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Dimitrios Valkanas*

Private Search and Seizure: The Constitutionality of *Anton Piller* Orders in Canada

This paper examines the constitutionality of the Anton Piller *order in Canadian law. First, the paper examines whether* Anton Piller *orders overall are unconstitutional through three major avenues of attack: (i)* Charter *challenges; (ii) the ultra vires doctrine; and (iii) the principle of natural justice, audi alteram partem. Afterwards, in the event that no challenge against* Anton Piller *orders broadly would succeed, the paper examines whether their uniquely Canadian variant known as a "rolling" or "John (or Jane) Doe"* Anton Piller *orders could be challenged, looking at both* Charter *and non-*Charter *challenges. Finally, this paper proposes the imposition of additional criteria and safeguards on both the issuance and execution of* Anton Piller *orders, in case the constitutional challenges of both regular and "rolling"* Anton Piller *orders appear unlikely to succeed. The paper looks at criteria already suggested in the jurisprudence and doctrine discussing* Anton Piller *orders, in addition to introducing original proposals for reform.*

Cet article examine la constitutionnalité des ordonnances de type Anton Piller *dans le droit canadien. D'abord, l'article examine ces ordonnances en général sont inconstitutionnelles suivant trois voies : (i) des contestations sous* la Charte *; (ii) la doctrine ultra vires ; et (iii) le principe de la justice naturelle, audi alteram partem. Ensuite, dans l'éventualité qu'aucune de ces contestations de l'ordonnance de type* Anton Piller *en soi ne réussit, l'article examine si le variant de l'ordonnance connue comme l'ordonnance de type* Anton Piller *« roulante » ou « John (ou Jane) Doe » peut être contestée, prenant en considération des contestations sous* la Charte *et d'autres contestations. Finalement, l'article propose d'imposer des critères et des protections additionnels sur l'autorisation et l'exécution des ordonnances de type* Anton Piller*, dans le cas que toutes les contestations constitutionnelles des ordonnances de type* Anton Piller *régulières et « roulantes » semblent vouées à l'échec. L'article prend en considération des critères déjà proposés par la jurisprudence et la doctrine autour des ordonnances de type* Anton Piller*, en plus d'introduire des propositions originales pour la réforme de ces ordonnances.*

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Introduction

The public mind has long conceived of search and seizure as an exceptional measure, carried out by uniformed police officers with a warrant for the purposes of a criminal investigation. Nevertheless, judicial developments in recent decades have led to the creation of a similar procedure for civil cases. In particular, the *Anton Piller* order, a "civil search warrant,"[1] has allowed private parties to conduct search and seizures for the purposes of private law disputes. Canadians have a profound concern for their privacy

1. *Vinod Chopra Films Private Limited v John Doe*, 2010 FC 387 at para 5 [*Vinod Chopra*].

rights, having enshrined them in several sections of the *Canadian Charter of Rights and Freedoms*. As such, it is hardly surprising that significant concerns have arisen over the constitutionality of *Anton Piller* orders. This paper will examine three major constitutional challenges to the *Anton Piller* order in Canadian law. First, the constitutionality of *Anton Piller* orders as a whole will be considered; this question has already been partly addressed by the courts. Second, although simple *Anton Piller* orders may be constitutional, the possibility that their variant known as "Rolling" or "John Doe" *Anton Piller* orders may not be will be examined. Finally, regardless of the constitutionality of *Anton Piller* orders per se, new requirements and novel safeguards on both the granting and execution of such orders will be proposed.

I. *History of* Anton Piller *Orders*

1. *The origins of* Anton Piller *Orders*

Anton Piller orders draw their name from the landmark decision that brought them into the fold of English common law. More specifically, that decision is *Anton Piller KG v Manufacturing Processes Ltd & Ors*,[2] an English Court of Appeal case involving a copyright dispute between a German electronics manufacturer (Anton Piller) and their British agents and component suppliers (Manufacturing Processes). In that case, the British defendants had sought to sell confidential copyrighted information on the German plaintiff's products to third parties but were discovered. This led the plaintiff to request an ex parte order allowing them to examine and copy various pieces of evidence in the defendants' possession, so as to avoid their destruction. To do so, the plaintiff would have had to enter the defendants' premises, something which, without the defendants' consent, would have normally required a search warrant (which is not available in civil cases). Lord Denning MR granted the order, stating that the defendants would be free to refuse the plaintiff's solicitor entry, though their doing so would bring them into contempt of court.[3] Although the rules of the Court did not provide any basis for such an order, Lord Denning MR justified it by citing the Court's inherent jurisdiction.[4]

2. *The importation of* Anton Piller *Orders into Canadian law*

This landmark decision, despite its radical and unprecedented nature, was quickly imported into Canada by the courts, given its immense utility for

2. [1975] EWCA Civ 12 [*Anton Piller*].
3. *Ibid*.
4. *Ibid*.

copyright infringement and other intellectual property cases.[5] However, the meagre financial means of most defendants in cases involving *Anton Piller* orders meant that Canada had to wait a whole three decades before one of the sparse appellate challenges of such orders reached the Supreme Court.[6] That appellate case was *Celanese Canada Ltd v Murray Demolition Corp*,[7] a 2006 decision in a dispute between two vinyl acetate manufacturers: Celanese Canada and Canadian Bearings. In that case, Celanese Canada sued Canadian Bearings, alleging that the latter copied Celanese's confidential "proprietary processes and equipment."[8] Celanese then sought and obtained an *Anton Piller* order to search Canadian Bearings' premises for incriminating evidence, in order to seize and store it to avoid its destruction. In the course of the search, which was conducted in a haphazard manner, privileged information was accessed by Celanese's agents, being downloaded en masse and far too quickly for Canadian Bearings' solicitors to properly review the material. Later, Celanese's counsel accessed and copied the privileged information without notifying Canadian Bearings' counsel, even going so far as to pass some of the information on to Celanese's counsel in the United States. Once Canadian Bearings' counsel learned of this, it demanded the return of the documents, but Celanese's counsel refused, instead claiming that it had deleted the privileged material. The dispute reached the Supreme Court over Canadian Bearings' claim that Celanese's counsel should be disqualified, given that they had accessed privileged information in contravention of the *Anton Piller* order's stipulations.[9]

Ultimately, the Court sided with the defendant, Canadian Bearings, finding that the *Anton Piller* order had been executed in a manner inconsistent with the nature of the order itself and in breach of solicitor-client privilege, thereby prejudicing Canadian Bearing's ability to defend itself in court. Moreover, the Court noted the *Anton Piller* order's "uncomfortable resemblance to a private search warrant,"[10] and even noted that not authorizing forceful entry but requiring consent to search and seizure on penalty of contempt of court might appear to the citizenry as "a distinction without a meaningful difference."[11] Nevertheless, the Court

5. Jeff Berryman, "Thirty Years After: *Anton Piller* Orders and the Supreme and Federal Courts of Canada" (2007) 2:3 J Intl Commercial L & Technology 128 at 128-129 [Berryman, "Thirty Years After"].
6. *Ibid*.
7. 2006 SCC 36 [*Celanese*].
8. *Ibid* at para 5.
9. *Ibid*.
10. *Ibid* at para 1.
11. *Ibid* at para 28.

stated that *Anton Piller* orders had overcome their original extraordinary nature to become regularly issued over the thirty-year-period since their first appearance in Canada.[12] The Court found that *Anton Piller* orders were useful in preventing unprincipled defendants from exploiting procedural constraints to destroy evidence.[13] To ensure that this extraordinarily intrusive judicial instrument is only used in circumstances that warrant it, the Court developed a four-part test, which still stands as the current test for *Anton Piller* orders in Canada:

> 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.[14]

These conditions essentially match those stated by Lord Denning MR in *Anton Piller*.[15] Ultimately, *Celanese* served to recognize *Anton Piller* orders as a definitive part of Canadian procedural law, in addition to concretely articulating a single test for their being granted, as well as guidelines for their execution.

As noted previously, the Court noted the extraordinary and highly concerning nature of these orders.[16] Indeed, there have been multiple challenges to the constitutionality of such orders in Canada which will be canvassed below.[17] Nevertheless, the failure of any of these challenges to bear fruit has meant that *Anton Piller* orders have remained an undisturbed part of Canadian law.

12. *Ibid* at paras 29-32.
13. *Ibid* at para 32.
14. *Ibid* at para 35.
15. *Anton Piller*, *supra* note 2; the Court in *Celanese* also listed several protections for the rights of the parties, as well as various conditions governing the conduct of the search; see *Celanese*, *supra* note 7 at para 40.
16. See e.g. *Celanese*, *supra* note 7 at para 37, discussing *Netbored Inc v Avery Holdings Inc*, 2005 FC 1405 [*Netbored*], where the Court lists various examples of how *Anton Piller* orders can be abused.
17. See e.g. *Ontario Realty Corp v P Gabriele & Sons Ltd*, (2000), 50 OR (3d) 539, [2000] OJ No 4340 (Ont Sup Ct) [*Ontario Realty* cited to OR]; *Viacom Ha! Holding Co v Jane Doe*, (2000) CanLII 15260, [200] FCJ No 498 (QL) (FCTD) [*Viacom FCTD* cited to CanLII]; *Raymond Chabot SST Inc c Groupe AST (1993) Inc*, [2002] RJQ 2715, 2002 CanLII 41255 (QCCA) [*Chabot* cited to CanLII] (for an example of a challenger under the Quebec *Charter of Human Rights and Freedoms*).

II. *Three major constitutional challenges to the* Anton Piller *Order in Canadian law*

1. *Scrutiny of* Anton Piller *Orders under the* Charter

Given *Anton Piller* orders' similarity to a search warrant, it is hardly surprising that the *Canadian Charter of Rights and Freedoms*, which has several provisions that directly or indirectly govern search and seizure, offers a vehicle through which they can be challenged. Some possible avenues under the *Charter*, such as a section 8 challenge,[18] have already been examined by Canadian courts. Other potential challenges, such as those based on sections 7, 11(c), and 13 have been aired by doctrinal writers but have yet to be thoroughly tested before the courts.[19]

Before we can begin evaluating the merits and shortcomings of any *Charter* challenges, both potential and already adjudicated, we must first inquire as to whether the *Charter* applies to *Anton Piller* orders. Given that an *Anton Piller* order is issued through a court's inherent jurisdiction in a private dispute,[20] it is not immediately apparent that the *Charter*, a public law instrument applicable only to the federal and provincial governments and legislatures,[21] can be invoked to challenge its constitutionality. Indeed, it could well be argued that *Anton Piller* orders lie outside the *Charter*'s protections.

The first notable case to consider whether the *Charter* does indeed apply to such orders was *Viacom Ha! Holding Co v Jane Doe*.[22] In that case, several defendants were served with a "Jane Doe"-type *Anton Piller* order due to allegedly selling counterfeit merchandise infringing Viacom's intellectual property rights;[23] the defendants sought to have that order set aside, alleging a violation of their right against unreasonable search and seizure under section 8 of the *Charter*. Justice Tremblay-Lamer dismissed the defendants' challenge, finding that the order had been properly granted. In terms of the section 8 challenge, the judge first examined section 32 of the *Charter*, which limits its application to Parliament, the provincial

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18. See e.g. *Ontario Realty*, *supra* note 17.
19. See generally Nathaniel Lipkus, "A Tale of Two Remedies: Rationalizing the Anton Piller Order in Canada" (2006) 19:3 IPJ 459 at 484-514; Paul D Godin, "Anton Piller Orders in an Age of Scepticism: Charter Application and Other Safeguards for Judicially-Ordered Searches" (1996) 54:1 UT Fac L Rev 107.
20. *Anton Piller*, *supra* note 2, cited in *Vinod Chopra*, *supra* note 1 at para 12.
21. See *Canadian Charter of Rights and Freedoms*, s 32, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
22. *Supra* note 17.
23. A "John" or "Jane Doe" order is an order issued without a named defendant. For more details on such orders, see Part II of this paper which deals solely with them.

legislatures, and the federal and provincial governments.[24] She then found that, based on past jurisprudence, courts did not form part of "government" as envisaged under section 32, given that they are neutral arbiters and not parties to the dispute before them.[25] As the *Charter* cannot apply to a dispute between two private parties without any state intervention and *Anton Piller* orders are granted in such a context, the judge held that this placed them outside the scope of application of the *Charter*.[26] This is a conclusion supported by doctrine predating *Viacom*.[27] For these reasons, Justice Tremblay-Lamer found that the section 8 protections set out in *Southam*[28] could not be invoked by the defendants.[29] This decision was upheld on appeal with deference shown to the Justice Tremblay-Lamer's reasons.[30]

A few months after *Viacom*, however, another case examined *Anton Piller* orders under the colour of section 8: *Ontario Realty Corp v Gabriele & Sons Ltd*.[31] Unlike *Viacom*, which did not admit a *Charter* analysis as a strictly private dispute, *Ontario Realty* had a public law element, which enabled the Court to further its analysis: the order stipulated that a police officer was to be present during its execution.[32] Although the order made it "clear that the purpose of the police officer being there [was] not to do anything but to ensure public order and the avoidance of a disturbance by anyone,"[33] it still permitted the officer to use "reasonable force" to carry out the order, including the services of a locksmith to open cabinets.[34] The challenging party argued that this clause had essentially transformed the order into a proper search warrant. The Court disagreed, finding that the use of any force, including picking locks, was conditional on the plaintiff's allowing the search first.[35] Despite the unfortunate phrasing used by the issuing judge, no forced entry was ever authorized, thereby maintaining the principal distinction underlying the *Anton Piller* order's private law

24. *Viacom* FCTD, *supra* note 17 at para 74, citing *Charter*, *supra* note 21, s 32.
25. *Ibid* at para 76.
26. *Ibid* at paras 78-80.
27. See e.g. DM Paciocco, "Anton Piller Orders: Facing the Threat of the Privilege Against Self-Incrimination" (1984) 34:1 UTLJ 26 at 42.
28. *Canada (Combines Investigation Branch, Director of Investigation and Research) v Southam Inc*, [1984] 2 SCR 145, 14 CCC (3d) 97 [*Southam* cited to SCR].
29. *Viacom* FCTD, *supra* note 17 at para 81.
30. *Viacom Ha! Holding Co v Jane Doe*, 2001 FCA 395 [*Viacom* FCA].
31. *Supra* note 17.
32. *Ibid* at paras 21-22.
33. *Ibid*.
34. *Ibid*.
35. *Ibid*.

nature.[36] The Court specified that the party conducting the search, the Ontario Realty Corporation, was acting in a private capacity despite being a Crown entity, and that there was thus no government action to examine under the *Charter*.[37] That being said, courts have subsequently cited *Ontario Realty*'s reasoning on the non-applicability of the *Charter* with some skepticism and openness to change.[38] For instance, in *Ridgewood Electric Lt (1990) v Robbie*, Justice Corbett voiced that view that "there ought to be a greater public law dimension to the private *Anton Piller* remedy because a judicially authorized search of a private residence should not be a purely private matter,"[39] while also pointing to a pre-*Ontario Realty* case making a similar point in obiter.[40]

In any case, the court in *Ontario Realty* went on to consider the section 8 challenge for the sake of argument, as if there had been government action under the *Charter*.[41] As such, it examined the order under the *Southam* criteria: (i) that "the authorizing procedures […] be meaningful in the sense that the authorizing person should be able to assess the conflicting interests of the state and the individual on an entirely neutral and impartial manner"; and (ii) "a requirement for reasonable and probable grounds (established on oath) for the belief that an offence [has] been committed and that there [is] evidence to be found at the place searched."[42] The Court went on to find that the use of information obtained on oath, the requirement for an "extremely strong prima facie case," and the need for clear evidence of the possession of incriminating evidence by the defendants all meant that the *Anton Piller* order had requirements equal, if not superior, to those of *Southam*, thereby meeting the constitutionality requirements of section 8.[43] Likewise, in *Raymond Chabot c Groupe AST*, a challenge under Quebec's *Charter of Human Rights and Freedoms*,[44] which does not require government action to apply to civil disputes, did not yield any success.[45]

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36. *Ibid*.
37. *Ibid* at para 28.
38. See e.g. *Ridgewood Electric Ltd (1990) v Robbie* (2005), 74 OR (3d) 514 at para 43, 137 ACWS (3d) 411 (Ont Sup Ct) [*Ridgewood Electric*].
39. *Ibid* at para 36.
40. *Ibid* at para 66, citing *Fila Canada Inc v Jane Doe (TD)*, [1996] 3 FC 493, 114 FTR 155 (FCTD) [*Fila* cited to FC] (NB: neither decision actually examined the constitutionality of *Anton Piller* orders under the *Charter*).
41. *Ontario Realty*, *supra* note 17 at para 34.
42. *Ibid* at para 31.
43. *Ibid* at para 35.
44. CQLR, c C-12 [*Quebec Charter*].
45. *Chabot*, *supra* note 17. The order was challenged under Articles 5 (right to private life), 6 (right to peaceful enjoyment of property), 7 (inviolability of the home), 8 (protection against entry into the

Current jurisprudence establishes that the *Charter* applies to the courts but not to the private disputes before them,[46] as was found in *Dolphin Delivery*.[47] Some have argued that *Dolphin Delivery* also extends the *Charter*'s application to private disputes involving discretionary orders, such as *Anton Piller* orders.[48] While this argument has been considered and rejected by the courts,[49] as recognised by more recent doctrine,[50] the courts have also recognized that common law discretion must be exercised within the boundaries of the *Charter* on penalty of reversibility as an error in law.[51] Essentially, this would mean that *Anton Piller* orders could be argued to be exercises of discretion violating the limits of the *Charter*, thereby enabling one to challenge their issuance as an error in law. This argument is even more potent if one considers that contempt, which is the threat underlying the *Anton Piller* order, is of a quasi-criminal character.[52] Nevertheless, current jurisprudence has so far rejected the applicability of the *Charter* to *Anton Piller* order, and dismissed challenges even where it assumed the *Charter* applied.[53] As such, it is doubtful that this theory would be accepted, or that it would make a difference. It ought to be noted that some decisions have since expressed the view that there should be more public law protection for what resembles a private search and seizure, albeit without substantively considering the matter.[54]

Overall, the jurisprudence has, so far, not been favourable to *Charter* challenges of the *Anton Piller* order. Section 8 was more recently mentioned in the 2010 Federal Court decision *Vinod Chopra v John Doe*.[55] However, the Court never got to a section 8 analysis, despite posing the question of whether the defendant's section 8 right had been respected,[56] as the

home and taking of goods therein without consent), and 24.1 (protection against unreasonable search and seizure) of the Quebec *Charter*, *supra* note 44.

46. *Ontario Realty*, *supra* note 17 at para 26, citing *RWDSU v Dolphin Delivery Ltd,* [1986] 2 SCR 573, 2 ACWS (3d) 243.

47. *Ibid*.

48. Godin, *supra* note 19 at 140.

49. *Ontario Realty*, *supra* note 17 at paras 13, 26-27.

50. Lipkus, *supra* note 19 at 498.

51. *Ontario Realty*, *supra* note 17 at para 27.

52. *Vidéotron Ltée v Industries Microlec Produits Électriques Inc*, [1992] 2 SCR 1065, 96 DLR (4th) 376 [*Vidéotron* cited to SCR].

53. *Ontario Realty*, *supra* note 17 at paras 35-37.

54. See e.g. *Ridgewood Electric*, *supra* note 38 at para 36, where Corbett J notes his openness to "a greater public law dimension to the private Anton Piller remedy because a judicially authorized search of a private residence should not be a purely private matter"; *Fila*, *supra* note 40 at para 6, where Reed J stated that "[i]t is at least arguable that it applies to the civil search and seizures authorized by order of the Court under an Anton Piller order," albeit in obiter and before both *Viacom* and *Ontario Realty* were decided.

55. *Supra* note 1.

56. *Ibid* at para 14.

order was struck down as not having met the *Celanese* requirements.[57] Nevertheless, the court went on to note that the law has not substantially changed since 2001,[58] one year, that is, after *Viacom* and *Ontario Realty* were decided, thereby indirectly indicating that section 8 would not be infringed.

Section 8, however, is not the only means under which the *Anton Piller* order can be challenged under the *Charter*. First, section 7, which protects Canadians against the unreasonable deprivation of their liberty, could be argued. It is well established in Canadian jurisprudence that the threat of imprisonment puts one's liberty interest at risk;[59] however, such imperilment can be justified if it is done in a manner that complies with the principles of fundamental justice.[60] Given that *Anton Piller* orders are founded on a threat of contempt proceedings, which potentially entail imprisonment for non-compliance, it could be argued that *Anton Piller* orders violate section 7 by imperiling the defendant's liberty interest in a manner inconsistent with the principles of fundamental justice.[61] Even the Supreme Court has recognised that the threat of contempt proceedings is such that it makes the difference between an *Anton Piller* order and a search warrant illusory at best, in the eyes of an ordinary citizen who is faced with the threat of imprisonment.[62]

There has yet to be a section 7 challenge of an *Anton Piller* order before the courts, despite its seemingly obvious engagement of the defendant's liberty interest. If such a case were to arise, however, it is not that clear how receptive the court would be to these arguments. Canadian courts have, thus far, upheld the legal fiction underlying the *Anton Piller* order, viewing contempt proceedings as merely a natural result of such refusal. Indeed, *Ontario Realty* went so far as to state that this "'fiction' […] is not, in fact, a fiction for legal purposes."[63] When dealing with *Charter* challenges of injunction violations resulting in contempt charges in the past, courts have ruled that any deprivation of liberty is a result of the breach of the court order, rather than of the underlying foundation of the injunction itself.[64] Likewise, Lord Denning MR directly justified the use of contempt proceedings as the only means to ensure the efficacy of justice in the original *Anton Piller* case, stating that "courts have wide inherent

57. *Ibid* at para 57.
58. *Ibid* at para 14.
59. See *R v Clay*, 2003 SCC 75 at para 3.
60. See *ibid*.
61. See Lipkus, *supra* note 19 at 497ff.
62. See *Celanese*, *supra* note 7 at para 28.
63. See *Ontario Realty*, *supra* note 17 at para 37.
64. See *R v Krawczyk*, 2009 BCCA 250.

powers to ensure that justice is not denied to those who litigate before them."[65] In *Ontario Realty*, Justice Tremblay-Lamer directly quoted this part of Lord Denning's reasoning.[66] This paints an image of courts' willingness to tolerate the possible liberty implications of the *Anton Piller* order.

Nevertheless, in the event of a successful section 7 or 8 challenge, the evidence obtained from an *Anton Piller* order could be subjected to a section 24(2) analysis, thereby excluding any evidence that would not have been obtained but for the order as unconstitutionally obtained.[67] This is based on the argument that, in the course of an *Anton Piller* order, the executing party essentially acts as the police, and should therefore be bound to the same exclusionary rules regarding evidence.[68] On some occasions, the search is actually supervised and assisted by police, essentially breaking down the civil-criminal distinction,[69] meaning that the *Charter* would be applicable to the order. The argument would be that section 24(2) should bar any evidence obtained by the executing party in violation of *Charter* rights from being used in court. Of course, this argument was considered in *Ontario Realty*, ironically a case involving direct police supervision, and dismissed by the court.[70] Although *Ontario Realty* dealt with a section 8 challenge, there seems to be no meaningful reason why a section 7 challenge would fare any differently on that front. As such, there is little possibility of a successful section 7 challenge leading to a disqualification of the evidence obtained through an *Anton Piller* order pursuant to section 24(2), while the section 8 equivalent has already been rejected by courts.

In a similar vein to the section 7 challenge, several authors have examined challenges under section 11(c) and 13, dealing mainly with the threat of self-incrimination and the civil contempt threat.[71] Sections 11(c) and 13 of the *Charter* protect a person against being compelled to testify in their own prosecution and having their testimony used against them in other proceedings, respectively.[72] Of particular importance to this argument is the case of *Vidéotron Ltée v Industries Microlec Produits Électriques Inc*.[73] In that case, the Supreme Court of Canada decided that

65. *Anton Piller*, *supra* note 2 at 452.
66. See *Ontario Realty*, *supra* note 17 at para 12.
67. See Godin, *supra* note 19 at 134.
68. See *ibid* at 143ff.
69. See *ibid* at 127. See e.g. *Ontario Realty*, *supra* note 17.
70. See *Ontario Realty*, *supra* note 17.
71. See Godin, *supra* note 19 at 140ff; Paciocco, *supra* note 27; Mitchell P McInnes, "The Right to Silence in the Presence of Anton Piller: A Question of Self Incrimination" (1988) 26:2 Alta L Rev 332.
72. See *Charter*, *supra* note 21, ss 11(c), 13.
73. *Supra* note 52.

civil contempt, as created by the Quebec legislature in Article 50 of the *Code of Civil Procedure*, is "for all practical purposes [...] an offence."[74] As such, the Court determined that anyone cited for contempt of court is charged with an offence within the meaning of section 11 of the *Charter* and therefore enjoys the constitutional protection against self-incrimination found in section 11(c), even though the offence originates from a source other than the *Criminal Code*. Essentially, the Court painted civil contempt as a "quasi-criminal proceeding,"[75] regardless of its originating from an instrument of civil and not criminal law. It ought to be remembered that *Anton Piller* orders are founded on the threat of contempt proceedings in order to be effective; Lord Denning MR explicitly stated that this threat was instrumental to the *Anton Piller* order in enabling the courts to do justice to those who bring their cases before them.[76] As such, it could be argued that a case involving an *Anton Piller* order, despite being a civil case, engages section 11(c) of the *Charter* by virtue of its direct implication of contempt proceedings. Section 13 is also arguably engaged, as the defendant is coerced into handing over evidence that may be later used against them through the threat of contempt.

However, the major issue with such arguments is that *Anton Piller* defendants are not "witnesses" within the meaning of sections 11 and 13 of the *Charter*, according to the Federal Court;[77] this is because they are not under oath and do not feel obligated to answer any questions.[78] Furthermore, even if an *Anton Piller* order were to somehow violate sections 11(c) and 13, the exclusion of the evidence under section 24(2) would not be warranted as its use would not bring the administration of justice into disrepute, given the absence of "duress" and the fact that the evidence was obtained under a court order.[79] This has led doctrinal writers to recognize that *Anton Piller* defendants lie outside the protections of sections 11 and 13.[80] Section 13 claims in particular are even more unlikely to succeed, even if the *Charter* were applicable. This is because the Supreme Court has already determined that courts can compel witnesses to testify in most non-criminal cases, even if there is a possibility that their

74. *Ibid* at para 1.
75. Godin, *supra* note 19 at 134.
76. See *Anton Piller*, *supra* note 2 at 452. This part of Lord Denning's reasoning was also cited in *Ontario Realty*, *supra* note 17 at para 12.
77. *Apple Computer Inc v Minitronics of Canada Ltd*, [1998] 2 FC 265, 9 ACWS (3d) 350 (FCTD) [*Apple Computer* cited to FC].
78. *Ibid* at 291.
79. *Ibid*.
80. See Paciocco, *supra* note 27 at 28-33; Godin, *supra* note 19 at 142, n 160; McInnes, *supra* note 71 at 336ff.

testimony will be used against them in criminal proceedings later on.[81] The reasoning for this is that any such evidence will be excluded in later proceedings unless its discovery would have been possible without the compelled testimony.[82] As such, any section 13 claim would fail, even if the *Charter* were applicable.

Overall, the state of the law and the attitude of the courts do not appear favourable to challenges of the *Anton Piller* order under the *Charter*. For the most part, courts refuse to even apply the *Charter* to such orders and, where they do, they usually uphold the orders' constitutionality without any ambivalence. There have been some expressions of openness to increased *Charter* protections by courts in obiter, specifically regarding section 8, while a section 7 challenge has yet to be tested and has thus not been completely eliminated as a possibility. Nevertheless, the Canadian judiciary appears to ascribe faithfully to the legal fictions underlying the *Anton Piller* order in such a way as to make *Charter* challenges appear unfruitful.

2. *Exploring the ultra vires doctrine*

There is also the possibility that, regardless of the *Anton Piller* order's constitutionality under the *Charter*, it may simply lie outside the courts' powers. The *Anton Piller* order does not originate from any statutory instrument or from the rules of court but, rather, from the inherent jurisdiction of section 96 courts.[83] Although there have been attempts to ground *Anton Piller* orders elsewhere, most commonly in the rules of court, such efforts have been repeatedly rejected by courts across Canada.[84] The courts have refused to even consider any statutory instrument as a joint or ancillary source, relying solely on inherent jurisdiction.[85] This is likely

81. See *British Columbia Securities Commission v Branch*, [1995] 2 SCR 3 at paras 41-42, 123 DLR (4th) 462 [*Branch*].
82. See *ibid*.
83. See *Anton Piller*, *supra* note 2 at 61, cited in *Vinod Chopra*, *supra* note 1 at para 7: "This is not covered by the Rules of Court and must be based on the inherent jurisdiction of the Court"; see also *Ontario Realty*, *supra* note 17 at para 4; *British Columbia (Attorney General) v Malik*, 2011 SCC 18 at para 31 [*Malik*].
84. See e.g. *Ontario Realty*, *supra* note 17 at paras 3, 11-16 (for a case from Ontario); *Malik*, *supra* note 83 at para 31 (for a case from British Columbia); *Chabot*, *supra* note 17 at paras 58-67 (a Quebec case where the court recognizes that *Anton Piller* orders can be granted under the Province's civil law system).
85. See e.g. *Ontario Realty*, *supra* note 17 at para 16; *Malik*, *supra* note 83 at para 31; *Chabot*, *supra* note 17 at paras 58-67; in *Bell ExpressVu Ltd Partnership v Rodgers*, 161 ACWS (3d) 982 at para 8, 52 CPC (6th) 312 (Ont Sup Ct) [*Bell*], the court did use the rules of court regarding a failure to make full and frank disclosure to overturn an *Anton Piller* order, alongside past jurisprudence; however, the court made no link between the origin of the *Anton Piller* order or its power to grant such an order, and the rules of court.

because no single rule, or even set of rules, can truly encompass all the aspects of an *Anton Piller* order.[86] That being said, in *Raymond Chabot c Groupe AST*,[87] the Quebec Court of Appeal found that the Province's Superior Court could grant *Anton Piller* orders "en vertu des articles 20 et 46 du *Code de procédure civile*";[88] however, the Court ultimately found that articles 20 and 46 (now 49) of the *Code of Civil Procedure*[89] merely codified the Superior Court's inherent jurisdiction.[90]

In *Baxter Student Housing Ltd et al v College Housing Co-operative Ltd et al*,[91] the Supreme Court of Canada spelled out that "[i]nherent jurisdiction cannot […] be exercised so as to conflict with a statute or Rule."[92] The *Anton Piller* order seems to conflict with the common law rule against allowing a plaintiff to execute against a defendant without having first obtained a judgment.[93] Indeed, there seems to be little precedent justifying such a remedy; whereas Lord Denning MR relied on *East India Company v Kynaston*,[94] an 1821 British House of Lords case granting an order obliging the defendant to allow the plaintiff to inspect their premises for a civil suit, on penalty of contempt,[95] the two decisions have been distinguished on several points. Specifically, these include: first, that the *Kynaston* order was only issued after the two parties had presented their case before the Court; second, that the order authorized an inspection to determine the size of a tithe, and not a search and seizure; and, third, that the order itself was debated by the parties on more than one instance before it was actually executed.[96] The counter-argument advanced by Lord Denning MR is that the courts must have some way of vindicating those who submit their disputes before them, lest their authority be rendered nugatory.[97] This is fundamentally linked with the very core of equity, namely, that no right should be left without a remedy to uphold it; and that the courts should be able to do justice in a way that meaningfully

86. See Godin, *supra* note 19 at 116.
87. *Supra* note 17.
88. *Ibid* at paras 58-67 (translation: "pursuant to articles 20 and 46 of the *Code of Civil Procedure*").
89. CQLR, c C-25.01 [*CCP*].
90. See *ibid* at paras 54, 58-67.
91. [1976] 2 SCR 475, 57 DLR (3d) 1.
92. *Ibid* at para 8, citing *Montreal Trust Co v Churchill Forest Industries (Man) Ltd*, 21 DLR (3d) 75, 4 WWR 542 (Man CA).
93. See Lipkus, *supra* note 19 at 490 (the rule originates from property law).
94. [1821] UKHL 3 Bligh 153.
95. See *Anton Piller*, *supra* note 2.
96. See Godin, *supra* note 19 at 113.
97. See *Anton Piller*, *supra* note 2 (there, this argument was articulated justifying the use of the contempt charge to ensure compliance).

assists each successful plaintiff within the context of their case, where the common law's remedies would not otherwise suffice.[98] This is also the logic behind injunctions, which, like *Anton Piller* orders, require a strong prima facie case that there will be harm to the petitioner if they are not granted.[99] Interestingly, injunctions, unlike *Anton Piller* orders, require a consideration of the inconvenience to the defendant.[100]

Lord Denning's view has been supported by Canadian jurisprudence. In *Ontario Realty*, for instance, Justice Farley agreed with Lord Denning that the *Anton Piller* order should do the plaintiffs justice, noting the "very strong public interest in ensuring that the court process in civil cases is not frustrated by the suppression of evidence."[101] In that same case, Justice Farley explicitly rejected a claim that the Ontario Superior Court of Justice lacked the inherent jurisdiction to grant an *Anton Piller* order.[102] Likewise, *Ridgewood Electric*, a case otherwise encouraging further constitutional scrutiny of *Anton Piller* orders, also notes their important role in protecting "the court's own process, important property interests and the values underlying the relationship between employer and employee."[103] Indeed, it is a rule established by jurisprudence that one should not be able to frustrate the court's jurisdiction merely by acting swiftly;[104] this would mean that the *Anton Piller* order is, in a way, not conflicting with the common law rules, but actually giving effect to them. Given this trend in the jurisprudence, it appears unlikely that the courts would recognize the *Anton Piller* order as being outside their inherent jurisdiction, given its distinctly equitable character and its protection of important interests that cannot otherwise be safeguarded by the law. There is jurisprudence supporting the idea that the courts have the residual power to create remedies to safeguard the "integrity of the judicial process."[105]

That being said, one of primary issuers of *Anton Piller* orders is the Federal Court of Canada, a court of statutory, rather than inherent,

98. See Lipkus, *supra* note 19 at 490-492 (the author cites the common law principle of "*ubi jus ibi remedium*" at 491).
99. See *RJR MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 31, 111 DLR (4th) 385.
100. See *ibid*.
101. *Ontario Realty*, *supra* note 17 at para 13.
102. *Ibid* at paras 3, 11.
103. *Ridgewood Electric*, *supra* note 38 at para 23.
104. See Lipkus, *supra* note 19 at 491.
105. Jeff Berryman, "Challenging Shibboleths: Evidence Based Policy Making, the Supreme Court of Canada and Anton Piller Orders" (2010) 36:4 Adv Q 509 at 517 [Berryman, "Challenging Shibboleths"]. The *Mareva* injunction, which freezes a defendant's assets pending judgment, is another example of a judicially-created remedy meant to prevent defendants from rendering the court's power nugatory (see *Mareva Cia Naviera SA v International Bulkcarriers SA, (The Mareva)* (1975), [1980] 1 All ER 213, [1975] 2 Lloyd's Rep 509 (EWCA (Civ Div))).

jurisdiction.[106] Even if we were to admit that provincial superior courts can issue *Anton Piller* orders by virtue of their inherent jurisdiction, it is not at all apparent that the Federal Court should be able to do the same. This issue was considered by the Federal Court in *Netbored Inc v Avery Holdings Inc*,[107] a case in which a defendant potentially facing contempt charges related to an *Anton Piller* order challenged the Federal Court's authority to make such an order. Justice Hughes agreed that the "jurisdictional basis" for the Court to do so was "difficult to find."[108] Whereas it is well established the Federal Court has a wide equitable jurisdiction,[109] Justice Hughes instead cited rules 374, 359, and 361 which, collectively, allow the court to give an ex parte order for the "interim [preservation] of property where property, which is the subject of the proceedings, appears to be in peril of being lost, removed or destroyed" (i.e., essentially an *Anton Piller* order).[110] The United States, which does not have the *Anton Piller* order as one of the equitable remedies that its courts can use,[111] has a similar framework through rule 64 of the *Federal Rules of Civil Procedure*, which enables US federal courts to make an order for the preservation of evidence for an action.[112] Interestingly, ex parte applications exist in US law,[113] despite only being mentioned in passing in the *Federal Rules of Civil Procedure*.[114]

As such, all the elements for an *Anton Piller* order in all but name exist in both US and Canadian federal rules, even in the absence of inherent jurisdiction. Instead Justice Hughes goes on to cite an article by Professor Berryman, arguing that "the Federal Court should proceed to give *Anton Piller* orders pursuant to inherent jurisdiction."[115] This is peculiar, given

106. See *Federal Courts Act*, RSC 1985, c F-7, s 17; *Copyright Act*, RSC 1985, c C-42, s 41.24; *Patent Act*, RSC 1985, c P-4, s 52; *Trademarks Act*, RSC 1985, c T-13, s 55.
107. *Netbored, supra* note 16 at para 41.
108. *Ibid* at para 36.
109. See *Apotex Inc v Abbott Laboratories Limited*, 2013 ONSC 356 at para 77, where Quigley J decides that the Federal Court has equitable jurisdiction over all matters otherwise within its statutory jurisdiction.
110. *Netbored*, *supra* note 16 at para 36.
111. See Lipkus, *supra* note 19 at 493ff, explains that the *Anton Piller* order did not exist in English law at the time of American Independence, and was therefore not integrated into it by the *Judiciary Act of 1789*, c 20, 1 Stat 73, despite technically being allowed by the Fifth Amendment to the US Constitution, which only applies to public action and not to private parties.
112. See *Federal Rules of Civil Procedure*, 28 USCA, Rule 64.
113. SmartRules, "Ex Parte Motion in United States District Court–At A Glance" (26 August 2009), online (blog): *SmartRules* <blogs.smartrules.com/ex-parte-motion-in-united-states-district-court-at-a-glance/> [perma.cc/AT9B-L3SZ].
114. *Supra* note 112, Rule 47(c).
115. See *Netbored*, *supra* note 16 at para 36, citing Jeff Berryman "Anton Piller Orders: A Canadian Common Law Approach" (1984) 34:1 UTLJ 1 at 16-18 [Berryman, "Anton Piller Orders"]. Interestingly, it was also in *Netbored*, *supra* note 16 at para 53, that the Court recognized that it can

that the Federal Court does not have inherent jurisdiction, but is explicitly limited to its statutory jurisdiction by its own enabling instrument.[116] And yet, as already mentioned, past jurisprudence has already recognized the Court's equitable jurisdiction, which, for all intents and purposes, does not appear to substantively differ from an inherent jurisdiction in so far as injunctive remedies are concerned.[117] Indeed, the Federal Court's statutory jurisdiction has been recognized by the Supreme Court as being concurrent with the jurisdiction of a provincial superior court.[118] In either case, the result is the same; the Federal Court can grant *Anton Piller* orders and has indeed granted them. Although managing to ground the *Anton Piller* order in rules instead of inherent jurisdiction would have interesting complications, the Court's siding with Professor Berryman's view in *Netbored* has so far shut the gates to such a development.[119]

Ultimately, despite the *Anton Piller* order being an extraordinary use of the courts' inherent jurisdiction, it does not appear that it crosses the threshold of being ultra vires the Canadian courts, at least according to current jurisprudence. Even the Federal Court of Canada, a court of statutory jurisdiction, has found that it has the power to grant such orders. Even if an appeal regarding the Federal Court's use of inherent jurisdiction were to reach the Supreme Court, and assuming that the Supreme Court were to rule against the Federal Court having such jurisdiction, the Federal Court's Rules would still give it the exact same power to make *Anton Piller* orders. As such, there seems to be little chance of success in removing the *Anton Piller* order from the arsenal of the Canadian judiciary, especially after its explicit recognition in *Celanese*.[120]

3. *The principles of natural justice: audi alteram partem*

Given the *Anton Piller* order's highly extraordinary and intrusive character, it would seem likely that it violates the principles of natural justice. More specifically, there is a case to be made that the order, which is granted ex parte despite its extremely intrusive effect into the life and property of the defendant, violates the principle of audi alteram partem. As

only grant *Anton Piller* orders for types of evidence covered by its statutory jurisdiction.

116. See *Federal Courts Act*, *supra* note 106, s 17.

117. See e.g. *Glaxo Wellcome PLC v Minister of National Revenue* 1998, 162 DLR (4th) 433 at paras 32-33, [1998] 4 FC 439 (FCTD).

118. See *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626 at para 38, 157 DLR (4th) 385 [*Canadian Liberty* cited to SCR]. Inherent jurisdiction in this context must not be understood as a court's power to vindicate a legal right where one is found (which is exercised by all provincial superior courts), but as the court's control over its own procedures (which includes the power to grant interim injunctions).

119. See *Netbored*, *supra* note 16 at paras 29, 36.

120. *Supra* note 7.

stated by Chief Justice McLachlin in *Winnipeg Child & Family Services (Central Area) v W (KL)*,[121] "[i]n the *ex parte* procedure, […] *audi alteram partem* […] cannot, by definition, be respected."[122] This is particularly concerning in light of the fact that most *Anton Piller* defendants have meagre financial means,[123] raising doubts as to their ability to contest the order ex post facto.[124] Some jurisprudence has even raised doubts as to whether such an exercise would be financially worth it for the defendant, or whether defendants fully understand that the *Anton Piller* order is merely interlocutory and not final.[125] In England, the order's home jurisdiction, both doctrine and case law have raised questions about the fairness of an order which significantly intrudes into citizens' private and entrepreneurial lives and deprives them of their property, but which they have no chance to question until after the fact, having to obey such an order even if it is completely erroneous or unjustified at the time.[126] Canadian jurisprudence has raised similar concerns about the ability of plaintiffs to use the ex parte *Anton Piller* order to "fish" through a defendant's archives or to harm their business.[127]

A response to this lies precisely in the interlocutory nature of the *Anton Piller* order; due to not being final, the order can always be contested by the defendant after the fact.[128] However, as mentioned above, it is doubtful whether most defendants even have the means or understanding to do so, or whether it would be worth it for them.[129] A more important criticism of this argument would lie in the significant safeguards underlying the *Anton Piller* order, as set out in the *Anton Piller* criteria confirmed by the Supreme Court of Canada in *Celanese*.[130] Namely, these include: (1) a strong prima facie case; (2) very serious actual or potential damage to the plaintiff due to defendant's alleged misconduct; (3) convincing evidence that the defendant possesses incriminating evidence; and (4) a real possibility that the defendant may destroy this evidence before the

121. 2000 SCC 48.
122. *Ibid* at para 115 (note however that this statement was made in a family law case).
123. See Berryman, "Thirty Years After," *supra* note 5 at 128-129.
124. See *ibid*.
125. See e.g. *Havana House Cigar & Tobacco Merchants Ltd v Jane Doe*, 1 CPR (4th) 521 at para 21, 1999 CanLII 8614 (FCTD) [*Havana House*].
126. Paul Brown, ed, "In the News: Cold Storage for Mareva and Anton Piller Orders?" (1987) 137:6316 New LJ 701; *Columbia Picture Industries Inc v Robinson*, [1986] 3 All ER 338, [1986] FSR 367 (UK ChD) [*Columbia Picture* cited to All ER].
127. See e.g. *Netbored*, *supra* note 16 at para 37.
128. Lipkus, *supra* note 19 at 504.
129. Berryman, "Thirty Years After," *supra* note 5 at 128-129; *Havana House*, *supra* note 125 at para 21.
130. *Anton Piller*, *supra* note 2; *Celanese*, *supra* note 7 at para 35.

discovery stage.[131] These are not easy criteria to fulfill, and they are so by design.[132] Moreover, the Court in *Celanese* set out three major protections for the defendant: "a carefully drawn order which identifies the material to be seized and sets out safeguards to deal, amongst other things, with privileged documents; a vigilant court-appointed supervising solicitor who is independent of the parties; and a sense of responsible self-restraint on the part of those executing the order."[133]

And yet, despite these safeguards, there are still cases of *Anton Piller* orders being granted inappropriately, and then being retroactively reversed due to bringing the interests of justice […] into disrepute.[134] One could claim that this is a mere minority of cases, given how regularly *Anton Piller* orders are now issued; however, the aforementioned inability of defendants to challenge such orders due to financial reasons, a lack of understanding of the order's nature, or the mere futility of such an exercise makes it hard to know whether this is the case.[135] Indeed the *Anton Piller* order was originally conceived as an extraordinary measure, but is now rather commonly used;[136] that alone is not an encouraging sign. Of course, courts in both Canada and the United Kingdom have voiced these concerns before, and yet the order still stands.[137] Perhaps this argument could be raised in a future appellate challenge specifically turning on the question of audi alteram partem; after all, the principle of audi alteram partem is entrenched in Canadian law as part of the right to procedural fairness.[138]

It is unclear how willing a court would be to completely strike down the *Anton Piller* order, given how deeply entrenched it seems to have become in Canadian procedural law. In *Air Canada c Canada (Commissaire de la concurrence)*,[139] the Quebec Court of Appeal struck down a provision allowing the Commissioner of Competition to issue ex parte orders without giving notice or holding hearings that would prohibit Air Canada from engaging in an act or practice deemed "anti-competitive."[140] The Court

131. *Supra* note 7 at para 35.
132. Though, as will be shown in part IV-A below, the fourth criterion is often discharged inconsistently and based on dubious evidence.
133. *Supra* note 7 at para 1.
134. *Vinod Chopra*, *supra* note 1 at para 57.
135. Berryman, "Thirty Years After," *supra* note 5 at 128-129; *Havana House*, *supra* note 125 at para 21.
136. Berryman, "Thirty Years After," *supra* note 5 at 128-129.
137. *Netbored*, *supra* note 16 at para 37; *Columbia Picture*, *supra* note 126.
138. *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193; Colleen M Flood & Lorne Sossin, *Administrative Law in Context*, 3rd ed (Toronto: Emond, 2018) at 188ff.
139. [2003] RJQ 322, 222 DLR (4th) 385 (CA Qc).
140. *Ibid* at paras 5, 92-94.

reached this decision based on the consideration that the order affected a person's rights without enabling it to make its case in any way.[141] Therefore, the Canadian judiciary is perhaps not hesitant to strike down mechanisms that violate audi alteram partem. However, two major distinctions should be made: first, the provision in *Air Canada* affected a party's rights without allowing them to make their case for up to eighty days,[142] whereas *Anton Piller* orders can be challenged immediately after service; and second, *Air Canada* concerned a statutory provision that had been enacted three years before the case without any known use beforehand,[143] rather than a long-established judicial instrument supported by a Supreme Court judgment.

Therefore, as with the *Charter* and ultra vires challenges, the field is open for some yet-untested constitutional avenues of attack against the order, but the potential success of such endeavours is doubtful. However, even though the more usual form of the *Anton Piller* order seems to be here to stay, there is an even more intrusive modality of the *Anton Piller* order, namely the "John Doe" or "rolling" kind, which could be found to be unconstitutional. Finally, an alternative route to challenging the *Anton Piller* order's constitutionality would be the imposition of additional conditions and safeguards in both its granting and its execution, so as to ensure that the defendant's rights are protected as much as possible, given the order's intrusive character and its ex parte nature. These matters will be discussed in the following sections.

III. *The constitutionality of "Rolling" or "John Doe"* Anton Piller *Orders*

1. *An introduction to rolling* Anton Piller *Orders*

Although the Canadian judiciary originally imported the *Anton Piller* order from English law, it has seen fit to build upon it, developing an innovative modality of the order. In particular, the Federal Court of Canada has created what is known as a "rolling" or (less often) "John" or "Jane Doe" *Anton Piller* order.[144] This order is wholly a creation of the Federal Court,[145] the first known case involving such an order being the 1989 decision *Louis Vuitton SA c Tokyo-Do Enterprises Inc*.[146] However, this is merely the first known challenge of such an order; it is unknown when such orders were

141. *Ibid*.
142. *Ibid*.
143. *Ibid* at para 4 (the measure had been tailor-made for Air Canada's "quasi-monopoly" on the Canadian domestic air travel market).
144. See Daniel S Drapeau, "Anton Piller Orders: The Latest Word from the Supreme Court, the Federal Court of Appeal and the Federal Court" (2006) 20:1 IPJ 39 at 40-41.
145. See *Ibid*.
146. (1989), 16 ACWS (3d) 25, [1989] ACF No 432 (FCTD).

precisely created,[147] most likely because of the rarity of challenges against them. Rolling *Anton Piller* orders were devised to be used against unknown defendants or defendants with unknown addresses.[148] Unlike usual *Anton Piller* orders (known as "defendant-specific" orders), the named defendants in applications for such orders need not have any connection to the actual unknown defendant ("John Doe") against whom the order is to be executed.[149] Generally drafted to last for a year with the possibility of renewal,[150] such orders are useful against defendants whose transient business or shifting location would render the execution of an ordinary *Anton Piller* order impractical or even impossible.[151] Created to deal with counterfeiting but since also used for other purposes, such an order can be executed throughout Canada, by virtue of the Federal Court's unique national jurisdiction.[152] Other courts have also followed the Federal Court in issuing such orders within their respective provincial jurisdictions,[153] though the Federal Court remains the primary issuer.

Evidently, the rolling *Anton Piller* order engages many of the same issues as its defendant-specific counterpart, albeit in a much more insidious fashion. In addition to having all the regular trappings of an *Anton Piller* order, a rolling order is issued ex parte against an unknown defendant or, more often, a considerable number of unknown defendants who are later added to the action, while having effect over any number of yet unknown locations across a province or all of Canada.[154] Some cases even number hundreds of defendants added ex post facto,[155] with one example reaching eight hundred defendants, a number so high that it reached the limits of the court registry, causing the Federal Court to issue a new nationwide order.[156]

With such a high number of defendants, it might be surprising to learn that defendants rarely contest rolling *Anton Piller* orders, as with defendant-specific orders.[157] In fact, there seems to be even less jurisprudence on rolling orders than there is on defendant-specific orders, the latter of which at least made it to the Supreme Court of Canada in *Celanese*. Defendants

147. Berryman, "Thirty Years After," *supra* note 5 at 135.
148. See CED 4th (online), *Injunctions*, "Anton Piller Orders: 'Rolling' Orders" (V.2) at § 270-271.
149. *Ibid*; Berryman, "Thirty Years After," *supra* note 5 at 136.
150. CED, *supra* note 148 at § 270.
151. *Ibid*; Berryman, "Thirty Years After," *supra* note 5 at 137.
152. See Drapeau, *supra* note 144 at 40-41.
153. See e.g. *Bell*, *supra* note 85 (in the Ontario Superior Court); *Chabot*, *supra* note 17 (on appeal from the Superior Court of Quebec).
154. See *ibid*.
155. See Berryman, "Thirty Years After," *supra* note 5 at 129.
156. See *Nike Canada Ltd v Jane Doe*, 92 ACWS (3d) 299, 177 FTR 18 (FCTD).
157. See Berryman, "Thirty Years After," *supra* note 5 at 129, 136.

rarely choose to defend these orders, and this is not surprising if their circumstances are taken into account; defendants may be served, reviewed, and have judgment entered against them all in rapid succession months after the original order was issued, all the while new defendants keep being added to the order.[158] The renewability of the year-long term of the order often means that these will number in the hundreds, as mentioned above. Given that the defendants are mostly transient street vendors,[159] likely of meagre means and little legal education, they might either think the matter already settled or lack the means to mount a challenge.

2. Charter *challenges of the rolling* Anton Piller *Order*

A quick examination of the panoply of constitutional challenges previously attempted with respect to defendant-specific *Anton Piller* orders reveals that the rolling *Anton Piller* order might be even more secure against many of these constitutional challenges, despite being far more draconian. For starters, the very decision that found the *Charter* inapplicable to *Anton Piller* orders, *Viacom Ha! Holding Co v Jane Doe*,[160] dealt with a rolling *Anton Piller* order.[161] To make matters worse for such a challenge, the Court in *Viacom* held that even if the *Charter* were applicable, any challenge would still fail, given that the Federal Court's model rolling *Anton Piller* order was designed to comply with the *Charter*.[162] The decision in question was upheld in a short Federal Court of Appeal judgment that did not discuss any *Charter* issues.[163] *Viacom* dealt with a challenge under section 8 of the *Charter*, which protects against unreasonable search or seizure; however, it is unlikely that a section 7 challenge, regarding the defendants' liberty interest, would fare any better. That is because a defendant is unlikely to be imprisoned for disobeying a rolling *Anton Piller* order. Indeed, imprisonment for contempt will rarely be used and only in cases of continuous refusal to comply with the order.[164]

Nonetheless, a common law court striking down a particular form of *Anton Piller* order is not unheard of. In *Rank Film Distributors Limited*

158. *Ibid* at 136.
159. See CED, *supra* note 148 at § 270.
160. *Supra* note 17.
161. See *Ibid*.
162. See *ibid* at para 83. One of the elements militating for *Charter* compliance would likely be that rolling *Anton Piller* orders regularly include the protection that the premises to be searched do not include the defendant's residence unless specific evidence of wrongdoing there exists (see *Viacom* FCTD, *supra* note 17 at paras 80-84).
163. See *Viacom* FCA, *supra* note 30. In *Procter & Gamble Inc v John Doe* (2000), 94 ACWS (3d) 989 at para 58, 2000 CarswellNat 121 (WL Can) (FCTD), Teitelbaum J found that a rolling *Anton Piller* order met the section 8 criteria anyway.
164. See Berryman, "Thirty Years After," *supra* note 5 at 138.

and Others v Video Information Centre (A Firm) and Others,[165] the British House of Lords dealt with an *Anton Piller* order that required a defendant to "supply information" and to "disclose and produce documents" related to the action, effectively obliging them to testify.[166] Evidently, this is a far cry from the original and ordinary function of the *Anton Piller* order, which is concerned with evidence protection, not compelled testimony. Ultimately, the part of the order obliging the defendant to produce information was found to contravene the common law privilege against self-incrimination.[167] The Law Lords' specific reasoning was that, although the *Anton Piller* order is a civil law instrument, such coerced testimony would open the defendants to a criminal charge of conspiracy to defraud, thereby engaging the privilege against self-incrimination.[168]

In Canada, the privilege against self-incrimination has been codified as a constitutional right, which is protected by sections 11(c) and 13 of the *Charter*.[169] As stated in Part II(a), the Supreme Court of Canada has recognised that contempt of court, which is the threat backing up an *Anton Piller* order, implicates the defendant's anti-self-incrimination protections in section 11(c).[170] However, the Supreme Court has also determined that *Anton Piller* defendants are not "witnesses" within the meaning of sections 11(c) and 13.[171] Moreover, the Court has decided that witnesses can be compelled to testify in most non-criminal cases, even if there is a possibility that their testimony will be used against them in criminal proceedings later on.[172] Therefore, it is highly likely that *Rank Film* would have been decided differently before a Canadian court. This paints an image of a judicial culture that is much more permissive of expansions of the *Anton Piller* order beyond the ordinary, defendant-specific model. The fact that the rolling *Anton Piller* order is an original creation of the Federal Court of Canada only serves to reinforce this impression.[173] It also ought to be noted that the United Kingdom has codified the *Anton Piller* order through the *Civil Procedure Act 1997*,[174] which has overturned *Rank Film* to allow compelled testimony.[175] However, other British statutes have

165. (1981), [1982] AC 380, [1981] 2 All ER 76.
166. *Ibid* at para 5.
167. *Ibid* at paras 4-8, 14-15.
168. *Ibid* at para 8.
169. *Supra* note 21.
170. *Vidéotron*, *supra* note 52.
171. *Apple Computer*, *supra* note 77 at 291.
172. *Branch*, *supra* note 81 at paras 46-47.
173. Drapeau, *supra* note 144 at 40-41.
174. *Civil Procedure Act 1997* (UK), s 7.
175. *Ibid*, s 7(5)(a).

precluded the use of evidence obtained through such testimony for related proceedings that could result in a penalty, to respect the privilege against self incrimination.[176] Perhaps a similar statute could be enacted in Canada, given that there already are examples of Canadian cases where defendants were compelled to produce information and evidence by an *Anton Piller* order,[177] thereby resembling the order struck down in *Rank Film*.

3. *Non-*Charter *Constitutional Challenges of the Rolling* Anton Piller *Order*

In the case of the rolling *Anton Piller* order, its distinguishing feature is the lack of a specific defendant or location against which the order is directed. Thus, any novel non-*Charter* avenues of attack that have not already been discussed in Parts II(b) and (c) would have to focus on this feature. For starters, it could be argued that it is beyond the power of the courts to issue such a broad order, which has application not only against an unknown number of unknown defendants,[178] but also applies throughout the territory of Canada or a province without any jurisdictional limitations.[179] This would essentially be the ultra vires argument examined in Part II(b), but specifically adapted to the particular modalities of the rolling *Anton Piller* order. However, this line of thought is cut short by a consideration of the Supreme Court decision of *MacMillan Bloedel Ltd v Simpson*.[180] In that case, Justice McLachlin, as she then was, wrote for a unanimous court, affirming that Canadian courts have the power to issue "John Doe" injunctions, which are fully binding on those who are not party to the action.[181] Not only can a court enjoin unknown persons not to violate its orders, it need not even use terms such as "John Doe" or even refer to unknown persons at all.[182] It ought to be noted that this was a general decision regarding "John Doe" injunctions, as no specific ruling on the power of courts to grant rolling *Anton Piller* orders against unknown persons has yet been issued.[183] Nevertheless, given this sweeping endorsement of "John Doe" injunctions generally, and given the unlikelihood of success of a general ultra vires challenge noted in Part II(b), is seems that any attempt to paint the rolling *Anton Piller* order as ultra vires the courts has little

176. See e.g. *Senior Courts Act 1981* (UK), s 72 [*Senior Courts Act*].
177. *Apple Computer*, *supra* note 77 at 290.
178. As stated before, this number often rises to the hundreds.
179. Drapeau, *supra* note 144 at 40-41 (when granted by the Federal Court).
180. [1996] 2 SCR 1048, 137 DLR (4th) 633 [*MacMillan* cited to SCR].
181. *Ibid* at paras 36-37.
182. *Ibid* at para 42.
183. See e.g. *Vinod Chopra*, *supra* note 1; *Viacom* FCD, *supra* note 17; *Fila*, *supra* note 40; Though several of the constitutional challenges mentioned in Part II involved "John Doe" orders, this particular issue was never brought up.

chance of success.[184] Another facet of this same argument limited only to the Federal Court would be that the Court cannot create new modalities of the *Anton Piller* order, as it is a court of statutory, rather than inherent jurisdiction. As such, the rolling *Anton Piller* order would be ultra vires the Federal Court of Canada. However, as mentioned in Part II(b), the Federal Court has already cited its own supposed "inherent jurisdiction" to grant *Anton Piller* orders,[185] a view supported by the Supreme Court's determination that the Federal Court's statutory jurisdiction is concurrent with that of a provincial superior court.[186] Therefore, such an argument, though apparently logical, would not likely be accepted by the courts.

As with the defendant-specific *Anton Piller* order, the rolling order could also be attacked as violating the principles of natural justice. A challenge specific to the rolling *Anton Piller* order would be that, by being directed against persons who are non-parties at the moment of its issuance, it violates a fundamental principle of justice. Arguably, that principle would be audi alteram partem, since the unnamed party lacks any form of notice with which to challenge the order. Two considerations strengthen this argument: first, the Supreme Court has recognised audi alteram partem as part of Canadian law;[187] second, as was previously mentioned, the defendants of such orders are generally transient vendors,[188] who often lack the resources and knowledge to challenge a rolling *Anton Piller* order, as shown by the small volume of relevant jurisprudence.[189] The large number of defendants (sometimes in the hundreds per order)[190] and the relatively few contestations would mean that this order operates as a unilateral seizure mechanism, rather than an order which can be properly contested by the party following execution. Arguably, these two considerations would render the application of audi alteram partem particularly sensitive in this context.

However, the Supreme Court also considered a similar argument in *MacMillan*, where the appellant argued that an order issued against non-parties violates the "principle of fundamental justice" that a writ notifying

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184. This is because, like injunctions, they are ad personam orders and thus apply to the defendant wherever they are.

185. *Netbored*, *supra* note 16, citing Berryman, "Anton Piller Orders," *supra* note 115.

186. *Canadian Liberty*, *supra* note 118 at para 38.

187. See *Baker*, *supra* note 138; Flood & Sossin, *supra* note 138 at 188ff (audi alteram partem is recognized as a part of Canadians' right to procedural fairness).

188. That is, individual small-scale sellers without a set location, such as street merchants selling "bootleg" goods. Rolling *Anton Piller* orders are useful because they enable plaintiffs to seize the goods of such vendors as they find them.

189. Berryman, "Thirty Years After," *supra* note 5 at 129, 136-137.

190. *Ibid* at 129, 136.

a defendant of proceedings against them is required for any court to grant relief for the plaintiff.[191] This argument is perhaps even stronger here than with regard to the defendant-specific *Anton Piller* order, because the defendant becomes a party *and* receives notice at the moment of execution, instead of merely receiving notice at the moment of execution. That is to say, the defendant could not have even received notice before execution due to not being named in the originating application. Despite this, the Court rejected the argument regarding "John Doe" orders as a whole, considering it a "distinction without difference" that a party should be named in an injunction to be bound by it.[192] Nevertheless, that decision dealt with "John Doe" injunctions broadly and not rolling *Anton Piller* orders in particular. In a suit concerning rolling *Anton Piller* orders, the distinction could be made that there is a great imbalance of power between the transient vendor class that commonly defends against such an action and the major IP holders that initiate such actions against hundreds of defendants. In the past, courts have shown sensitivity to such considerations.[193] Of course, transient vendors are not the only class of defendant for such orders; nevertheless, they are the most common defendants, meaning that they would provide an opportunity for this argument to be made.

As with the defendant-specific *Anton Piller* order in Part II(c), a challenge invoking the principles of fundamental justice seems to have a moderate chance of success. On the one hand, courts have shown strong favourability to "John Doe" injunctions broadly and have long granted rolling *Anton Piller* orders in particular. On the other hand, arguments about the unfairness of the order, to the point of violating audi alteram partem and operating as a unilateral seizure mechanism, have some merit. Ultimately, it would be up to the courts to decide such a matter. Nonetheless, given the low volume of challenges of rolling *Anton Piller* orders, it will take a long time for such a challenge to occur. Moreover, *Charter* or ultra vires challenges of such orders are not likely to succeed, as outlined above. As such, the most productive route to limit the nefarious effects of *Anton Piller* orders would be to impose further limitations and requirements upon them, something which will be explored in Part IV.

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191. *MacMillan*, *supra* note 180 at para 22.
192. *Ibid* at para 28.
193. See e.g. *Uber Technologies Inc v Heller*, 2020 SCC 16, where the Supreme Court held that a mandatory arbitration clause in an employment contract was unconscionable, given the great power imbalance between the employer and the employee.

IV. *Imposing additional requirements and safeguards on* Anton Piller *Orders*

1. *Imposition of additional criteria for issuance*

Even if the *Anton Piller* order, both in its defendant-specific and rolling modalities, cannot be expunged from Canadian law as unconstitutional, there may still be additional requirements that can be imposed upon both its issuance and execution. In *Ridgewood Electric*, for example, the Ontario Superior Court of Justice casts doubt on the legal foundation of the *Anton Piller* order before stating that it ought to be "structured" so as to afford greater protection to defendants' residences.[194] If the judiciary cannot do much to overturn the *Anton Piller* order as a whole, given its entrenchment in Canadian law, it can at least move towards a more restrictive approach. This movement was echoed by Canada's most important issuer of *Anton Piller* orders, the Federal Court, in *Netbored Inc v Avery Holdings Inc*[195] and this approach has since been endorsed by the Supreme Court of Canada.[196] After all, jurisprudence from the original *Anton Piller* decision to the Supreme Court's *Celanese* ruling is in agreement that the *Anton Piller* order is an "extraordinary" remedy limited to "exceptional" circumstances.[197]

As previously mentioned, the current Canadian test for the issuance of an *Anton Piller* order was set out by the Supreme Court in *Celanese* and requires the plaintiff to prove: (1) a strong prima facie case; (2) very serious actual or potential damage to the plaintiff due to defendant's alleged misconduct; (3) convincing evidence that the defendant possesses incriminating evidence; and (4) a real possibility that the defendant may destroy this evidence before the discovery stage.[198] In addition to these conditions, the Supreme Court imposed several safeguards on its execution, requiring: "a carefully drawn order which identifies the material to be seized and sets out safeguards to deal, amongst other things, with privileged documents; a vigilant court-appointed supervising solicitor who is independent of the parties; and a sense of responsible self-restraint on the part of those executing the order."[199] Though it might not be evident, these safeguards already contain one reform advocated by those promoting

194. *Supra* note 38 at paras 8, 20.
195. *Supra* note 16.
196. See Drapeau, *supra* note 144 at 48-49, citing *Celanese*, *supra* note 7 at paras 28-30.
197. *Celanese*, *supra* note 7 at para 1; *Anton Piller*, *supra* note 2.
198. *Celanese*, *supra* note 7 at para 35.
199. *Ibid* at para 1.

further restrictions on *Anton Piller* orders: an independent supervising solicitor (ISS).[200]

The ISS requirement has been explicitly adopted in England,[201] despite its necessity being rejected by the European Court of Human Rights.[202] In spite of the lack of compelling evidence for its adoption,[203] the Supreme Court of Canada mandated it anyway,[204] likely wishing to avoid abuse, given that *Anton Piller* defendants rarely have the resources to contest the order.[205] As such, the Supreme Court would perhaps be receptive to reform of the *Anton Piller* order. Such reform can primarily take two forms: first, the imposition of additional conditions to issue an *Anton Piller* order; and second, the imposition of further safeguards during its execution.

Before considering the imposition of any additional criteria to the *Celanese* test, it is worth noting that at least one of the current criteria has not been applied properly or consistently. Specifically, this is the requirement for a real possibility that the defendant may destroy the evidence that is the object of the *Anton Piller* order before the discovery stage. In *Viacom*, for example, the Court notes that "[c]ourts have recognized that it is difficult to prove with tangible evidence that an infringer has a history of destroying evidence."[206] Thus, courts have turned to general evidence of the defendant's "dishonest character" to fulfill this criterion,[207] without there being clear guidelines as to what constitutes such evidence. In one case, the defendants' not giving customers receipts was accepted as evidence.[208] The order was granted, even though no evidence of the defendants' having previously destroyed evidence was brought forward.[209] In *Vinod Chopra*, the Federal Court struck down a rolling *Anton Piller* order which would have brought the administration of justice into disrepute.[210] The issuing

200. Drapeau, *supra* note 144 at 59.
201. See Adrian Zuckerman, ed, *Halsbury's Laws of England*, vol 11 (London, 2020: LexisNexis) at para 596; United Kingdom, Ministry of Justice, *Practice Directions to the Civil Procedure Rules* (last modified 6 April 2022) Practice Direction 25A-Interim Injunctions, para 7.1ff, online: *Justice* <www.justice.gov.uk/courts/procedure-rules/civil/rules/part25/pd_part25a> [perma.cc/26WZ-XXJR].
202. *Chappell v United Kingdom*, No 10461/83, [1989] ECHR 4, (1990) 12 EHRR 1 (Eur Ct HR) [*Chappell* cited to ECHR].
203. Berryman, "Challenging Shibboleths," *supra* note 105 at 520.
204. *Celanese*, *supra* note 7 at para 40.
205. Berryman, "Thirty Years After," *supra* note 5 at 128-129.
206. *Viacom* FCTD, *supra* note 17 at para 66.
207. *Ibid*.
208. See Allan M Rock, "The Anton Piller Order: An Examination of Its Nature, Development and Present Position in Canada" (1984) 5:2 Adv Q 191 at 195, referring to *Nintendo of America Inc v Coinex Video Games Inc* [1983] 2 FC 189, 34 CPC 108.
209. *Ibid*.
210. *Vinod Chopra*, *supra* note 1 at paras 57ff.

judge had considered this criterion fulfilled based on generalizations about the kinds of persons who destroy or conceal evidence, as well as hearsay.[211]

As such, one necessary reform of the *Anton Piller* order would be to outline stricter criteria for what kind of evidence would be necessary to discharge this prong of the *Celanese* test. For instance, Nathaniel Lipkus has recommended an 'adjusting scale' approach; per this approach, more or less stringent evidence of the defendant's dishonest character would be required, proportional to the fragility or concealability of the evidence targeted by the *Anton Piller* order.[212] In addition, it would perhaps be preferable for courts to give concrete examples of the sorts of evidence that would be necessary for each level of scrutiny. This could either be accomplished through a Supreme Court decision or, more likely, through revision or creation of model *Anton Piller* orders, which several Canadian courts already have.[213] One year after *Vinod Chopra*, the Supreme Court ruled that past civil or criminal decisions could be used to prove the defendant's dishonest character.[214] While this served to indicate one kind of evidence that may be used, it did not provide a comprehensive list or set of guidelines to discharge this criterion.

Moreover, on top of the four *Celanese* criteria, there is an additional criterion mentioned in the jurisprudence and noted in doctrine.[215] This is the requirement that the inspection would do no real harm to the defendant or its case.[216] In fact, this criterion is listed in the original *Anton Piller* decision by Lord Denning,[217] as noted by the Federal Court in *Netbored*.[218] As such, it could easily be integrated into the current test without much effort. Indeed, the Federal Court has already successfully applied it in

211. *Ibid* at paras 36-40.
212. Lipkus, *supra* note 19 at 516-518.
213. Though these model orders are not law, they could offer a point of reference for plaintiffs, defendants, and judges at different stages of the issuance, execution, and challenge process. See e.g. Commercial List Users' Committee of the Ontario Superior Court of Justice, "Precedent Order to Allow Entry and Search of Premises" (last visited 18 November 2020), online: *Ontario Courts* <www.ontariocourts.ca/scj/files/forms/com/anton-piller-order-EN.doc> [perma.cc/YN8H-YZQB]; Anton Piller Working Group, "Draft Model Order for Seizure and Safekeeping of Evidence" (last visited 18 November 2020), online (pdf): *Law Society of British Columbia* <www.lawsociety.bc.ca/Website/media/Shared/docs/publications/notices/10-07-06_antonpiller.pdf> [perma.cc/3BYN-ZHGL]. As noted in *Viacom* FCTD, *supra* note 17 at para 83, the Federal Court also has a model rolling *Anton Piller* order, which was drafted to be constitutional.
214. *Malik*, *supra* note 83.
215. Rock, *supra* note 208 at 197; *Netbored*, *supra* note 16 at para 40, 63-66. In *Netbored*, examples of real harm mentioned include the defendant going out of business, or the bad service of an *Anton Piller* order making an unflattering first impression of the justice system on a teenage girl (*ibid* at 63-66).
216. Rock, *supra* note 208 at 198; *Netbored*, *supra* note 16 at para 40.
217. Rock, *supra* note 208 at 198.
218. *Supra* note 16 at para 40.

Netbored,[219] while also mentioning it in *Vinod Chopra*.[220] Specifically, the Court in *Vinod Chopra* notes that the *Anton Piller* order should only be granted if "no real harm would be done" from the defendant's point of view,[221] thereby making this a requirement for an *Anton Piller* order of similar status to the four *Celanese* criteria. Thus, it would not only be easy for the Supreme Court to add this criterion to the *Celanese* test, given its originating in the *Anton Piller* decision, but it could well be argued that its exclusion was erroneous. Interestingly, English courts have interpreted this criterion as the requirement that the order's likely harm to the defendant's business affairs not be disproportionate to the order's legitimate objective.[222] Perhaps Canadian courts could follow this approach. To quantify it, a formula calculating and comparing the harm to the defendant's business as opposed to the damages the plaintiff would be awarded in a successful action could be devised.

In the same vein, courts have suggested that issuance of an *Anton Piller* order should be contingent on not bringing the administration of justice into disrepute. This idea was first aired in *Netbored*.[223] In that case, the plaintiff's attorneys served an *Anton Piller* order on a fifteen-year-old girl, who phoned her mother and told them to return in the afternoon; they never returned.[224] Justice Hughes lambasted the sort of impression that that event, which was likely the girl's first contact with the Canadian judiciary, must have left upon her, calling it "real harm."[225] *Vinod Chopra* went on to cite *Netbored* and to explicitly formulate this as a requirement: "would the interests of justice be brought into disrepute?"[226] In fact, in that case, the *Anton Piller* order being reviewed was struck down for breaching this requirement due to the "careless, inadequate, or misleading" evidence it was founded upon.[227] Although this condition is not mentioned in the original *Anton Piller* decision, Lord Justice Shaw's concurring opinion raised an overriding concern for the executing party's

219. *Ibid* at paras 63-66.
220. *Supra* note 1 at para 24.
221. *Ibid* at para 8. In *Netbored*, *supra* note 16 "real harm" is construed as lasting harm to the defendant's legitimate interests or those of society at large, which must be evaluated from the defendant's perspective (*ibid* at 63-66). Of course, the use of legitimately seized evidence of the defendant's illegal activities would not be excluded by this criterion, given that the law could not possibly recognize a legitimate interest in concealing evidence of one's wrongdoing from the victim and the courts.
222. See *Indicii Salus Ltd v Chandrasekaran*, [2006] EWHC 521 (Ch) at para 85.
223. *Supra* note 16 at paras 63-66.
224. *Ibid*.
225. *Ibid*.
226. *Vinod Chopra*, *supra* note 1 at para 24.
227. *Ibid* at para 57.

duty to act with "prudence and caution."[228] This could reflect the same attitude found in Justice Hughes' comments in *Netbored*. As such, a strong case could be made for the adoption of both requirements by the Supreme Court. Arguably, they have already been adopted by the Federal Court in *Netbored*, and explicitly confirmed in the post-*Celanese* decision of *Vinod Chopra*.

Interestingly, the Federal Court has also suggested specific criteria for the rolling *Anton Piller* order. As Mentioned in Part III, the rolling *Anton Piller* is of particular concern, given its lack of a definite defendant and specific premises. In *Club Monaco Inc v Woody World Discounts*,[229] the Federal Court imposed a series of additional considerations solely for rolling *Anton Piller* orders, including: (i) personal knowledge of the plaintiff's relation to the problem in the affidavit; (ii) particular proof of the specific infringements of the plaintiff's rights or interests; (iii) proof of multiple infringements; (iv) proof that the illegal activity justifies a pan-Canadian scope of application by transcending provincial boundaries; (v) tangible proof of infringement rather than mere assertions; and (vi) a demonstration of proper usage of the previous order when applying for a renewal.[230] These requirements were cited and used in *Vinod Chopra*, as the case concerned a rolling *Anton Piller* order.[231] Although *Club Monaco* was a pre-*Celanese* decision, *Vinod Chopra* came after *Celanese*; as such, the Federal Court has arguably imposed a new set of conditions specific to rolling *Anton Piller* orders, which have yet to be examined by the Supreme Court. In Part III(c) a great power imbalance was noted between the transient vendors who are often the defendants of such orders and the major IP holders commonly seeking them. It was noted that this imbalance translates into a small number of contestations of rolling *Anton Piller* orders, despite their numerous defendants.[232] As such, the imposition of stronger restrictions on this kind of order could do much to protect defendants' interests, if the rolling *Anton Piller* order is to persist in Canadian law. As also noted in Part III, this kind of order essentially operates as a unilateral seizure mechanism due to a lack of contestation; thereby, it would seem logical to require tangible proof of repeated violations that transcend the area of a single jurisdiction before granting such sweeping powers to a plaintiff ex parte.

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228. See *Anton Piller*, *supra* note 2, Shaw LJ, concurring.
229. (1999), 45 CPC (4th), 2 CPR (4th) 436 (FCTD) [*Club Monaco* cited to CPC].
230. *Ibid* at para 7.
231. *Vinod Chopra*, *supra* note 1 at para 25.
232. Berryman, "Thirty Years After," *supra* note 5 at 129, 136-137.

2. *Imposition of additional safeguards on execution*

Beyond additional conditions put forth by courts themselves, doctrinal writers have also suggested modifications to the current execution framework, chiefly to protect the defendant's "privacy and liberty and the natural justice principle, audi alteram partem."[233] Interestingly, those are the same heads under which the main constitutional challenges of the *Anton Piller* order have fallen; ultimately, if these interests can be safeguarded by the modification of the order rather than by its abolition, the ultimate goal would still be met. Despite the adoption of the ISS requirement by the Supreme Court,[234] it has been shown to have generally not had an effect.[235] Instead, minimum experience requirements for the serving attorney have also been recommended.[236] The European Court of Human Rights relied partly on its faith in lawyers' professionalism to reject the ISS requirement,[237] so more experienced and professional lawyers could perhaps succeed where the ISS failed.

Likewise, permission to search the residence of a defendant could only be granted where direct evidence of wrongdoing there has been produced, the residence being otherwise explicitly excluded from the definition of the "premises" to be searched. This is already a practice of the Federal Court with respect to rolling *Anton Piller* orders,[238] but it could be extended to all orders. Such an approach would safeguard the privacy interest of defendants' homes, while putting to rest the fears behind section 8 challenges. It would also assuage the general public's concerns of being deprived of the right to exclude from their home to anyone but warrant-carrying police, concerns which were even noted by Lord Denning in the original *Anton Piller* case.[239]

The United Kingdom, as the original source of the *Anton Piller* order, is a potential source of inspiration for further reform. English courts have recently shown growing restraint and skepticism towards the order, driven by concern over the principle of audi alteram partem.[240] This is particularly pronounced in *Columbia Picture Industries Inc v Robinson*,[241] which imposes several new safeguards. Namely, *Anton Piller* orders should be drawn with the minimal necessary extent to seize and preserve

233. Lipkus, *supra* note 19 at 514.
234. *Celanese*, *supra* note 7 at para 40.
235. Berryman, "Challenging Shibboleths," *supra* note 105 at 520.
236. Sarah Lovick, "Pillers of Justice" (1992) 142:6542 New LJ 323.
237. *Chappell*, *supra* note 202 at paras 17, 61.
238. Lipkus, *supra* note 19 at 519-520.
239. *Supra* note 2.
240. Brown, *supra* note 126.
241. *Supra* note 126.

fragile or concealable evidence, to infringe the defendant's rights as little as possible.[242] Moreover, a detailed record of seized items should be kept and only items covered by the order should be seized—in cases where it is difficult to determine whether material is covered by the order, it should be up to the judge and not the executing solicitor to decide.[243] To resolve the issue of the seizure of documents often depriving defendants of the means to make an effective defence, *Columbia Picture* suggests that seized items should be returned to the defendant as soon as possible;[244] particularly, items that are the object of a dispute between the parties (such as alleged illegal copies of films) should be returned before the trial.[245] Canadian courts have suggested dealing with this problem by allowing the defendant to keep or be provided with copies and samples of the seized goods.[246] Currently, *Celanese* limits itself to allowing the defendant to inspect and verify the listed goods to be seized before they are removed from the premises.[247]

Other recommendations considered in Britain include minimal experience requirements for the serving attorney and an ISS (already discussed above), mandating the presence of women if a woman is likely to be alone on the premises, and requiring that searches be conducted during ordinary office hours on weekdays.[248] This last measure would enable defendants to seek brief legal advice before the order is executed; it is argued this should be a right that defendants should hold and be informed of by the serving solicitor.[249] This recommendation has been echoed by some model orders, citing developments in English law,[250] whereas others have not applied this recommendation as strictly.[251] Given that model orders are not binding sources of law, it is unclear how much they can do to effect this change.

Of course, one major issue arising with this last recommendation is that many defendants who lack the means to defend against an order

242. *Ibid* at para 8.
243. *Ibid*.
244. *Ibid*.
245. *Ibid*.
246. *Havana House*, *supra* note 125 at para 21.
247. Drapeau, *supra* note 144 at 61.
248. See Lovick, *supra* note 236.
249. *Ibid*.
250. See e.g. Ontario Superior Court of Justice, *supra* note 213 at para 5, citing *Universal Thermosensors Ltd v Hibben and Others*, [1992] 1 WLR 840 (Ch) at 860, [1992] 3 All ER 257 (UK Ch D).
251. See e.g. Law Society of British Columbia, *supra* note 213 at para 16 (where the model order generally requires that searches be conducted between 9:00 a.m. and 5:00 p.m., but it allows for searches before 9:00 a.m. in some circumstances).

may not be able to afford to exercise this right anyway. Nevertheless, such defendants could be somewhat aided if the order itself is at least explained to them clearly upon service. The Supreme Court has already mandated a plain language explanation.[252] However, some authors have ventured further, suggesting that there should be a pre-written, court-approved explanation given to the defendant.[253] Given that it is unknown how many defendants choose not to challenge the order due to a lack of understanding,[254] an explanation that the *Anton Piller* order is not final and can be contested should at the very least be included in such a document.

Furthermore, as many defendants lack the financial means to mount such a defence,[255] a way should perhaps be devised to aid them. Currently, *Celanese* imposes undertakings on plaintiffs seeking *Anton Piller* orders in all cases, "[a]bsent unusual circumstances."[256] Perhaps conditional fee arrangements could be undertaken between lawyers and defendants based on a certain percentage of these undertakings.[257] To facilitate this, the sum of the undertaking submitted should be made known to the defendant upon service. Moreover, legal aid hotlines could be set up to provide defendants with advice once the order is served but before it is executed; while legal aid is usually reserved for public law matters, the highly intrusive nature of *Anton Piller* orders, which resemble a search warrant,[258] and the possibility of imprisonment for failure to comply could justify such a measure. After all, *Anton Piller* orders commonly determine the outcome of the case "immediately,"[259] meaning that legal aid would be most useful at the moment of service.

Courts could also use the already established practice of granting "interim" or "advance" costs. Essentially, this practice obliges the defendant to fund the plaintiff's litigation when the latter lacks the resources to do so. The current test for such costs is found in *British Columbia (Minister of Forests) v Okanagan Indian Band*,[260] and requires:

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252. *Celanese*, *supra* note 7 at para 40; Drapeau, *supra* note 144 at 61; Lovick, *supra* note 236.
253. See e.g. Lipkus, *supra* note 19 at 520.
254. Berryman, "Thirty Years After," *supra* note 5 at 128-129; *Havana House*, *supra* note 125 at para 21.
255. Berryman, "Thirty Years After," *supra* note 5 at 128-129.
256. *Celanese*, *supra* note 7 at para 40.
257. Admittedly, it is nonetheless doubtful whether such undertakings would be large enough to cover a lawyer's fees, particularly given the impecunious nature of many *Anton Piller* defendants. For instance, the sum value of an itinerant vendor's seized wares may hardly suffice to entice a lawyer to take on their case.
258. *Malik*, *supra* note 83 at para 29.
259. Robert Smith, "The Mareva Injunction and Anton Piller Order: Practice and Precedents, Richard Ough" (1987) 137:6314 New LJ 649.
260. 2003 SCC 71.

(i) an impecunious challenging party; (ii) a case with prima facie merit; and (iii) special circumstances, meaning a case that is in the public interest and whose issues have not been previously resolved.[261] Arguably, *Anton Piller* defendants are often impecunious,[262] satisfying condition (i); moreover, condition (ii) would operate to only admit meritorious challenges of *Anton Piller* orders, which must exist, as there are known instances of such orders being overturned.[263] With regard to criterion (iii), the lack of extensive jurisprudence on *Anton Piller* orders has been noted.[264] As such, there would be many questions that could be answered through such litigation, including, for example, many of the constitutional challenges examined in Parts II and III of this paper. Moreover, *Anton Piller* orders do arguably engage several important social interests, despite their private law context, these being defendant's "privacy and liberty and the natural justice principle, *audi alteram partem*."[265] Evidently, these interests are important enough to have been codified in sections 7, 8, 11(c) and 13 of the *Charter*.[266] As such, a good case could be made for the use of such costs to fund *Anton Piller* challenges.

Of course, assuming that defendants do obtain the funds necessary to challenge an *Anton Piller* order after the fact, they may run into a common problem facing those served with ex parte orders—namely, that the order may be reviewed by the same judge that originally issued it.[267] Though there are no rules requiring that the order be reviewed by the issuing judge,[268] it is nonetheless often the case that this happens, particularly because it is considered better practice by courts and lawyers alike.[269] As defendants might have a harder time convincing the issuing judge that their own order was unjust or unnecessary,[270] it might well be fairer for a new judge to be

261. *Ibid* at para 40.
262. Berryman, "Thirty Years After," *supra* note 5 at 136; CED, *supra* note 148 at § 270.
263. See e.g. *Vinod Chopra*, *supra* note 1 at para 57, where the Federal Court struck down a rolling *Anton Piller* order for violating multiple prongs of the *Celanese* test, *Netbored* requirements, and *Monaco Club* criteria, to the point of bringing the "interests of justice […] into disrepute."
264. See Berryman, "Thirty Years After," *supra* note 5 at 129, 136.
265. Lipkus, *supra* note 19 at 514.
266. *Supra* note 21.
267. See *R v McKeon*, 7 WCB (2d) 193 at para 18, 1989 CarswellBC 142 (WL Can) (BCSC), citing *Wilson v The Queen*, [1983] 2 SCR 594 at 606–610, 4 DLR (4th) 577 (both cases are criminal in nature, but they state that the rule is identical in civil law).
268. See e.g. *Canadian Paraplegic Assn (Newfoundland & Labrador) Inc v Sparcott Engineering Ltd* (1997), 150 Nfld & PEIR 203, 71 ACWS (3d) 1053 (Nfld CA); *TNT Canada Inc v Canada (Director of Investigation & Research)*, [1995] 2 FC 544, 54 ACWS (3d) 249 (FCTD); *Assindia Sales Ltd v Alexander* (1979), [1980] 2 WWR 298, 16 BCLR 239 (BCSC) [*Assindia Sales* cited to WWR].
269. *See Gulf Islands Navigation v SIU, Canadian District* (1959), 27 WWR 652, 18 DLR (2d) 216 (BCSC).
270. This is not to suggest by any means that judges would *never* be willing to set aside their own

required to review the order after it has been served and executed. This could likely be achieved through legislative reform, as current rules allow any judge of the court that issued the order, including the issuing judge, to review it.[271] Amending these rules would give defendants more of a fighting chance in reversing *Anton Piller* orders.

In the same vein, a final safeguard on the execution of *Anton Piller* orders could be their codification through provincial and federal legislation. The United States has already enshrined its equivalent of the *Anton Piller* order in the *Federal Rules of Procedure*.[272] However, this has not been done in the spirit of reform, but merely because the *Anton Piller* order did not exist in English law at the time of American Independence, and was therefore not integrated into US law by the *Judiciary Act of 1789*.[273] Instead, the United Kingdom has taken the lead with the *Civil Procedure Act 1997*.[274] Apart from codifying the *Anton Piller* order as is, legislation has also served to reform the order; for instance, though the UK *Act* overturned *Rank Film* to allow compelled testimony,[275] other statutes have precluded the use of evidence obtained through such testimony for related proceedings that could result in a penalty, to respect the privilege against self incrimination.[276] Arguably, this operates to dispel concerns regarding self-incrimination, which would resolve the issues raised by section 11(c) and 13 challenges in Canada. There is no reason why any of the reforms proposed in this paper could not be enacted through legislation, rather than waiting for gradual judicial reform. Indeed, given the aforementioned scarcity of appellate challenges, this might be the best means to reform the order.

Such legislation might, for instance, be used to mandate punitive damages in case an *Anton Piller* order is overturned. This could either be justified through the extreme intrusion into a party's life and rights that such an order entails,[277] or through the abuse of process that an unwarranted *Anton Piller* order could be argued to constitute,[278] given that

orders where this is fair—see e.g. *Secure Resources Inc v Wilson*, 2021 ABQB 744 for a recent case where Lema J of the Alberta Court of Queen's Bench set aside his own *Anton Piller* order. However, it would stand to reason that a judge, having already concluded that an order ought to be granted, would have a harder time changing their mind after the fact.

271. See *Supreme Court Rules*, BC Reg 221/90, r 44(8); *Assindia Sales*, *supra* note 268 at para 8ff.

272. *Supra* note 112, Rule 64. For ex parte orders, see also Rule 47(c) (*ibid)*.

273. See Lipkus, supra note 19 at 493ff and text accompanying note 111.

274. *Supra* note 174, s 7.

275. *Ibid*, s 7(5)(a).

276. See e.g. *Senior Courts Act, supra* note 176, s 72.

277. See e.g. *Imperial Tobacco Canada ltée c Conseil québécois sur le tabac et la santé*, 2019 QCCA 358 (where the court examined rights violations in its punitive damages analysis).

278. See e.g. *Thériault-Martel c Savoie*, 2014 QCCS 3937 (where the court awarded punitive

it is meant to be an extraordinary remedy used sparingly.[279] Alternatively, if an *Anton Piller* order is overturned, the party that sought it could be barred from seeking such orders anew without special leave of the court, as is currently the case for vexatious litigants.[280] Hopefully, such measures would discourage plaintiffs from applying for *Anton Piller* orders carelessly due to their confidence that the defendant likely will not seek to overturn the order, thereby limiting the ever-expanding use of such orders. The measures proposed would also shift some of the order's cost to the plaintiff, further discouraging its inconsiderate use.

Conclusion

Forty-five years after the *Anton Piller* order's creation, and fourteen years after its importation into Canadian law, the once-extraordinary remedy has now grown into a mature and well-entrenched part Canada's procedural law; so much so, in fact, that the Canadian judiciary has seen fit to innovate upon the order, creating its uniquely Canadian "rolling" or "John Doe" variant. Despite the *Anton Piller* order's apparent engagement or even outright infringement of several *Charter* rights, such as the protection against unreasonable search and seizure, the protection against unjustified infringement of one's liberty interest, and the right to not testify in one's own prosecution, the order has withstood all *Charter* challenges so far, and seems likely to do the same with any future challenges. Challenges of the order alleging that it is ultra vires the courts or in contravention of the principle of audi alteram partem, though perhaps more meritorious, are also unlikely to find acceptance in a judiciary that has shown considerable deference to *Anton Piller* orders. The same can be said of rolling *Anton Piller* orders in particular, despite their being even more draconian. Therefore, the best remedy for the *Anton Piller* order's infringement of defendants' rights and interests would be its reform, which would consist of imposing additional conditions for its issuance and further safeguards upon its execution. Several potential paths of reform exist, including the importation of British reforms, the application of doctrinal recommendations, or even the repurposing or mimicking of existing procedural safeguards in other areas of Canadian law. Such measures can address many of the concerns surrounding the order to a large degree; however, given the sparse jurisprudence surrounding these

damages for abuse of process).

279. See *Anton Piller*, *supra* note 2; *Celanese*, *supra* note 7 at para 1.

280. See generally CCP, *supra* note 89, c 3(2), art 55; *Productions Pixcom inc c Fabrikant*, 2005 QCCA 703; *Courts of Justice Act*, RSO 1990, c C.43, s 140; *Rules of Civil Procedure*, RRO 1990, Reg 194, r 25.11.

orders, legislation, rather than judicial activism, might be the best method for reform.