

THIRTY YEARS AFTER: ANTON PILLER ORDERS AND THE SUPREME AND FEDERAL COURTS OF CANADA*

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Abstract. Thirty years have passed since the creation of the Anton Piller order; an interlocutory order that allows a plaintiff to demand access to a defendant's premises so as to search for infringing property and documents where there is a real threat that such evidence will be lost if the action was to commence in the normal way. During the passage of this time, the Federal Court of Canada, which has a special jurisdiction over intellectual property disputes, has developed an innovative Rolling Anton Piller order that is of particular attraction to holders of intellectual property. In July 2006, Canada's highest appellate court had its first opportunity to rule on an Anton Piller order, although not a rolling order. This paper discusses some unintended consequences that the decision of the Supreme Court of Canada may have on rolling Anton Piller orders.

1. Introduction

It has now been over thirty years since the English Court of Appeal decided *Anton Piller K.G. v. Manufacturing Processes Ltd.* (1976). In that period, the order that bears the case's name has been adopted in other Commonwealth nations including Canada.¹ The order has been formalized in the United Kingdom (Civil Procedure Act of 1997), Australia (Federal Court of Australia, Practice Notes), is about to be in New Zealand (New Zealand Rules Committee), and, if the suggestions of the Supreme Court of Canada are followed, a formal order is likely to be drafted in Canada.

The development of the Anton Piller order demonstrates both strengths and weakness of common law methodology. Strength is demonstrated in the genesis of the order and the work of one inventive counsel, Hugh Laddie, formerly a judge of the English High Court, now a Professor of Law at University College, London, who, through historical research of early chancery practice, was able to formulate an order that would later become known as a form of 'civil search warrant' (Berryman, 1984). Weakness, at least in Canada, is demonstrated by the fact that it has taken over thirty years for an Anton Piller case to reach the Supreme Court of Canada. Given this record, the Supreme Court has used the opportunity afforded it in *Celanese Canada Ltd. v. Murray Demolition Corp* (2006) to issue a judicial encyclical on what a model Anton Piller order should contain.

When introduced, Anton Piller orders could be divided into two categories; cases which were dispositive of the issues confronting the applicant, and cases where the preservation of evidence was necessary to prove a further substantive cause of action. The former category, described those cases where the applicant held a proprietary interest in the property being seized pursuant to the order. The main objective was the removal from sale of pirated copyright, trademark, or patented material. While commenced as an interlocutory motion, many of these cases did not result in a substantive hearing of the merits. The applicant received everything they wanted from interlocutory proceedings, and few defendants challenged the order; usually because liability was self-evident, or they lacked the financial resources to do so. The applicant would often proceed to obtain a default or summary judgment. In the latter category, the defendant often challenged the interlocutory order after it was served. The applicant did not claim a proprietary interest in the material seized pursuant to the order, but needed the material, usually documents, to prove its substantive claim. The Anton Piller order did not distinguish between these two categories, despite serving two different and distinct functions. Common to both types of orders were the fact that they could be granted *ex parte*, and allowed for the attachment of interrogatories. These two attributes distinguished the order from the usual civil procedural rules which allow for interim preservation (In Ontario see rule 45, Rules of Civil Procedure. Federal Court, Federal Court Rules 1998, rule 377) and interim inspection of property (In Ontario, see rule 32, Rules of Civil Procedure. Federal Court, Federal Court Rules 1998 rule 249).

The early seventies was, relatively speaking, an age of innocence. The most common method of pirating was the use of banks of video and tape recorders which were seized with the offending copies they reproduced. The cult of celebrity was still embryonic, and the value attributed to global design and trade marks was still to emerge. Computerization of businesses was present, although the wide-spread use of personal computers was still

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¹ The first reported decision appears to have been *Bardeau Ltd. v. Crown Food Services Equipment Ltd.* (1982), Berryman, 2000 chap. 5), Australia (Wright, 2003) and New Zealand (*Busby v. Thorn E.M.I. Video Programmes Ltd.* (1984), Blanchard, 2003).

to come. Businesses still relied upon paper documentary files. Jump thirty years, and we now burn CD's, DVD's, or download direct from satellite to MP3 players pirated material. The cult of celebrity is endemic, and brand names such as Nike, Tommy Hilfiger, Guess, Starbucks etc, are known and valued in all parts of the globe. The personal computer is now personally wearable, and no company can operate without some level of computerization. We speak of a paperless society and a digital universe where entire libraries of records can be instantaneously loaded onto a USB flash drive, and unlimited opportunities to consume media prevail. Not surprisingly, the Anton Piller order has also found new uses, particularly in its second guise as necessary to preserve evidence. Thus, it has been resorted to in restraint-of-trade clauses, and breach of confidentiality upon termination of employment where a fear exists that the defendant has wrongfully removed confidential client lists or other documents (*Ritter v. Hoag*, 2004, and *Assante Financial Management Ltd. v. Dixon*, 2004); to locate and seize assets for subsequent judgment as a supplementary feature of a Mareva injunction (*Sociedade Nacional de Combustiveis de Angola U.E.E. v. Lundqvist*, 1991); as a supplement to the discovery process (*Profekta International Inc. v. Mai*, 1997); and as an extra-territorial orders where the plaintiff seeks an injunction to gain access to the defendant's premises located in a different jurisdiction to determine the existence of disputed property (*Cook Industries v. Galliher*, 1979, and *Altertext Inc. v. Advanced Data Communications Ltd.*, 1985).

The *raison d'être* of the Anton Piller order has been the preservation of evidence rather than the confiscation of infringing property, despite the prevalence of cases of the latter type before most courts in Canada. Criteria to evaluate the exercise of a court's discretion to grant an order, and protections incorporated in the terms of the order, that seem appropriate and understandable as part of an order to preserve evidence, can appear superfluous and at odds with an order that seeks to remove infringing property. Of the latter type, the Federal Court of Canada has developed a unique and very effective order known as a "Rolling Anton Piller Order". An applicant, alleging in one part of the country that it is facing widespread infringement of its intellectual properties by unknown persons, has been successful in gaining an Anton Piller order that can be validly executed throughout the land. Some of these orders have been renewed over successive years and have resulted in having hundreds of defendants added to the original pleadings. The Supreme Court of Canada's failure to distinguish the two constituencies who use Anton Piller orders may have lead it to suggest guidelines for a model order that may significantly inhibit further use of Rolling Anton Piller orders in Canada.

2. The Supreme Court of Canada

The Supreme Court of Canada has jurisdiction to hear all manner of cases on appellate review from all provincial, as well as federal appellate courts. It is thus in the peculiar position to make declaratory orders on private civil law matters which are, constitutionally speaking, clearly within the domain of provincial jurisdiction, but which have effect in all provincial jurisdictions. This gives the court a unique role to play in developing common law principle. However, the court does not have complete control of its docket. It is dependent upon an issue of importance justifying the expense, in the eyes of a litigant, to warrant the effort to appeal. Because Anton Piller defendants rarely have the resources to mount an appellate challenge, Canada has had to wait thirty years before an Anton Piller order has finally reached its highest court in the case of *Celanese Canada Ltd. v. Murray Demolition Corp* (2006). Significantly, the effective adversaries in this case were two of the largest law firms in Canada.

The plaintiff, Celanese Canada Ltd., was a company that owned and operated a vinyl acetate factory in Edmonton. As part of its corporate restructuring it decided to demolish and sell the Edmonton plant. In order to prepare the site for sale it contracted with the defendant, Murray Demolition Corp., to undertake the demolition. In the course of carrying out that contract, Celanese alleged that Murray Demolition and Canadian Bearings Ltd, an affiliate, were secretly copying proprietary and confidential information on the operation of Celanese's plant. Celanese further alleged that this information was being used to construct an unauthorized vinyl acetate facility in Iran.

As part of the litigation, Celanese sought and obtained an Anton Piller order against Canadian Bearings. The order made provision for an independent supervising solicitor, as has apparently recently become the norm in orders given by Ontario courts. The order required the defendant to allow the plaintiff access to search for all documentary evidence touching the substantive dispute, and for its removal. The actual search was undertaken by Eastman, the independent supervising solicitor, and BDO Hayes Smith, an independent accounting firm, together with two police officers who were present ostensibly to prevent any breach of the peace. At various times, Eastman was in contact with the plaintiff's lawyers, Cassels Brock (CB). Upon service of the order, an executive for the defendant, Canadian Bearings, requested the presence of their solicitors, Borden Ladner Gervais (BLG). The execution of the order took two days in which over 1400 electronic documents were downloaded by BDO Hayes Smith and copied onto CD's. These were then placed into plastic envelopes and sealed with signatures of both Eastman and a member of BLG, and given into the custody of BDO Hayes Smith. At this stage, BLG had not had the opportunity to review all the electronic documents copied to determine whether solicitor-client privilege should be claimed.

One day following the seizure of evidence, the plaintiff's lawyers, CB, who were themselves acting as agents of Kasowitz, a Houston based American law firm responsible for the carriage of the substantive claim, enquired of Eastman the whereabouts of the seized documents including the records that had been copied and sealed. At this point in time, Eastman made an error that would prove to be fatal. Believing that there was no agreement between CB and BLG as to how the sealed material was to be handled, nor finding anything in the court order on how to dispose of solicitor-client privilege claims, Eastman instructed BDO Hayes Smith to allow complete access to CB to the sealed material. A lawyer for CB would later admit to having seen a few e-mails sent between BLG and the defendants, and would write an e-mail confirming that he had reviewed all the electronic documents seized from the defendants. A copy of the sealed material eventually found its way into the hands of Kasowitz, where a lawyer was given instructions to classify the electronic documents into one of four categories; relevant, irrelevant, proprietary, and hot. During this classification, the lawyer also noticed that some of the documents were either addressed to or from BLG, and he placed these into an additional classification of privileged.

Within a few days, and after CB was ordered by the motions judge to furnish a copy of the electronic documents seized, BLG realized that privileged documents had been transferred into the hands of CB and Kasowitz. BLG demanded a return of these documents and to be provided with a list of persons at both firms who had access to the privileged material. CB did not immediately reply to this demand, but later indicated that the privileged material had been deleted from both firms computing systems. In subsequent litigation, the Ontario Court of Appeal noted that 18 lawyers, clerks and law students at CB, and 12 lawyers at Kasowitz had access to the privileged material over a three week period.

Based on a violation of solicitor-client privilege, BLG moved to have both CB and Kasowitz disqualified to further represent Celanese. This action was dismissed by the motions court, but allowed before the Divisional Court. On further appeal to the Ontario Court of Appeal, the action was remitted back to the motions judge, on the basis that both lower courts had misapplied the appropriate test for disqualifying counsel. This judgment was itself appealed to the Supreme Court of Canada. Thus, the disputed issue before the Supreme Court was the appropriate test to be used when considering a motion to disqualify counsel of record. In particular, the lower courts had taken various approaches as to what the moving party, in this case Canadian Bearings, had to prove before an order disqualifying the opposing party's lawyer would be made. On this issue, the Supreme Court held that the moving party need only prove that the other party's "lawyer had obtained confidential information attributable to a solicitor and client relationship which was relevant to the matter at hand." (Celanese Canada Ltd. v. Murray Demolition Corp. 2006, paragraph 42 of the judgment). In the context of an Anton Piller order, the fact that confidential information was seized pursuant to the order's execution, infers that it relates to 'a matter at hand'. Upon proof of these two points, a presumption arises in favour of the moving party to the effect that such disclosure of solicitor-client documents will prejudice the moving party's defence in the substantive claim. The moving party is not required to give evidence of actual, or a real risk of prejudice. Once the moving party discharges its evidential requirement, the onus of proof shifts to the opposing party to rebut the presumption of prejudice. That a presumption operates in favour of the moving party is justified on the basis that the opposing party is largely author of its own misfortune. It has been the over zealous execution of the order that has created the problem in the first place.

Binnie J., giving the unanimous decision of the Supreme Court, states that the presumption should operate because it would be wrong to expect the moving party to have to reveal what confidential information had been breached to prove prejudice. Such an approach is inconsistent with the protection afforded the solicitor-client privilege in the first place. Secondly, placing the onus on the opposing party gives an incentive to avoid over zealous execution and to strictly observe the terms of the original order so as to avoid even inadvertently viewing privileged material. Thirdly, it seems intuitively unfair to require the moving party who has been subject to the surprise attack of an Anton Piller order, to then be required to carry a further evidential burden to clear up an error caused by the careless actions of the opposing party.

In this case, lawyers from CB and Kasowitz admitted that they had at some time in their possession documents over which solicitor-client privilege would arise; nor did they rebutted the presumption by showing that what they had seen were merely mundane or insignificant documents.

The fact that the opposing party's lawyers had access to privileged material does not necessarily mean that they should be disqualified from acting, and a court should go onto consider whether there is some other appropriate remedy short of disqualification. Such a concession is warranted to respect the right of a party to have legal representation of its own choice, and, to accommodate the fact that in the course of modern complex litigation, involving the exchange of large volumes of documents, mistakes will happen. The Supreme Court accepted the submissions of the Advocates' Society and the Canadian Bar Association, who were given intervenor status, as to criteria which should guide a court's decision whether to disqualify:

1. How the documents came into the possession of the plaintiff or its counsel [In this case CB and Kasowitz had come into possession of the documents through execution of the Anton Piller order without taking sufficient precautions to isolate privileged material.]
2. What the plaintiff and its counsel did upon recognition that the documents were potentially subject to solicitor-client privilege [Crucial was the failure by CB to observe the terms of the Anton Piller order which required the preparation of list of the documents seized at the search site, and the subsequent breaking of the sealed computer records without notice and attendance by BLG.]
3. The extent of the review made of the privileged material [CB and Kasowitz were not forthcoming on the extent to which they had reviewed the privileged material. The fact that Kasowitz was able to classify the documents into relevant, irrelevant, proprietary, hot and privileged, was inconsistent with their assertion on this motion that they had not undertaken a substantive review.]
4. The contents of the solicitor-client communications and the degree to which they are prejudicial [This point was met when CB was unable to rebut the presumption of prejudice.]
5. The stage of the litigation [The litigation was only at an early stage and BLG had informed CB immediately upon knowing of the breach of solicitor-client privilege that they took the matter extremely seriously.]
6. The potential effectiveness of a firewall or other precautionary steps to avoid mischief. [There was insufficient evidence of appropriate precautions taken to avoid the mischief.]
7. After applying these criteria, the Supreme Court reiterated that the opposing lawyers had not met the requirements of the test outlined in an earlier decision of the Supreme Court also dealing with disqualification of lawyers.

In *MacDonald Estates v. Martin* (1990) at page 1260, Sopinka J. had indicated the appropriated test as: "...that the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur." Presumably, the criteria now endorsed by the Supreme Court is to be read as elucidating Sopinka J.'s test, and not in opposition to it. Applying the above criteria, the Supreme Court disqualified CB and ordered Celanese not to take advice from Kasowitz with respect to any litigation in Canada.

Clarification of the evidential requirements associated with a motion to disqualify counsel who have infringed upon solicitor-client privilege is obviously important. This decision of the court reinforces its earlier position in *MacDonald Estates v. Martin*, (1990). However, what is of greater significance in the judgment is the opportunity seized by the Supreme Court to outline, in quite extensive detail, 'guidelines for the preparation and execution of an Anton Piller order'. This comes in spite of an assertion by the court that the decision of the original motions judge to grant the order was neither being challenged nor an issue before the court. Given these prefatory remarks, it is unclear what later courts are to make of the guidelines, although they are qualified as always being 'dependent upon the circumstances.' In addition to the guidelines, there is much cautionary language discussing the basic criteria for granting an Anton Piller order which can only be construed as expressing a desire to dampen the granting of such orders.

2.1 A Mandatory Independent Supervising Solicitor Requirement

The Supreme Court's guidelines are extensive; many are obvious and have been mentioned in other lower court judgments, a fact acknowledged by the Supreme Court, yet other guidelines will raise as many issues as they appear to resolve. The most significant change to current practices is the endorsement by the Supreme Court to the use of an independent supervising solicitor. This requirement is alluded to in both the first guideline as well as earlier in the judgment where it is asserted that the protection to be accorded a party subject to an Anton Piller order includes, "a vigilant court-appointed supervising solicitor who is independent of the parties." This would appear to mandate in all Anton Piller orders an independent supervising solicitor (ISS).

The history of the ISS requirement is difficult to discern. Although its genesis is usually attributed to the requirement contained in the UK model search order 2, it can also be traced to a suggestion made by Cillers A.J. in the South African Supreme Court that execution of the order should require evidence and property seized *to be placed into the hands of an impartial court officer or sheriff* (*Roamer Watch Co. v. African Textile Distributors*, 1980 at 273). A somewhat ironic protection accorded infringing intellectual property wrongdoers given the apartheid experience of the time. The actual path to the UK model search order originates in an article published by Dockray and Laddie (1990), which was favourably adopted by Nicholls V.C. in *Universal Thermosensors Ltd. v. Hibben* (1992).

These references were then adopted by the Staughton Committee in 1992, which was charged with creating a new practice direction. What is most notable in this discourse is the fact that the ISS was suggested as a way to overcome inexperienced solicitors, (it is important to recall the division of the English bar between barristers and

2 UK Civil Procedure Rules 25.1(1) (h) and practice direction 25PD.14

solicitors, a feature that is not practiced in Canada) who, may, through lack of familiarity, or simply pressure of time at execution, overlook or misunderstand import procedural protections accorded the defendant under the order. In addition, the ISS had the added advantage of impartiality which was seen as important to overcome the appearance of bias that service by the plaintiff's solicitor alone carried. The Staughton Committee also made a recommendation, which was subsequently adopted in the UK practice direction, that the judge exercise a discretion whether to dispense with an ISS, and could do so as long as the reasons for dispensing were included in the order. At no time was any empirical evidence offered to suggest that the ISS was necessary to curb widespread abuse of Anton Piller orders, rather, the evidence was anecdotal and the measure prophylactic.

History has repeated itself in the Supreme Court of Canada. Appellant's counsel, BLG, together with counsel for the interveners, The Advocates' Society and the Canadian Bar Association, all submitted to the court that an ISS should be part of an Anton Piller order. Even respondent's counsel, CB, remained agnostic on this issue; simply asserting that such a requirement should not be retroactive to impinge upon the order currently before the court. Again, no actual empirical evidence was offered as to widespread abuse of Anton Piller orders, or that the presence of an ISS would address the abuses that were commented upon by the Supreme Court. In the course of his judgment for the court, Binnie J. only expressed disquiet over the decision in *Adobe Systems Inc. v. KLJ Computer Solutions Inc.* (1991), which he called a 'troubling example,' and in *Ridgewood Electric Ltd. v. Robbie* (2005), which he described as raising an issue of 'serious abuse.' In the former case, the problem was a failure to make proper inquiries concerning the credibility and good standing of the defendant, and the likelihood that it would destroy evidence if the action was commenced on notice. In spite of a finding that the plaintiff had failed to make sufficient inquiries, the trial judge did not dismiss the order, and in fact held that the defendant had infringed the plaintiff's copyright as well as erased certain evidence in violation of the Anton Piller order itself. In *Ridgewood* (2005) an ISS was part of the order. The order was again upheld. Fault lay in the order in that it did not properly lay out the conditions appropriate to a search of residential premises. And in *Celanese* (2006) itself, an ISS was also present. The fault lay with an inexperienced ISS who did not appreciate the consequences surrounding sealing of evidence, and the fact that the order did not prescribe directions with respect to the handling of documents where a claim of solicitor-client privilege was being asserted.

The arguments in favour of an ISS are largely focused upon the idea that as an officer of the court, an ISS can act as an impartial witness to ensure that the order is properly executed, i.e. that the plaintiff's lawyer does not exceed its terms; to take into custody disputed material seized; and to provide an independent report of what happened at execution to the court at any subsequent review motion. The Supreme Court is not the first court to voice this option (*Grenzservice Speditions Ges.m.b.H v. Jans*, 1996, per Huddart J., *Fila Canada Inc. v. Doe*, 1996, and *Nike Canada v. Jane Doe*, 1999, per Reed J., *Avngaran International Video & Audio Inc. v. Universal DVD Inc.*, 2006 per von Finckenstein J). Simply insisting upon the appointment of an ISS still leaves a number of issues to be resolved. For instance, the UK model search order requires the ISS to have a certain experience level and insists that the ISS give independent undertakings to the court. What happens when these are not forthcoming or are breached is not known. For example, if it could be shown that the ISS in *Celanese* (2006) had acted in breach of the order, or was negligent in allowing the sealed envelopes to be broken without the presence of defendant's counsel, would there be liability, and, if so, should the original order afford the ISS immunity from suit?

The argument against a mandatory ISS requirement centres on one of cost. Requiring an ISS is to deliver the 'Rolls Royce' of procedural protection. Who can argue against the proposition that two, possibly three, after the defendant's lawyer arrives, is better than one? But the cost of an ISS must be borne by someone. The UK practice allows cost of the ISS to be determined by the Court; however the initial burden falls upon the plaintiff, but can be recovered in accordance with the usual cost rules (UK Model Search Order para. 24, *Gee*, 2004 at 17.068, and *Universal Thermosensors Ltd. v. Hibben*, 1992, at 861). In the context of the dispute in *Celanese* (2006), whose disputants engaged two of the largest law firms in Canada to represent them, the cost of an additional ISS is probably not burdensome. However, in the context of a dispute touching the removal of pirated intellectual property or satellite broadcast signals brought against a flea market vendor or small shop owner, the cost, if ultimately borne by the defendant, could be appreciable. If the cost is shifted to the defendant as part of the normal cost following cause rules, the defendant is, in effect, being required to pay for additional procedural protection which they may well not have requested if approached in advance. We should think seriously whether the cost of the remedy in these cases is justified to eradicate the feared (although not proven) risk of abuse. Alternatively, we could simply require the plaintiff to absorb the ISS cost regardless of the outcome of the substantive dispute. In the context of Anton Piller orders aimed at intellectual property and trademark infringement, there is a common practice to cumulate the orders of a number of property holders and execute the orders simultaneously. Thus, there is an economy of scale achieved that can disperse the cost of an ISS over a number of mostly financially strong plaintiffs. However, this option has a negative dark side to it. Because most defendants subject to piracy and trademark disputes prefer to settle their claims rather than to defend the Anton Piller orders brought against them, any settlement can easily build in the cost of an ISS to the plaintiff, and is not normally subject to judicial scrutiny. Even if we do not allow any cost shifting mechanism to operate, and make

the plaintiff fully absorb the cost of the ISS process, these are obviously then passed onto the consuming public through an increase in price on the intellectual property holder's legitimate product. Ultimately, one has to ask whether the ISS process is a cost effective way to provide the appearance of protection.

Another troubling feature about the ISS requirement is that it is premised on the assumption of bias and inability to trust the plaintiff's solicitor, who is also an officer of the court, to properly execute the court's order. But then, wrongly assumes that an ISS is not similarly subject to the same pressures. It is naïve to believe that a cadre of ISS will be established who can exercise the wisdom of Job. Rather, given the reality that their retainer is being paid for by the plaintiff, they will exercise caution to ensure that further work will follow. Certainly, there is no economic incentive to champion the cause of an infringer. There is an added problem in that an unsophisticated defendant may incorrectly believe that an ISS is there to provide legal advice and otherwise safeguard his or her interest.

The presence of an ISS in *Celanese* (2006) was seen by the Supreme Court as a practical way to deal with assertions by the defendant that material taken was subject to solicitor-client privilege. Solicitor-client privilege is a right held by the client alone, and any requirement to lift the privilege must be demonstrably justified (Hubbard, Magotiaux, Duncan, 2006, at §11.40). It would be wrong for a court as part of an Anton Piller order to order the seizure of documents subject to solicitor-client privilege or legal privilege. Gee suggests that the UK model order is deficient in this respect in that it purports to allow a court to order the production of documents over which privilege is claimed and to have them entrusted into the hands of the ISS. Gee asserts that a court has no power to require these documents to be taken into custody by any party, because this would violate the fundamental nature of the right the client has concerning privileged correspondence (Gee, 2004, at 17.049). The use of an ISS is a pragmatic response to deal with the lacuna in the law that states that the client has an almost absolute right to solicitor-client privilege, but not beyond that, and the practical concerns of how that privilege can be established. Placing the evidence into the hands of a third party under seal, and allowing subsequent judicial proceedings to determine the veracity of the claim is a practical solution. It is not the only solution. The defendant's legitimate claims could also be met by a requirement that the defendant's lawyer take custody of a copy of the material covered in the Anton Piller order and give an undertaking to produce it as required pursuant to a normal discovery process or subsequent court order. The problems with solicitor-client privilege should not be over extended. On the other side of Anton Piller orders, the seizure of infringing property, there is not the same risk that execution will engage the seizure of documents involving solicitor-client privilege. The seizure of infringing material subject to the order, and the answering of interrogatories concerning the name and location of sources and suppliers, does not raise solicitor-client privilege. The more immediate privilege in these cases concerns the privilege against self-incrimination. The reality in Canada is that the defendant can be compelled to testify. The only doubtful area is whether the defendant will have a subsequent privilege preventing the use of that evidence in a later criminal prosecution (Berryman, 2000, at 86).

An alternate way to address the potential for abuse at execution of an Anton Piller order is to place greater reliance upon the role of the plaintiff's solicitor as officer of the court to keep within the bounds of the order. This requires the courts to become vigilant in the reporting of execution of the order at a subsequent review motion and to ensure that the defendant has been afforded an opportunity to challenge the order if so inclined. Where there are proven abuses concerning execution the court has a number of available remedies. Obviously, as occurred in *Celanese* (2006), is the removal of counsel of record. This is an extreme and most potent position, but one that has been ordered in the past and for lesser abuses (*Grenzservice Spedition Ges.m.b.H v. Jans*, 1996, and *Computer Security Products Inc. v. Forbes*, 1999). Other options are to order the return of any material seized (*Louis Vuitton v. Bags O'Fun Inc.*, 2000). In at least one case a solicitor has been held in contempt of court for failing to inform the defendant about what materials could be seized under the order, although no fine was imposed upon the solicitor (*VDU Installations Ltd. v. Integrated Computer Systems and Cybernetics Ltd.*, 1989). The plaintiff or counsel can be called upon to pay damages, including punitive damages, pursuant to the undertaking filed at the time of granting the order (*Columbia Pictures Inc. v. Robinson*, 1987, *Walt Disney Co. v. John and Jane Doe*, 2001, *Village Gate Resorts Ltd. v. Moore*, 1999, and *Geophysical Service Inc. v. Sable Mary Seismic Inc.*, 2003). Finally, there is always the broad discretion with respect to cost orders that can express judicial concern with over zealous execution (*M.M. International Business Directories Ltd. v. International Business Index*, 2000, *Pulse Microsystems Ltd. v. SafeSoft Systems Inc.*, 1996, and *Havana House & Tobacco Merchants Ltd. v. Jane Doe*, 2000).

A final concern with a mandatory ISS requirement is that it has the potential to lull us into a false sense of security concerning the potential for abuse with respect to Anton Piller orders. An ISS requirement addresses execution; it does nothing to address the problems concerning initial granting of the order. If reported decisions are a barometer of problems, by far the most common abuse concerning Anton Piller orders is a failure by plaintiffs' counsel to make full and frank disclosure at the initial ex parte hearing, and which clearly is unaffected by an ISS requirement. For example, in a space of approximately three years (2003-06) more Anton Piller cases have raised a failure to observe full and frank disclosure requirements than any other alleged abuse in execution of

the order. Thus, of 18 judgments reported across Canada on Anton Piller orders, seven raised full and frank disclosure issues while only two raised issues concerning execution.

2.2 The Requirement of a Plaintiff's Undertaking

A second recommended guideline from the Supreme Court is a plaintiff's undertaking in damages, "in the event the order turns out to be unwarranted or wrongfully executed". The first part of such an undertaking is uncontroversial. It is a usual requirement of interlocutory proceedings to require a moving party's undertaking (Ontario see Ontario Rules of Civil Procedure 40.03; and in the Federal Court, see Federal Court Rules 1998, rule 373(2)). But the second part does not automatically follow. A plaintiff may well ask, if it is either his lawyer, or the independent supervising solicitor, acting as officers of the court, who act wrongfully, why is he initially on the hook for any damages? The UK model order requires a series of undertakings covering the following:

Plaintiff's undertakings:

- [1] to compensate for loss if granting or execution of order has caused loss,
- [2] to issue a claim form [statement of claim] as soon as practicable,
- [3] to swear an affidavit confirming what was said by the applicant's solicitor in Court,
- [4] to serve the above documents on the defendant,
- [5] to serve on the defendant a copy of the supervising solicitor's report,
- [6] not to use any information or documents seized for anything other than the civil litigation and to keep confidential the same,
- [7] to keep in an account held by the plaintiff's solicitors a bond,
- [8] to insure any property seized and which is held in custody by the defendant's Solicitor.

Plaintiff's Solicitor's Undertakings:

- [1] to answer any questions whether an item seized is covered by the order,
- [2] to return original documents seized once copies are taken,
- [3] to place in the hands of the defendant's solicitor, once an undertaking has been received, any goods seized the ownership of which remains in dispute,
- [4] to retain in safekeeping all other material pertaining to the order until further court order.

Independent supervising solicitor's undertakings:

- [1] to explain the order to the defendant and inform him or her of the right to counsel
- [2] to write a report of the execution of the order.

Many of these obviously relate to execution of the order and may not cause a pecuniary loss to the defendant. Some of the undertakings are given by the plaintiff's lawyer and ISS in their own capacity and not on behalf of the client. The undertaking is a promise made to the court and does not create any contractual or other legal relationship between the parties, thus, it cannot support either a suit or counterclaim. The undertaking is a discretionary matter to be exercised by the court (Sharpe, 2000, at 2.510). But, if the defendant has not suffered a pecuniary loss, what is he or she being compensated for by way of a damage undertaking? Zuckerman (1994) has argued that the undertaking protects injury to the defendant's substantive rights as well as his or her procedural rights. The wrongful execution of an Anton Piller order, for example, having in excess the number of persons conducting the search, or failing to make an accurate list of items seized, constitutes a violation of the defendant's procedural rights in that they violate the procedural protection afforded the defendant by the order and may interfere with the exercise of his or her legitimate rights of ownership and possession. These procedural rights may be violated even though the plaintiff is successful on the substantive merits of the case that supported the interlocutory order's grant.

2.3 The Hours of Search

The Supreme Court has suggested in a guideline respecting the conduct of a search that it should be "commenced during normal business hours when counsel for the party about to be search is more likely to be available for

consultation". Given the abandonment of Lord Day Acts (Sunday closing laws) as unconstitutional, and the movement to extend shopping well into weekend hours, it may be a bit of a misnomer to still speak of 'normal business hours.' However, the link to availability of defendant's counsel must imply a normal work week being a week day and between the hours of 7am to 7pm. ³If this is intended, the ability to use Anton Piller orders in flea markets and other transient commercial places that operate on weekends and at night may be frustrated. This may well be one of those guidelines that must yield to the court's qualification; that they are 'depending upon the circumstances.'

2.4 The Power of a Responsible Employee to Permit a Search

Another guideline under the heading 'conduct of the search' is the requirement that "premises should not be searched or items removed except in the presence of the defendant or a person who appears to be a responsible employee of the defendant." The choice of language – responsible employee – was used by Nicholls V.C. in *Universal Thermosensors Ltd. v. Hibben*, (1992) and found its way into the UK model order. The language is of some significance. The nature of an Anton Piller order is that it requires the defendant to give his or her consent to permit entry to the premises and to conduct a search. Extending the order to a responsible employee arguably requires of that employee the obligation to give consent to entry and search. An employee would have to have the employer's authority to give consent unless the conferral of authority derives from some other source. Without authority, the employee would be consenting to a trespass. The United Kingdom solution to this problem has been through legislation that specifically empowers the court to 'direct any person to permit' entry (Civil Procedure Act (UK) 1997 c. 12, s.7(3)), although this language is not without its own problems (Dockray & Thomas, 1987).

Without a similar provision, Canadian courts are forced to go through some degree of legalistic gymnastics to find a similar power. A source conferring upon the court the power to order someone other than the defendant to permit consent to entry can be found in the respective provincial rules relating to interim inspection and preservation of property, as well as in some of the intellectual property statutes. (For example, in Ontario see Rules of Civil Procedure 32 and 45 respectively. See the Federal Copyright Act, 1985, and the Trade-marks Act, 1985). Extending the authority to responsible employees to give consent may have other repercussions to the defendant's rights. The employee may give up documents where the defendant may well have argued solicitor-client privilege. The actions of the employee in such circumstances may amount to waiver. An employee who answers interrogatories may be manufacturing evidence that can be used against the defendant. The defendant may be giving up his or her right to speak to counsel before commencement of the search.

3. The Federal Court and Rolling Anton Piller Orders

It is difficult to discern a definite point in time when the rolling Anton Piller order was created in Canada although it is uniquely a creation of the Federal Court (Berryman, 2001). Canada's Federal Court is a statutory court created pursuant to the constitutional powers accorded the Federal government to establish courts for the 'better administration of the laws of Canada' (Constitution Act 1867, s.101). Under the constitutional division of powers the Federal government has the exclusive responsibility to create and regulate copyright and patents, and pursuant to the trade and commerce power, to make provision for trademarks (Constitution Act 1867, s.91 (23) & (22), and s.91(2)). These sections cover the registration and infringement of intellectual property but do not cover contractual disputes over the ownership of these rights which are within Provincial jurisdiction under s. 92 (13); the right to regulate property and civil rights in the Province. While the jurisdiction of the Federal Court, and the reasons for maintaining it as a separate court, have often been challenged throughout its 126 year history, most critics have accepted the desire to have a specialist tribunal deal with, among other things, intellectual property as a valid reason for the court's continued existence (Bushnell, 1997). Pursuant to this specialized nature the Federal Court, during the eighties, built up a significant Anton Piller jurisdiction, the majority of which involve breaches of copyright and trademark, but now includes pirated satellite broadcast signals (*Bell ExpressVu Ltd. Partnership v. Rex*, 2002).

The Federal Court has certain procedural advantages to litigants. One, litigants can expect a certain familiarity by the bench to intellectual property law. The plaintiff can quickly surmount the initial threshold test to Anton Piller relief. Two, the court operates throughout Canada. An order granted in, say Toronto, can be executed in any part of the country and made returnable in any registry where the court functions. Three, for a time, the Federal Court did not operate a case management system thus it was possible to have large number of defendant's added to one proceeding, in one case, over 800 defendants. This was advantageous where the primary reason for the order was simply to remove infringing products from the market place so as to protect the ephemeral value of a trademark or copyright. The plaintiff was successful at the interlocutory stage without having to be overly

³ The UK model order suggests that the order should not normally specify a commencement hour before 9.30 a.m.

concerned with bringing the action on for final determination. The court has since adopted case management, limiting the number of defendants added to one proceeding, and has required plaintiffs to bring their actions to some conclusion, either trial or default judgment, or withdrawal. Status Review Hearings have had the effect of limiting the large number of defendants that use to be added to rolling orders in the past (Drapeau, 2004, at 469). Four, an interlocutory Anton Piller order issued by the court is valid for one year from its grant and can be served on any defendant during that time. However, service on a particular defendant then commences a 14 day clock by which time the plaintiff must amend its pleadings by adding the defendant's name, report to the court on the execution of the Anton Piller order, and requested a continuance of the interlocutory injunction until trial. Five, the Federal Court, as have all provincial courts, has embraced the standard Ormrod L.J. tests for granting an Anton Piller order, but has resisted the need to create a distinct independent supervising solicitor requirement as in the United Kingdom. Thus, the Anton Piller order remains a cost effective means to secure the removal of infringing intellectual property.

The majority of Anton Piller orders sought in the Federal Court over infringing intellectual property have been brought by a limited number of counsel. Most prominent have been Lorne Lipkus, Colleen Zimmerman, and Christopher Pibus. These counsels have considerable expertise in obtaining and executing Anton Piller orders and maintain their own independent private investigators to supply the necessary affidavit evidence to support the orders. The genesis of the rolling order appears to have been a number of Anton Piller orders executed against known itinerant street and flea market vendors. These orders were brought by known trademark and copyright holders against defendants who had pirated video, CD and software, as well as jewellery, clothing and other apparel. The affidavit evidence offered in support provided specific details of infringement. After a number of site specific Anton Piller orders were granted, these were then used as evidence to support new affidavit evidence from private investigators alleging widespread infringement occurring in many flea market locations across Canada. Because the plaintiff could not identify the defendants in advance the appellation John and Jane Doe appeared on the style of cause. By the 1990's approximately 50 of these rolling orders were operating within the country at any one time, and each may have attracted several hundred defendants to the proceeding.

Individual acts of infringement caught by these rolling Anton Piller orders do not by themselves create large damage awards. To make this process cost effective it is the practice of counsel to 'batch' the execution of multiple orders obtained over a successive period of time. Thus, by the time that a raid is made in a flea market, or small confectionery store, counsel will be executing a number of orders representing a variety of intellectual property holders. Following execution, counsel will return to court on a review motion to report on the execution. At the review, counsel will introduce a report on what was seized. This report may be by way of CD-ROM showing visual evidence of how the material seized does violate the plaintiff's intellectual properties. Invariably, most defendants choose not to appear, or where they do, counsel will attempt to persuade the defendant to agree to a consent judgment. Where the defendant objected to the plaintiff's request for permission to enter its premises, counsel will move for a show cause hearing for contempt of court. At a later stage after the review process the plaintiff will usually move for default judgment. Rarely does a trial of the merits take place. Thus, for a defendant, a rolling Anton Piller has a certain life cycle to it. The defendant may enter the process months after the order was initially granted, be served, reviewed, and have judgment entered against it, all at the same time that the order is bringing other new defendants into its ambit. In fact, the order may be subsequently renewed beyond its one year duration and thus bring several hundred defendant's within its terms.

Largely because few defendants choose to defend Anton Piller orders, there has been little reported judicial discussion on rolling Anton Piller orders. The nature of the order has been summarized by Reed J. in *Fila Canada Inc. v. Doe* (1996) as follows:

The order, which is sought, is what is known as a "rolling" Anton Piller order. As is obvious from the style of cause, when these orders are obtained from the Court neither the identity nor the address of the persons against whom they will be executed are known. On some occasions one or two persons may be identified as named defendants but they will have no necessary connection to the Jane and John Does against whom the order will be executed. The known defendants are allegedly infringing intellectual property rights belonging to the plaintiff but in different places, at different times and in different circumstances. These "rolling" orders can be distinguished from defendant-specific Anton Piller orders. While defendant-specific Anton Piller orders may also include Jane and John Doe defendants, in general, the latter will be connected to the named defendants, for example, by being an employee of the defendant or a supplier of the alleged counterfeit goods of the defendant.

The "rolling" orders are executed against street vendors and transient flea markets vendors although they are framed in broad enough terms to encompass the search of retail premises, office premises, vehicles, warehouses, as well as residences. They are usually expressed to last a year subject to being renewed. Pelletier J. has commented upon what constitutes appropriate affidavit evidence to justify a nationwide rolling Anton Piller order in *Club Monaco Inc. v. Woody World Discounts* (1999):

In general, a number of instances of counterfeiting would be required to justify a "rolling" order for the simple reason that a specific instance would only justify a specific order. If the plaintiff wishes an order applicable to unlimited future instances, it is incumbent upon it to demonstrate that specific orders are not an

appropriate remedy. The deponent's unsupported testimony as to his or her belief that such an order is required would not usually be sufficient.

In the same way, proof of a number of incidents of counterfeiting in Ontario would only justify an order which applied in Ontario. If a Canada wide order is sought, there should be some proof that the counterfeiting is not a local problem. This is not an insurmountable problem: an order tailored to the evidence submitted at the time of the hearing could be extended subsequently by amendment if further evidence of counterfeiting in other provinces or regions became available.

In addition to the above two cases, there is provision that a rolling Anton Piller order should not authorize execution against an unnamed person occupying residential premises (*Nike Canada Ltd. v. Jane Doe (2)*, 1999). It is also advisable that before granting a rolling Anton Piller order, that there be at least specific instances against one named defendant who may provide some opportunity to scrutinize the validity of the plaintiff's alleged intellectual property rights in a proper adversarial process (*Columbia Pictures Industry Ltd. v. John and Jane Doe* (2000)).

Reconciling the rolling Anton Piller order with the classic Ormrod L.J. criteria for granting the order is difficult. The plaintiff can readily meet the first threshold hurdle, i.e. demonstrate a strong prima facie case, by pointing to its registered copyright, trademark or patent and providing specific examples of infringement. The fact that the examples are referable to specific defendants rather than the amorphous John and Jane Does has not been commented upon. The second criterion, proof that potential or actual damage is very serious for the plaintiff, has usually been met by simple assertions that the continued presence of infringing material in the market place threatens the trade reputation of the plaintiff, particularly where the goods are of inferior quality, or, threatens the goodwill with established licensed retailers of the plaintiff's goods.

The third criterion, and one described by the court as the most crucial element in proof (*Adobe Systems Inc. v. KLJ Computer Solutions Inc.*, 1999), is more problematic. That test requires the plaintiff to demonstrate with clear and convincing proof that the defendant has in his or her possession incriminating documents or things and a real possibility of destruction of such material. This test would appear to require a known defendant to be satisfied. While the actual identity of the defendant may not be known at the time the order is sought, nevertheless, it does contemplate that the plaintiff could point to a specific defendant, or at least the location where the defendant is most likely to operate. For a rolling Anton Piller order, while there may be some known defendants when it is first granted, the majority of later defendants could not be said to have been known, or within the contemplation of the plaintiff, at the time the order is sought. This criterion has been met by pointing to three recurrent themes: the ease of removal and disposal of the counterfeit items (*Cullom Machine Tool & Die Inc. v. Bruce Tile Inc.*, 1990, and *Nintendo of America, Inc. v. Coinex Video Games Inc.*, 1983); the general transient nature of the potential defendant's business i.e. judicial notice of the activities of street vendors, flea market operators, and concert merchandisers (*Adobe Systems Inc. v. KLJ Computer Solutions Inc.*, 1999, but see *Top Star Distribution Group Inc. v. Sigm.*, 2000); and the prior experiences of the plaintiff; i.e. a track record of successful site specific Anton Piller orders will justify the need for a rolling Anton Piller order (*Titan Sports Inc. v. Mansion House (Toronto) Ltd.*, 1990, and *Nike Canada Ltd. v. Jane Doe (2)*, 1999, but see *Chin-Chin Communications Corporation v. Chinese Video Centre Ltd.*, 1983).

Ormrod L.J.'s criteria are formulated to primarily preserve evidence where there is a real fear of destruction if notice is given. As such, they contemplate a cause of action in which the Anton Piller is an ancillary order to ensure the plaintiff is not thwarted in its action purely through the loss of evidence at the hands of the defendant. Of course, the order has always been used for other purposes, namely to seize and remove from sale infringing property. In these cases the plaintiff has no intention of bringing the proceeding on for a full trial of the merits; nevertheless, the fiction over preservation of evidence is maintained. Where the primary rationale for the order is the removal of infringing material from sale, the adaptation of Ormrod L.J.'s criteria makes perfect sense, although it can hardly be said to be consistent with the criteria. The rolling Anton Piller order merely takes that adaptation to its furthest point. The Federal Court in Canada has, in affect, created a wide-sweeping pre-judgment seizure order.

If the Supreme Court of Canada's decision in *Celanese* (2006) now mandates a mandatory independent serving solicitor the economics of rolling Anton Piller orders will change appreciably. Anecdotal evidence suggests that the majority of defendants do not contest Anton Piller orders and that plaintiffs simply move forward to enter default judgments. Either defendants accept their guilt over retailing infringing material, or the cost of defending (litigation fees or time away from the defendant's business absorbed in attending court) is simply too high. If the latter is true in the face of clear evidence of overreaching by plaintiffs then an independent solicitor requirement may be justified. Again, from anecdotal evidence, the former is true. Itinerant vendors who infringe are by and large conscious that they are engaged in illicit dealing. The absence of merchandise records, the speed with which communication takes place between vendors when Anton Piller raids take place, and the often covert way illicit goods are supplied to vendors all suggests a level of sophistication and duplicity in their activities. This is not to minimize the potential and likelihood that some plaintiff's do exceed the boundaries of the Anton Piller order; however, as discussed above, there are other means of handling these breaches before imposing the burden

of an independent solicitor requirement. For instance, the court can impose cost penalties on plaintiff's solicitors for excessive service, can restore to the defendant all property taken, and can impose solicitor-client costs and penalty damages pursuant to the plaintiff's damage undertaking (*Havana House & Tobacco Merchants Ltd. v. Jane Doe*, 2000).

The Federal Court's rolling order has not addressed the issue of the plaintiff's lawyer's personal undertaking and how, or who should bear the primary responsibility where it is infringed. The standard undertaking required by the court mirrors the language suggested by the Supreme Court in its guidelines rather than the more detailed requirements specified in the UK model search order. The hours for service of the rolling order are set as between 7am and 9pm on any day of the week, which clearly accommodates the more transient nature of those engaged in pirating and infringing conduct.

With respect to the issue of who is bound to observe an Anton Piller, the usual Federal Court order is worded; "each defendant or person in charge of a defendant's premises shall permit". The language does not have the same evaluative criteria as 'responsible employee'. It is intended to be more encompassing reflecting the fact that operators of small stores, flea markets, and other transient retail outlets may well leave other persons in charge, often family members or business associates, without that person necessarily coming within the usual legal status of being an employee.

4. Conclusion

The Supreme Court of Canada took the only opportunity it has had in 30 years to express important principles on the working of Anton Piller orders in Canada. The facts in *Celanese* (2006) put before the Court the category of cases where one of the litigants fears the destruction of documentary evidence, and where the proceedings are likely to be litigated. The guidelines suggested by the court may be appropriate in these circumstances, although even in these cases the requirement of an ISS may miss the mark. For cases arising in the other category of Anton Piller orders, namely the seizure of infringing intellectual property, the guidelines, and the cautionary language used by the Supreme Court to describe the Anton Piller order, suggests that the Federal Court may well have to review its Rolling Anton Piller order practices.

It is easy to be critical of the Federal Court's rolling order. It is a type of pre-judgment seizure and has the effect of violating a cardinal common law principle that judgment cannot be obtained before trial, and that a person has a right to be heard before judgment (*Sharpe*, 2000, at §2.750, and *Berryman*, 2002). One comes to expect that the highest level of scrutiny and procedural protections would be applied to an order that has been described as the nuclear weapon of civil procedure (*Bank Mellat v. Nikpour*, 1985, at 92 per *Donaldson LJ.*). But the order is very much a product of its time as a reasoned response to the pervasiveness of intellectual property infringement. Canadians share an ambivalent attitude to piracy. They regard it as a victimless crime, similar in criminal proportionality to highway traffic offences. Rationally, they can understand the economic arguments that make piracy a crime, but emotionally, they are also willing accomplices in fuelling a market for illicit goods. Canadians would be concerned if excessive public law enforcement resources were shifted from the investigation and prosecution of crimes of violence to support the interests of what are perceived as well financed intellectual property holders. Measured in this context the Federal Court's activities are an accurate read of the public's tolerance for law enforcement in this area. Intellectual property holders are in a de facto sense given the means to privately pursue the prosecution of those who commercially exploit piracy. With respect to damages for intellectual property infringement routinely caught under a Rolling Anton Piller order, the Federal court has created a tariff in which a plaintiff will be entitled to \$6,000 against a defendant who is guilty of infringing behaviour on fixed retail premises; \$3,000 against a defendant operating from a transient street stall or push car; and \$24,000 against a manufacturer and distributor of infringing material (*Oakley Inc. v. Jane Doe*, 2000). This tariff approach has been introduced to avoid the costly process of sending damage assessment for a reference. The damages have been called 'conventional' and 'nominal'. Nominal damages must still be linked to the reasonable compensatory losses experienced by the plaintiff. The practice adopted by the Federal Court does not appear to follow this practice. There is an obvious parallel to statutory damages that have been introduced for copyright infringement in Canada. The rolling Anton Piller order completes the picture by accommodating a form of private civil search warrant. Where execution of this order has abutted other cherished common law values, and in particular the view that an 'Englishman's home is his castle', a principle derived from the celebrated case of *Entick v. Carrington* (1765), the Federal Court has been quick to withhold the rolling Anton Piller from operation and have insisted upon a site specific order where the demonstrably need for executing the order at a place of residence is more closely scrutinized (*Nike Canada Ltd. v. Jane Doe*, (2)). Nor should we ignore the fact that a rolling Anton Piller defendant is not going to face imprisonment as a consequence of what is discovered pursuant to the order or even if he or she disobeys the order. Although there is power to imprison for contempt of court rarely will it be exercised in an Anton Piller setting, and only after continuous refusal to abide by the court's order (*Lyons Partnership LP v. MacGregor*, 2000, and *Louis Vuitton Malletier S.A. v. Bags O'Fun Inc.*, 2003). In fact, the standard requirement that the plaintiff return to the court on a review motion to report on execution, add the

defendant to the action and ask for a continuation of the injunction, mean that the conduct of the Anton Piller order will receive far greater scrutiny than that which follows the grant and execution of a criminal search warrant by the police.

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