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## Memorandum

Date: March 29, 2016

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**To:** Commercial List Users' Committee

**From:** Ira Nishisato

**Subject:** Recommended Amendments to Model *Anton Piller* and *Mareva* Orders

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In 2007, the CLUC approved model *Anton Piller* and *Mareva* orders (the “Model Orders”). Since that time the Model Orders have been widely used not only by the Commercial List but also by the Superior Court of Justice generally. The CLUC has asked whether the Model Orders need to be updated in light of developments in the law and in technology in the time since they were issued. I have reviewed the case law that has developed since 2007 and reconsidered the provisions of the Model Orders, and make the following recommendations.

By way of reminder, the Model Orders were intended to provide a “baseline” for the standard provisions that were considered integral to these types of orders. They were not intended to contemplate the circumstances of every case or to limit the discretion of the Court in fashioning orders appropriate to the circumstances. Annotated versions of the Model Orders, with extensive footnotes, were provided to discuss some of the many issues that can arise. Consequently, while various judges have included additional, or different, provisions in these orders in specific cases, I have generally not recommended changes based on individual cases unless there has been a material change in the law or practice. In some cases I have recommended changes to the footnotes in the annotated Model Orders rather than to the provisions themselves.

### **Model *Mareva* Order**

I do not recommend any modifications to the Model *Mareva* Order at this time. The issues that have arisen in the case law since the Model *Mareva* Order was introduced are largely the same issues that existed prior to its introduction.

### **Model *Anton Piller* Order**

I recommend six modifications to the Model *Anton Piller* Order, which are described below and reflected in the blacklined Model *Anton Piller* Order attached as Appendix A.

## 1. Access to Seized Evidence Following The Search

Paragraph 20 of the Model *Anton Piller* Order provides that a plaintiff will generally not be permitted to access the Evidence seized (the “fruits of the search”) prior to the delivery of the defendant’s affidavit of documents. Footnote 29 notes that it may be appropriate in certain cases to permit the plaintiff to access the evidence seized, but it does not refer specifically to the recurring issue of access to the seized evidence on a motion to set aside the *Anton Piller* Order.

It is well-established that a motion to set aside an *Anton Piller* Order is a hearing *de novo* and the Courts have routinely considered the seized evidence in such motions: see e.g. *Alberta (Treasury Branches) v. Leahy*.<sup>1</sup> Ontario courts have generally followed this practice.<sup>2</sup>

The Quebec Court of Appeal in *IMS Health Canada inc. v. Think Business Insights Ltd.*<sup>3</sup> indicated that the law, at least in Quebec, is that the court has the discretion to grant a plaintiff access to the evidence seized in advance of a motion to set aside an *Anton Piller* Order. The Court of Appeal indicated that when determining whether to exercise this discretion the court must look to the facts of the case, the grounds the defendant has raised for setting aside the order, and the interests of justice.<sup>4</sup>

***I recommend that paragraph 20 of the Model Anton Piller Order remain intact but footnote 29 be revised to note that the issue of whether a plaintiff may access the evidence seized prior to discovery should be dealt with on the return of the order, and the practice in Ontario is generally to permit access on a motion to set aside.***

## 2. Treatment of Plaintiff’s Proprietary/Confidential Information and Trade Secrets

### (a) Handover Orders

*Anton Piller* Orders are often granted in cases involving the misappropriation of proprietary/confidential information and trade secrets. If the plaintiff can satisfy the Court that it has a strong *prima facie* case, it may be appropriate to require the defendant to hand over the information in question where the defendant has no right to possess it. In such a situation the court may require the defendant to hand over all copies of the confidential information. The Supreme Court of British Columbia made an order to this effect in *Global Cheese Press Inc. v. Zhang*.<sup>5</sup> Where such an order is made, it may also preclude the defendant from accessing the information in the custody of the Independent Supervising Solicitor following the seizure.

### (b) Wiping Devices

A related issue that arises in the same circumstances is whether a plaintiff can be permitted to actually wipe (i.e. permanently delete) information from a defendant’s electronic devices that the defendant is not entitled to possess. On the face of it, this would seem to be the antithesis of an

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<sup>1</sup> 2000 ABQB 575, aff’d 2002 ABCA 575.

<sup>2</sup> See e.g. *Bell ExpressVu Limited Partnership v. Rodgers (Tomico Industries)*, 2007 CanLII 50595 (ON SC).

<sup>3</sup> 2013 QCCA 1303, 2013 CarswellQue 7618.

<sup>4</sup> *IMS Health Canada, supra*, at para. 62. Quoted in *ArcelorMittal Montreal inc. v. L. Belanger Metal inc.*, 2014 QCCA 2328.

<sup>5</sup> *Global Chinese Press Inc. v. Zhang*, 2015 BCSC 254.

order to preserve evidence. However, it is technologically feasible both to preserve the original imaged devices in the custody of the ISS and to wipe the information from the devices that remain with or are returned to the defendant. Obviously this issue is best dealt with on the return of the order, since the defendant may dispute the ownership or confidential nature of the information in question or at least challenge the scope of the order. An *ex parte Anton Piller* Order should not provide for wiping of any information except in extraordinary cases.

In *9219-1568 Quebec Inc. v. Ramoutar*,<sup>6</sup> Justice Brown permitted the deletion of confidential information from the defendant's seized computers but ordered that it be performed by forensic computer experts to prevent deletion of other information, and that the forensic computer experts would be required to report the method and results of the deletion process to the court following the deletion. The court allowed the plaintiff's expert to remove the defendant's computers' hard drives, transfer all non-confidential information onto new hard drives, and replace the computers' hard drives with the new ones. This guaranteed the confidential information was deleted.

***I recommend that a footnote be added to the Model Order to provide commentary on these issues.***

### **3. Seizure of Cash**

From time to time, cash is found during the execution of an *Anton Piller* Order. Cash is generally not evidence and in most cases it should not be seized, except perhaps where a *Mareva* Order is also granted. However, in fraud cases, it may be argued that it is evidence of the proceeds of the fraud and as such constitutes evidence that should be seized.<sup>7</sup> Given the sensitivities surrounding cash, this can be a highly contentious issue if the order is silent. If cash is seized, it is best practice to ensure that the cash is counted by the ISS in front of the defendant so there is no dispute as to the amount. Still, it would be helpful to all concerned if, in cases where cash may be seized, the *Anton Piller* Order addressed the issue explicitly.

***I recommend that a footnote be added to the Model Order to address this issue and suggest that counsel in fraud cases should ensure that the Order explicitly addresses the issue.***

### **4. Immediate Handover of Mobile Devices**

With the increased prevalence of internet-connected mobile devices, there is an increased risk of defendants either notifying persons who could access computers remotely and destroy evidence or themselves accessing computers remotely and destroying evidence, thereby frustrating the order. In cases where this probability exists, it may be appropriate to include a provision that the defendant shall immediately turn over any mobile devices to the ISS, even before seeking legal advice. It is best practice for the ISS, at a minimum, to ask the defendant to place his or her mobile devices in plain view of the ISS while the order is being explained and the defendant is seeking legal advice. Judges will, of course, want to consider whether such an order may be tantamount to a gag order and whether it would be appropriate in a specific case.

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<sup>6</sup> 2014 ONSC 1954.

<sup>7</sup> In *The Manufacturers' Life Insurance Company v. High Park Medical & Rehabilitation Centre*, 2015 ONSC 5169 at para. 5, Justice Myers suggests that the fact that the plaintiff found large amounts of cash on the execution of the *Anton Piller* Order, for which the defendant had no credible explanation, could be evidence of fraud.

*I recommend that a footnote be added to the Model Order to flag this issue and encourage counsel and the Court to consider whether such a provision would be warranted.*

## **5. Immediate Return to Premises**

Paragraph 1 of the Model Order requires the defendant to forthwith permit entry into the Premises. However, in some cases, the Court has also ordered the defendant, if served away from the Premises, to return immediately to the premises in order to provide entry. While such a term may be implicit in the requirement to “forthwith” permit entry, the point may be debatable, particularly if, for example, a defendant were served at work and unable to leave immediately. While a plaintiff should generally serve the order at the Premises, it is always possible that a defendant may leave the Premises before being served and not return until some time later. A provision requiring the defendant to return immediately to the Premises could ensure that the order is carried out with minimal delay and reduce the risk of mischief.

*I recommend adding a provision to the Model Order requiring the defendant, if served away from the Premises, to return immediately to the Premises in order to provide entry to the Authorized Persons.*

## **6. Technology Update**

The references to technology in the current Model Order are outdated, and the proposed amendments in Appendix A reflect current terminology.

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