Focus CIVIL LITIGATION

When Justice Sharpe speaks, people listen

Marc Whiteley

When Justice Robert Sharpe of the Ontario Court of Appeal speaks, people take notice. So, when he broadcasts a significant change to the way he thinks interlocutory injunctions ought to be granted, people ignore him at their peril.

For decades, the convention has been for Canadian courts to apply the three-part test, which requires a serious issue to be tried in the underlying proceeding, that the applicant demonstrate irreparable harm to its interests pending trial and that the "balance of convenience" favours granting the injunction. This standard grew out of the decisions in *American Cyanamid Co. v. Ethicon Ltd.* [1975] All E.R. 504 (H.L.) and *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994] 1 S.C.R. 311.

In his text, *Injunctions and Specific Performance*, Justice Sharpe describes how, at its core, what the test actually seeks to accomplish is a balancing of the relative risks of granting or denying an injunction prior to a full hearing of the dispute on the merits.

Except in rare circumstances, such as where the injunction will bring an end to the proceedings, the current paradigm frowns upon a prolonged examination of the plaintiff's case at the first step of the analysis as unnecessary and even undesirable. It's this aspect of the *RJR/Cyanamid* test that could be about to change.

In the most recent revision to his text, Justice Sharpe appears to have embraced a regime in which the strength of the moving party's case almost always receives close scrutiny. Calling it incontrovertible that a moving party's chance of ultimate success at trial is directly relevant to the relative risks of harm in granting or refusing an injunction, Justice Sharpe had previously explained that "if relevant, the strength of a case should be considered."

Now, however, in the current edition of his text he's suggesting that the strength of the moving party's case should almost always be considered, writing that "as it is relevant" it deserves attention. On this view, a restricted assessment of the merits becomes the exception as opposed to the norm. If this is true, it would be a significant rethink of a key aspect of the *Cyanamid* decision.

Prior to *Cyanamid*, it was believed that moving parties were required to show a *prima facie* entitlement to the injunction before it could be granted. The most commonly cited authority for this proposition was the House of Lord's decision in *J.T Stratford & Son, Ltd. v. Lindley*, [1964] 3 All E.R. 102.

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By the time the Lords granted leave to appeal in *Cyanamid*, concern had developed over the length and complexity of hearings for interlocutory injunctions. In pursuit of either discharging or frustrating the onus of satisfying the *prima facie* test for injunctive relief, litigants were converting interlocutory proceedings into effective trials of the underlying action. A prime example of this was the *Cyanamid* case where the hearings before the motions judge and the Court of Appeal took three and eight days, respectively.

In this context, and in an obvious attempt to rein in what were becoming protracted mini-trials at the interlocutory stage, the Lords in *Cyanamid* rejected the requirement that an applicant had to show anything resembling a *prima facie* case. Lord William John Kenneth Diplock explained that expressions such as "a probability," "a *prima facie* case," or "a strong *prima facie* case" in this context lead "to confusion as to the object sought to be achieved by this form of temporary relief."

Justice Sharpe hasn't retreated from Diplock's premise that the minimum eligibility threshold for injunctive relief should remain that a moving party's case must be neither frivolous nor vexatious — in fact, he's called it a "positive and helpful" aspect of the case that shouldn't be overlooked.

Rather, his opinion now appears to be that it's usually undesirable for the investigation of the merits to end after a motions judge concludes that there is a serious issue to be tried. On this view, approaching the injunction analysis differently has the effect of denying motions judges information critical to the exercise of their discretion over whether to grant the injunction.

Litigators would do well to take note of this change in practice and be prepared to use it to their clients' advantage. Where the merits are weak, a strict application of the other two parts of the test will be called for, but the converse is also true.

When the dust settles, Justice Sharpe's most recent outlook may simply be an acknowledgement of what has been subconsciously at work in the minds of motions judges — the stronger your underlying case, the more likely you are to get your relief.

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You can look, but you can't eat

An employee at a 7-Eleven in Nanaimo, B.C., reported an unusual theft last month: two plastic display breakfast sandwiches. At three in the morning, a hungry customer apparently mistook the display items for the real thing. The fake sandwiches were worth more than $70 each. The accused realized his error only after leaving the convenience store, and threw one of the sandwiches away, but held on to the other, according to theprovince.com. Police tracked the man down and the props were returned undamaged. Luckily for the accused, the store manager declined to press charges. Congratulations should go out to the company responsible for manufacturing the display sandwiches–apparently the props look good enough to eat. **— Matthew Grace**