

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:)
)
TREASURE TRADERS) Patricia Szwed for the Plaintiffs
INTERNATIONAL CORPORATION and)
BUSINESS IN MOTION)
INTERNATIONAL CORPORATION)
)
Plaintiffs)
)
- and -)
)
)
DAVID JOHN THORNTON) David John Thornton, on his own behalf
)
)
)
Defendant)
)
)
) **HEARD:** June 29, 2006

REASONS FOR JUDGMENT

M.G.J. QUIGLEY J.

Introduction

[1] Treasure Traders International Corporation (“TTI”) and Business in Motion International Corporation (“BIM”) ask the Court to grant them injunctive relief. They claim that the actions of the respondent, David John Thornton, both in person and through his website, have defamed them and caused them irreparable business harm.

[2] The Respondent resists TTI's and BIM's claims. He argues that neither TTI nor BIM have satisfied either the procedural or the substantive prerequisites to an interlocutory injunction. As in any injunction motion, the Court must assess whether TTI and BIM present a serious issue to be tried, whether TTI and BIM will suffer irreparable harm if the injunction is not granted, and in favour of which of the parties, TTI and BIM or the respondent, the balance of convenience lies.

Facts

[3] TTI and BIM claim to be network marketing companies that carry on business as distributors of gems and various other products and services. By virtue of the fact that TTI and BIM are network marketing companies, their owners claim that their customers are provided with an opportunity to also become their distributors. The only description provided by TTI and BIM of their business is set out in paragraphs 7 and 8 of their Statement of Claim as follows:

7. By virtue of the fact that TTI and BIM are network marketing companies, their customers are provided with an opportunity to also become their distributors.

8. TTI and BIM host presentations where attendees are required to pay an admission fee. The distributors are encouraged to bring potential customers to the said presentations. At the said presentations, trained and qualified TTI and BIM personnel address the attendees and explain the system. The attendees are offered an opportunity to purchase a variety of products and services.

[4] There is no other evidence in the material they filed before the court to explain the manner in which their business actually operates, or to permit those businesses to be distinguished from the "pyramid sales" schemes against which the respondent Thornton campaigns so vigorously, and the operation of which in Canada is contrary to both the *Competition Act* and the *Criminal Code*.

[5] The principle of the plaintiff TTI, Alan Kippax claims to have first become aware of Thornton when the defendant held a protest at a TTI presentation on or about August of 2004. The applicants conducted internet searches, which revealed that Thornton

operates a business under the name Crimebuster International Foundation and "Crime Busters Now" ("CBN"). The plaintiff claimed to have become aware earlier this year that Thornton had been making defamatory statements against TTI and BIM both in his personal capacity and through the CBN. The plaintiff therefore conducted further investigation.

[6] Specifically, TTI and BIM allege that Thornton's website, www.crimebustersnow.com, states that TTI is involved in a "pyramid scheme" and in "fraud attempts to make a pyramid scheme with gemstones." On April 2, 2006, the applicants claimed to have become aware of other statements made by Thornton on various internet sites. These include allegations that TTI is under investigation by the RCMP, that BIM is also under police investigation, that Alan Kippax, the principal of the applicants, has a prior criminal record, and numerous other allegations, set out in detail in paragraphs of the applicants' factum.

[7] As a result of Thornton's actions, TTI and BIM claim that their reputation and business have suffered. Specifically, they state that sales have significantly decreased. They state as well that Thornton appears to have intentionally made the defamatory statements that are attributed to him in order to interfere with the applicants' contractual relations with their customers and distributors and to cause the applicants, TTI and BIM, to suffer damages.

[8] Thornton was self-represented. To appreciate the flavour of the matter from his perspective, paragraph 1 of Thornton's factum, in which he sets out his statement of the case, bears repetition:

The plaintiffs initiated a defamation claim against the defendant after learning that the defendant has been denouncing through the Internet the business operation of the plaintiffs as a pyramid scam. The plaintiffs further state, that the Defendant operates an anti-scam organization through which he further defames the plaintiffs. The defendant does not deny the defamation allegations since he believes that he is protecting the interests of the public because he considers the operation a criminal

activity. The defendant, further to feeling a moral obligation to act as a responsible citizen, also supports his right to denounce the plaintiffs as he is done in previous pyramid business operations closed down in other countries, at least one of which was associated with the plaintiffs. The defendant is impecunious and with limited knowledge of the law, legal procedures and resources to defend himself. The plaintiff seeks an injunction to prevent the Defendant from further denouncing the operation run by the plaintiffs as a scam and to disclose the names of those who have been contacted by the Defendant. The defendant argues that the courts have the obligation to protect the public and would like the courts to declare the legal action launched by the plaintiffs as frivolous and vexatious on the basis of the plaintiff's operation is a pyramid scheme and illegal money laundering operation. The defendant is also counter-petitioning the court to order that the plaintiffs remain in the province of Ontario while these proceedings continue and to post security for costs and damages if the plaintiffs wish to continue the action. He is also seeking punitive damages compensation and other relief.

[9] Thornton presented the court with numerous very interesting pieces of evidence in his affidavit material and in his submissions. Included amongst these are numerous news reports in various Canadian publications about TTI and BIM being under investigation. Further, he includes in his material as Exhibit "K" a copy of a U.K. Government news report explaining action taken by the Department of Trade and Industry in that country to close down TTI in the U.K. as a pyramid scheme operation. The November 30, 2005 press release issued by the U.K. Department of Trade and Industry reads in part as follows:

The Secretary of State for Trade and Industry has presented a petition in the High Court to wind up Treasure Traders Corporation Ltd. in the public interest.

The Company operated a "pirate ship" - themed pyramid selling scheme. Investors paid £1,200 to sign up and were told to recruit further members of a ship "crew". They would move up to the position of "Captain" depending upon how many recruits they could enrol.

Once the "ship" had a full crew of eight members they were told to "sail the high seas searching for gold" by taking a profit share of future investments.

In fact, many members of this scheme are receiving no return on their investment.

The petition was presented following an investigation carried out by the Department's Companies Investigation Branch (CID) under section 447 of the *Companies Act* 1985. The petition is listed for hearing on 14 December 2005.

On the application of the Secretary of State, the Court has appointed the Official Receiver as provisional liquidator of the company pending the hearing of the petition.

No further information will be made available until that time.

The registered office of the company is No. 1 Broadway, Hammersmith, London W69 DL. The sole director is Peter Kippax and the company secretary is Robert Pulleng.

It should be observed that the evidence before the court clarified that Peter Kippax was the cousin of Alan Kippax, the alleged principal of TTI and BIM. Peter Kippax apparently came to Canada late in 2005 and early in 2006, and then died in a motor vehicle accident in the Toronto area.

[10] Thornton asked the court to consider why it is that the applicants TTI and BIM seek an injunction only against him, an impecunious crusader against the ravages that pyramid sales schemes appear to have caused to countless individuals in a variety of countries, including Canada. He observes that they do not seek an injunction against any of the large Canadian news publishers who have made statements that appear to be as potentially defamatory as any of the statements Thornton has made. An example is Exhibit "E" to Thornton's affidavit, a reprint from the news website of Global Calgary dated January 25, 2006 that reads in part as follows:

Gemstone Investment Opportunity Collapses

Tony Tighe/Julie Matthews
Global TV
January 25, 2006

Thousands of people expecting big returns after investing in gemstones, have lost all their money.

Treasure Traders International was supposed to be a legitimate multi-level marketing plan, but as many have now found out, it was really a cleverly disguised pyramid-scam.

Global TV's Consumer Investigator in Edmonton discovered the company quietly closed the doors of its head office in Ontario, January 13, leaving investors across Canada stranded.

Fran Gaskell wishes she had never heard of Treasure Traders International.

"I don't know how I got bamboozled, but I did", says Gaskell.

In 2004, she invested \$1200 to become a wholesaler for coloured gemstones.

If she recruited at least two other people, she was promised a return of \$7,000.

"What hurts me more than anything else is I brought my friends and acquaintances in and told them I thought this was a good thing", she says.

Treasure Traders International shut its Canadian offices after it was declared a pyramid scheme in England and its assets were seized.

It's believed there were 30 to 40,000 people involved across Canada.

...

Calgary RCMP, staff Sergeant Bill Ralston says it's easy to spot a pyramid.

He says, if you make more money from recruiting other people to join in than from the sale of a product and then it's a pyramid.

"If their emphasis seems to be totally on recruiting and how big and wonderful this program is going to become through recruiting and you're going to be rewarded by your recruiting and then it's a pyramid", says the Commercial Crime detective.

He says buying a product to get into this game doesn't make it legal either.

[11] Similar reports alleging the illegality of the TTI and BIM businesses taken from the Toronto Sun (June 21, 2006) and the Windsor Standard (June 5, 2006) were also included in Thornton's motion record materials. It is Thornton's allegation that TTI and BIM bring their action against him alone only because he is an impecunious self-represented individual. He acknowledges as well that he has been a rather large "thorn in their side" as one of the principal sources of public statements aimed at warning members of the public against the "participatory business" schemes offered by TTI and BIM to Canadians. Thornton freely acknowledges that he campaigns publicly against those who would cause economic and emotional damage to ordinary Canadians by enticing them into pyramidal sales schemes.

[12] Further, in his responding material, Thornton asserts that the definition of a pyramid scheme contained in section 55.1 of the *Competition Act* exactly describes the manner in which TTI and BIM's alleged distribution business operates. Section 55.1 states as follows:

Definition of "scheme of pyramid selling"

55.1 (1) For the purposes of this section, "scheme of pyramid selling" means a multi-level marketing plan whereby

- (a) a participant in the plan gives consideration for the right to receive compensation by reason of the recruitment into the plan of another participant in the plan who gives consideration for the same right;
- (b) a participant in the plan gives consideration, as a condition of participating in the plan, for a specified amount of the product, other than a specified amount of the product that is bought at the seller's cost price for the purpose only of facilitating sales;
- (c) a person knowingly supplies the product to a participant in the plan in an amount that is commercially unreasonable; or
- (d) a participant in the plan who is supplied with the product
- (i) does not have a buy-back guarantee that is exercisable on reasonable commercial terms or a right to return the product in saleable condition on reasonable commercial terms, or
- (ii) is not informed of the existence of the guarantee or right and the manner in which it can be exercised.

Pyramid selling

(2) No person shall establish, operate, advertise or promote a scheme of pyramid selling.

Offence and punishment

(3) Any person who contravenes subsection (2) is guilty of an offence and liable

- (a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both; or
- (b) on summary conviction, to a fine not exceeding \$200,000 or to imprisonment for a term not exceeding one year, or to both.

[13] In his argument, Thornton explained to the court how the TTI and BIM participatory businesses adopt the exact model and mechanisms of other pyramidal sales

schemes that have been investigated and shut down by police authorities. He compared a schematic diagram of the operative marketing scheme used by TTI and BIM to other pyramidal sales schemes that have been shut down. To all appearances, the schemes were substantially the same. Finally, Thornton drew the court's attention to s. 206(1)(e) of the *Criminal Code*, which states as follows:

Everyone is guilty of an indictable offence and is liable to imprisonment for two years, who

(e) conducts, manages or as a party to any scheme, contrivance or operation of any kind by which any person, on payment of any sum of money, or the giving of any valuable security, or by obligating himself to pay any sum of money or give any valuable security, shall become entitled under the scheme, contrivance or operation, to receive from the person conducting or managing the scheme, contrivance or operation, or any other person, a larger sum of money or amount of valuable security than the sum or amount paid or given, or to be paid or given, by reason of the fact that other persons have paid or given, were obligated themselves to pay or give any sum of money or valuable security under the scheme, contrivance or operation;

Analysis

Are the tests met for a grant of injunctive relief?

[14] To succeed on a motion for a pre-trial injunction, TTI and BIM must demonstrate first that there is a serious question to be tried, second that they will experience irreparable harm if the injunction is not granted, and finally, that the balance of convenience favours the granting of the injunction. These were the principles enunciated by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at pages 410-411 per Sopinka and Cory JJ. While that case was concerned with the availability of injunctive relief in a *Charter* context, certain of the judge's comments, adapted for these present non-*Charter* circumstances, are apposite. The Court said:

At the first stage, an applicant for injunctive relief ..., must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of

the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions judge should only go beyond a preliminary investigation of the merits when the result of the interlocking Tory motion will in effect amount to a final determination of the action, or when the constitutionality of the challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, where the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the *Metropolitan Stores* test.

At the second stage, the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. "Irreparable" refers to the nature of the harm rather than its magnitude....

The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving Charter rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party. These public interest considerations will carry less weight in exemption cases and in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest, must demonstrate that the suspension of the legislation would itself provide a public benefit.

[15] It should be emphasized, however, that a pre-trial injunction is a remedy of extraordinary character, which places a high onus on the plaintiff seeking the relief. The Divisional Court emphasized this in its reasons in *Kanda Tsushin Kogyo v. Covely* (1997), 96 O.A.C. 324, at paras. 3-4, citing R.J. Sharpe, *Injunctions and Specific Performance*:

What we have in a pre-trial injunction is a drastic and extraordinary remedy. Thus it should be granted only in those circumstances which warrant taking such a drastic and extraordinary step. Implicit in this is that the plaintiff must demonstrate (to a degree appropriate when granting such relief without the benefit of a trial) that such remedy is warranted.

[16] Against this background, it remains to consider the application of these three tests in the context of the facts and evidence and the claims made by TTI and BIM and the response of the respondent, Thornton.

[17] Fundamental to a consideration of the existence of a serious triable issue is the proposition that an injunction is “not a cause of action by itself. It is simply a remedy that is given in support of a breach of a legal, equitable or statutory right.” Thus, a party seeking an injunction must have either a recognized common law cause of action, or a claim in equity, or a claim for infringement of a statutory right against the person who is subject to the injunction. Without the presence of these rights, a court can grant no injunctive relief. (*Hope (District) v. L-156 Holdings Ltd.*, [1995] B.C.J. No. 1335, para. 18 (B.C.S.C.), per Scarth J., citing *Kaiser Resources Ltd. v. Western Canada Beverage Corp.* (1992), 71 B.C.L.R. (2nd) 236 at p. 244 per Bouck J.). In *Duplain v. Cameron* (1960), 26 D.L.R. (2nd) 340, at p. 343, Brownridge J. of the Saskatchewan Court of Queens Bench emphasized that an applicant for an injunction must assert some right, the violation of which should be enjoined until his action in respect of that right can be tried.

[18] In the present circumstances, TTI and BIM assert a claim for damages of \$10,000,000 for defamation and interference with economic relations. I observe that there was no evidence or other material advanced on this injunction motion that would appear to provide any real support for a damages claim of that magnitude. In addition, their claims would require this court to essentially prevent Thornton from using any information he has previously obtained or taking any action personally that would interfere with the right which TTI and BIM claim they have which is to continue to carry on their “network marketing business”.

[19] On a preliminary investigation of the presence of a triable issue, that would satisfy the first branch of the test in *R.J.R. MacDonald*, it appears to me that there is at least a triable issue present whether the actions of the defendant, Thornton, and his

internet published statements respecting TTI and BIM have intentionally interfered with the economic interests of the plaintiffs and constitute actionable defamation, or whether he would be successful at trial, possibly based on a defence of fair comment or some other defence.

[20] As to the second test in *R.J.R. MacDonald*, the Supreme Court ruled that “the applicant must convince the Court that it will suffer irreparable harm if the relief is not granted. ‘Irreparable’ refers to the nature of the harm rather than its magnitude”. The Supreme Court went on to say that irreparable harm is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.

[21] The key element of this test requires that the party claiming injunctive relief not merely argue that harm may result, but that it must convince the Court that it will result. Expressed another way by the Divisional Court in the *Kanda* decision, *supra*, the Court said that evidence of irreparable harm must be “clear and not speculative”.

[22] In the present case, the nature of the irreparable harm, which it is alleged has and will continue to be sustained by TTI and BIM if this injunctive relief is not granted, is stated in para. 15-19 of the Statement of Claim of the plaintiffs. The plaintiffs cited numerous authorities to the court supportive of the proposition that internet publications cannot help but cause irreparable harm having regard to the breadth of their availability to the internet “surfing” public.

[23] It may well be that the very brief and un-particularized statements made by the Plaintiffs is not evidence of a sufficiently clear and convincing character to permit the Court to conclude that TTI and BIM will in fact suffer “irreparable harm” as that concept has been defined in the jurisprudence. The decision of Anderson J. in *North Bay Trappers Hockey Team Ltd. v. Reg Quinn Ltd.*, [1983] O.J. No. 211, para. 7 (H.C.J.), establishes that a mere allegation of irreparable harm does not make it so. An affiant

“cannot establish irreparable harm by saying that it exists or will be suffered. It is only in the allegations of fact which are put forward as supporting that contention that foundation can be found for a conclusion that such harm is to be anticipated.” I note as well that our courts have consistently ruled that claims for lost contracts do not constitute irreparable harm: see *Semiconductor Insights Inc. v. Kurjanowicz* (1995), 63 C.P.R. (3d) 532, p. 545 (Ont. Gen. Div.), where Cunningham J. stated:

Irreparable harm does not occur when there are lost contracts. Irreparable harm may occur when it is determined that customers have forever departed. There may be a temporary loss of business, which for all intents and purposes would equate to a temporary loss of revenue. But that is clearly something which can be compensated for in damages.

[24] Assuming, however, at least for the purposes of this test on this motion that the plaintiffs are engaged in a legitimate business, then the actions of the respondent Thornton may have caused irreparable harm to the TTI and BIM businesses. Indeed it is admitted by the respondent that that is exactly the result his actions were intended to have. I am thus prepared to assume for the purposes of this motion that irreparable harm has been caused by Thornton, principally because, apart from the evidentiary deficiencies of the material put before the court by the plaintiffs, Thornton himself effectively acknowledges that he hopes he has caused them irreparable harm. There is no doubt that his intent was to provide warnings to the public regardless of the harm it might cause to the plaintiffs, or indeed to others who might be engaged in similar schemes.

[25] I would observe by corollary, however, that if it were to be established at trial or otherwise that the “business” carried on by the applicants is a pyramid sales business of the type declared to be contrary not only to the *Competition Act* but also to the *Criminal Code*, then no “irreparable harm” would seem capable of being legally established by the TTI and BIM. The reason is simple. It seems obvious to me that our courts would not exercise their equitable jurisdiction to grant the extraordinary remedy of an injunction to prevent alleged “irreparable harm” to be suffered by an illegal business, and to cause the

conduct of one who seeks to stop the carrying on of such illegal pursuits to be enjoined. Again, however, that is an issue that can be determined at trial.

[26] The third test enunciated in *R.J.R. MacDonald* is the balance of convenience. As the court said in that case, this involves “a determination of which of the two parties will suffer the greater harm from the granting or refusing of an interlocutory injunction, pending a decision on the merits.” A related question, which may affect the determination of the balance of convenience or inconvenience relates to the giving of an undertaking with respect to damages.

[27] Rule 40.03 of the *Rules of Practice* stipulates that on a motion for an interlocutory injunction or a mandatory order, the moving party shall, unless the court orders otherwise, undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party.

[28] In the present case, neither TTI nor BIM has provided an undertaking with respect to damages that Thornton may sustain if this injunction were to be granted, to the best of my knowledge. Such an undertaking is normally given on an injunction motion unless the court, in its discretion, decides not to require it: see for example *Fulham v. Manitoba Hydro* (1995), 29 M.P.L.R. (2d) 243, para. 13, Man. C.A., per Scott J.A.M. (undertaking “an essential condition in the granting of an injunction but for exception circumstances”); *Lac La Biche (Town) v. Alberta* (1993), 17 C.P.C. (3d) 230 page 236 (Alta. C.A.), per Cote J.A. However, even this point is not determinative of the matter in my opinion.

[29] The balance of convenience issue is a simple one to resolve in the context of this dispute tied in as it is inextricably with the principle that an injunction will be denied in circumstances where the party seeking to enjoin the conduct of another does not come to court with “clean hands.”

[30] In his seminal work, *Injunctions and Specific Performance, supra*, Justice Robert J. Sharpe indicates that the maxim that one "who comes to equity must come with clean hands" is colourful, but potentially misleading insofar as it suggests a general power to scrutinize all aspects of the plaintiff's behaviour and refuse relief if it offends. Justice Sharpe says that the principle is employable *only where the alleged misconduct of the plaintiff relates directly to the very transactions in issue*, and is not merely related to the general morals or conduct of the person seeking relief (my emphasis).

[31] As an example, in *City of Toronto v. Polai* (1968), 3 D.L.R. (3d) 498, the trial judge refused an injunction sought by the City to enforce a municipal bylaw on the grounds that, by virtue of a selective enforcement policy, the City came to the court with "unclean hands". This, however, was reversed on appeal on the grounds that the public interest in enforcement of by-laws was paramount and not affected by the City's conduct. Schroeder J.A. said " the misconduct charged against the plaintiff as a ground for invoking the maxim against him must relate directly to the very transactions concerning which the complaint is made, and not merely to the general morals or conduct of the person seeking relief."

[32] Sharpe J.A. suggests that these principles are sound and that wrongdoing will not deprive the plaintiff of a specific performance or an injunction remedy unless it bears directly upon the appropriateness of the remedy. However in my opinion this is one of those instances. The alleged wrongdoing of the plaintiffs does bear directly upon the appropriateness of the remedy in this instance. In his materials, the respondent, Thornton, has at least raised a *prima facie* case that the applicant's TTI and BIM are engaged in a "business" activity that violates both the *Competition Act* and the *Criminal Code*.

[33] In my opinion it would be inappropriate for this Court to enjoin the conduct of even a self-appointed crusader, such as Thornton, by granting this injunction in the face

of the broadest and most sketchy evidence about the nature of their business. The plaintiffs claim this Court ought to shut down Thornton because he loudly and publicly questions their legality and warns fellow citizens against being caught up in their alleged web of deception.

[34] In this case, Thornton showed the court how the TTI “game board” is a virtual exact replica of the “game board” used in the Women in Power pyramid sales scheme. Pyramid sales schemes and the manner in which they operate and the harm they cause were discussed by the Ontario Court of Appeal in *R. v. McKenzie*, [1982] O.J. No. 415 (O.C.A.), and more recently in *R. v. Richardson*, [1999] O.J. No. 5160 (O.C.J.). The plaintiffs state that the inconvenience of preventing Thornton from carrying on with his campaign against pyramid sales schemes is non-existent compared to the “irreparable damage” that has been sustained by the plaintiffs. The Court understands the need to scrutinize carefully (see: *Pilot Insurance Co. v. Jessome*, [1993] O.J. No. 172 (Ont.Gen.Div.) the activities and motivations of self-appointed champions, such as Thornton. However, the threshold for scrutiny is lower in a case such as this, in my view, where the self-appointed champion has raised a serious doubt that the businesses of the plaintiffs are legitimate business ventures that have the right to be protected by our law.

[35] In the absence of evidence that even begins to rebut the assertions made by, Thornton, and faced with the prospect of the plaintiffs coming to court to request equitable relief when it seems that their own hands may well be far from clean, there is no doubt in my mind that the balance of convenience favours Thornton.

Conclusion

[36] This Court concludes that the balance of convenience on this motion strongly favours a refusal to grant the injunction. Even had the Court not reached the conclusion on the basis of the points outlined above that the balance of convenience favours Thornton, or having regard to the failure of the plaintiffs to provide an undertaking with

respect to damages, the question of the actual legality of the “business” carried on by TTI and BIM would have tipped the balance in favour of Thornton.

[37] In the result, the Court cannot grant the relief sought by the plaintiffs on two grounds. They must fail first because they have failed to satisfy the tests enunciated by the Supreme Court of Canada in *RJR MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 and in other authorities. Moreover, as I have previously indicated, in my opinion this is not a situation where injunctive relief can be granted for additional reasons relating to the fact that the “business” which TTI and BIM seek to protect through an injunction is of at least seriously questionable legality. A party asking the court to exercise its equitable jurisdiction to grant relief must come before the court with “clean hands”, as the expression goes. In this case, it is open to serious question on the basis of the materials filed whether the applicants have done so.

[38] The issues in this case require a trial, and only through a trial will the evidence be able to be presented that will enable the legal entitlement of the applicants, if any, to be determined. This court cannot, through a request for injunctive relief brought on totally unsatisfactory affidavit evidence, permit itself to become an unwitting accomplice in upholding against fair criticism a “business” that at least *prima facie* appears and may well be found at trial to constitute an illegal activity specifically sanctioned by provisions of both the *Competition Act* and the *Criminal Code*.

[39] As such the motion for an interlocutory injunction by TTI against David John Thornton is dismissed. If TTI is to have the remedy they claim, subject to my comments that follow, it will have to await a trial on the merits of their claim of defamation, at which defences of fair comment and illegality of the applicant’s business activities can be fully explored.

Orders

[40] In Thornton's factum, in Part IV, he lists some 15 orders for relief that he asked the court to grant. In my view, having regard to my dismissal of the injunction motion brought by the applicants, and the fact that a trial will be necessary to determine the merits of the claims asserted by the plaintiffs against Thornton, most of the relief sought by Thornton would be inappropriate for this Court to grant, and indeed many of the requests for relief sought by Thornton are simply outside of the jurisdiction of the court in the present circumstances. However, in the event that the applicants TTI and BIM do continue with their action against Thornton, he shall be at liberty to return to the court to seek an order for security as to costs against the plaintiffs.

[41] By corollary, it will be open to the plaintiffs to bring another injunction application before trial, but only in the event that they are prepared to adduce probative evidence at such time that would call into doubt the *prima facie* case of illegality that the respondent Thornton has successfully made out.

original signed by ^{MGA} M.G.L. Quigley J

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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Plaintiffs

- and -

Defendant

REASONS FOR JUDGMENT

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