THE MAREVA INJUNCTION AND ANTON PILLER ORDER, 2D ED. By Richard Ough, William Flenley & John N. Adams. Toronto: Butterworths, 1993. Pp. 250. ($103.00).

Each legal text tends to deal with its subject matter with an approach lying somewhere on the spectrum from "academic" (scholarly, critical, analytical) to "practical" (terse, accessible, concentrating on practice matters). While it is fair to say that academics are often not concerned with matters of practice, the reverse is not true: practitioners are often deeply interested in analysis of the evolution and discriminating application of the law. The hardest text for a legal writer to produce is the useful practitioner's guide: a text which manages to distil the law in a complex area so as to communicate quickly both the trite basics and the essential tensions and subtleties of the law, without allowing detail and critical analysis to compromise a crisp presentation.

Ough, Flenley and Adams' *The Mareva Injunction and Anton Piller Order* is, first and foremost, a practitioner's book. Any Canadian practitioner who reads it is likely to be struck throughout by two strong feelings: a wish that every text on an item of practice were as insightful, concise and helpful to the practitioner; and regret that the book is so narrowly focused on the law of England that its usefulness to a Canadian practitioner is diminished. The remedies discussed in this text had their genesis in England, but on their adoption by Canadian courts they began a separate evolution within our own jurisprudence and constitutional context.

Litigation in Canada, as indeed in other parts of the world, is routinely faulted for the enormous resources of time and expense it consumes. What is more damning, but less often criticized, is that in the context of the time and money it devours, litigation is spectacularly ineffective. Many undertakings which have nothing to do with law or litigation are time-consuming and expensive, but they reward the patience and effort devoted to them with tangible results. Not so with litigation, where any experienced practitioner cautions his or her client on the elements of chance and irrelevancy in the probable outcome.

The ultimate frustration is experienced by the plaintiff who endures the litigation process, obtains a judgment (by the combination of effort and luck which generates such results) and then finds the defendant judgment-proof. Any potential plaintiff contemplating litigation can research the solvency of the defendant and make an educated guess whether *at that time* there are likely to be assets in the hands of the defendant to satisfy a judgment. The risk is that a defendant will, between the time litigation commences and the time of judgment, hide or remove from the jurisdiction the assets which could be used to satisfy the judgment. Indeed, a defendant who reached the stage of having a substantial judgment pronounced against him or her while still possessing significant assets might be seen, among canny litigants, as foolish and ill-prepared, like a person who pays avoidable taxes.

Another frustration with the impotence of litigation is felt by those who enter the litigation process, with its professional courtesies, assumptions of good faith and sometimes maddeningly naive procedures for disclosure, only to have an unscrupulous opponent dispose of unfavourable evidence and prevent the plaintiff from proving his or her case. While litigation concerning intellectual property rights (most notably copyright infringement) is especially vulnerable to the disappearance of evidence, indeed most often of the infringing products themselves, many other commercial disputes present the risks of the paper-shredder or the midnight movers.

The Mareva injunction and the Anton Piller order are relatively recent, but now familiar, remedies which represent a reaction not only to the evolving global commercial milieu, but also to the coming of age of litigious practices, a sort of "taking off the gloves" by gentlefolk who have realized that their opponents are not constrained by principles of fair play. Each of these remedies represents an incursion by the litigation process into the affairs of defendants which in earlier times were protected by specific, articulated principles of the common law.

The Mareva injunction, by which the defendant's assets are seized pending trial (*i.e.* before judgment) to ensure the meaningfulness of a judgment,[1] and the Anton Piller order, by which the defendant's premises are laid open to unannounced examination by a plaintiff in search of evidence, represent a balancing of the defendant's interests — when there has been no breach of the plaintiff's rights established — and the interests of a plaintiff threatened with irreparable harm. The Mareva injunction and the Anton Piller order are extensions of — but not qualitatively different than — the traditional jurisdiction of the courts in administering interlocutory relief generally.

Indeed, this sanctioned compromise of the defendant's rights before the wrongfulness of its conduct is established is the salient juridical feature of the interlocutory injunction. At the interlocutory stage there will be some inquiry into the likelihood that the defendant's conduct is wrongful — a preliminary examination of the merits of the plaintiff's case to determine whether there is some level of comfort that the remedy is warranted — but there will not be a finding of which party, as between the plaintiff and the defendant, is "in the right". That determination awaits the trial.

Ough, Flenley and Adams' *The Mareva Injunction and Anton Piller Order* deals exclusively with the law of England and Wales, and this narrow coverage of the case law and procedure is entirely appropriate for the text's intended purpose. The usefulness of this sort of text to an English practitioner might be diminished if it were cluttered with extensive references to the law in foreign jurisdictions; that is the sort of detail to which an English barrister might resort in dealing with a hard case or a novel application of the law. For most purposes, the English barrister wants a pithy and well organized presentation of the principal points and main cases on the legal issues and procedural hurdles facing him or her, not a dissertation on how the Canadian courts deal with the same issues. The latter point would be a necessary topic for any thorough text on the substantive law, in whichever of the common law jurisdictions it were published, but could be an annoying distraction in a practitioner's guide.

This is not to say that the presentation of the law in this text lacks erudition, or that the practical orientation of the book results in superficiality. The opposite is true. The authors of this text have indeed achieved that ideal balance of communicating effectively both the basics and the subtleties of the law, conveying only so much of the genesis of the law as is necessary to appreciate the tensions in the current leading cases.

The strictly procedural material (*e.g.* how to appear before a judge during summer recess) is limited to local relevance and is of no use to a Canadian practitioner. The precedents, if a discerning hand modified them for local use, could be helpful to a Canadian lawyer preparing a motion, but there is no substitute for the comfort level one can give a judge by presenting him or her with material which follows the terms and

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[1] The Mareva injunction can also be obtained after judgment. In this less common context it is primarily an aid to execution, an interim measure pending the arrival of the sheriff.

language of other materials used and accepted by judges in the same jurisdiction in other cases.

Plainly, then, this book could only be a companion text to some other primary material to be used by the Canadian practitioner. Though even in very recent Mareva injunction cases at appellate levels one sees the basic prerequisites for the remedy recited by reference to the leading English cases, there is also routine reference to authoritative provincial and leading Canadian cases; certainly, at first instance, most practitioners will rely primarily on authorities from the provincial appellate courts.

The major development of the Mareva injunction in England — its expansion in 1988 to "world-wide" application — has a limited, albeit potentially significant, relevance to Canadian jurisprudence. England is a "unitary state", and the Canadian courts have for some time (although not exhaustively) had to deal with the extra-jurisdictional issues arising from the use of these remedies when dealing with their application outside the province of the issuing court.

The Mareva injunction's "world-wide" jurisdiction has only recently been accepted by Canadian courts. This has the predictable ambivalent effect of making the law cited in *The Mareva Injunction and Anton Piller Order* only marginally applicable to the existing Canadian jurisprudence and yet likely very useful to a practitioner intent on pushing the envelope of the remedy by importing the broader jurisdiction now routinely accepted by the English courts. Put another way, a Canadian practitioner must have a thorough knowledge of the Canadian law on these remedies before it will be prudent to have reference to this English text.[2]

To return to the comment at the opening of this review, the message highlighted by the appearance of this text is that we should have a similar reference work for the Canadian practitioner. The practitioner in Canada is — on this topic as on others — left to assemble the law and motion material from a variety of sources. At present most practitioners use Robert Sharpe's leading text.[3] Although more thorough than many, it does not aspire to the level of detail and practice direction which can be achieved by a text devoted exclusively to the practitioner's perspective on one or two particular types of injunctions. Debra M. McAllister's scholarly and thorough *Mareva Injunctions*[4] is not practice oriented and there are no plans to update the second edition, now eight years old. The similarly erudite articles on these remedies in Berryman's *Remedies: Issues and Perspectives*[5] are authoritative but do not purport to be 'stand-alone' texts or to be directed to the practitioner. There are a number motion materials and useful precedents for both Mareva and Anton Piller orders in *Williston and Rolls Court Forms*,[6] but little guidance on the law. Most practitioners compile a file of papers delivered at continuing education seminars, where one can often find excellent first-hand commentary on recent developments. Ough, Flenley and Adams' book illustrates how all of this type of material can be brought together with an efficient and thoughtful presentation.

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[2] A fairly current account of the Canadian law on both remedies can be found in the articles by Professors Sadinsky and Mullan in J. Berryman, ed., *Remedies: Issues and Perspectives* (Scarborough, Ont.: Thomson Professional Publishing, 1991).

[3] R. Sharpe, *Injunctions and Specific Performance*, 2d ed. (Aurora, Ont.: Canada Law Book, 1993).

[4] D.M. McAllister, *Mareva Injunctions* (Toronto: Carswell, 1987).

[5] J. Berryman, *supra* note 2.

[6] R.J. Rolls, ed., *Williston and Rolls Court Forms*, 2d ed. (Toronto: Butterworths, 1986).

The Mareva Injunction and Anton Piller Order is doubtless an excellent text on these topics for barristers in England and it will be a valuable addition to the library of a Canadian lawyer whose practice involves anything beyond resort to these remedies in their most rudimentary form. But Canadian jurisprudence and Canadian legal publishing have long since come of an age where, for material of this quality on practice topics, we should not have to look to English texts.

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