Focus

CIVIL LITIGATION

Full stop the hard way

Proving imminent harm is key to getting a rarely-granted injunction quia timet

Anna Wong

Lying close to the top of the litigator's toolbox is a familiar, well-used instrument: the injunction.

Injunctions have been sought and issued in wide-ranging circumstances, including in property litigation, commercial actions, IP infringement proceedings, labour disputes, and in cases of public protests. They have been used to assist in preserving evidence (*Anton Piller* order, a.k.a. civil search warrant) and to prevent disposition of assets which may later be required to satisfy a judgment (*Mareva* injunction, a.k.a. freezing order).

Broadly speaking, an injunction is an equitable remedy whereby a party is required to restrain from certain activities (prohibitory injunction) or to take positive steps (mandatory injunction). It may be granted on an interlocutory basis prior to a final determination of the issues in the action, or on a permanent basis after a hearing on the merits. In some cases, the real battle takes place on the interlocutory motion, such as where an injunction, or the failure to obtain one, inflicts such hardship as to strip any benefit to be had from going to trial.

Injunctive relief can also be ordered where the alleged harm is prospective. This type of injunction is known as an injunction *quia timet* — "because he fears."

An injunction *quia timet* is a powerful tool as it allows a party to put an end to something before it even transpires, such as to block a planned highway construction. The spotlight is not often shone on this type of injunction, while commentaries on the *RJR MacDonald* test for an interlocutory injunction abound.

In the seminal decision of *Operation Dismantle Inc. v. Canada* [1985] S.C.J. No. 22, our top court made clear that to get a *quia timet* injunction, the plaintiff has the burden of showing a "very strong probability upon the facts that grave damage will accrue to him in the future."

When sought on an interlocutory basis, it must be demonstrated that:

(1) there is a high probability that if an injunction is not granted, the anticipated activity will occur imminently or in the near future;

(2) there is a serious question as to whether the plaintiff has a right that would be breached by the activity; and

(3) the balance of convenience, weighing the likelihood of irreparable harm to the plaintiff, favours granting the injunction. (*YX, Inc. v. IND Lifetech, Inc.* [2008] B.C.J. No. 1698.)

It should come as no surprise that *quia timet* injunctions are rarely granted, as courts are reluctant to intervene when no actual harm has been done. The risk of an unwarranted stifling effect on a defendant's freedom to do as it desires within the parameters of the law is amplified when the situation is still unfolding. As with all types of injunctions, an injunction *quia timet* will not be granted if an award of damages will fully compensate: *Hipwell v. Wallace (Rural Municipality)* [1987] M.J. No. 175.

The test for an injunction to prevent an anticipated breach of contract is an onerous one. In *1230995 Ontario Inc. v. Badger Daylighting Inc.* [2010] O.J. No. 2166 (affirmed in [2011] O.J. No. 2584), a franchisee sued the franchisor for breach of franchise agreement after the franchisor assigned four counties that the plaintiff had as part of its territory to another franchisee. In addition to damages, the franchisee sought an injunction to prevent the franchisor from further removing counties from its territory. Notwithstanding the finding of breach, Justice W.A. Jenkins held that the application for a *quia timet* injunction was premature and did not meet the test, which requires "proof of imminent danger or that that apprehended danger will, if it occurs be very substantial and it would be impossible for the plaintiff to protect himself without an injunction."

Injunctions *quia timet* have been sought in the property context, but they are often not successful. By way of a recent example, in *Wiggins v. wpd Canada Corp.* [2013] O.J. No. 1858, the plaintiffs requested a *quia timet* injunction to prevent the construction of a wind farm on the grounds that it would be a nuisance. Regulatory approval for the project was pending. The plaintiffs, neighbouring landowners, presented extensive expert evidence: appraisal evidence of prospective property depreciation, medical evidence of probable adverse health effects, and acoustic

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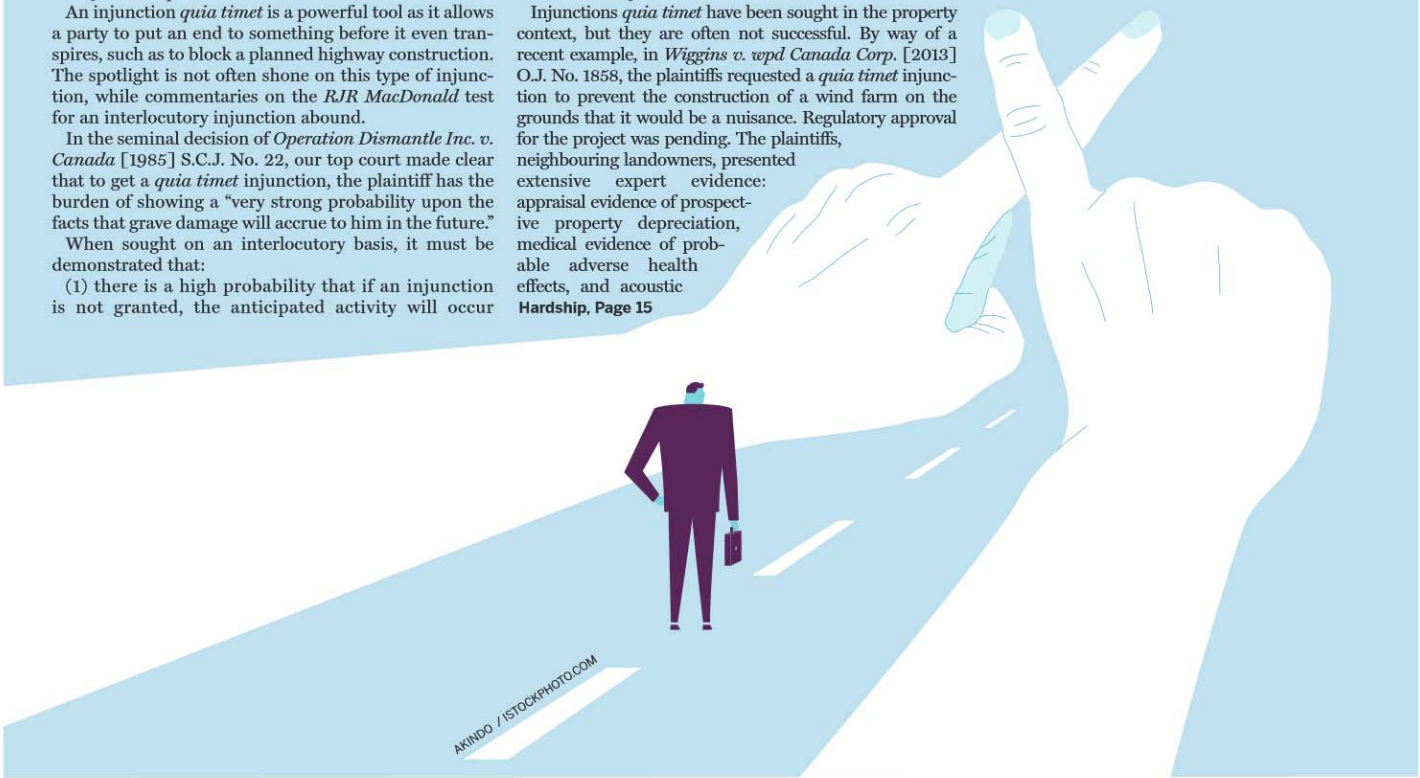

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Implied and voluntary waiver

John Philpott

Solicitor-client privilege has been elevated by the Supreme Court of Canada into a fundamental right that must remain "as absolute as possible." Nevertheless, the doctrine of "waiver of privilege" remains alive and well.

Most lawyers are aware that producing correspondence between themselves and their client can constitute waiver, and are careful to keep such correspondence confidential. While it's important to be careful to avoid any embarrassing mishaps, it is equally important to understand which intentional acts may inadvertently result in privilege being waived.

Voluntary or intentional waiver occurs when your client knows the existence of the privilege and "voluntarily evinces an intention to waive that privilege." (See *S & K Processors Ltd. v. Campbell Avenue Herring Producers* [1983] B.C.J. No. 1499.) This can be avoided by ensuring your clients understand the basics of confidentially and, as seen below, never using the words "legal advice" in an affidavit. That's the simple part.

"Implied waiver" raises its ugly head when your client's mind is put in issue in respect of legal advice. This is not a bright line rule. Rather, as stated by Justice Beverly McLachlin in *S & K Processors Ltd.* [1983], 45 B.C.L.R. 218 (S.C.), "waiver may also occur in the absence of an intention to waive, where fairness and consistency so require." Essentially, a party cannot assert a position based on legal advice, and then seek to hide the particulars of that advice behind the cloak of solicitor-client privilege. Once that position is asserted, the cloak drops away. Without some disclosure of the contents of that legal advice, the defence sits in an evidentiary lacuna.

In *Creative Career Systems v. Ontario* [2012] O.J. No. 262, Justice Paul Perell sets a high bar on what constitutes implied waiver. The party must use and rely on legal advice in a material part of their claim or defence. According to *Creative Career*, privilege is not waived "even if the party relied on the legal advice during the events giving rise to the claim or defence. For a party to have to disclose the legal advice more is required."

Unfortunately for counsel and client, subsequent jurisprudence has fostered uncertainty and also created some surprising distinctions. In *Ebrahim v. Continental Precious Minerals Inc.* [2012] O.J. No. 716, Justice David Brown considered whether privilege was waived when a party swore an ill-advised affidavit that he did not jointly hold shares with a family member because he "received legal advice to that effect prior to initially purchasing the shares." One of the issues in the application was whether the affiant and his family acted together to purchase shares in a hostile takeover.

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While the legal advice appeared to have been relied on during the events giving rise to the defence, it was not relied on in the application itself. Indeed, the affiant's counsel sought to withdraw that portion of the affidavit. Ultimately, the toothpaste was not allowed back in the tube and it was held that privilege was waived because "legal advice" was *voluntarily* put in the affidavit. (For those interested, most of the analysis in the case revolves around implied waiver.)

This is difficult to reconcile because the affiant did not go beyond stating that legal advice was received. Most implied waiver cases have similar facts. Does this mean privilege is voluntarily waived if a client blurts out that he received legal advice while being examined on discovery? Interestingly, it appears not. *Ebrahim* draws a distinction between statements made in an affidavit versus at an examination for discovery, finding the former to be of a more voluntary nature.

Another noteworthy distinction has been drawn between individuals and large companies or municipalities. In *Guelph (City) v. Super Blue Box Recycling Corp.* [2004] O.J. No. 4468, Justice David Corbett found that answers given by a municipality on examination for discovery regarding receipt of legal advice satisfied the "fairness test." (Like the insurance defence cases mentioned above, bad faith was a live issue in *Super Blue Box*.)

Nevertheless, he did not order that the contents of the legal advice be disclosed out of concern a municipality's privilege could be waived by an inadvertent slip of a representative on discovery, even if that representative is a high official. Query whether, for matters of privilege, the answers given by representatives of large companies or municipalities bind their employers.

While there may be some practical motivations behind these recent decisions, they muddy the waters on which acts waive privilege. Instead of focusing on the underlying fairness concern articulated in *Creative Control*, they create new rules based on where and when evidence is given. Everyone will be better served if clear and separate tests for voluntary and implied waiver are re-established. Until then, counsel should not take their clients "near absolute" rights for granted.

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evidence that the project would likely exceed the permissible 40 dBA threshold. The claim was dismissed on a summary judgment motion. Justice Susan Healey reasoned that even if the plaintiffs' evidence of harm was accepted, harm will only materialize *if and when* the project receives regulatory approval, a process which allows for public input and appeal. The plaintiffs could not prove that the wind farm will be built, or if it did get the regulatory go-ahead, what conditions or restrictions might be imposed and their ramifications. This case neatly illustrates that injunctive relief will not be ordered where there is no way of assessing whether the alleged harm will occur.

A *quia timet* injunction was obtained in *Evergreen Buildings Ltd. v. IBI Leaseholds Ltd.* [2005] B.C.J. No. 3149, in which the landlord commenced an action to evict the tenant, who was not in default, in order to demolish the building and build a new one. The court granted the tenant a permanent injunction enjoining the landlord from doing anything that would breach its covenant of quiet enjoyment. The case was remitted for reconsideration on appeal ([2005] B.C.J. No. 2552). The Court of Appeal held that the equities between the parties, including "factors relating to the 'uniqueness' of the property, and the relative hardship, if any, of holding the landlord to the strict terms of the lease," must be considered in determining whether to grant injunctive relief.

While *quia timet* injunctions are denied in nine out of 10 cases, not all such requests are doomed. As one can glean from the foregoing cases, the timing of the application as well as the ability to lead clear evidence of imminent harm are key factors. It is also important to have the equities on your side as an injunction is, after all, an equitable remedy.

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