts have also confirmed that banks and their employees may face contempt of court charges if they do not properly comply with freezing orders.

Freezing orders are often complicated and lengthy. Their scope and requirements are not always clear. Given the international scope of modern finance, and the possible sanctions for failure to comply, financial institutions and other recipients of freezing orders would be wise to seek advice about whether, how and to what extent they must comply with them.

D. Ross McGowan
Tel: (604) 640-4173
rmcgowan@blgcanada.com

David A. Crerar
Tel: (604) 640-4181
dcrerar@blgcanada.com

EXPROPRIATION WITH COMPENSATION

It is a defining attribute of government that it has the power to take private property for public purposes, without the owner's consent. However, most expropriations of land in British Columbia are governed by the *Expropriation Act*, which ensures a fair procedure and entitles owners to be paid compensation. There are many public infrastructure initiatives in the works to help stimulate the B.C. economy. If your business owns property these projects may have an impact on you, whether they affect access to your property during construction or involve an actual expropriation of part of your land. It is important for property owners to understand the process under the *Expropriation Act* and their rights, to avoid being "taken" by surprise.

"One of the best defences for a property owner is a good offence."

One of the best defences for a property owner is a good offence. Major public projects are rarely conceived overnight. The types of large-scale projects that require the acquisition of significant tracts of land typically involve years of planning and are well publicized. But even though they may seem for a long time to be just political "pipedreams", once funding is secured they may proceed very quickly. One example of such a major project is the proposed expansion of the "Evergreen" rapid transit line from Burnaby through Coquitlam to Port Moody, which has been in the research, planning and design stages for nearly a decade. Now the provincial transportation authority has started discussions with affected property owners about the land required for the project. Before acquiring new property or beginning a significant upgrade to your existing property you should consider whether a major infrastructure project is expected which might change the access to your property, turn your street frontage into a new transit route or affect the

ability of customers to use your business. Even a proposed change in the designation of land use (which is not itself an expropriation), such as the designation of abandoned railway tracks through a residential neighbourhood as a new "light rail" corridor, may be an indication of future expropriations.

Usually, short of a change in political will, property owners cannot stop a public project from proceeding. However, in single site or "non-linear" projects, such as a new park or school, the *Expropriation Act* gives owners the right to request that a public inquiry be held before the project is approved. This allows owners to challenge the reasonableness of the amount of land that is required, and investigate whether there are design alternatives. Although "linear" projects, like new highways and hydro lines, do not provide the right to a public inquiry, these projects can still, literally, change course. During the project design stage property owners should remain actively involved. You may be able to advocate for small shifts in the location or configuration of the project to your benefit. For example, owners may succeed in lobbying for a construction method that would minimize the interference with their businesses and customers.

The *Expropriation Act* allows property owners and expropriating authorities to negotiate different types of agreements depending on the circumstances. An owner can agree on the compensation to be paid and "sell" the necessary part of his or her land to the expropriating authority, similar to an ordinary land transaction. Or the owner and the expropriating authority can agree to preserve the owner's right to challenge the amount of compensation as if the land had been expropriated, but to cooperate on other aspects of the process. In this kind of agreement, called a "section 3 agreement", the parties may be able to find common ground on logistical issues, such as traffic and access arrangements, that will help the owner maintain normal business operations.

Governments prefer consensual arrangements and only use expropriation as a tool of last resort. This gives owners some leverage in negotiating arrangements. Given that most large-scale public projects take many years to be constructed, fostering a cooperative relationship with the expropriating authority and avoiding expropriation can have long term benefits for owners.

However, if discussions between a property owner and the expropriating authority break down and, as the saying goes, "the show must go on", then the authority can expropriate the land it needs without the owner's agreement. The expropriating authority must pay the owner compensation for the land determined in accordance with a qualified appraiser's report. Under the *Expropriation Act* the owner has one year to challenge the amount of compensation.

A common misconception is that the expropriating authority must "make the owner whole". The *Expropriation Act* provides that an expropriating authority must pay a property owner the market value of the land taken, plus reasonable costs and damages directly attributable to the disturbance caused by the expropriation (which may include business losses), and the owner's reasonable legal fees and appraisal costs to advance a claim for more compensation. However, there are a number of factors that can make the compensation less than an owner might expect. For example, the fact that it was annoying and inconvenient for customers to access your business during construction will not entitle you to compensation unless you can establish *actual* business losses that are *directly attributable* to the project. A new infrastructure project that coincides with a downturn in the economy may make the depression in market value of your land more difficult to prove. You may not be entitled to any compensation, despite several years

"...a number of factors can make compensation less than an owner might expect."

of heavy construction right outside your front door, because some expropriating authorities are exempt by statute from paying compensation unless some of your land was actually expropriated. Also, the Expropriation Act does not provide for full indemnity for your legal or consulting fees. It only allows for "reasonable" fees.

The determination of compensation is the main source of disputes in expropriations. Where agreement cannot be reached within one year, a property owner may commence a lawsuit in the Supreme Court of British Columbia to have the court determine the compensation. A lawyer can help with the court proceeding, but seeking legal advice on strategic decisions before the situation escalates to expropriation, and afterwards to assist with properly valuing your claim, can help owners to get the most out of a difficult situation.

Emily Mak
Tel: (604) 640-4043
emak@blgcanada.com

Dispute Resolution is general information, not legal advice. We would be pleased to provide additional details and to discuss the possible effects of these matters in specific situations.

Vancouver Dispute Resolution Department Manager:

P. D. (Don) MacDonald
Direct Tel: (604) 640-4119
E-mail: pdmacdonald@blgcanada.com

Editor:

Stephen Antle
Direct Tel: (604) 640-4101
E-mail: santle@blgcanada.com

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Borden Ladner Gervais LLP
Lawyers • Patent & Trade-mark Agents

Calgary
1000 Canterra Tower
400 Third Avenue S.W.
Calgary, Alberta, Canada T2P 4H2
tel: (403) 232-9500 fax: (403) 266-1395

Montréal
1000 de La Gauchetière Street West
Suite 900, Montréal, Québec, Canada H3B 5H4
tel: (514) 879-1212 fax: (514) 954-1905

Ottawa
World Exchange Plaza
100 Queen St., Suite 1100
Ottawa, Ontario, Canada K1P 1J9
tel: (613) 237-5160 1-800-661-4237
legal fax: (613) 230-8842 IP fax: (613) 787-3558

Toronto
Scotia Plaza, 40 King Street West
Toronto, Ontario, Canada M5H 3Y4
tel: (416) 367-6000 fax: (416) 367-6749

Vancouver
1200 Waterfront Centre
200 Burrard Street, P.O. Box 48600
Vancouver, British Columbia, Canada V7X 1T2
tel: (604) 687-5744 fax: (604) 687-1415

Waterloo Region
Waterloo City Centre
100 Regina Street South, Suite 220
Waterloo, Ontario, Canada N2J 4P9
tel: 519 579-5600 fax: 519 579-2725
IP fax: 519 741-9149

www.blgcanada.com

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