

**SUPREME COURT OF CANADA**

|  |  |
| --- | --- |
| **Citation:** British Columbia (Attorney General) *v.* Malik,  2011 SCC 18, [2011] 1 S.C.R. 657 | **Date:** 20110421  **Docket:** 33266 |

**Between:**

**Her Majesty The Queen in Right of the Province of British Columbia**

**as represented by the Attorney General of British Columbia**

Appellant

and

**Ripudaman Singh Malik, Raminder Malik and Jaspreet Singh Malik**

Respondents

**Coram:** McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

|  |  |
| --- | --- |
| **Reasons for Judgment:**  (paras. 1 to 66): | Binnie J. (McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ. concurring) |

British Columbia (Attorney General) *v.* Malik, 2011 SCC 18, [2011] 1 S.C.R. 657

**Her Majesty The Queen in Right of the**

**Province of British Columbia as represented by**

**the Attorney General of British Columbia** *Appellant*

*v.*

**Ripudaman Singh Malik,**

**Raminder Malik and Jaspreet Singh Malik** *Respondents*

**Indexed as:** British Columbia (Attorney General) ***v.*** Malik

2011 SCC 18

File No.: 33266.

2010: October 15; 2011: April 21.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

on appeal from the court of appeal for british columbia

*Civil procedure — Anton Piller order — Evidence — Admissibility — Crown bringing action against respondents to recover monies advanced to fund defence costs — Crown obtaining ex parte Anton Piller order — Chambers judge relying on facts found against respondents in prior judicial proceedings — Whether Superior Court judge hearing ex parte application for interlocutory order may admit findings and conclusions of prior judicial decision into evidence — Whether prior decision admissible only where respondents precluded by issue estoppel or abuse of process from relitigating the facts adduced — Whether sufficient admissible evidence adduced to justify order.*

The Province seeks reimbursement of more than $5.2 million it paid to fund Mr. Malik’s defence in the Air India bombing trial in which Mr. Malik and a co-accused were acquitted. The Province’s action is based on claims of debt, breach of contract, conspiracy, and fraud. In granting an *Anton Piller* order authorizing the search of the business and residential properties of the Malik family for evidence that they helped conceal Mr. Malik’s assets, the chambers judge relied in part on facts found against the Malik family in prior judicial proceedings brought by Mr. Malik to obtain non-repayable provincial funding for his defence (the “*Rowbotham* application”). The British Columbia Court of Appeal set aside the *Anton Piller* order because in its view the *Rowbotham* findings and conclusion were, for the most part, inadmissible even on an interlocutory application. In the absence of the *Rowbotham* facts there was insufficient admissible evidence to justify the order.

*Held*: The appeal should be allowed.

The requirements for an *Anton Piller* order were set out by this Court in *Celanese Canada Inc. v. Murray Demolition Corp*. to include (i) a strong *prima facie* case; (ii) serious damage to the plaintiff as a result of the defendant’s alleged misconduct, potential or actual; (iii) convincing evidence that the defendant has in its possession incriminating documents or things; and (iv) a real possibility that the defendant may destroy such material before the discovery process can do its work. This stringent test was met in this case.

In December 2000, Mr. Malik applied for bail. It was in his interest at that time to show that he was a man of substance. He filed evidence that he and his wife had a net worth of over $11 million. Less than a year later, claiming to be without resources, Mr. Malik sought non-repayable government funding on *Rowbotham* principles. The application was rejected by the B.C. Supreme Court on the basis that “Mr. Malik remains a multimillionaire despite leading evidence to suggest his net worth is zero”. Further, it was held, “[t]he assets of Mr. Malik and his family are so interconnected as to be fused” and “Mr. Malik was, and still remains the patriarch of the Malik family which operated as a single financial entity. Mr. Malik jointly owns with his wife two businesses that gross millions each year”. In summary, the *Rowbotham* judge concluded, “[t]he evidence shows that Mr. Malik and his family have tried to arrange his financial and business affairs to minimize the value of his estate, to render him insolvent, and to therefore limit the amount of his contribution [to the costs of his defence], or to eliminate that obligation entirely”. The question is whether these findings and conclusions were admissible in the interlocutory proceedings.

An *Anton Piller* order is, in effect, a private search warrant and should only be granted on clear and convincing evidence. Such an order is available in British Columbia under the inherent jurisdiction of the Superior court. The Province comes before the Court as an ordinary civil litigant and its application for an *Anton Piller* order should be judged by the same rules as any other litigant. The Province enjoys no special Crown privilege or priority.

A judgment of a prior civil or criminal case is admissible, if considered relevant, as evidence in subsequent interlocutory proceedings as proof of its findings and conclusions, provided the parties are the same or were themselves participants in the prior proceedings on similar or related issues. The weight to be given to the earlier decision will rest not only on the identity of the participants, the similarity of the issues, the nature of the earlier proceedings and the opportunity given to the prejudiced party to contest it but on all the varying circumstances of the particular case. The issue of admissibility is separate and distinct from whether, once admitted, the prior decision is conclusive and binding. The prejudiced party or parties will have an opportunity before the reviewing judge to lead evidence to contradict the earlier findings or lessen their weight unless precluded from doing so by the doctrines of *res judicata*, issue estoppels or abuse of process.

There is a strong public interest in the avoidance of an unnecessary multiplicity of proceedings. Duplicative litigation creates the potential risk of inconsistent results. Inefficient procedures not only increase costs unnecessarily, but result in added delay, and can operate as an avoidable barrier to effective justice. The view that earlier judicial pronouncements should be inadmissible on the basis of concerns about hearsay and opinion evidence — the so-called rule in *Hollington v. F. Hewthorn & Co.* — is based on indefensible technicalities and its extension to interlocutory proceedings in a civil case is not consistent with more modern concerns about the avoidance of a needless multiplicity of proceedings.

In this case, the *Rowbotham* judgment was properly put before the chambers judge keeping in mind, of course, that it was for him, taking into account the whole of the interlocutory record, to make the factual and legal determinations necessary to issue or to decline to issue the orders sought by the Province. It was for him to determine, at the interlocutory stage, what weight to place on the *Rowbotham* findings and conclusions.

The earlier proceeding had been initiated by Mr. Malik and involved the other members of his family. The same series of family transactions, and allegations of asset manipulation, had thus earlier been examined by a judge of the Supreme Court of British Columbia. The issue before the chambers judge was (the Province claims) whether Mr. Malik was without funds to pay his debt to the Province as a result of asset manipulation and fraudulent dealings within the Malik family as initially explored in the *Rowbotham* application.

The court’s earlier decision was a judicial pronouncement after the contending parties had been heard. It had substantial effect on their legal rights. It would have been wasteful of litigation resources and potentially productive of mischief and inconsistent findings to have required the chambers judge to require the Province to litigate the *Rowbotham* facts *de novo* at the *ex parte* stage of an interlocutory motion.

On the interlocutory record considered admissible, the *Anton Piller* order was properly granted. It is evident that the chambers judge made his own decision on the matters he was required to determine in relation to the *Anton Piller* application and did not abdicate his judgment to the *Rowbotham* judge. It was open to the chambers judge on the whole of the interlocutory record to issue the *Anton Piller* order *ex parte*. On the facts of this case, the four “essential conditions” that must be met to justify an *Anton Piller* order were satisfied. First, it was open to the chambers judge to conclude that the Province had made out a strong *prima facie* case to establish Mr. Malik’s debt and the Malik family’s conspiracy to defraud the Province and to assist Mr. Malik to avoid his obligations under the Defence Counsel Agreement. Secondly, a claim of over $5.2 million against a debtor who, *prima facie*, exhibits a continuing history of evading payment by fraud and conspiracy with other members of his family to cover their financial tracks is very serious. Thirdly, it was open to the chambers judge to conclude on the *ex parte* application that incriminating documentation was in the possession of the Malik family. Finally, the evidence suggests, on a *prima facie* basis, that Mr. Malik has failed to respect court orders before, and that there was a “real possibility” that he and members of his family would do so again if they consider it is in their financial advantage. Given a history of refusal to provide proper disclosure of financial information despite an agreement and court orders to do so, it was open to the chambers judge to conclude that the Malik family might if forewarned continue the pattern of refusal and obfuscation by destroying relevant material before the discovery process could do its work.

It was open to the Malik family to challenge any of the “*Rowbotham* facts” when they brought before the chambers judge their application to set aside the *Anton Piller* order. They did lead some evidence, but their evidence did not relate to the financial transactions said to demonstrate the manipulation of family assets that lay at the heart of the *ex parte* order. The chambers judge was entitled to take into account this lack of any contest in affirming his *ex parte* orders and dismissing the Malik family’s review application.

**Cases Cited**

**Applied:** *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 SCC 36, [2006] 2 S.C.R. 189; **not followed:**  *Hollington v. F. Hewthorn & Co.*, [1943] 1 K.B. 587; **discussed:** *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; *Toronto (City) v. Canadian Union of Public Employees, Local 79* (2001), 55 O.R. (3d) 541, aff’d *Toronto (City) v. C.U.P.E., Local 79*,2003 SCC 63, [2003] 3 S.C.R. 77; **referred to:** *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1; *Anton Piller KG v. Manufacturing Processes Ltd.*, [1976] 1 Ch. 55; *Yousif v. Salama*, [1980] 3 All E.R. 405; *R. v. Smith*, [1992] 2 S.C.R. 915; *Re Del Core and Ontario College of Pharmacists* (1985), 51 O.R. (2d) 1; *Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd.* (1988), 47 D.L.R. (4th) 431; *Arthur J.S. Hall & Co. v. Simons*,[2000] U.K.H.L. 38, [2002] 1 A.C. 615; *Jorgensen v. News Media (Auckland) Ltd.*, [1969] N.Z.L.R. 961; *Harvey v. The King*, [1901] A.C. 601; *Memphis Rogues Ltd. v. Skalbania* (1982), 38 B.C.L.R. 193; *Litchfield v. Darwin* (1997), 29 B.C.L.R. (3d) 203; *Capitanescu v. Universal Weld Overlays Inc.* (1996), 46 Alta. L.R. (3d) 203; *Catalyst Partners Inc. v. Meridian Packaging Ltd*., 2007 ABCA 201, 76 Alta. L.R. (4th) 264.

**Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, s. 24(1).

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 45.01.

*Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 22‑2(13).

*Supreme Court Rules*, B.C. Reg. 221/90, rr. 46(1), 51.

**Authors Cited**

*Cross and Tapper on Evidence*, 12th ed. by Colin Tapper. New York: Oxford University Press, 2010.

*McCormick on Evidence*, vol. 2, 5th ed. by John W. Strong, General Editor. St. Paul, Minn.: West Group, 1999.

*Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 3rd ed. by Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst. Markham, Ont.: LexisNexis, 2009.

APPEAL from a judgment of the British Columbia Court of Appeal (Finch C.J.B.C, Frankel and Tysoe JJ.A.), 2009 BCCA 201, 92 B.C.L.R. (4th) 78, 53 C.B.R. (5th) 1, 270 B.C.A.C. 178, 454 W.A.C. 178, 69 C.P.C. (6th) 205, [2009] 7 W.W.R. 61, [2009] B.C.J. No. 915 (QL), 2009 CarswellBC 1193, setting aside the *Anton Piller* order affirmed by McEwan J., 2008 BCSC 1027, 46 C.B.R. (5th) 41, [2008] B.C.J. No. 1454 (QL), 2008 CarswellBC 1621. Appeal allowed.

Jonathan Noel Eades, Matthew S. Taylor and Robert N. Hamilton, for the appellant.

Bruce E. McLeod, for the respondents Ripudaman Singh Malik and Raminder Malik.

Jaspreet Singh Malik, on his own behalf.

The judgment of the Court was delivered by

Binnie J. —

I. Introduction

1. The issue on this appeal is whether the Supreme Court of British Columbia erred in issuing an *Anton Piller* order to permit the Province to conduct a “private search” of the respondents’ premises on the basis of an “information and belief” affidavit. The Province sought this interlocutory order in connection with its action against the respondents alleging debt, breach of contract, conspiracy, and fraud. It is seeking reimbursement of more than $5.2 million it paid to fund the respondent Ripudaman Singh Malik’s defence in the Air India bombing trial, in which Mr. Malik and a co-accused were acquitted. The other respondents are Mr. Malik’s wife Raminder, and their son Jaspreet Singh Malik (“Jaspreet”), a Vancouver lawyer.
2. In granting the *Anton Piller* order to search the business and residential properties of the respondents for evidence that they helped conceal Mr. Malik’s assets, and a *Mareva* injunction to freeze their existing assets, the chambers judge relied in part on facts found against the Malik family in prior judicial proceedings brought by Mr. Malik to obtain non-repayable provincial funding for his defence. Mr. Malik’s *Rowbotham* application had been rejected on the basis that “Mr. Malik remains a multimillionaire despite leading evidence to suggest his net worth is zero” (2003 BCSC 1439, 111 C.R.R. (2d) 40, at para. 71).
3. The current proceedings are still at the interlocutory stage. The seizure of documents has occurred but the documents are in the control of the independent solicitor and have not been seen bythe Province. The British Columbia Court of Appeal set aside the *Anton Piller* order and limited the *Mareva* injunction to Mr. Malik himself (2009 BCCA 201, 92 B.C.L.R. (4th) 78). The Province appeals only the refusal of the *Anton Piller* order to this Court.
4. The procedural question that divided the courts below is whether a Superior Court judge hearing an *ex parte* application for an interlocutory order may admit into evidence the findings and conclusions of a prior judicial decision (here the *Rowbotham* proceeding between Mr. Malik and the Province) or whether, as the Court of Appeal held, the prior decision was *not* admissible to prove the truth of its contents *unless* the Province could establish that the respondents were precluded by issue estoppel or abuse of process from relitigating the facts thus adduced. On that basis the Court of Appeal permitted only three “facts” to be extracted from the *Rowbotham* judgment, namely “that Mr. Malik could look to his own assets to raise funds, that Mr. Malik could look to the income and assets of his family to fund his defence costs because their assets were fused and that, as a result, Mr. Malik had the means to pay for, or make a contribution towards, his defence costs” (para. 63). On the record thus truncated the Court of Appeal held that there was insufficient admissible evidence to justify the *Anton Piller* order.
5. An *Anton Piller* order is an exceptional remedy and should only be granted on clear and convincing evidence. It is a highly intrusive measure that, unless sparingly granted and closely controlled, is capable of causing great prejudice and potentially irremediable loss. The fact the Province was the applicant here conferred no special Crown privilege or priority. The Province comes before the Court as an ordinary civil litigant and its application should be judged by the same rules as any other litigant, as should be the merits of the position taken by the Malik family respondents.
6. Nevertheless, I believe that the Court of Appeal was wrong to insist that the same series of financial transactions as had been exhaustively reviewed on the *Rowbotham* application had to be, in effect, tried *de novo* and *ex parte* by the chambers judge as if the *Rowbotham* proceedings had never taken place, apart from the three “facts”. These facts, as the Court of Appeal held, shed little light on what the chambers judge had to decide here.
7. In my view, for the reasons that follow, a judgment in a prior civil or criminal case is admissible (if considered relevant by the chambers judge) as evidence in subsequent interlocutory proceedings as proof of its findings and conclusions, provided the parties are the same or were themselves participants in the prior proceedings on similar or related issues. It will be for that judge to assess its weight. The prejudiced party or parties will have an opportunity to lead evidence to contradict it or lessen its weight (unless precluded from doing so by the doctrines of *res judicata*, issue estoppel or abuse of process).
8. On the interlocutory record thus considered admissible, the *Anton Piller* order was properly granted, in my view. The chambers judge was entitled to evaluate, as with any affidavit based on information and belief, the reliability and probative value of the sources relied on by the affiant. The chambers judge was entitled to have regard to the judgment of Stromberg-Stein J. in the *Rowbotham* proceedings brought by Mr. Malik himself — a contested hearing in which he and members of his family gave evidence and examined witnesses. This was permissible provided of course that the chambers judge himself, taking into account the whole of the interlocutory record, made the factual and legal determinations necessary to issue or to decline to issue the order. It is evident in this case from his reasons that the chambers judge made up his own mind and, in my view, it was open to him on the whole of the interlocutory record to issue the *Anton Piller* order *ex parte*.
9. It was also of course open to Mr. Malik or his wife and Jaspreet to challenge any of the “*Rowbotham* facts” when they brought before the chambers judge their application to set aside the *Mareva* injunction and the *Anton Piller* orders. They did lead some evidence, but their evidence did not relate to the financial transactions said to demonstrate the manipulation of family assets that lay at the heart of the *ex parte* orders. The chambers judge was entitled to take into account this lack of any contest in affirming his *ex parte* orders and dismissing the respondents’ review application. I would therefore allow the appeal.

II. Facts

1. On October 27, 2000, Mr. Malik and a co-accused were charged with multiple counts of murder arising out of bomb explosions on Air India flight 182, which was blown out of the air off the coast of Ireland on June 23, 1985, and a second bomb that exploded on the same date at Narita Airport, Japan, which killed two baggage handlers. Mr. Malik’s criminal trial commenced April 28, 2003 and continued for almost two years. In December 2000, Mr. Malik applied for bail. At the time it was in his interest to show that he was a man of substance. He filed evidence that he and his wife had a net worth of over $11 million. Less than a year later, claiming to be without resources to pay for his own defence, Mr. Malik sought government funding.

A. *The Provincial Funding Agreements*

1. Public money was made available to Mr. Malik under a series of funding agreements with the Province. The “Indemnity Agreement”, dated March 21, 2002, contained an acknowledgment that Mr. Malik was not entitled to funding unless he committed all of his resources to his defence, and covenanted not to encumber his assets. The Indemnity Agreement was replaced a few months later by the “Defence Counsel Agreement”, dated August 6, 2002, which contained similar provisions but provided as well that Mr. Malik would transfer all his assets to the Province and for that purpose would assist in the identification of those assets. The Province’s claim for approximately $5.2 million relates to funds paid out under the August 6, 2002 agreement.
2. In January 2003, being of the view that Mr. Malik was not living up to his undertakings, the Province notified him that it would terminate his defence funding unless he executed an indemnity. Mr. Malik refused to do so unless he could obtain a *Rowbotham* funding order under s. 24(1) of the *Canadian Charter of Rights and Freedoms*.
3. On May 14-15, 2003, Tysoe J., then of the Supreme Court of British Columbia, ordered Mr. Malik to provide financial disclosure. Some disclosure was made, but not to the Province’s satisfaction.

B. *The Rowbotham Application*

1. In August 2003, Mr. Malik brought an application seeking relief pursuant to the decision in *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.), seeking to compel the Province to provide funding or to stay the criminal proceedings. The other respondents provided supportive testimony.
2. On September 19, 2003, the applications judge, Stromberg-Stein J., held that Mr. Malik had not demonstrated that he was financially eligible for funding and dismissed his application. As stated, she found that “Mr. Malik remains a multimillionaire despite leading evidence to suggest his net worth is zero” (para. 71). In particular, she held:

The assets of Mr. Malik and his family are so interconnected as to be fused. The Malik family has conducted its affairs such that all assets were jointly held for the benefit of all. Assets and income are pooled for one common enterprise. Title is meaningless. [para. 25]

[Further,] Mr. Malik was, and still remains the patriarch of the Malik family which operated as a single financial entity. Mr. Malik jointly owns with his wife two businesses that gross millions each year. He and his wife jointly own millions in real estate, although there is little equity because it is heavily mortgaged. [para. 31]

The legitimacy of Mr. Malik’s claims that he owes more than $1 million to family members is questionable. The claims are imprecise, none were documented until after Mr. Malik’s arrest, and there is no proper proof of legitimacy. [para. 72]

1. In summary, Stromberg-Stein J. concluded, “[t]he evidence shows that Mr. Malik and his family have tried to arrange his financial and business affairs to minimize the value of his estate, to render him insolvent, and to therefore limit the amount of his contribution, or to eliminate that obligation entirely” (para. 82).
2. In support of these conclusions Stromberg-Stein J. made a number of findings of fact regarding the Malik family finances (the “*Rowbotham* facts”). It is the attempted use in the *Anton Piller* proceedings of the *Rowbotham* findings and conclusions that lies at the heart of this appeal.

C. *The “Rowbotham Facts”*

1. The findings of Stromberg-Stein J. that informed the belief of Mr. Gordon Houston, who filed the Province’s principal affidavit on the interlocutory motions, were summarized by the chambers judge as follows:

At his bail hearing in December, 2000, a Personal Net Worth Statement was filed on behalf of Mr. and Mrs. Malik indicating a net worth of $11,648,439.85 [p. 3, para. 5];

In November, 2001, Mr. Malik approached the AG to fund his defence and asserted that he had assets but those assets were not in cash form and liquidating them would require time [p. 4, para. 6];

In February, 2002, negotiations between Mr. Malik’s counsel and the AG led to an interim funding agreement [p. 4, para. 6];

The funding agreement was entered into so funding could commence immediately and the AG advanced funds in good faith based on Mr. Malik’s representations [p. 4, para. 7];

Subsequently, Mr. Malik claimed he was insolvent because his assets were insufficient to discharge his liabilities, including debt owed to unsecured creditors who were all family member [p. 5, para. 10];

The evidence establishes a collective effort by Mr. Malik and the Malik family members to diminish the value of his estate [p. 10, para. 21];

The assets of Mr. Malik and his family are so interconnected as to be fused.  The Malik family has conducted its affairs such that all assets were jointly held for the benefit of all.  Assets and income are pooled for one common enterprise [p. 16, para. 25];

Title to the Marguerite Street home is in Mrs. Malik’s name alone.  The land was purchased and the home constructed from joint funds.  The Maliks shared all expenses [p. 19, para. 35];

It appears that since Mr. Malik’s arrest, Papillon’s annual earnings dropped from $4 million to $2.5 million per year [p. 22, para. 42];

Regarding property in India, the Maliks provided numerous contradictory explanations concerning both the value and the ownership of this property [p. 23, para. 45];

Regarding the allegation that Gurdip Malik loaned Mr. Malik $330,000 US, the evidence shows these funds were received from Gurdip Malik’s company, Papillon Eastern Imports Ltd. in Los Angeles, and used to pay business and personal expenses, and to reduce the line of credit [p. 24, para. 48];

Jaspreet Malik was instrumental in obtaining and arranging the registration of a security agreement against Mr. Malik’s shares in the hotel [p. 25, para. 49];

There is evidence of collusion to secure Gurdip Malik’s loan before [the *Rowbotham*] hearing and to reduce Mr. Malik’s equity in the hotel [p. 25, para. 50];

There is no record of outstanding wages now claimed [by the Malik children] dating as far back as 1994 up to 1997.  No formal records were kept regarding the hours worked by the children [p. 25, para. 51];

Although confusing, the evidence establishes the Maliks never intended to pay their children and the children never contemplated they would be paid [p. 26, para. 53];

Following Mr. Malik’s arrest his family continued to transfer, give away and buy luxury vehicles.  A 1999 $108,000 Mercedes, purchased by Mr. Malik with joint funds, was transferred to Mrs. Malik while he was incarcerated.  Mrs. Malik elected to repay the car loan before it was due [p. 27, para. 56];

Mrs. Malik gave away her 1998 Land Rover of unknown value [p. 28, para. 57];

Evidence about the purchase of the Lexus is inconsistent and confusing.  In March 2001 Hardeep purchased a $35,000 Lexus with joint funds.  He then borrowed that amount and lent it to Khalsa Developments Ltd.  The loan was paid off by Khalsa Developments Ltd. [p. 28, para. 58];

Darsham purchased a $22,000 Chevy Blazer with joint funds in 2003 [p. 28, para. 59];

The Maliks reported charitable donations for the years 1994 to 2000 of $564,729.97.  Of that amount, $512,612.97 was donated to either Satman Education Society or Satnam Trust, which were headed by Mr. Malik [p. 28, para. 60];

In violation of a court order not to dispose of any assets, $72,000 from Mr. Malik’s income tax refund was placed in a joint account and used to pay business debt.  This money was repaid to the Province during this application [p. 29, para. 63];

About the end of December 2000, the Maliks voluntarily elected to pay a franchise cancellation penalty of $100,000 when the hotel changed its affiliation from the Quality Inn to the Executive Inn [p. 29, para. 64];

Mr. Malik’s agreement to contribute to the cost of his defence, as outlined in the Defence Counsel Agreement is a compelling consideration.  Malik failed to liquidate his assets [p. 30, paras. 69-70];

Mr. Malik and Mrs. Malik have manipulated facts to suit their particular needs as evidenced by the representations at the bail hearing about the value of the Malik’s assets [p. 31, para. 75];

The evidence shows that Mr. Malik and his family have tried to arrange his financial and business affairs to minimize the value of his estate, to render him insolvent, and to therefore limit the amount of his contribution, or to eliminate that obligation entirely [p. 34, para. 82];

Any perceived cash shortage is artificial and contrived [p. 34, para. 83].

(2008 BCSC 1027, 46 C.B.R. (5th) 41, at para. 43)

1. In respect of the value and ownership of certain properties in India Stromberg-Stein J. noted that

[a]t the bail hearing Mr. and Mrs. Malik provided affidavits claiming to own property in India valued at $200,000. Two years later their in-house accountant, Mr. Singh, provided a letter indicating the property was burdened with a tenant who had failed to pay rent. Mr. Malik maintains he does not know whether he owned it, whether he made lease payments, or whether it earned rental income. This is inconsistent, and unlikely behaviour for an astute business person, particularly one looking for a potential source of income. [para. 45]

D. *The Payment Agreement*

1. Following the dismissal of the *Rowbotham* application, the Province and Mr. Malik entered into the “Payment Agreement”, dated October 17, 2003, which set out terms for the provision of future fees and required Mr. Malik to provide security for these fees and to acknowledge his indebtedness to the Province for the sums advanced under the previous agreements.
2. The Province paid Mr. Malik a total of $5,200,131 under the Defence Counsel Agreement and $1,681,526 under the Payment Agreement. The latter has been repaid. However, the Province claims that Mr. Malik has not transferred the assets (alleged to be his at least beneficially) to the Province. The debt of $5,200,131 under the Defence Counsel Agreement is still outstanding. The Province demanded repayment on December 13, 2005.
3. In March 2007, Mr. Malik issued a writ against the Province for malicious prosecution. At the time of the Province’s application for the *Mareva* injunction and *Anton Piller* order that writ had not been served.
4. On October 23, 2007, the Province commenced the present action in debt, breach of contract, conspiracy, and fraud against six members of the Malik family and four corporations owned by them. It claims that all these individuals made false statements (mainly concerning debts said to be owed by Mr. Malik to other members of the family) and conspired to conceal Mr. Malik’s assets. On the same day the Province applied *ex parte* to obtain an *Anton Piller* order authorizing independent lawyers to enter three business and residential premises to search for and take away any documents or computer files relating to the assets and liabilities of the respondents, including numerous specified documents. The three premises were the home of Mr. Malik and his wife; the law office at which their son Jaspreet practices law; and the office of Papillon Eastern Imports Ltd. (where Jaspreet also previously carried on the practice of law).

III. Relevant Enactments

1. *Supreme Court Rules*, B.C. Reg. 221/90, r. 51

**Rule 51 — Affidavits**

. . .

(10) **Contents of affidavit —** An affidavit may state only what a deponent would be permitted to state in evidence at a trial, except that, if the source of the information is given, an affidavit may contain statements as to the deponent’s information and belief, if it is made

(a) in respect of an application for an interlocutory order, or

(b) by leave of the court under Rule 40(52)(a) or 52(8)(e).

IV. Judicial History

A. *Supreme Court of British Columbia (McEwan J.), 2008 BCSC 1027, 46 C.B.R. (5th) 41*

1. On the respondents’ motion to set aside the *Anton Piller* order and *Mareva* injunction, the Maliks claimed “witness immunity” in respect of their earlier testimony in the *Rowbotham* proceedings. The chambers judge distinguished between the factual findings in the *Rowbotham* proceedings, which he held were admissible to establish a *prima facie* case, and the legal arguments that the Province sought to base on these facts, including issue estoppel and abuse of process. In his view, the latter issues did not need to be decided on the interlocutory application in light of the respondents’ decision not to lead evidence to contradict the *Rowbotham* findings:

The facts which the Province outlined in its original [*ex parte*] submissions have not been shown to be materially misleading.

From the perspective of a court assessing the evidence with a view to ensuring that the positions of the parties are protected until the facts can be determined at trial, arguments about the legal limits of *res judicata* and witness immunity will not defeat a strong fact based *prima facie* case that the defendants have acted in ways that are inconsistent with their contractual and other legal obligations. The allegation that aspects of the defendants’ dealings or behaviour have been the subject of a series of adverse rulings in another proceeding, will not, in the absence of material facts demonstrating that the rulings were effectively unfounded or irrelevant, be negated by abstract arguments unattached to actual findings of fact. [paras. 60-61]

1. Accordingly, the chambers judge affirmed the *Anton Piller* order and the *Mareva* injunction.

B. *Court of Appeal (Finch C.J.B.C. and Frankel and Tysoe JJ.A.), 2009 BCCA 201, 92 B.C.L.R. (4th) 78*

1. Tysoe J.A., writing for a unanimous court, set aside the *Anton Piller* order in its entirety and the *Mareva* injunction against all respondents but Mr. Malik. In that court’s view, the chambers judge should not have relied on the *Rowbotham* proceedings apart from the three findings already mentioned, namely “that Mr. Malik could look to his own assets to raise funds, that Mr. Malik could look to the income and assets of his family to fund his defence costs because their assets were fused and that, as a result, Mr. Malik had the means to pay for, or make a contribution towards, his defence costs” (para. 63). However, Tysoe J.A. held:

The remaining *Rowbotham* findings were not admissible because the doctrines of issue estoppel and abuse of process do not prevent the defendants from relitigating those facts. [Emphasis added; para. 38.]

1. In the court’s view, the limited admissible *Rowbotham* findings, together with the supplemental facts contained in the affidavits filed by the Province, did not establish a strong *prima facie* case of fraud or a real risk of dissipation of assets by the Malik family. The appeals were therefore allowed. As stated, only the *Anton Piller* order is in issue before this Court.

V. Analysis

1. An *Anton Piller* order is, as our Court emphasized in *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 SCC 36, [2006] 2 S.C.R. 189, a thoroughly “draconian” measure equivalent to a private search warrant reserved for “exceptional circumstances” (para. 30) where “unscrupulous defendants” may if forewarned make “relevant evidence disappear” (para. 32). Accordingly:

There are four essential conditions for the making of an *Anton Piller* order. First, the plaintiff must demonstrate a strong *prima facie* case. Second, the damage to the plaintiff of the defendant’s alleged misconduct, potential or actual, must be very serious. Third, there must be convincing evidence that the defendant has in its possession incriminating documents or things, and fourthly it must be shown that there is a real possibility that the defendant may destroy such material before the discovery process can do its work . . . . [para. 35]

It bears repeating that the Province enjoys no special status in this application. It appears as a civil litigant and is to be treated no differently than any other applicant for an *Anton Piller* order.

1. The Province’s argument is that this is a case of “exceptional circumstances” because Mr. Malik and other members of his family have, over a period of 8 years, misrepresented his net worth and conspired to move assets around within the family to create the appearance that Mr. Malik is without financial resources. It alleges that Mr. Malik breached his undertakings in the Indemnity Agreement of March 21, 2002 not to encumber his assets. Nor, according to the Province, did Mr. Malik respect the undertaking in the Defence Counsel Agreement of August 6, 2002 to identify and transfer assets to the Province. Although at his bail hearing in December 2000, a Personal Net Worth Statement was filed on behalf of Mr. and Mrs. Malik indicating a net worth of $11,648,439.85, Mr. Malik took the position at his *Rowbotham* application in August 2003 that he was unable to contribute anything to his own defence. Stromberg-Stein J. rejected this claim on the basis of detailed factual findings in respect of intra-family transactions. The Province alleges that the *Rowbotham* application itself was an act in furtherance of the family conspiracy. The Province claims the Malik respondents, given their track record, cannot be trusted to produce relevant documents in the ordinary way. In the absence of an *Anton Piller* order “there is a real possibility that the defendant[s] may destroy such material before the discovery process can do its work” (*Celanese Canada*, at para. 35).
2. An issue was raised in the court below whether *Anton Piller* orders were available in British Columbia to preserve evidence relevant to a dispute as opposed to preserving property that is the subject matter of the dispute. *Celanese Canada* was an appeal from Ontario, and a difference was noted in wording between r. 46(1) of the British Columbia *Supreme Court Rules*, which deals with preservation of “property that is the subject matter of a proceeding or as to which a question may arise”, and r. 45.01 of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which deals somewhat more broadly with the preservation of “property in question in a proceeding or relevant to an issue in a proceeding”. I agree with Tysoe J.A. that *Anton Piller* orders for the preservation of evidence are available in British Columbia under the inherent jurisdiction of the Superior Court, which indeed is the source identified by Lord Denning in the eponymous case of *Anton Piller KG v. Manufacturing Processes Ltd.*, [1976] 1 Ch. 55 (C.A.), and endorsed in *Yousif v. Salama*, [1980] 3 All E.R. 405 (C.A.). Accordingly, the particular wording of British Columbia’s r. 46(1) does not assist the respondents.
3. *The Evidentiary Record*
4. The issue on this appeal is whether the plaintiff (the Province) adduced sufficient admissible evidence on which the chambers judge could make the necessary findings on a balance of probabilities. The Province was required to show that it had a strong *prima facie* case and that absent such an order, there was a real possibility that relevant evidence would be destroyed or made to disappear: *Celanese Canada*, at para. 1. I agree with the respondents that if the Province failed to adduce sufficient admissible evidence at the *ex parte* hearing to justify the orders there was no obligation on them to adduce any evidence at all at the hearing before the chambers judge to set aside the *ex parte* orders.
5. The Province’s principal affiant in the *Anton Piller* application, Mr. Gordon Houston, based his information and belief respecting the material facts largely (though not entirely) on the findings of Stromberg-Stein J. in the *Rowbotham* proceedings. However, Mr. Houston also included additional evidence concerning property dealings subsequent to the *Rowbotham* application with the Malik family home (6475 Marguerite Street), commercial properties in Vancouver belonging to the Maliks, and further details of a summary judgment motion for $330,000 allegedly orchestrated by Jaspreet against his father at the suit of Mr. Malik’s brother, Gurdip Malik, intended (the Province alleges) to reduce artificially Mr. Malik’s net worth just prior to the *Rowbotham* application. In the result, based on Mr. Houston’s “review of the file, the Malik family’s actions leading up to the Rowbotham hearing, the Reasons for Judgment of Stromberg-Stein J., and the Malik family’s property dealings subsequent to the execution of the Payment Agreement”, he testified as to his belief that “the financial disclosure made by Mr. Malik was neither complete nor accurate” and that “there is a significant risk that evidence relevant to the Province’s claims in this action may disappear if an Anton Piller Order is not obtained”.
6. I agree with Tysoe J.A. that if the *Rowbotham* judgment is admissible only in respect of the three “facts” previously noted, the *Anton Piller* order cannot stand.
7. One of the problems that confronted the courts below was that the Province initially put forward the extravagant position that the “*Rowbotham* facts” not only constituted *prima facie* evidence that informed its deponents’ information and belief, but were conclusive and binding, not only on Mr. Malik — the applicant in the *Rowbotham* application — but on all the other members of the Malik family and their related corporations named as defendants in the present action — by reason of the doctrines of issue estoppel and abuse of process. In my view, the issue of admissibility is separate and distinct from whether, once admitted, the *Rowbotham* findings were conclusive and binding.
8. The chambers judge accepted the *Rowbotham* findings as *prima facie* proof of their content, and noted that while Mr. and Mrs. Malik and Jaspreet led evidence at the hearing to set aside the *ex parte* orders, none of this evidence disputed the transactions relied on by the Province to make the factual case against them. The question of whether the *Rowbotham* findings were conclusive and binding on the Maliks in this case (which would only have arisen had they made the attempt to adduce evidence to contradict those findings), was not something the chambers judge believed he was required to decide. I agree with the chambers judge that the admissibility of the *Rowbotham* facts was not dependent on the respondents being foreclosed from challenging them because of issue estoppel or abuse of process.
9. *The Concern About a Multiplicity of Proceedings*
10. The admissibility of prior civil or criminal judgments in subsequent civil proceedings, and the effect to be given to them, must be seen in the broader context of the need to promote efficiency in litigation and reduce its overall costs to the parties. The doctrines of *res judicata*, issue estoppel and abuse of process are all part of this larger judicial policy but they do not exhaust its potential.
11. It seems clear the *Rowbotham* judgment was properly put before the chambers judge. He was entitled to take judicial notice of prior decisions of the court. Then there is the public documents (or official written statement) exception to the hearsay rule: *McCormick on Evidence* (5th ed. 1999), vol. 2, at §295. Moreover, it was incumbent on the Province to make “full and frank disclosure of all relevant facts” to the chambers judge (*Celanese Canada*, at para. 37). This requirement included drawing the court’s attention to the *Rowbotham* decision. Further, as the Province points out, the *Rowbotham* proceeding was itself pleaded as a step in the alleged Malik family conspiracy to defraud the Province. In this aspect, the judgment was tendered for the purpose of proving the *fact* that the proceedings were taken by Mr. Malik, and supported by testimony from his family. In this latter respect, the fact the proceeding itself was taken is *not* hearsay: *R. v. Smith*, [1992] 2 S.C.R. 915, at pp. 924-25.
12. All of this, of course, does not carry the Province very far. The mere fact the *Rowbotham* decision was properly before the chambers judge does not determine what use may properly be made of it. In my view the chambers judge was *not* required to proceed as if the *Rowbotham* judgment was of merely historical interest and of no probative value to the *Anton Piller* application (apart from the Court of Appeal’s “three facts”).
13. In a number of decisions our Court had emphasized a public interest in the avoidance of “[d]uplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings” (*Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, at para. 18). Inefficient procedures not only increase costs unnecessarily, but result in added delay, and can operate as an avoidable barrier to effective justice:

Where the same issues arise in various forums, the quality of justice delivered by the adjudicative process is measured not by reference to the isolated result in each forum, but by the end result produced by the various processes that address the issue.

(*Toronto (City) v. Canadian Union of Public Employees, Local 79* (2001), 55 O.R. (3d) 541 (C.A.), *per* Doherty J.A., at para. 74, aff’d 2003 SCC 63, [2003] 3 S.C.R. 77 (*sub nom. Toronto (City) v. C.U.P.E., Local 79*), at para. 44)

When *Toronto (City) v. C.U.P.E., Local 79* reached this Court, Arbour J. pointed out that the judicial concern about duplicative litigation operates equally against a plaintiff or a defendant: “I cannot see what difference it makes” (para. 47). At issue in those cases were the doctrines of *res judicata*, issue estoppel and abuse of process.

1. *Danyluk* concerned a civil action by a disgruntled employee whose claim under the *Employment Standards Act*, R.S.O. 1990, c. E.14, had already been dismissed by a government adjudicator. The employer asked for dismissal on the basis of issue estoppel. The Court held that the doctrine of issue estoppel must be applied flexibly, and that from a fairness perspective the employee should be permitted to relitigate the claims arising out of her employment because “[i]t is unlikely the legislature intended a summary procedure for smallish claims to become a barrier to closer consideration of more substantial claims” (para. 78). On the other hand, *Toronto (City) v. C.U.P.E., Local 79*, applied the doctrine of abuse of process, notwithstanding different parties, to prevent the relitigation of a criminal conviction of a municipal employee for sexual abuse of a child in his care. The issue resurfaced in a subsequent grievance arbitration by the employee, who had been fired following his conviction. The respondent City filed before the arbitrator not only a certificate of conviction but a transcript of the boy’s evidence at the criminal trial. (The child did not testify at the arbitration.) In holding the arbitrator bound by the earlier criminal proceedings, Arbour J. offered three observations on why relitigation is generally undesirable:

First, there can be no assumption that relitigation will yield a more accurate result than the original proceedings. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly and additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality. [para. 51]

1. Of course the weight of the prior judgment will depend on such factors as the similarity of the issues to be decided, the identity of the parties, and (because of the differing burdens of proof) whether the prior proceedings were criminal or civil. As the Sopinka text points out: “The fact that it is a civil judgment only would be significant in terms of weight. The party against whom the judgment was rendered would have a greater opportunity to explain it or suggest mitigating circumstances” (Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* (3rd ed. 2009), at §19.177).
2. Here it is objected that the *Rowbotham* issues are different from the fraud and conspiracy case, but Arbour J. in *Toronto (City) v. C.U.P.E., Local 79*, cited the decision of the Ontario Court of Appeal in *Re Del Core and Ontario College of Pharmacists* (1985), 51 O.R. (2d) 1, where Houlden J.A. (dissenting on a different point) observed in the context of an appeal from a decision of a professional disciplinary body, that “lack of identity of issue goes to weight, not to admissibility” (p. 17). Arbour J. also referred to *Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd.* (1988), 47 D.L.R. (4th) 431 (B.C.S.C.). In that case, it was held that it was an abuse of process for the defendants to deny that a certain transfer was fraudulent where that issue had been determined against them after a full and fair trial in a previous proceeding between different parties.
3. The Province suggests that the Court of Appeal was influenced — although not expressly referring to it — by the so-called rule in *Hollington v. F. Hewthorn & Co.*, [1943] 1 K.B. 587 (C.A.). In that case, in which damages were claimed arising out of a motor vehicle accident, the English Court of Appeal ruled inadmissible in the subsequent civil action a certificate of conviction of the defendant driver for careless driving because “on the trial of the issue in the civil court, the opinion of the criminal court is equally irrelevant” (p. 595). In its country of origin this rule is “generally thought to have taken the technicalities of the matter much too far” (*Arthur J.S. Hall & Co. v. Simons*, [2000] U.K.H.L. 38,[2002] 1 A.C. 615, at p. 702, *per* Lord Hoffman). The editor of *Cross and Tapper on Evidence* (12th ed. 2010) agrees. After dismissing *Hollington v. F. Hewthorn & Co.* as a bundle of “indefensible technicalities” (p. 109), he comments that the “House of Lords might at some stage reconsider the matter in the light of the modern emphasis on fairness and the abuse of process, especially where the prejudiced party had a full opportunity to contest the finding against him in the earlier proceedings” (p. 110). The editors of the Sopinka text appear to share the same view (§19.158). To similar effect, see *Jorgensen v. News Media (Auckland) Ltd.*, [1969] N.Z.L.R. 961 (C.A.), at p. 980, citing, at p. 971, *Harvey v. The King*, [1901] A.C. 601 (P.C.), and at p. 974, *McCormick on Evidence*:

Probably the trend of evolution will be toward the admission generally against a present party of any judgment or finding in a former civil or criminal case if the party had an opportunity to defend. The principles on which is founded the hearsay exception for official written statements would justify this extension.

In this appeal we are concerned only with the effect, if any, to be given to *Hollington v. F. Hewthorn & Co.* in *interlocutory* proceedings. In my view the “rule” simply has no application at this stage of proceedings in British Columbia. In addition to the general considerations already referred to, r. 51(10)(a) of the British Columbia *Supreme Court Rules* expressly permits the admission of hearsay on an interlocutory application (as does replacement r. 22-2(13), which came into force on July 1, 2010 (*Supreme Court Civil Rules*, B.C. Reg. 168/2009)).

1. I do not see how the “indefensible technicalities” of *Hollington v. F. Hewthorn & Co.*, or their extension to interlocutory proceedings in a civil case are consistent with the concerns expressed by this Court in *Toronto (City) v. C.U.P.E., Local 79*, about the need to avoid an unnecessary multiplicity of proceedings.
2. Whether or not a prior civil or criminal decision is admissible in trials on the merits — including administrative or disciplinary proceedings — will depend on the purpose for which the prior decision is put forward and the use sought to be made of its findings and conclusions. On this point I agree with *Del Core* (which was *not* an interlocutory proceeding) that it “would be highly undesirable to replace this arbitrary rule [in *Hollington v. F. Hewthorn & Co.*] by prescribing equally rigid rules to replace it” (p. 22).
3. I agree, as well, with the Ontario Court of Appeal in *Del Core* that the prior proceedings may be admissible but the “weight and significance” to be given to them “will depend on the circumstances of each case” (p. 21).

The law of Ontario is only now emerging from the long shadow cast over it by the decision in *Hollington v. Hewthorn*, *supra*. It would be highly undesirable to replace this arbitrary rule by prescribing equally rigid rules to replace it. The law should remain flexible to permit its application to the varying circumstances of particular cases. [p. 22]

1. Once admitted, the weight to be given to the earlier decision in subsequent interlocutory proceedings will rest not only on the identity of the participants, the similarity of the issues, the nature of the earlier proceedings and the opportunity given to the prejudiced party to contest it but on all “the varying circumstances of particular cases” (*Del Core*, at p. 22).
2. *The Rowbotham* *Decision Was Admissible in This Case*
3. In my view the chambers judge did not err in treating as admissible the *Rowbotham* decision on the interlocutory applications. The earlier proceeding had been initiated by Mr. Malik and involved the other respondents. The same series of family transactions, and allegations of asset manipulation, had earlier been examined by a judge of the Supreme Court of British Columbia. The underlying issue in the *Rowbotham* case, as it is here, is whether the Malik family was playing games with the Province (and the B.C. courts) with respect to their financial affairs. The question in that case was whether Mr. Malik was without financial resources to fund his defence. The issue in this case is whether Mr. Malik is without funds to pay his debt to the Province as a result of asset manipulation and fraudulent dealings within the Malik family as initially explored in the *Rowbotham* application, and according to the Houston affidavit, has continued ever since. These issues cannot be answered at an eventual trial without access to the underlying documents. The history of dealings between the Province and the Malik family justifies serious concern whether such evidence would be made available by the Malik family in the ordinary course of discovery.
4. On the other hand, the chambers judge (quite properly in my view) did *not* foreclose the Malik family from leading evidence on the return of the motion to explain away or put a different light on their financial transactions.
5. Undoubtedly, a chambers judge should proceed cautiously with hearsay evidence, particularly where the *ex parte* remedies sought are as prejudicial to the absent defendants as in the case of an *Anton Piller* order or a summary judgment(*Memphis Rogues Ltd. v. Skalbania* (1982), 38 B.C.L.R. 193 (C.A.), at pp. 194-95), or an injunction(*Litchfield v. Darwin* (1997), 29 B.C.L.R. (3d) 203 (S.C.), at para. 5). However, the need to proceed with caution does not render hearsay as such inadmissible under r. 51(10)(a) on an interlocutory motion.
6. More significantly in this case, for the reasons already discussed, I do not regard a prior judicial decision between the same or related parties or participants on the same or related issues as merely another controversy over hearsay or opinion evidence. The court’s earlier decision was a judicial pronouncement after the contending parties had been heard. It had substantial effect on their legal rights. It would have been wasteful of litigation resources and potentially productive of mischief and inconsistent findings (as discussed in *Toronto (City) v. C.U.P.E., Local 79*) to have required the chambers judge to put aside Stromberg-Stein J.’s judgment and require the Province to litigate the *Rowbotham* facts *de novo* on an interlocutory motion. Of course the *Hollington v. F. Hewthorn* *& Co.* doctrine and its civil offshoots are not just about hearsay. They are also about inadmissible opinion evidence — opinion piled on hearsay. But for the reasons already discussed I would decline to give effect to the arguments made in *Hollington v. F. Hewthorn & Co.* They give rise to unnecessary inefficiencies and any alleged unfairness can be addressed on a case-by-case basis according to the circumstances.
7. *Did the Chambers Judge Defer Improperly to the Decision of the Rowbotham Judge, Delivered Five Years Earlier?*
8. The reasons of the chambers judge for granting the *Anton Piller* order and *Mareva* injunction are quite brief. He stated that the Province had a “strong *prima facie* case that goes back to the reasons for judgment in 2003 of Madam Justice Stromberg-Stein in this matter” (para. 2), and then didn’t refer to the *Rowbotham* case again. He said that his decision to grant the *Mareva* injunction was based on the material and written arguments before him. With respect to the *Anton Piller* order, he stated:

Similarly, with respect to the Anton Piller order, I am satisfied on the basis of the material placed before me and the written argument that the order as sought . . . is appropriate. . . . [T]he material placed before me suggests, again on a strong *prima facie* basis, that that person may be involved in making arrangements to collude with the other defendants to frustrate the obligation that the defendant [Mr. Malik] has on the face of it with the plaintiff. That is all I will say, inasmuch as I do not think on an *ex parte* motion of this kind the court should discuss or suggest that it’s made any finding on the merits except to say that what is before it suggests a very strong case.

(*British Columbia (Attorney General) v. R.S.M.*, B.C.S.C. (in chambers), No. S077088, October 23, 2007, at para. 5)

I therefore turn to the four “essential conditions” set out in *Celanese Canada* that must be met to justify an *Anton Piller* order.

(1) The Plaintiff Must Demonstrate a Strong *Prima Facie* Case

1. What the chambers judge termed a very strong “case” included evidence that (1) Mr. Malik owed the Province over $5.2 million; (2) Mr. Malik’s net worth had gone from a joint interest (with his wife) in $11,648,439.85 in December 2000 to alleged insolvency in August 2003 with no explanation other than intra-family transfers of assets; (3) Mr. Malik had neither identified nor transferred assets to the Province as he had undertaken to do; (4) the Malik family has made numerous transfers of assets including luxury vehicles and Mr. Malik’s $72,000 income tax refund, in violation of a court order not to dispose of any assets (this amount was belatedly repaid to the Province); (5) the particular transfers of property within the family up to the time of the *Rowbotham* hearing had been examined judicially in the course of that proceeding; (6) the pattern of shuffling assets within the family and loading the remaining assets with debt continued after the *Rowbotham* application in respect of Mr. Malik’s home at 6475 Marguerite Street and the commercial property on Hamilton Street, where some of the mortgages ranking in priority to the Province’s claim had been shuffled back to a Malik family company, 0772735 B.C. Ltd., in an effort to obtain priority over the Province’s claim. These mortgages had a combined value of about $1.9 million; (7) the circumstances of the transfers raised a legitimate concern that their purpose was to facilitate Mr. Malik escaping his financial obligations under the agreements for defence funding that he had entered into with the Province; (8) Jaspreet played an active role in attempting to obtain a default judgment against his father at the suit of his uncle Gurdip Malik on a $330,000 loan that was not due for another year; (9) the intra-family transactions included a security interest registered by Jaspreet in favour of Gurdip Malik against Mr. Malik’s shares in Khalsa, a company that owned a $3 million hotel, one year before the $330,000 loan was due and one month after Tysoe J. ordered Mr. Malik not to dispose of or encumber any of his assets; and (10) the Malik children claimed unpaid wages in the amount of $260,000 that had never been recorded or claimed before Mr. Malik’s legal troubles.
2. In my view it was open to the chambers judge on the basis of the whole of the interlocutory record to conclude that the Province had made out a strong *prima facie* case to establish Mr. Malik’s debt and the respondents’ conspiracy to defraud the Province and to assist Mr. Malik to avoid his obligations under the Defence Counsel Agreement.

(2) The Damage to the Plaintiff of the Defendant’s Alleged Misconduct, Potential or Actual, Must Be Very Serious

1. A claim of over $5.2 million against a debtor who, *prima facie*, exhibits a continuing history of evading payment by fraud and conspiracy with other members of his family to cover their financial tracks is, in my view, very serious.

(3) There Must Be Convincing Evidence That the Defendant Has in Its Possession Incriminating Documents or Things

1. In my opinion, it was open to the chambers judge to conclude on the *ex parte* application that incriminating documentation behind the registered and unregistered property transfers was in the possession of the respondents, especially Jaspreet who held himself out as his father’s “legal counsel in relation to financial affairs” (chambers judgment, at para. 11). Jaspreet acted for his parents, either personally or in connection with other members of his firm, in at least 18 mortgage transactions since 1996, the majority of which post-date the court order against Mr. Malik not to dispose of his assets. It is alleged, based on the evidence, that Jaspreet is functioning not as an independent lawyer, but as a co-conspirator. I think it was reasonable for the chambers judge to conclude that Jaspreet was “involved in making arrangements to collude with the other defendants to frustrate the obligation that the defendant [Mr. Malik] has on the face of it with the plaintiff” and that, in the circumstances, a good deal of relevant and incriminating evidence would likely be found at the places sought to be searched, namely the Malik family home and Jaspreet’s various places of work.

(4) It Must Be Shown That There Is a Real Possibility That the Defendant May Destroy Such Material Before the Discovery Process Can Do Its Work

1. The Province argued that this is a case of “exceptional circumstances” because Mr. Malik and other members of his family have, over a period of 8 years, misrepresented his net worth and conspired to move assets around within the family to create the appearance that Mr. Malik is without financial resources. The evidence suggests, again on a *prima facie* basis, that Mr. Malik has failed to respect court orders before, and that there is a “real possibility” that he and members of his family will do so again if they think it is to their financial advantage.
2. It will often be difficult or perhaps impossible for a plaintiff to show that a defendant *will* actually destroy evidence, but it is always open to the court to draw inferences reasonably compelled by the surrounding circumstances. As Paperny J. (as she then was) observed in *Capitanescu v. Universal Weld Overlays Inc.* (1996), 46 Alta. L.R. (3d) 203 (Q.B.):

Generally, courts have inferred a risk of destruction when it is shown that the defendant has been acting dishonestly, for example where matter has been acquired in suspicious circumstances, or where the defendant has knowingly violated the applicant’s rights. [para. 22]

This passage was cited with approval by the Alberta Court of Appeal in *Catalyst Partners Inc. v. Meridian Packaging Ltd.*, 2007 ABCA 201, 76 Alta. L.R. (4th) 264, at para. 13.

1. Given a history of refusal to provide proper disclosure of financial information despite Mr. Malik’s agreement (and a court order) to do so, in my opinion it was open to the chambers judge to conclude that the respondents might if forewarned continue the pattern of refusal and obfuscation by destroying relevant material “before the discovery process can do its work” (*Celanese Canada*, at para. 35).
2. It is evident that the chambers judge made his own decision on the matters he was required to determine in relation to the *Anton Piller* application and did not abdicate his judgment to the *Rowbotham* judge. On the respondents’ application to set aside the *ex parte* orders Mr. and Mrs. Malik filed evidence (Jaspreet did not) but their evidence did not seek to contradict the facts relating to their financial affairs on which the *ex parte* orders were based. In these circumstances, it was open to the chambers judge, in my opinion, to affirm his previous orders.
3. Whether and to what extent the *Rowbotham* issues can properly be relitigated at the eventual trial of this action is a decision for the trial judge to make.

E. *The Solicitor-Client Issue*

1. Jaspreet appeared in person before this Court to object to the seizure at his law offices on the grounds of solicitor-client privilege. This is an important issue in *Anton Piller* cases, as the judgment in *Celanese Canada* made clear. However, in this case, unlike *Celanese Canada*, the allegation is that Jaspreet is a party to the alleged fraud and conspiracy, and therefore that no privilege attached to the relevant documents.
2. Moreover, unlike the situation in *Celanese Canada*, the independent solicitors have not made any of the seized documents available to the plaintiff Province. The parties appeared before the chambers judgeon October 25th, 2007, two days after the *Anton Piller* order was granted. Counsel raised the issue of solicitor-client privilege, and the parties reached what McEwan J. described as “operating understandings” as to the safeguards that would govern the files seized from the law offices until such time as the Maliks’ substantive challenge to the orders was resolved.
3. In the end Jaspreet was only able to identify three files captured by the search that were subject to proper objections on the ground of solicitor-client privilege. One of those was a file that did in fact belong to one of the Malik family members who was subject to the search but the file was unrelated to the case. The other two files belonged to clients who had the same names as targets of the search. In all three cases the documents were not taken from the premises, and (as stated) none of the documents have been viewed by the Province. In the circumstances, the objection to the *Anton Piller* order based on solicitor-client confidences should also be rejected.

VI. Disposition

1. I would therefore allow the appeal with costs.

*Appeal allowed with costs.*

Solicitor for the appellant:  Ministry of the Attorney General, Victoria.

Solicitors for the respondents Ripudaman Singh Malik and Raminder Malik:  Bruce E. McLeod, Vancouver.

Solicitors for the respondent *Jaspreet Singh Malik*:  Malik Law Corporation, Surrey.