NEW BOOKS AND MEDIA


Reviewed by Murray A. Clemens, Q.C., and Emily L. Hansen

This review is, as you have likely noticed, well out of time. We respectfully request an extension of time to file. In our humble submission, we easily satisfy the test. We had the necessary intention to prepare a review, and the author certainly knew of our intention to review his text (and indeed probably cursed our dilatoriness). We have a genuine excuse for our delay: our first office copy of this book went mysteriously “missing” (presumably because it was so useful it became someone’s pocket companion), and even once we had obtained a second copy, that copy was in constant demand for client work. There is no issue of prejudice, as we suspect all will be benefitted rather than prejudiced. Crerar’s book is, as you will learn if you keep reading, a worthy and valuable text, which surely grants at least some unearned but accepted merit to our review. Lastly, and most importantly, it is in the interests of justice to grant the extension. For the benefit of the bar, and the bench which has to hear the bar’s members, this book should be widely known and consulted, and so far as the applications discussed are concerned, it should have a place at counsel table along with the annotated rules.

Assuming you are still with us, let us get down to the heart of the matter. This is a fine book that ably achieves its stated purpose. Crerar writes with style (he opens with: “Fraud is fire, and law is ice”) and includes various details and anecdotes of interest to curious readers (examples include a footnote identifying Groberman J.A. of our Court of Appeal as successful counsel in the cited case, and the discussion of the Canadian origins of the
Anton Piller order—in cases involving video arcade games and the overtaking of Mr. Pac-Man by Ms. Pac-Man). 4

Crerar himself sets out his purpose with clarity in the opening pages. This is not a replacement for Sharpe’s *Injunctions and Specific Performance*, 5 nor for Gee’s *Commercial Injunctions*; 6 rather, it is crafted as a companion for the high-stakes applications for the orders that give the book its name. “Attaining and responding to *Mareva* and *Anton Piller* orders will, by their very nature, be a race against the clock. … This book … is designed for urgent court applications … for quick gathering of the law and presentation in court.” 7 However, the author gives himself some leeway to showcase his inner legal historian and fortune teller—the introductory chapter offers a surprisingly thorough overview of the origins and development of *Mareva* and *Anton Piller* orders in the United Kingdom and Canada, along with musings about their future.

This text achieves its purpose. It allows a comparison of the law in each Canadian jurisdiction at a flash. Who knew, without checking, that the availability and form of an *Anton Piller* order are codified in some jurisdictions but not others and that the test for a preservation order varies slightly between provinces? And, for the non-B.C. practitioner, Crerar reminds us that B.C.’s courts have taken a rather different and more liberal tack when dealing with *Mareva* orders—we are “an outlier, or pioneer”, and even here “rejected” by Alberta. 8 Crerar has a special talent for driving to the heart of the matter and anticipating those questions you did not see coming: Does a given international jurisdiction issue or recognize *Mareva* orders, and what is the test, and how is it applied? (Crerar has the answer for more than eight jurisdictions in only eight pages); 9 from whence does the jurisdiction to issue *Anton Piller* orders arise? (Crerar reminds you); 10 what are the factors relevant to deciding whether to rescind an *ex parte* order for material non-disclosure? (there are four). 11 He even uses language that will help you sound smooth and sophisticated in front of a tough judge, rather than bumbling and uncertain. Full cites are provided each time a case is referenced—while the style guide purist may scorn this practice, the rest of us mortals are deeply grateful not to be hunting backwards for the reference *supra* (or, heaven forbid, forwards for the reference *infra*).

Crerar is fond of lists. Seven indicia of risk of asset dissipation are described, as are seven badges of fraud that may indicate a fraudulent conveyance. 12 Similarly, factual scenarios that do or do not satisfy the “ordinary course of business” exception are summarized in list form. 13 Crerar identifies 12 types of civil proceedings that have given rise to *Mareva* relief. 14 If you like narrative in your texts, this feature may not endear Crerar’s text to
you—Crerar’s text does not make for the most enjoyable vacation read. However, for those looking to cut to the chase and either support their point or refute opposing counsel’s, a list is a wonderful thing.

Practitioners in jurisdictions other than B.C. and Ontario may sometimes find themselves frustrated by the emphasis on Canada’s two most populous common law jurisdictions. Fewer cases are cited from other jurisdictions. However, this lacuna can hardly be laid at Crerar’s feet: as he repeatedly notes, many Canadian jurisdictions simply have not produced much (or any) law on the subjects of his book (for example, Newfoundland and Labrador has statutory relief akin to *Mareva* but no published *Mareva* or *Anton Piller* decisions; similarly, there is no discussion of what those practitioners in jurisdictions other than B.C. and Ontario should do when preparing an *Anton Piller* or *Mareva* order, given that only B.C. and Ontario have model orders). Those looking for a critical comparison of the law in the various provinces and territories can get a taste in the introduction (where Crerar discusses the differing emphasis on *Mareva* versus preservation of property orders in mainland Maritime provinces and B.C.). Those looking for a detailed critical analysis of differences within the federation are in the wrong place.

One does have to be careful when using this text—overreliance could lead you down the path of error. In the first place, the book is divided into three main topics: *Mareva* orders, preservation of property rules and *Anton Piller* orders. That is very sensible, so long as you read the introduction and you know that much of the *Mareva* content applies with equal force to the *Anton Piller* section, even where the former is not mentioned in the latter. The key pieces are, however, flagged for the reader in the latter section—for instance, chapter 19, on the procedure for *Anton Piller* orders, expressly refers to chapter 7, on the procedure for *Mareva* orders, “most of which will also apply to *Anton Piller* applications”. While helpful, the discerning reader is left a bit concerned about what constitutes “most”, and which parts do not apply.

A second point of caution is that the book does exactly what it sets out to do: provide an overview of the law, along with succinct and punchy statements of the holdings in various cases. It is not a lengthy treatise, despite being a complicated area of law. The drawbacks of this approach are two. Crerar identifies one in the Introduction: “Do not blindly cite these cases, and heed the admonition of Lord Halsbury”, which, paraphrased, says “don’t forget about the facts”. The second is not identified; it is that apparent inconsistencies or muddy places in the law (of which there are many in this area) are not always made clear. For instance, what constitutes the “clear evidence” required to establish each of the four elements for an *Anton
Perhaps the answer is as simple as that proffered by U.S. Supreme Court Justice Porter Stewart: "I know it when I see it". Further, what is the distinction between the requirement that an Anton Piller order set out a procedure for dealing with privileged and confidential materials and the requirement that terms be included to protect "sensitive, confidential, and privileged lawyer and client information"? No discussion is provided to elucidate the distinction or overlap of those categories. Another example where Crerar's comparatively high-level approach leaves a little too much mystique is in the distinction between a situation “[w]here the plaintiff asserts an ownership interest in the defendant's assets" and only needs to satisfy the interlocutory injunction test rather than the Mareva test, and a situation where “[a] Mareva order is not an appropriate means" because the plaintiff seeks to “preserve the very subject matter of the action". In any event, this is a small quibble, as a diligent practitioner will not be determining the appropriate form of relief on the fly in the courtroom (or at least the judges sitting in chambers very much hope that is not the general practice).

In conclusion, I hope you will keep a copy of Crerar's text on your shelf. Bring it with you to court. Use it to spark ideas and lines of inquiry. Do not, however, use it as a substitute for thorough research and careful reading of cases. No single text can substitute for careful preparation, but this one can assist your preparation and support you when faced with unexpected submissions from opposing counsel or questions from the bench. Whether you deal with Mareva and Anton Piller relief frequently or infrequently, this friendly yellow book may as well have “Don't Panic" emblazoned on its cover (much like that other well-known volume—but please, do not start bringing a towel to court).