

August 1, 2023

Leaving on a Jet Plane? Not so Fast

by [Corey Groper](#)

In *Wayne Safety Inc. v. Diana Gendelman et al.*, Osborne J. considered when a court may order defendants in a civil proceeding to surrender their passports. After noting that the jurisprudence in this area is “relatively limited”¹, Osborne J. set out a number of useful factors for future courts to consider in determining whether an order compelling the surrender of passports should be made.

Background

The defendants were alleged to have engaged in a fraud. After awarding the plaintiff a wide range of interlocutory relief in the form of Anton Piller, Mareva and Norwich orders as well as the appointment of an Independent Supervising Solicitor (the “ISS”), the matter returned before Osborne J. for the adjudication of several additional issues, including the defendants’ request that the passports they had deposited for safekeeping with counsel for the ISS be returned.²

Despite confirming that they had no imminent travel arrangements planned, the defendants “vigorously” submitted that they regularly visited friends and family members in Russia and Israel and that there was no basis for an order restricting their ability to do so.³

The plaintiff opposed the return of the passports, arguing that the defendants posed a flight risk given that they had friends and family members abroad and that whatever properties they owned in Ontario appeared to be “under water”. For these reasons, the plaintiff argued that there was good reason to believe that a significant portion of the funds allegedly stolen from it had been transferred overseas.⁴

¹ Endorsement of Osborne J. dated June 12, 2023, *Wayne Safety Inc. v Diana Gendelman et al.*, 2023 ONSC 3517 (CanLII) (“Endorsement”), [para. 32](#).

² Endorsement, [paras. 1-5](#).

³ Endorsement, [para. 30](#).

⁴ Endorsement, [para. 31](#).

The Surrender of Passports: A Question of Justice and Convenience

Osborne J. began by recognizing that courts have, on numerous occasions, ordered the surrender of passports belonging to defendants in civil proceedings. In doing so, he held that the court's jurisdiction to grant such an order flows from s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "CJA"), which grants a judge the power to issue an interlocutory injunction or mandatory order where it appears to be just or convenient to do so.⁵

Ordering the Surrender of Passports Ought to be "Granted with Caution"

Despite finding that the discretionary jurisdiction under s. 101 of the CJA should be interpreted "sufficiently broadly to include the power to order the surrender of a passport", Osborne J. noted that imposing such a term "ought to be granted with caution", as the nature of the right being infringed is "qualitatively different" than the rights affected by other types of extraordinary relief, such as Mareva, Anton Piller and Norwich orders.⁶

Unlike those other types of orders, "which focus on the preservation and production of assets and/or evidence", orders requiring the surrender of passports infringe upon "the liberty and freedom of movement of the holder of that passport." As such, the threshold for obtaining such an order should be "high."⁷

Flight Risk Not Necessarily Enough

In determining whether to make an order directing the surrender of a passport, the issue should not be framed by simply posing the rhetorical question of whether the defendant "poses a flight risk." While that issue is clearly part of the analysis, it cannot, on its own, form the entire analysis. Even where the defendant poses a flight risk, there must be some additional factual basis upon which to order the surrender of a passport.⁸

⁵ Endorsement, [paras. 32-37](#).

⁶ Endorsement, [paras. 38-39](#).

⁷ Endorsement, [para. 40](#).

⁸ Endorsement, [para. 41-42](#).

The Relevant Factors

While not purporting to set out any definitive test, Osborne J. went on to enumerate a list of factors which “could be useful in determining whether an order compelling the surrender of passports should be made.” In doing so, he noted that the analysis will be very fact specific and will only be applied once entitlement to Mareva relief has been established.

The relevant factors include the following:

- a) are there assets, and particularly assets (including but not limited to funds), located outside the jurisdiction, which are the subject of the Mareva relief?
- b) were those assets transferred out of the relevant jurisdiction in an attempt to place them beyond the reach of the court?
- c) were there attempts on the part of the defendant to hide, to not disclose, or transfer contrary to any court order, any assets, documents, or other evidence out of the jurisdiction?
- d) were there attempts on the part of the defendant to hide, to not disclose, or transfer any assets contrary to a court order?
- e) was there a breach by the defendant of a prior order of the court?⁹

In his concluding remarks, Osborne J. stated that the legal test requires further judicial consideration and that other factors, in addition to the non-exhaustive list set out above, may be relevant to the analysis.¹⁰

Key Takeaways

1. Ontario courts have jurisdiction to make orders directing defendants in civil proceedings to surrender their passports pursuant to s. 101 of the *CJA*.
2. In exercising their discretionary power to order the surrender of a passport, courts must proceed with caution.
3. The threshold for obtaining an order directing the surrender of a passport should be high as it infringes upon the liberty and freedom of movement of the defendant.
4. As a starting point, the moving party must satisfy the court that a Mareva injunction freezing the subject assets should be granted. Only when such a burden has been met will the court consider whether the defendant’s passport should be surrendered.¹¹

⁹ Endorsement, [para. 45](#).

¹⁰ Endorsement, [para. 45](#).

¹¹ Endorsement, [para. 46](#).

5. It is not enough to simply show that the defendant poses a flight risk. More is required including, among other things, overt attempts by the defendant to dissipate, move or transfer assets beyond the relevant jurisdiction, especially if those attempts are undertaken in breach of a court order.