A Trojan Horse: the Cross-Border Enforcement of Mareva Injunctions in Canada

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Introduction

Patrick Glenn has proffered the thesis that regionalization, and in particular that practiced in Europe and North America, has inevitably led to harmonization of laws. In Europe, national private law of the various states forming the EU has generally been built on unitary principles, which, when brought together has necessitated supra-national institutions that impose harmonization. North America countries, borne from experience as federal states that have as an integral aspect of governance the mediation by courts of jurisdictional responsibility between individual states/provinces and federal governments, have developed a bifurcated response that fosters informal pan-national harmonization, particularly of trade and commercial matters, matters which often lie within federal jurisdictional competence, while similarly tolerating unilateral protectionism in matters often within exclusive state or provincial jurisdiction. Glenn’s thesis is not to evaluate the benefits of one approach over the other; rather, it is to suggest that we are travelling on different trajectories, but in pursuit of similar goals. Of course, there is an important difference in process. Europe can only move forward in harmonization by creating supra-national adjudicative bodies, enactment of domestic legislation relinquishing areas of jurisdiction, and treaty engagements. This is the work of bureaucrats and politicians. North America could adopt these approaches, but the current climate makes that highly unlikely. Rather, harmonization occurs at the coalface of litigation, each chip-by-chip bringing us closer together in areas where there is common ground. This is the work of lawyers, judges and courts.

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2. Another aspect of Glenn’s thesis is that the European nations are largely civilian code countries that make differences in legal regimes glaringly apparent. Glenn states that they approach harmonization from a presumption of conflict that is resolved from above. In contrast, North American countries largely share a common law heritage that ‘submerged conflict in a mass of decisional law’ (Ibid at 1792).

3. The prospect of changes to NAFTA is remote and Canada is increasingly looking to other international fora to resolve trade irritants (WTO). Within the citizenry of Canada and the USA there is a growing gulf in social and political values. See M. Adams, Fire and Ice: The United States, Canada and the Myth of Converging Values (Toronto, Penguin Canada: 2003).
It is now trite to expound on the transformation of western society as a result of the knowledge and services based economy, and increasing globalization of capital and ideas. Underpinning this development is a fundamental realignment of our understanding of the concept of property, away from hard assets capable of ownership by physical exclusion of others, toward ephemeral and transient ‘property,’ that only holds value to the extent that it can be managed by manipulation of legal rights and remedies against others. This metamorphosis, an event that could only delight the alchemists of old, has sharpened the focus on equitable remedies and procedural law. Once property – rights exercised under shares, money, rights under a promised contractual performance, confidences, ideas, trademarks, reputation, goodwill – is transmogrified into digital signals and bundled legal entitlements, capable of multiple use and dilution rather than sole physical custody, a commensurate remedial paradigm shift is required. Because injunctions, by and large, operate in personam, they recreate an exclusionary effect, restraining and containing an offender’s actions over the violated property right, similar to retention of physical custody. But, because these new forms of property exist only as legal phenomena, and cannot be restored if broached, the application for injunctive relief is itself an important incident of the rights attached to the property. The value of this new form of property is often fleeting and ephemeral, making the timely pursuit of injunctive relief of the utmost importance. And, of course, interlocutory injunction relief raises new concerns touching due process.

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4 I have done some of this in earlier writing. See Jeffrey Berryman, *The Law of Equitable Remedies* (Toronto, Irwin Law, 2000) at 5.

5 The decision of the Supreme Court of Canada in *Cadbury Schweppes Inc. v. FBI Foods Ltd.* [1999] 1 SCR 142, determining that a right to confidence is sui generis, is emblematic of a transformation in property rights and the difficulty of aligning appropriate remedy to property right.

6 In terms of the celebrated analysis of Calabresi and Melamed in ascribing right to remedy, the new forms of property conflagrate the legal ‘right’ and ‘property rule’ such that they are indistinguishable. A. Melamed and G. Calabresi, “Property Rules, Liability Rules and Inalienability: One View of the Cathedral”, (1972), 85 *Harvard L. Rev.* 1089.

7 A trademark, employee’s confidentiality, or restraint of trade clause, are quintessential examples of these new forms of property. They require constant management to ensure either distinctiveness, to avoid information becoming part of the public domain, or to avoid loss of market advantage to a competitor through an employee breaching a restraint obligation.

8 Another impact of this new form of property is that it is capable of multiple ownerships without detracting from the owner’s usage. Thus, theft in a criminal sense is akin to grabbing a person’s air, constantly being replaced by an endless supply. In turn we increasingly see the theft of new property as constituting a victimless crime. Policing becomes a matter for private property holders rather than State
are other attractions to equitable remedies. Injunctions are available on a momentary basis. They can be highly tailored to meet particular circumstances and competing interests. They give rise to coercive enforcement through contempt of court powers, and can bind non-parties.9

From a remedial perspective10 the protection of these new forms of property places greater emphasis on injunctions, and, more commonly, interlocutory injunctions. Property that exists only as a legal phenomenon highlights the need for expedited judicial processes so that the value of the rights can be preserved. To wait for final judgment on breach of a confidentiality clause is to seek relief long, long, after the horse has bolted. The intrinsic value of the confidentiality is inextricably linked to an appropriate and timely awarded remedy. Similarly, even if the right violated can be readily quantified in a monetary equivalent, our wired, and wireless, world makes it that much easier to turn the euphoria of judgment into an empty victory when judgment debtor can remove all assets, thus becoming judgment proof, before the bailiff is called.

Generally, the common law had been unreceptive to the reciprocal enforcement of equitable remedies and interlocutory injunctions in particular. The requirement that a foreign judgment be final,11 and for a fixed sum,12 operated as conclusive bars to enforcement of equitable orders. At a fairly early stage in its evolution the European

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10 By ‘remedial perspective’ I am referring to the approach advocated by Ken Cooper-Stephenson who suggests that there is no clear demarcation between ‘rights’ and ‘remedies’. Rather, adjudicators shape, some would say manipulate, both right and remedy each informed by studying the underlying structures and values that inhere to either the contested right or the preferred remedy. Thus, for example, in the case of trespass, a person exclusively advocating a rights perspective would only accept an injunction remedy (A property rule in Calabresi and Melamed terms) so as to sanctify property and confirm that it can only be taken from the owner by consensual exchange. An integration approach may see the awarding of an injunction as serving an important hortatory function on the place of property, but suspend its operation for pragmatic reasons if, say, there is a compelling public interest in allowing a temporary or minor trespass. See K. Cooper-Stephenson, “Principle and Pragmatism in the Law of Remedies” in J. Berryman ed. Remedies: Issues and Perspectives (Scarborough, Ont., Carswell: 1991) 1. This approach is much criticized as being discretionary remedialism. For a critique on the protagonists see S. Evans, “Defending Discretionary Remedialism”, (2001), 23 Sydney L. Rev. 463.
12 Cheshire & North ibid. at 429.
Community, and in turn the United Kingdom, changed the rules on enforcement of judgments by agreeing to the Brussels and Lugano Conventions on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. Title III of the Brussels Convention gives a wide definition to ‘judgment’ to include preliminary issues, as well as non-monetary judgments, however this definition was not intended to cover procedural orders that do not ‘either determine or regulate the legal relationships of the parties’. Interlocutory injunctions, such as Anton Piller and Mareva, which are usually described as procedural injunctions, transcend the substantive - procedural demarcation, and make it difficult to identify whether they truly do regulate the parties’ relationship. In any case, a further more significant impediment exists with respect to these particular injunctions, and that is the fact that orders granted on an ex parte basis are excluded from the recognition and enforcement provisions of the convention. However, Article 24 of the Convention makes provision for courts in contracting states to order provisional and protective measures where another contracting state’s court has jurisdiction over the substantive matter. Of course, this would necessitate the applicant having to satisfy any

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15 A Mareva injunction is an interlocutory proceeding in which a plaintiff seeks to restrain the removal or dissipation of assets away from the court’s jurisdiction prior to judgment being made in the substantive dispute between the litigants. An Anton Piller order is interlocutory proceedings in which the plaintiff seeks to restrain the defendant from destroying either evidence or property that it considers vital to be able to successfully prosecute its suit. Both orders are obtainable on an ex parte basis. In the United Kingdom Mareva injunctions are now called Freezing Injunctions. See Civil Procedure Rules 1998 r.25.1(f). In Australia the High Court of Australia in Cardile v. LED Builders Pty Ltd. (1999), 162 ALR 294, has insisted that Mareva injunctions be called Mareva orders, or ‘asset preservation orders’, indicative of the fact that they are merely procedural rather than substantive. See also P. Devonshire, “Freezing Orders, Disappearing Assets and the Problem of Enjoining Non-parties”, (2002), 118 LQR 124 arguing that the Australian approach places the Mareva order on a sounder footing, linking it to the power of courts to exercise jurisdiction to administer their own procedures, and thereby supporting administration of a freestanding Mareva order.
16 The Schlosser Report above note 14 gave a preliminary order requiring the taking of evidence as an example of an order that would not be covered by the Convention because it was not determinative or regulated the parties’ relationship. Given, that a further significant feature of both Anton Piller and Mareva injunctions is the attachment of interrogatories, the example given in the Schlosser Report clear envisages that they could not be enforced.
17 Cheshire & North above note 11 at 486.
requisite test for this form of relief in the domestic court, rather than simply seeking enforcement of the interlocutory order obtained in the foreign court.\textsuperscript{18}

As Glenn identified, North American states have not invested the time in creating a convention dealing with reciprocal enforcement of judgments, rather we have relied upon informal means, and particularly judicial decisions\textsuperscript{19}. For Canada, the decision in \textit{Morguard Investments Ltd. v. De Savoye}\textsuperscript{20} freed us from received common law traditions, and launched us in a new direction built on the premise that full faith and credit should be accorded the judgments of foreign courts so as “to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner.”\textsuperscript{21} Informal harmonization is very much a work in progress. Nor has it lead to an abandonment of comprehensive legislative action,\textsuperscript{22} and, in some areas, there is still wide divergence.\textsuperscript{23}

It is against this background of increasing need for injunctive relief to protect property, coupled with the need that such relief is granted on an interlocutory basis to make it effective, that I wish to explore. There are numerous permutations on the potential enforcement of interlocutory relief across jurisdictional borders. In what follows I intend to restrict myself to the enforceability of Mareva injunctions. Mareva orders can be positioned at the outer extreme of judicial interlocutory relief, a point recognized in the heightened scrutiny accorded the order by courts. The order engages complex jurisdictional issues because it confers procedural protections and operates as an ancillary order to other substantive claims. In addition, there is significant jurisprudence on extra-territorial enforcement that engages problems with enforceability against third parties. The order is frequently granted on an \textit{ex parte} basis and relies upon \textit{in personam} enforcement. Finally, the order does not have immediate parallels in the United States,

\textsuperscript{18} \textit{Ibid} at 487. See also L. Collins, “The Territorial Reach of Mareva Injunctions”, (1989), 105 \textit{LQR} 262 at 289.
\textsuperscript{19} Glenn, above note 1 at 1799
\textsuperscript{20} \text{[1990]} 3 SCR 1077.
\textsuperscript{21} \textit{Ibid} per La Forest at 1096.
\textsuperscript{23} P. Glenn identifies Mareva injunction jurisdiction as one area where there is divergence between Canada on the one hand, and the United States and Mexico on the other. Above note 1 at 1804.
and thus may prove attractive to foreign nationals from that country against defendants amenable to a Canadian court’s jurisdictional reach. If some form of reciprocal enforcement can be found engaging Mareva orders, then, it is highly likely that other forms of interlocutory relief will similarly be enforceable on a reciprocal basis.

Subject Matter and Personal Jurisdiction Before United Kingdom Courts

An issue that bedevilled English courts with respect to Mareva orders concerned whether the court issuing the interlocutory order must also be seized of the substantive dispute (i.e exercise subject matter jurisdiction) that the Mareva order is ancillary to. A corollary issue is that a court order cannot exist in the air and must be served on someone. A defendant can be present or consent to a court’s jurisdiction, or service can be affected through some form of authorized service *ex juris* so as to confer jurisdiction (personal jurisdiction). The interdependency of these issues was at the heart of the Privy Council’s decision in *Mercedes-Benz v. Leiduck*\(^{24}\). Much of the decision turned on the applicable language of the civil procedural rules relating to service *ex juris*. The only connection the defendant had to Hong Kong, where the application was brought, was that he held assets in that jurisdiction. The substantive dispute was to be determined in Monaco, where the defendant, a German citizen, was held under arrest pending criminal investigations. The majority held that since an order could not exist in the absence of an action, the success of a Mareva injunction turned upon whether service could be affected against the defendant (personal jurisdiction). The only way this could occur was through the service of a ‘writ out of jurisdiction’ procedure\(^{25}\). On the language of the applicable rule, service outside the territorial jurisdiction of the court could only arise where the applicant had a claim based on an enforceable legal right, of a kind falling within the appropriate rule, and for which the defendant could be required to answer. In the absence


\(^{25}\)  Ord 11, r. 1(1)(b) stated:

> Provided that the writ does not contain any claim mentioned in …service of a writ out of jurisdiction is permissible with the leave of the Court if in the action begun by the writ –
> (b) an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction (whether or not damages are also claimed in respect of a failure to do or the doing of that thing);
of being able to serve the defendant, no Mareva injunction could be granted. This left open the issue, if personal service was not a problem – as in if the defendant was present in Hong Kong at the time of service, could a Mareva injunction then be ordered where the court would not have jurisdiction over the substantive claim (subject matter jurisdiction). The majority did not have to answer this question in light of their decision on service outside the jurisdiction.

Lord Nicholls delivered a cogent dissent. In essence, he reversed the order of the two questions raised by the majority. One, did the Hong Kong court have jurisdiction to grant a freestanding Mareva injunction (subject matter jurisdiction)? And, two, whether a plaintiff in such a case may effect service on a defendant outside the court’s territorial jurisdiction (personal jurisdiction)? Lord Nicholls’s judgment is premised on the assertion that if two people living in Hong Kong, but party to a contract that includes an exclusive jurisdiction clause favouring a foreign country, were engaged in a dispute, then a Hong Kong court would have jurisdiction to grant a Mareva injunction against the defaulting party, where the defaulting party was seeking to thwart enforcement of the potential judgment of a foreign court in removing assets from Hong Kong. As Lord Nicholls asserted, the history of the development of the Mareva injunction revealed that it is an order:

…granted to facilitate the process of execution or enforcement which will arise when, but only when, the judgment for payment of an amount of money has been obtained. The court is looking ahead to that stage, and taking steps designed to ensure that the defendant cannot defeat the purpose of the judgment by thwarting in advance the efficacy of the process by which the court will enforce compliance.27

If the rationale for the Mareva injunction lay in facilitating judicial process relating to prospective enforcement, the plaintiff’s underlying cause of action was irrelevant with regard to the court’s jurisdiction, although it may be material when exercising discretion to grant the order. As long as the plaintiff would, at some stage, have a money judgment

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26 The arguments presented by Lord Mustill for the majority were that the origins and history of the Mareva injunction meant that it was not of the type of injunction as envisaged in Ord. 11, but that it was one sui generis. Ord. 11 was designed to allow for service outside the jurisdiction so that claims could be adjudicated. The order spoke of ‘an action’ commenced ‘by a writ’.

27 Above note 24 at 306.
enforceable by the Hong Kong court, it held subject jurisdiction to determine whether to grant or deny the order. The fact that such an order is to be made against a defendant outside the court’s jurisdiction only added to the compelling need for the domestic court to grant such relief. This would be particularly so, where the foreign court in which the dispute was to be heard had no jurisdiction to grant interim Mareva type orders itself. If there is a requirement that Mareva injunctions be ancillary to some underlying cause of action, it is sufficient that the action is to be heard by a foreign court or arbitral body, and, that it raises an issue that, if brought before the domestic court, would constitute a justiciable claim.\textsuperscript{28}

Having answered the first question, and determined subject matter jurisdiction supported a freestanding Mareva order, Lord Nicholls quickly concluded that service on a foreign defendant outside the court’s jurisdiction could be effected pursuant to the same contested rule relied upon by the majority. Because the Mareva injunction was an injunction, like any other injunction, it fell within the rule.

In the United Kingdom the ruling in \textit{Mercedes-Benz} was effectively reversed by the provisions enacted as part of the \textit{Civil Jurisdiction and Judgments Act} 1982 (UK), namely s.25\textsuperscript{29}, coupled with the statutory enshrinement of Mareva injunctions contained in s.37 of the \textit{Supreme Court Act} 1981 (UK).\textsuperscript{30} In addition, the rules of civil procedure

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\item \textsuperscript{28} Lord Nicholls preferred the reasoning in \textit{Channel Tunnel Group Ltd. v. Belfour Beatty Construction Ltd.} [1993] AC 334. In addition, Lord Nicholls points out that subsequent to the development of Mareva orders the courts have developed anti-suit injunctions and discovery orders (Norwich orders) where there is clearly no underlying suit supporting the applicant’s claim before the domestic court.
\item \textsuperscript{29} S.25 was enacted to give effect to article 24 of the 1988 Brussels Convention and conferred upon the English courts the jurisdiction to grant interim relief in support of proceedings, themselves being defined in the Convention, initiated in other member states of the Convention. The statutory jurisdiction has been further conferred to grant interim relief supporting non-convention states by statutory instrument SI 1997 No. 302. S.25(2) makes it clear that the lack of subject matter jurisdiction is not a barrier to the granting of interim relief.
\item \textsuperscript{30} S.37(3) reads:
\begin{quote}
The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceeding from removing from the Jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as cases where he is not, domiciled, resident or present within that jurisdiction.
\end{quote}
In addition, a European Council Regulation EC No.44/2001 article 31 states:
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were amended to make it clear that service out of the jurisdiction with court approval could be effected in any proceeding where an interim remedy was sought pursuant to s. 25(1). 31 The impact of these provisions has been concisely summarized by Millett LJ when he said, “The position has now been reached, therefore, that the High Court has power to grant interim relief in aid of substantive proceedings elsewhere of whatever kind and wherever taking place.” 32

The English courts have reviewed the parameters of their new jurisdiction on several occasions, the most recent being the Court of Appeal decision in Motorola Credit Corporation v. Uzan 33. That appeal concerned the granting of a Worldwide Mareva injunction over four defendants, all members of the Uzan family, to secure assets located within England, and to provide disclosure of assets located throughout the world. Motorola commenced an action in the US District Court for the Southern District of New York claiming that the defendants were party to a fraud when they diverted monies loaned to a Turkish company within their control, to their own purposes. Motorola had advanced funds to enable the defendants’ Turkish companies to purchase telecommunication equipment and services. Upon discovering the alleged fraud, Motorola applied to the US District Court for a temporary restraining order prohibiting the defendants from taking any further steps to prejudice the security of the loans advanced by Motorola. At the same time, Motorola initiated proceedings in London for a freezing order and Worldwide Mareva against all four defendants. Of the defendants, one, (D1), owned a substantial residential property in London and made occasional trips to the United Kingdom for leisure. Another, (D4), held residency, and substantial assets in the United Kingdom. The other two defendants, (D2, D3), neither held assets nor were resident in the United Kingdom, and only made occasional leisure trips to the jurisdiction. At the interim proceedings a freezing order and Worldwide Mareva issued against all four defendants, from which they appealed.

Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.

31 See CPR 6.20(4).
33 [2004] 1 WLR 113 (CA).
What is immediately apparent from the unanimous judgment of the Court of Appeal is that there is no doubt that an English court now has jurisdictional authority to grant such an interim order. The only question before the court is to determine appropriate criteria to guide the exercise of discretion, and in particular, to give guidance on what, in the language of the section, would constitute circumstances that would make it ‘inexpedient for the court to grant’ relief.\(^{34}\) In determining criteria the court drew together ideas advanced in three other earlier judgments dealing with s. 25, Republic of Haiti v. Duvalier\(^{35}\), Credit Suisse Trust v. Cuoghi\(^{36}\), and Refco v. Eastern Trading Co.\(^{37}\)

\(^{34}\) S.25(2) reads:

On an application for any interim relief under subsection (1) the court may refuse to grant relief if, in the opinion of the court, the fact that the court has no jurisdiction apart from this section in relation to the subject-matter of the proceedings in question makes it inexpedient for the court to grant it.

\(^{35}\) [1990] 1 QB 202. Following Duvalier’s fleeing from Haiti to France, the new Haitian government commenced proceedings in France to recover assets that had been stolen. Duvalier had utilized the services of an English firm of solicitors to create a scheme to conceal the looted assets. The applicant brought an action in England for a worldwide Mareva order as well as disclosure of the whereabouts of the assets. While Duvalier was not resident in England, the court held that his solicitors were bound by the disclosure order to give information about the concealed assets. The substantive cause of action was being heard in France, a signatory to the Convention which required the English court to aid the French court in such provisional and protective measures as its own domestic law would afford if the substantive action were heard in England. The French court had no comparable judicial order. The English court was the only court that could effectively order Duvalier’s agents, the solicitors, to disclose the information, so that the location of the contested assets could be revealed. The circumstances of the case demanded ‘international co-operation’ and did not make it ‘inexpedient for the court to grant’ the injunction.

\(^{36}\) Above note 32. Credit Suisse commenced an action in Switzerland against one of its employees, Mr Voellmin, who it alleged had been party to a fraud on its customers’ accounts. The plaintiff further alleged that Cuoghi, a person resident in England, was complicitous with Voellmin touching part of the funds. Credit Suisse sought a worldwide Mareva order against Cuoghi, for whom they had commenced extradition proceedings, in England in support of its Swiss proceedings. The Worldwide Mareva was granted and affirmed on appeal.

\(^{37}\) [1999] 1 Ll. Rep. 159 (CA). The plaintiff was a futures broker operating in the United States. The defendant was a partnership of the Ashraf family that traded in precious metals. Zahid, one of the defendant members of the Ashraf family began futures trading through the plaintiff. The plaintiff began to liquidate the defendant’s position, ultimately culminating in a debt owed of millions of dollars. Zahid then executed a promissory note for the amount owed. When the other family members discovered the extent of Zahid’s trading, they argued that he had acted without authority, and that the plaintiff had in fact conspired to defraud the defendant business and the other family members. The plaintiff moved in England, where the defendants had considerable assets, for a worldwide Mareva order. The order was declined, on the basis that the plaintiff had not demonstrated a real risk of dissipation of assets and thus the court, if it had jurisdiction over the substantive dispute, would not have granted a Mareva order. This was seen as the first condition that must be met under s.25 before turning to the issue whether the lack of jurisdiction made it inexpedient to grant the order. Nevertheless, in deference to the arguments raised by the parties, the Court of Appeal did indicate how it would approach the issue of inexpediency where the US court had declined to rule on whether such interim relief should be granted, and in fact had no jurisdiction to grant, and had
From these authorities the court deduced five factors when considering whether it is inexpedient to grant the order. However, before applying these factors the English court must conclude that, but for the lack of jurisdiction, the plaintiff has satisfied the court that it would also grant a Mareva injunction if the substantive claim to be filed, or already filed, were placed before it. Thus, before moving onto the question of expediency, the English court must be satisfied that the plaintiff has a good arguable case, and that there is a serious risk of dissipation of the assets if notice was given and the order declined. Nor does the fact that the primary court has ruled on whether to give interim relief operate as res judicata on the same issue raised before the English court. Similarly, it is no abuse of process for the defendant to raise an objection to the grant of the English court’s order based on points argued, or not raised, before the primary court when that deferred the issue of whether such relief should be available to a plaintiff over assets in England to the English courts. The comments of Millett LJ are worth quoting in full:

The Jurisdiction of national courts is primarily territorial, being ordinarily dependent on the presence of persons or assets within their jurisdiction. Commercial necessity resulting for the increasing globalisation of trade has encouraged the adoption of measures to enable national courts to provide assistance to one another, thereby overcoming difficulties occasioned by the territorial limits of their respective jurisdictions. But judicial comity requires restraint, based on mutual respect not only for the integrity of one another’s process, but also for one another’s procedural and substantive laws. The test is an objective one. It does not depend upon the personal attitude of the judge of the foreign court or on whether the individual judge would find our assistance objectionable. Comity involves respect for the foreign Court’s jurisdiction and process, not for the foreign judge’s feelings. A court which is invited to exercise its ancillary jurisdiction to provide assistance to the court seised of the substantive proceedings need feel no reluctance in supplying want of territorial jurisdiction but for which the other court would have acted. But it should be very slow to grant relief which the primary court would not have granted even against persons present within its own jurisdiction and having assets there. Assisting a foreign court by supplying a want of territorial jurisdiction is plainly within the policy of the Act; assisting plaintiffs by offering them a lower standard of proof is not obviously within the legislative policy. I recognize, however, that the dividing line may sometimes be hard to draw, and that the distinction is not by any means necessarily decisive. I do not wish to be understood as circumscribing a valuable jurisdiction, but rather to be indicating matters relevant to be taken into account when the Court is invited to exercise it. (At 175).

This adopts the two stage test enunciated in Refco, that when exercising jurisdiction under s.25, a court must ask:

“(a) whether the facts would warrant the relief sought if the substantive proceedings were brought in England; (b) if yes, whether in the terms of s.25(2) the fact that the court has no jurisdiction apart from that section makes it inexpedient to grant the interim relief sought.” Motorola above note 33 at 135.

This is the requisite threshold test for freezing orders applied in the United Kingdom. This is in contrast to the applicable test in Ontario of prima facie case. See R. v. Consolidated Fastfrate Transport Inc. (1995), 24 OR (3d) 564 (CA).
court considered its own jurisdiction to give interim relief. Once this stage is satisfied, attention turns to the question of expediency and the five factors iterated by the court.

[1] Whether the making of the order will interfere with the management of the case in the primary court, e.g. where the order is inconsistent with an order of the primary court or overlaps with it.

This point acknowledges the general issue of comity between courts and the need to respect each others processes. If the primary court exercises a jurisdiction to grant worldwide Mareva orders and has issued its own disclosure/interrogatories, and the defendant is amenable to in personam enforcement, there may be little reason for an English court ever to grant its own Mareva order.

[2] Whether it is the policy in the primary jurisdiction not itself to make worldwide freezing/disclosure orders.

This point picks up on observations of the court in the Cuoghi and Refco cases. If the primary court has a jurisdiction to grant Mareva type relief over assets within its jurisdiction against a defendant present in the jurisdiction, but declines to do so, this should weigh heavily against granting such relief in the United Kingdom. The English court is not to become an avenue for a plaintiff to bootstrap its substantive claim properly brought in the primary court. Where, however, the primary court has no jurisdiction to grant Mareva type relief, either because the procedural concept is foreign to the primary court’s law, or, because neither assets nor the defendant is within the jurisdiction, it is appropriate for an English court to grant Mareva relief as long as it does not interfere with the primary court’s work.

One particular irritant is the vague position in the United States on the availability of Mareva type orders. While the US Supreme Court has indicated that there is no Federal jurisdiction to order similar preliminary relief, it is a feature in some state jurisdictions. The Federal Court rules allow a Federal District Court situated in a state

\[\text{Grupo Mexicano de Desarrollo SA v. Alliance Bond Fund Inc. 527 US 308 (1999).}\]
that allows such preliminary relief, to also exercise that relief.\textsuperscript{41} Thus, it becomes an issue whether the specific US District Court has jurisdiction to make pre-judgment Mareva orders, but simply declines to do so, in which case, an English court should be reluctant to act on the grounds of comity, or, whether the US District Court does not have jurisdiction at all, in which case, and English court may be willing to act in a supportive and ancillary fashion.

\textsuperscript{3} Whether there is a danger that the orders made will give rise to disharmony or confusion and/or risk of conflicting inconsistent or overlapping orders in other jurisdictions, in particular the courts of the state where the person enjoined resides or where the assets affected are located. If so, then respect for the territorial jurisdiction of that state should discourage the English court from using its unusually wide powers against a foreign defendant.

The concern here is engaged when there are three of more jurisdictions that may, or have, exercised jurisdiction over all, or parts, of the litigants and the dispute. In \textit{Motorola}, all but one of the defendants resided in Turkey where they also held considerable assets. The effect of the Worldwide Mareva order purported to control all the defendants’ assets including those located within Turkey. The defendants had brought various legal proceedings in the Turkish courts, including anti-suit injunctions, against the claimant from proceeding before both US and English courts. The litigation was rapidly escalating to a point where abiding by a court order issued in one jurisdiction automatically violated another court’s order issued in another jurisdiction.

\textsuperscript{4} Whether at the time the order is sought there is likely to be a potential conflict as to jurisdiction rendering it inappropriate and inexpedient to make a worldwide order.

A worldwide Mareva injunction made against a person not resident in the English court’s jurisdiction is served on an assumed personal jurisdiction basis (pursuant to CPR 6.20(4)), meaning that it can affect a non-resident’s assets held within the court’s jurisdiction as well as abroad. This effect may make the order attractive to plaintiffs and encourage them to bring suit in English courts, even where there is only a tenuous link to

\textsuperscript{41} Federal Rules of Civil Procedure 64 \texttt{http://www.law.cornell.edu/rules/frcp/Rule64.htm}
England in that the defendant maintains modest assets within the court’s jurisdiction. It also gives the claimant access to the discovery and interrogatory provisions that usually accompany a Mareva order. It is an excessive reach of extra-territorial jurisdiction to require parties who neither keep assets nor reside within the court’s jurisdiction to be bound by the court’s order. It is problematic for third parties who, once given notice of a court order, are required to observe it from fear of become aiders and abettors to its breach, and thus liable to contempt proceedings. The circumstances of third parties, particularly financial institutions, that hold the defendant’s assets on foreign soil, but maintain offices within the court’s jurisdiction, has necessitated complicated procedural orders to balance the plaintiff’s desire for asset preservation, without appearing to exercise an extra-territorial jurisdiction in excess of the bounds of comity between courts.

42 The circumstances of third parties, particularly financial institutions, that hold the defendant’s assets on foreign soil, but maintain offices within the court’s jurisdiction, has necessitated complicated procedural orders to balance the plaintiff’s desire for asset preservation, without appearing to exercise an extra-territorial jurisdiction in excess of the bounds of comity between courts.

43 Whether, in a case where jurisdiction is resisted and disobedience to be expected, the court will be making an order which it cannot enforce.

This is the counsel of prudence and simply reinforces the notion that there must be an effective enforcement mechanism for those who will breach a court order, particularly where that is likely to be the inevitable result. A defendant subject to the court’s in personam jurisdiction, can feel the wrath of contempt proceedings, as can the defendant who has assets within the court’s jurisdiction, only to have them seized as a result of a default judgment. However, a defendant that is neither present, nor has assets in the court’s jurisdiction, and is not facing a substantive trial, is largely free to thumb his or her nose at the court. Unless the order is going to have repercussions for third parties, or achieve disclosure of assets, it is better for the court to acknowledge its impotence and decline to make any order at all.

Applying these factors the court held that the applicant had made out a case for a Mareva injunction. The order against D4 was affirmed on the basis that she was resident

42 See J. Berryman, above note 9, and P. Devonshire, above note 15.
44 This was the case in Haiti v. Duvalier, above note 35.
and held substantial assets within the United Kingdom. The order against the D1 was also affirmed on the basis that he held substantial assets within the court’s jurisdiction, which provided sufficient mechanism to ensure compliance. As against D2 and D3, the orders were discharged. In the Court of Appeal’s opinion, the trial judge had given insufficient attention to the disharmony that such an order would create between the English and Turkish courts, and the fact that to comply with the English order touching the defendants only, but considerable, assets in Turkey would violate a Turkish Court’s order issued over the same dispute. In addition, in the absence of personal jurisdiction, or assets within the English court, and based upon the prior record of continued disobedience to any of the procedural orders given by lower courts touching this dispute, and the complete inability of the court to properly enforce those orders, it was futile to continue the Mareva injunction against these two defendants.

A further argument against enforcing the order on D4 was made on appeal. The defendant argued that as it had not voluntarily submitted to the jurisdiction of the US court, and no other argument supported jurisdiction, the applicant’s suit for a Mareva injunction could not be said to be made in contemplation of ever having a valid US court judgment enforceable in the United Kingdom under other provisions contained in the *Civil Jurisdiction and Judgments Act*. The Court of Appeal was able to dodge this argument, accepting the evidence of the applicant that other factors were present to suggest that D4 had in fact submitted to the US court’s jurisdiction. Whether this was the case turned on the question of applicable US procedural law, for which no arguments had been raised before the judges who had heard the initial application. All that the applicant had to demonstrate was a good arguable case that the defendant had consented to the US court’s jurisdiction, and this had been made out in the present circumstances.

The position taken by the English Court of Appeal reinforces Millett LJ’s assertion, “that the High Court has power to grant interim relief in aid of substantive proceedings elsewhere of whatever kind and wherever taking place”\(^{45}\). Within this jurisdiction the court is willing to exercise its discretion to grant such ancillary relief

\(^{45}\) *Credit Suisse Fides Trust v. Cuoghi*, above note 32.
where it is expedient to do so, meaning that the relief will serve a useful purpose, does not impede nor amount to intermeddling with the work of the primary court, and can be enforced against the person or his or her property.

**Subject Matter and Personal Jurisdiction Before Canadian Common Law Courts**

If we substitute Ontario for England in the *Motorola* case, would a similar result prevail? Sharpe is of the opinion that it could not unless service can be affected *ex juris* on a foreign defendant, and further, that assets alone within a court’s jurisdiction is not enough to confer jurisdiction to grant a Mareva injunction in support of foreign proceedings. 46 This is largely to accept that Ontario’s position is that enunciated in the majority’s decision in *Mercedes-Benz*. However, Sharpe does acknowledge that others, namely Black & Babin 47, and Mitchell 48, have argued for such a jurisdiction.

As in *Mercedes-Benz* itself, there are two lines of enquiry; one, whether a freestanding Mareva order can be granted (subject matter jurisdiction), and two, can the court effect service on a foreign defendant outside the court’s jurisdiction (personal jurisdiction)?

As to the first issue, a strong argument can be made suggesting that the Supreme Court of Canada has endorsed such a freestanding order. In both *Brotherhood of Maintenance of Way Employees Pacific System Federation v. Canadian Pacific* 49 and *Canada (Human Rights Commission) v. Canada Liberty Net* 50 the Supreme Court has adopted an expansive definition of the statutory provisions conferring upon superior courts the power to grant injunctions to do so where the court will not be seized of the substantive dispute between the parties, but where the injunction order is being sought to assist another tribunal to ensure the effectiveness of its final orders. In both cases the Supreme Court specifically rejected the *Siskina* analysis, preferring the decision of the

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47 Above note 43.
48 Above note 24.
House of Lords in *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.*\(^{51}\), and totally ignoring the divergent views expressed in *Mercedes-Benz v. Leiduck*. Both cases involved the power of a superior court (British Columbia Supreme Court and the Federal Court of Canada, respectively) to grant ancillary injunction relief to compensate for the fact that the inferior tribunals (Canada Labour Relations Board and Canada Human Rights Commission, respectively), before whom the substantive disputes would be determined, were seized of the matter but lacked jurisdiction to grant interlocutory relief. The Supreme Court accepted that, “Canadian courts have jurisdiction to grant an injunction where there is a justiciable right, wherever that right may fall to be determined...”\(^{52}\)

This jurisdictional extension has been tested with respect to Mareva injunctions in a number of cases. In *United States of America v. Friedland*\(^{53}\) Spencer J. granted a Mareva order following an *ex parte* application by the United States government against the defendant. The defendant was about to receive INCO shares valued at over $500 million in either British Columbia or Ontario. At the time, the United States government was pursuing the defendant in an action commenced in Colorado before the US District Court for costs associated with an environmental cleanup (estimated at being $152 million) from a mining company that had since declared bankruptcy, but in which the defendant had been the controlling mind. In an oral chambers decision, Spencer J. granted the order. The plaintiff was able to demonstrate that it had a *prima facie* claim against the defendant for which it would gain judgment before the Colorado court, and that there was a serious risk of the defendant removing its assets from British Columbia. At the time, the defendant lived a very peripatetic life and had changed his residence on numerous occasions in what appeared to be an attempt to make himself judgment proof.

\(^{51}\) [1993] AC 334. In this case the House of Lords favoured the granting of interlocutory injunction ordering parties to continue working on building the channel tunnel, although the dispute underpinning the need for injunction relief would be resolved in an arbitration panel in Brussels, pursuant to an exclusive arbitration clause in the contract.

\(^{52}\) *Brotherhood of Maintenance of Way Employees Pacific System Federation v. Canadian Pacific* above note 49 at 505.

A similar action brought in Ontario was not as successful. Although initially granted on an *ex parte* motion, it was dismissed and set aside once the defendant contested its grant. The defendant successfully argued before Sharpe J. that the United States government had failed to make full and frank disclosure, and on that ground alone the order was set aside. Sharpe J. specifically declined to rule, although asked, on the question whether the court had jurisdiction to order injunctive relief in support of the US District Court.

At least one other British Columbian court has followed its earlier position. In *Mishkin (Trustee) v. Roddy Diprima Ltd.* Harvey J. issued a Mareva order in support of an action commenced in New York against the defendant alleging fraud and breach of federal securities law. In granting the order, Harvey J. noted that he had jurisdiction to give the order in support of foreign proceedings, where the other foundations of the Mareva jurisdiction were proved.

In a series of cases involving the purchasing of lottery tickets in Canada for residents of the United States, Ontario courts have wrestled with the jurisdictional argument over Mareva orders. In all these cases the United States government has commenced actions in US District Courts alleging fraudulent telemarketing schemes in violation of federal law. Because the defendants operate from Ontario, and are resident in the Province, the United States government has been waging a concerted campaign to close these operators down. In *United States of America v. Levy*, where a Mareva injunction was granted, Campbell J. dealt with the standing issue, concluding that the plaintiff was properly before the court. Most of the case report is devoted to the issue whether the United States Government could pursue an action in Ontario against an Ontario defendant for breach of US law against US citizens. Campbell J. concluded that as the US Government’s claim was a civil matter seeking restitution, and was not tantamount to enforcing a penal, revenue of public law statute, it had standing to request the interlocutory order. In supporting his judgment, Campbell J. relied upon Ontario

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56 (1999), 45 OR (3d) 129.
authorities that had considered the reciprocal enforcement of judgments following the decision in *Morguard*. Regrettably, this approach deflected the issue of whether an Ontario court had jurisdiction to grant a freestanding Mareva order ancillary to proceedings that had been commenced, rather than concluded, in the United States.

In *United States of America v. Yemec*\(^{57}\), a case with remarkably similar facts as *Levy*\(^{58}\), the plaintiff was not as successful. In this case Mareva and Anton Piller orders had been initially ordered, but were later dissolved on the return motion. The plaintiff’s tack had been somewhat different. Gans J., hearing the return motion, saw the plaintiff’s request as a freestanding order and not either as in ‘aid of the process’, or part of the enforcement of an antecedent judgment of a US court. This was seen as a distinguishing characteristic from *Levy*. In addition, the nature of the remedy sought by the plaintiff, defined by Gans J. as an equitable remedy seeking restitution or disgorgement of profits, had the effect of denying the plaintiff standing to commence the action, although this issue remains under review.\(^{59}\) Implicit in Gans J.’s order is an endorsement of Campbell J. in *Levy* that a Mareva order ancillary to a US court’s interlocutory proceedings can be granted.\(^{60}\)

In all the above cases, the Canadian courts have accepted an ability to grant freestanding Mareva orders in support of foreign proceedings, but, because the defendant has been resident within the courts’ jurisdiction, service has not been in question. In this respect, Canadian courts have adopted the first part of Lord Nicholls dissenting opinion in *Mercedes-Benz*, but where do they stand on service *ex juris* – assumed jurisdiction?

All provincial rules of civil procedure provide for service outside a court’s jurisdiction, either with or without leave of the court.\(^{61}\) These rules are similar in


\(^{58}\) Above note 56.

\(^{59}\) See the Divisional Court judgment above note 57 at ¶28.

\(^{60}\) In a footnote Gans J. commented favourable in support of the position adopted Mitchell (above note 24). See above note 57 at footnote 6.

\(^{61}\) For example see in Ontario rule 17.02, which reads:
wording to the English rule (formerly, Ord. 11. r. 1,) considered in Mercedes-Benz⁶², although not identical. The rules in both Nova Scotia and British Columbia appear to be wider in ambit in that they allow for service of any ‘originating process or document’, or ‘originating notice’ commencing a proceeding (which includes an interlocutory proceeding), whereas, Ontario’s rule is conditioned by requiring the ‘originating process’ to be linked to a ‘claim’. Having determined that Canadian courts have jurisdiction to grant a freestanding Mareva order, I would suggest that Lord Nicholls liberal interpretation of a similar English rule should be favoured over that of Lord Mustill, delivering the majority’s decision in Mercedes-Benz. Such an interpretation is consistent with the criteria now applied by Canadian courts to determine personal jurisdiction to commence an action, and whether to grant reciprocal enforcement to a foreign judgment.

Watson and Perkins suggest a sequential approach is adopted in Canada to determine jurisdiction – defendant’s consent, whether the court is the defendant’s home court, real and substantial connection between subject matter of the litigation and the court, and does the need to promote access to justice or avoidance of multiplicity of suits

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A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims,  
(i) injunctions – for an injunction ordering a party to do, or refrain from doing, anything in Ontario or affecting real or personal property in Ontario,

In British Columbia, see Rule 13:
Service Outside British Columbia without leave

Service of an originating process or other document on a person outside British Columbia may be effected without leave if  
(i) an injunction is sought as to anything to be done in British Columbia, or a nuisance in British Columbia is sought to be prevented or removed, whether or not damages are also sought in addition.

In Nova Scotia under rule 10.07:

(1) Subject to rule 10.04, where an originating notice is to be served on a person elsewhere than in Canada or one of the states of the United States of America, service of the notice on the person is only permissible with the leave of the court. [E. 11/(1)]

(2) The court may, upon an application under paragraph (1) supported by affidavit or other evidence stating that in the belief of the deponent the plaintiff has a good cause of action and showing in what place or country the defendant is or probably may be found, order that the originating notice be served on the defendant in such place or country and make such other order as it thinks fit. [E. 11/4(1)]

⁶² See above note 25 for text of rule, and now found in Civil Procedure Rules 1998, 6.20(2).
warrant the court taking jurisdiction. The adoption in Canada of a real and substantial jurisdiction test for assumed jurisdiction, and enforcement of foreign judgments, was premised on the need to, “accommodate the flow of wealth, skills and people across state lines,” and to “ensure security of transactions with justice”. When applying the real and substantial test to enforcement of a US court judgment in Ontario, Sharpe J. asserted:

In my view, the law would be seriously deficient and at odds with the reality of modern commercial life if it were possible for a resident of this province to actively engage in a business in the United States for a period of several years, but then shelter behind the borders of Ontario from answering to a claim for civil liability for harm caused by that activity.

The policy objectives that animate the reciprocal enforcement of foreign judgments seem equally applicable to accommodating a Mareva order over assets within a court’s jurisdiction, but dependent upon service \textit{ex juris}. Isn’t security of transactions and inter-state trade encouraged by securing the enforcement of judgments where assets lie within the domestic court’s jurisdiction? What is required is to interpret ‘real and substantial’ in light of the limited interest that the applicant is advancing. A Mareva order is not final judgment, it is simply a means to secure assets for eventual enforcement once a foreign judgment is obtained and brought to the domestic court for reciprocal enforcement. Lord Nicholls stressed that the Mareva order sought in \textit{Mercedes-Benz} was “a form of relief granted in anticipation of and to protect enforcement of a judgment yet to be obtained in other proceedings.” Considered in this light, the criteria advanced by the Ontario Court of Appeal in \textit{Muscutt v. Courcelles}, and used to assist in exercising Rule 17.02, can, with some modification, be applied to a Mareva applicant.

66 Per LaForest in \textit{Morguard} above note 20 at 1096 and 1098. Reiterated in \textit{Beals v. Saldanha} above note 64 at 436 per Major J.
68 Above note 24 at 313.
69 (2002), 60 OR (3d) 20 (CA).
In *Muscutt* the court considered the following criteria:\(^7^0\):

(a) *The connection between the forum and the plaintiff’s claim.* This criterion recognized that courts should not be preoccupied with determining the locus of the particular substantive claim nor the residence of the claimant; rather, what is important is the nature of the plaintiff’s claim. In a Mareva suit, the limited nature of the claim is to secure assets for eventual enforcement of a later judgment.

(b) *The connection between the forum and the defendant.* This criterion focuses upon whether the defendant has undertaken any activity within the domestic forum court’s jurisdiction, or, is there minimum contacts that strengthen the case for assuming jurisdiction? In the context of a Mareva order the presence of assets within the domestic forum is a logical connection. But, it should also take account of the specific criteria pertaining to the grant of Mareva orders, namely, the requirement that the applicant prove that there is a serious risk of dissipation of the assets away from the court’s jurisdiction.

(c) *Unfairness to the defendant in assuming jurisdiction.* Under this heading it is important to note that granting a Mareva order does not force the defendant to attorn to the domestic forum court’s jurisdiction, nor that of the foreign court seized of the substantive claim. Under rule 17.06 the defendant can move to set aside service outside the court, and such a motion is deemed not to be a submission to the domestic court’s jurisdiction (17.06(4)). Such a motion would bring to an end the Mareva order.

(d) *Unfairness to the plaintiff in not assuming jurisdiction.* This criterion focuses upon the inconvenience to the plaintiff if required to litigate elsewhere. Again, this criterion might look at the risk of dissipation of assets prior to judgment being obtained, and the availability of similar relief from the foreign court seized of the substantive action. In this way, the factors used by the

\(^7^0\) Also see J. Berryman, “Real and Substantial: The Ontario Court of Appeal’s View on Service Ex Juris: Muscutt v. Courcelles”, (2003), 26 *Adv. Q.* 492.
English courts in exercise of their new enhanced statutory jurisdiction can be brought to bear. This criterion begins to pick up point [1] from *Motorola*.

(e) *The involvement of other parties to the suit.* This criterion seeks to avoid a multiplicity of proceedings that have the potential to come to inconsistent results. It mirrors points [3] and [4] from *Motorola*.

(f) *The courts willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis.* This criterion, described as a potent factor and designed to impose constraints on the real and substantial test applied by domestic courts, looks at reciprocity. Would an Ontario court enforce a foreign court’s judgement if it were the product of assumed jurisdiction? This picks up point [2] from *Motorola*.

(g) *Whether the case is inter-provincial or international in nature.* This criterion reflected concerns about applying the flexible standard implicit in the real and substantial test on the reciprocal enforcement of foreign judgment as against judgments obtained in other provinces. In light of the decision of the Supreme Court of Canada in *Beals v. Saldanha*[^64^], which tends to eschew distinctions between inter-provincial and international reciprocal enforcement (at least with the United States), this criterion may have limited application.

(h) *Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.* This factor focuses upon the extent to which the foreign jurisdiction would recognize a decision of an Ontario court if jurisdiction were assumed, and the extent to which a foreign court exercises its own assumed jurisdiction. This also picks up points [1] and [2] from *Motorola*, although the question is only whether the foreign court would also extend to an Ontario plaintiff the right to seek a Mareva or equivalent order and is thus of limited application.

The real and substantial test informs the court as a question of fact and/or law that there is a connection between the claimant and the jurisdiction, what is called jurisdiction

[^64^]: Above note 64.
Following such a determination a court moves into a discretionary phase applying the *forum non conveniens* doctrine. It is at this stage that a court balances the interests of the particular litigants, determining whether the domestic court is the ‘most appropriate or natural forum’.

Again, the discretionary aspect of service *ex juris* must be mindful of the limited scope of the Mareva order. But it is here that one could pick up point [5] from *Motorola*, and concern with how an order that is usually thought to be dependent upon *in personam* enforcement can be workable against a foreign defendant.

The decision of the Ontario Court of Appeal in *Barrick Gold Corp. v. Lopehandia* provides some guidance. In that case the court approved an injunction as part of an order where service had been authorized under rule 17.02(i) against a defendant resident in British Columbia. The defendant had conducted a lengthy campaign of libel against the plaintiff company using the Internet. The plaintiff commenced proceedings for libel and default judgment was entered in Ontario. The trial judge granted damages but declined to order an injunction on the basis that the requisite service had not been made under 17.02(i), that the defendant had no assets or presence in Ontario, and that as a claim for *in personam* relief, it should have been brought in British Columbia. The Court of Appeal rejected all three reasons. The defendant’s actions affected the plaintiff’s property – its goodwill - within Ontario, which is ‘personal property’ within 17.02(i). The defendant had a presence in Ontario, in that Yahoo!, one of the service providers with whom the defendant had disseminated his libel, was located in Ontario. The lack of *in personam* jurisdiction was seen as a more troubling problem. Nevertheless, the court granted the injunction indicating that it could be effective against those within the province and who have notice of the order, i.e. Yahoo!. In addition, the

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73 In *Muscutt* above note 69, per Sharpe J. at 593 indicated that the following factors should be considered when determining *forum non conveniens*: (1) the location of the majority of the parties, (2) the location of key witnesses and evidence, (3) contractual provisions specifying applicable law or according jurisdiction, (4) the avoidance of multiplicity of proceedings, (5) the applicable law and its weight in comparison to the factual questions to be decided, (6) geographical factors suggesting the natural forum, and (7) whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage available in the domestic court.

74 (2004), 71 OR (3d) 416.
court suggested that in a post Morguard environment, the plaintiff might have success in taking the injunction and having it enforced by courts in British Columbia.

A comparable situation occurs with a foreign defendant who has assets within the court’s jurisdiction. Assets can only be dissipated with the aid of agents and other parties. It has long been recognized that a major component of the Mareva order is the ability to hold others who have notice of the order, but are not otherwise party to the proceedings, to observe the order on pain of contempt.\textsuperscript{75} Once assets are within a court’s jurisdiction there is a hook upon which enforcement can be ensured. This is the single feature that separated the particular defendants in Motorola. And, once the hook of enforcement can be found, it can be leveraged into a fully blown World Wide Mareva order, requiring the defendant, and his or her agents, to disclose the whereabouts of other assets whose location is beyond either the court in which the substantive dispute is brought, or the Canadian court in which the Mareva order is sought.\textsuperscript{76}

An important aspect of a Mareva order’s utility is the element of surprise and that it is issued \textit{ex parte}. The rules of service \textit{ex juris} provide for \textit{ex parte} service.\textsuperscript{77} However, in the context of a Mareva order that is ancillary to substantive proceedings commenced in a foreign jurisdiction, there is an added concern over the timing of commencement of the suit in the foreign court, either on notice or \textit{ex parte}, with the application for a Mareva order in a Canadian court. In some of the Ontario proceedings brought by the US government to recover moneys from telemarketers engaged in selling lottery tickets to US citizens, there are hints that the plaintiff may have been more aggressive in pursuing its Mareva applications, and less diligent in pursuing its substantive actions at home. In \textit{United States of America v. Yemee},\textsuperscript{78} proceedings commenced with a Norwich order\textsuperscript{79}, at

\textsuperscript{75} See Sharpe, above note 46 at §2.1040, but noting at §6.170 that before a third party would beheld in contempt of a Mareva order its conduct would have to amount to an intentional and contumacious violation of the order. See also J. Berryman above note 9 for full discussion of when a non-party is bound to observe a court order.

\textsuperscript{76} A World Wide Mareva order is subject to additional safeguards with respect to enforcement against agents and third parties with respect to the use of information obtained from the exercise of the order and to ensure that a third party is not brought into a conflict with the laws of the domestic country where the foreign assets are located. See Sharpe \textit{ibid} at §2.910, and Berryman above note 4 at 75.

\textsuperscript{77} See for example Ontario rule 17.03(2), and British Columbia 13(4).

\textsuperscript{78} Above note 57.
which time the judge had been told that proceedings were imminent in the US. In fact, these were not commenced until three months later, and at the time the plaintiff then sought a Mareva and Anton Piller order. The combined affect of the orders was to terminate the defendant’s business. Obviously, there is a need to carefully measure the apparent risk to the applicant, against procedural fairness to a defendant, wherever located. Appropriate scrutiny of the applicant’s action (i.e. that the applicant has a strong prima facie case and there is a real risk of dissipation of assets to thwart recovery); ensuring that proceedings have be launched, or will be forthwith, in the foreign court; emphasis on the need to make full and frank disclosure; and rigorous enforcement of an undertaking in damages from the applicant if it is subsequently shown that the Mareva order should not have been ordered, should ensure sufficient safeguards for the defendant.

**Conclusion**

To recap, the argument made here is that Canadian courts have in their new approach to determining jurisdiction the means to achieve what the English courts have had statutorily conferred, namely, the ability to give freestanding Mareva injunctions when a foreign defendant only has assets within the court’s jurisdiction. Through reliance on the real and substantial criteria, adapted to accommodate the concerns raised in *Motorola*, Canadian courts have a mechanism to evaluate applications consistent with demands for procedural fairness.

This is only one-way to meet the demands for security of transactions in cross borderer settings, and it requires the applicant to launch costly proceedings in a Canadian court. Even then, assuming a successful outcome, will the Mareva order be effective across all of Canada? The current answer is no. The Mareva order is not a ‘final’ judgment concerning a ‘monetary judgment’, and the applicant is required to make

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79 A Norwich order is an interlocutory proceeding in which the plaintiff seeks to recover documents from a third party, who is not a party to the substantive proceedings, where there is a risk that the documents will be destroyed as soon as proceedings are commenced, and the documents are vital to the plaintiff’s suit.

80 See *United States of America v. Friendland* above note 54 for what is required to make full and frank disclosure.
similar application in each province where assets are located. A preferable way would be
to have immediate enforcement in one province of a Mareva order issued in another
province. For that to happen the Supreme Court will need to revise the current position
on recognition of non-monetary judgments issued by foreign courts. A case that will be
closely watched raising that very issue is Pro Swing v. ELTA\textsuperscript{81}, for which leave to appeal
has been granted by the Supreme Court. It may be that simply enforcing the equitable
decrees of foreign courts is to cede too much control over matters that inform the exercise
of judicial discretion, which inevitably accompanies equitable orders. By their nature,
equitable orders are highly particularized, very context dependent, and often subject to
amendment during enforcement. These characteristics are jeopardized if Canadian courts
simply endorse the work of foreign courts. A suitable compromise is to require the
plaintiff to come to Canada and seek an equitable order in aid of its action commenced in
the foreign court, but fashioned by factors traditionally applied by Canadian courts to the
relief sought. In this paper I have argued for the extension of Mareva relief, but one can
easily envisage a plaintiff seeking an interlocutory injunction to protect confidentiality, or
to secure evidence (Anton Piller) in situations that are ancillary to a substantive claim
heard by a foreign court.

\textsuperscript{81} (2004), 71 OR (3d) 566 (CA), leave to appeal granted [2004] SCCA No. 420. The issue before
the court is whether a consent judgment issued before a US court, and which included an order enjoining
the defendant from purchasing, marketing, and selling the plaintiff’s product could be enforced in Ontario.