

Rules of the Supreme Court, 1986

PRACTICE NOTE

P. N. (TD) No. 2004-02

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The following Practice Note was filed with the Registrar, as Secretary of the Rules Committee of the Trial Division, and is published pursuant to rule 4.04 of the *Rules of the Supreme Court, 1986*.

EX PARTE INJUNCTIONS

Background

1. Section 105 of the *Judicature Act* provides that an injunction may be granted by an order of the Court “in all cases where it appears to the Court to be just or convenient that such an order should be made” and that such an order may be made either unconditionally or upon such terms and conditions as the Court thinks just.
2. While very broad, this provision does not confer an arbitrary or unregulated discretion on the Court. The power to grant an injunction must be exercised judicially according to recognized principles.
3. *Rule 22.01(2)* provides that an application for an injunction “shall” be made “upon notice” except where an “urgency” exists. *Rule 29.04*, which deals with *ex parte* applications generally, permits an *ex parte* application to be made where “the court is satisfied that the delay caused by giving notice would or might entail serious mischief”.

4. With respect to an application for an injunction in a labour “dispute” within the meaning of s. 2(1)(l) of the *Labour Relations Act*, s. 134 of that *Act* provides that notwithstanding the *Judicature Act* or another Act or law, an injunction may not be granted where “a lawful strike or lockout exists” unless the parties to the dispute “have been given notice of the application and have been given an opportunity to appear” and that the notice “shall be served in sufficient time before the time fixed for the hearing, not being less than 24 hours, to enable the person to attend at the hearing”.
5. There is a general reluctance on the part of the court to grant any order on an *ex parte* basis because, to do so, offends the general principle of procedural justice that both sides should be heard.
6. Injunction applications continue to be made *ex parte*, in situations involving labour disputes, without reference to the requirements of s. 134 of the *Labour Relations Act* and, in other situations, without apparent consideration of the importance of attempting to provide notice, either by way of proper service or by way of some other attenuated or substitute notification, to other persons potentially affected by the application.
7. In light of the confusion and inconsistencies in practice that may exist with respect to when it may be appropriate to proceed *ex parte* on an injunction application, it is considered appropriate to issue the following practice note to clarify the practice and procedure in this regard.

Practice Note

8. The basic rule is that no injunction shall be granted without notice to other parties or affected persons. The requirement of notice, unless otherwise modified by order of the court, means proper service according to the procedures and time limits stipulated in the rules of court.
9. In exceptional cases, such as, for example, urgency flowing from a proven immediate threat of irreparable harm to the applicant if prohibitory steps are not taken forthwith, an application for an injunction may, subject to paragraph 10, proceed in the absence of notice.
10. An application for an *ex parte* injunction will not generally be considered unless the

judge is satisfied:

- (a) that the threat of irreparable harm is so immediate and serious that even abbreviated notice (i.e. less than that stipulated by the rules of court) or informal notice (such as by telephone, facsimile or email either to the affected person or to known counsel) would not be appropriate; and
 - (b) that, in the case of a labour dispute, at least 24 hours' notice is not required by virtue of the application of s. 134 of the *Labour Relations Act*.
11. On an *ex parte* application, the applicant has an obligation of good faith to disclose to the court all material information, whether favourable to the applicant's case or not. Subsequent discovery of a failure of an applicant to make full disclosure may result in discharge of an *ex parte* order *pro tanto* and/or an order for costs.
12. In an application for an *ex parte* injunction, the applicant will be expected to include in the applicant's papers:
- (a) a statement as to whether or not the applicant believes s. 134 of the *Labour Relations Act* applies, and the reasons for that belief;
 - (b) information as to the steps, if any, taken by or on behalf of the applicant to bring the application to the attention of other parties and affected persons;
 - (c) a description of the circumstances that makes it inappropriate or not feasible to serve the application on, or give abbreviated or informal notice to, other parties and affected persons; and
 - (d) a statement as to whether the applicant is offering an undertaking or security, and the manner in which the provision of such an undertaking or security may alleviate prejudice that may otherwise accrue to other parties or affected persons if the injunction were to be granted without notice.
13. While *Rule 48.02(1)* provides that affidavits used on an application may contain statements as to the belief of the deponent with the sources and grounds for the belief, a stricter rule applies in the case of a labour dispute to which s. 134 of the *Labour Relations Act* applies. In such a case, paragraph 134(1)(b) provides that affidavits "shall be confined to the facts that the person who swears or affirms the affidavit is able of his or her own knowledge to prove".

14. Where, on an application for an injunction, another party or affected person appears pursuant to abbreviated or informal notice (i.e. less than full and proper service in accordance with the rules of court), and satisfies the judge that the abbreviated or informal notice is not sufficient to enable that party or person to respond fully or properly to the application, the judge may nevertheless proceed with the hearing if the urgency of the case makes it appropriate to do so, but the matter shall be considered to be an *ex parte* hearing notwithstanding the presence or participation of the other party or person or counsel.
15. If an injunction is granted following an *ex parte* hearing or following a hearing considered as an *ex parte* hearing in the circumstances contemplated by paragraph 14, the earliest possible and feasible return date for an *inter partes* hearing shall be set. Counsel seeking the *ex parte* order will not be heard to say he or she is not available for the scheduled *inter partes* return date.
16. On the subsequent *inter partes* hearing, the party who obtained the *ex parte* order retains the burden of satisfying the court, on the basis of all of the evidence then before the court, that grounds exist for the granting of an order continuing the injunction.
17. The determination of the degree of urgency justifying the granting of an *ex parte* injunction and the selection of appropriate return dates for an *inter partes* hearing are in the discretion of the presiding judge and he or she may depart from the foregoing practice if the interests of justice so require.

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