Interlocutory Injunctions: Revisiting the Three-Pronged Test

Jean-Philippe Groleau*

The three-pronged test that courts in Canada and in other jurisdictions apply in considering applications for interlocutory injunctions is well established: the applicant must demonstrate that (1) there is a serious question to be tried, (2) he will suffer irreparable harm if denied the relief, and (3) the balance of inconvenience pending trial favours him. This article examines the premises underlying this test. First, the test presumes that the hearing on an application for an interlocutory injunction is conducted at a time when only incomplete and disputed evidence is available to the court. From this premise flows the low threshold of determining whether there is a serious question to be tried. Second, the test presumes that the remedy is sought to preserve the rights of the parties pending trial. From this arises the necessity of determining whether the harm will be reparable at trial and where the balance of inconvenience lies in the interim.

The author argues that these assumptions are inaccurate for many applications for interlocutory injunctions—applications that involve no material facts in dispute or that finally dispose of the dispute between the parties. In all these cases, it is argued that the three-pronged test is ill-conceived and that the court should adjudicate primarily on the merits. The author closes his analysis by proposing a general approach to assess the importance to be given to the merits and the balance of inconvenience in any given case. He bases this approach on where that case falls with regard to its potential end-result and its degree of factual complexity.

Le test qu'appliquent les tribunaux judiciaires au Canada et au sein d'autres juridictions lors de l'analyse d'une demande d'injonction interlocutoire est bien établi: le requérant doit démontrer (1) qu'il y a une question sérieuse à juger, (2) qu'il subira un préjudice irréparable si sa demande est refusée et (3) que la balance des inconvénients penche en sa faveur en attendant une décision sur le fond. Cet article examine les hypothèses sur lesquelles repose ce test. D'une part, le test présuppose que la preuve présentée lors de l'audition d'une demande d'injonction interlocutoire est incomplète et contestée. De cette proposition découle la première étape du test, qui consiste à déterminer s'il y a une question sérieuse à juger, un seuil facile à atteindre. Le test présuppose également que le remède servira à préserver les droits des parties en attendant une décision sur le fond. Cette proposition engendre les deux dernières étapes du test, à savoir la nécessité de déterminer si le préjudice que le requérant subira si l'injonction est refusée sera réparable par une décision au fond et où se situe la balance des inconvénients en attendant cette décision.

L'auteur soutient que ces hypothèses sont mal fondées dans un grand nombre de demandes d'injonction interlocutoire, c'est-à-dire celles où les faits ne sont pas vraiment contestés et celles qui équivalent en fait au règlement final de l'action. Pour toutes ces demandes, l'auteur prétend que l'application du test traditionnel est inappropriée et que la cour doit juger principalement sur le fond. L'auteur conclut son analyse en proposant une approche générale pour évaluer l'importance qui doit être accordée, lors de toute demande d'injonction interlocutoire, au fond de l'affaire et à la balance des inconvénients. Cette approche consiste à examiner la finalité d'une demande d'injonction interlocutoire ainsi que son degré de complexité factuelle.

* LL.B. (Montreal), LL.M. (Cambridge). Associate, Freshfields Bruckhaus Deringer LLP (London).
The author wishes to thank his former colleagues at Davies Ward Phillips & Vineberg LLP in Montreal for all their encouragement, and particularly Louis-Martin O'Neill, without whose support and input this article would not have seen the light of day. The views expressed in this article are strictly those of the author and not of any law firm. Any errors are, of course, the sole responsibility of the author.

To be cited as: (2008) 53 McGill L.J. 269
Mode de référence : (2008) 53 R.D. McGill 269

Introduction

It is now viewed as trite law that an applicant for an interlocutory injunction must fulfill three conditions before the court will grant his application, namely, he must show that (1) there is a serious question to be tried, (2) he will suffer irreparable injury if refused the interlocutory relief, and (3) the balance of inconvenience resulting from granting or denying the interlocutory relief lies with him rather than with the respondent.[1]

Two important premises underlie this three-pronged test. First, the test assumes that the hearing on an application for an interlocutory injunction is conducted upon incomplete and disputed evidence. Consequently, the motions judge is not in a position to properly assess the relative strength of the parties' cases. This premise creates a low threshold for the applicant to meet in order to fulfill the requirement of the first prong: demonstrating that there is a serious question to be tried.

Second, the test assumes that the remedy's raison d'être is to preserve the rights of the parties in the most equitable fashion pending trial. This premise underlies the last two prongs of the test: (1) determining whether the applicant will suffer irreparable harm if the injunction is refused,[2] and (2) finding where the balance of inconvenience lies in granting or denying the injunction, or in other words, who between the applicant and the respondent will be most disadvantaged by the grant or denial of the interlocutory injunction.

These two assumptions are misguided in at least some applications for interlocutory relief.[3] Undermining the validity of the first assumption are those cases that present no material facts in dispute at the interlocutory hearing or whose factual records before the motions judge are complete. In such cases, the very reason for refusing to consider the merits is absent. It is thus puzzling why a court would grant an interlocutory injunction when it could easily determine that the right it serves to protect does not appear to exist. The best test to adjudicate on an application for an

---

[1] See e.g. *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, [1975] 1 All E.R. 504 (H.L.) [*American Cyanamid* cited to A.C.]; *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, 38 D.L.R. (4th) 321 [*Metropolitan Stores* cited to S.C.R.]; *RJR-MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 [*RJR-MacDonald* cited to S.C.R.]; *Brassard c. Société zoologique de Québec inc.*, [1995] R.D.J. 573 (C.A.) [*Brassard*].

[2] Hence, it is in the nature of this condition that it will invariably have to be met in order for an interlocutory injunction to be issued however clear the right the applicant seeks to protect may seem. The fulfillment of this condition is even a statutory requirement in Quebec, under art. 752 C.C.P. However, the requirement that the harm be truly "irreparable" (in the sense that it cannot be compensated by an award in damages) has been relaxed over the years. See *infra* note 88.

[3] The author, most unfortunately, has no empirical evidence with regard to the proportion of hearings on applications for interlocutory relief where these two assumptions are misguided, either completely or partially.

interlocutory injunction is always whether the right the applicant seeks to protect does indeed seem to exist: the balance of inconvenience test is merely second-best.

In addition, not all interlocutory injunctions are sought merely to preserve rights pending trial, negating the relevance of the second assumption. Indeed, the nature of many interlocutory injunctions is that they dispose of the dispute between the parties, thus having a final effect. In such cases, where both the successful and unsuccessful party on the interlocutory application have negligible incentives to proceed to trial, courts should engage in an extensive review of the merits at the interlocutory stage, notwithstanding the difficulties involved. The predominant—if not the only—consideration should be the strength of each party's case. Weighing the balance of inconvenience is only relevant where the court's mission is to find the most equitable way to preserve the respective rights of the parties pending trial. Since there will be no trial in such cases, any examination of this condition is unnecessary.

It follows from the above that the three-pronged test is only just and convenient when applied to a specific set of circumstances, that is, where the factual record is incomplete and where the remedy is sought to preserve rights pending trial. Only by assessing where the circumstances of each application for an interlocutory injunction fall with respect to the premises underlying the traditional three-pronged test will courts be able to come to just and convenient results. This article aims to provide an analytical framework within which the courts can make that assessment. It is hoped that the propositions laid down in this article will at least help to reveal the true nature of the contemporary three-pronged test: a convenient guideline to be applied in cases that truly warrant it. This test should not be applied as a straitjacket, for doing so could only result in what the test sought to avoid in the first place—inequitable and impractical solutions.

I. Contemporary Approach to Interlocutory Injunctions

A. The American Cyanamid *Three-Pronged Test*

For the greater part of the nineteenth and twentieth centuries, applicants for interlocutory injunctions had to meet the test laid out by William Williamson Kerr in 1888, namely that "[t]he Court must, before disturbing any man's legal right, or stripping him of any of the rights with which the law has clothed him, be satisfied that the probability is in favour of his case ultimately failing in the final issue of the suit."[4] The rationale motivating this rule was set forth by Justice Laddie in *Series 5 Software Ltd. v. Clarke*:

> There was obvious sense in this approach, since if the court came to the preliminary view on the hearing of the application for interlocutory relief that the defendant was likely to win at the trial it would normally be unjust that he

[4] *A Treatise on the Law and Practice of Injunctions*, 3d ed. (Philadelphia: Blackstone, 1889) at 13.

> should be restrained pending the trial even if the plaintiff gave a cross-undertaking in damages.[5]

This test, according to which the applicant had to show a prima facie case, a case which on the evidence before the court at the interlocutory hearing shows that the applicant's rights are (or about to be) violated by the respondent, was applied by the House of Lords in *J.T. Stratford & Son Ltd. v. Lindley*[6] and as late as 1975 in *F. Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade and Industry*.[7] As a consequence, courts generally assessed the rights underlying an application for an interlocutory injunction as they would have at trial, and therefore essentially adjudicated on the merits.

That threshold test was altered by the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.* more than thirty years ago, some four months after having applied it in *Hoffmann-La Roche*.[8] *American Cyanamid* was a patent case in which the factual issues before the court were very complex, so much so, that the hearing before the House of Lords was scheduled for twelve days.[9] For the reasons explained below, however, the Law Lords disposed of the case in three days.[10]

The Court of Appeal of England and Wales ("English C.A.") in *American Cyanamid* applied the traditional prima facie case test and dismissed the interlocutory injunction ordered by the motions judge.[11] Lord Russell then stated for the court that "if there be no prima facie case on the point essential to entitle the plaintiff to complain of the defendants' proposed activities, that is the end of the claim to interlocutory relief."[12]

Lord Diplock, writing the main reasons for the House of Lords, criticized the approach adopted by the English C.A. as effectively creating

> a rule of law that precluded them from granting any interim injunction unless upon the evidence adduced by both the parties on the hearing of the application the applicant had satisfied the court that on the balance of probabilities the acts of the other party sought to be enjoined would, if committed, violate the applicant's legal rights.[13]

Lord Diplock explained the nature of a hearing on a motion for an interlocutory injunction:

---

[5] *Series 5 Software Ltd. v. Clarke* (1995), [1996] 1 All E.R. 853 at 857 (Ch.D.) [*Series 5*].
[6] [1965] A.C. 269, [1964] 3 All E.R. 102 (H.L.).
[7] (1974), [1975] A.C. 295, [1974] 2 All E.R. 1128 (H.L.) [*Hoffmann-La Roche*].
[8] *Supra* note 1. Oddly, *Hoffmann-La Roche* (*ibid.*) was not mentioned in *American Cyanamid*.
[9] *Ibid.* at 507 [cited to All E.R.].
[10] The hearing took place on 12-14 November 1974 (*ibid.* at 396).
[11] *American Cyanamid Co. v. Ethicon Ltd.*, [1974] Fleet Street Reports 312 (C.A.).
[12] *Ibid.* at 333.
[13] *American Cyanamid*, *supra* note 1 at 405.

> My Lords, when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex hypothesi the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. It was to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction.[14]

Hence, because at the stage of an interlocutory injunction the evidence was incomplete and untested by cross-examination[15] and because an interlocutory injunction was merely a means of mitigating the risk of injustice pending trial, Lord Diplock dismissed the prima facie case test as leading to "confusion as to the object sought to be achieved by this form of temporary relief."[16]

Instead, he was of the opinion that a much lower threshold test should be adopted pursuant to which "[t]he court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried,"[17] or the applicant must show a "real prospect of succeeding in his claim for a permanent injunction at the trial."[18] Once this has been demonstrated, "the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."[19]

Lord Diplock did not entirely eliminate an appraisal of the relative strength of each party's case from the purview of the court's discretion. However, he stated that such an appraisal should only be made "if the extent of the uncompensatable disadvantage to each party would not differ widely," and then "only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute

---

[14] *Ibid.* at 406.

[15] The practice is entirely different in Canada, including in Quebec. See Part II.B.2.a.

[16] *American Cyanamid*, *supra* note 1 at 407.

[17] *Ibid.*

[18] *Ibid.* at 408. The terms employed by Lord Diplock—that the claim must not be "frivolous or vexatious" (*ibid.* at 407), that there must be a "serious question to be tried" (*ibid.*), or that there must be a "real prospect of succeeding" (*ibid.* at 408)—do not appear equivalent at first glance. The meaning of these different phrases was discussed by Browne L.J. in *Smith v. Inner London Education Authority* ((1977), [1978] 1 All E.R. 411 (C.A.)) and more specifically by Megarry V.-C. in *Mothercare Ltd. v. Robson Books Ltd*. ([1979] Fleet Street Reports 466), where he stated that "[u]nless compelled to it, I would not hold that an honest but virtually hopeless claim should be rewarded with an interlocutory injunction just because it cannot be described as being 'frivolous or vexatious' in the accepted sense" (*ibid.* at 473). Accordingly, Megarry V.-C. was of the opinion that the terms "frivolous or vexatious" were to be read in a sense different from that in striking-out actions, and further mentioned that he hoped it would altogether disappear from the vocabulary used on applications for interlocutory injunctions (*ibid.* at 473-74). In other words, the new test is that there be a *possibility* of success at trial as opposed to the old test of a *probability* of success at trial.

[19] *American Cyanamid*, *ibid.* at 408.

that the strength of one party's case is disproportionate to that of the other party."[20] In other words, only exceptionally would the strength of each party's case be considered at the interlocutory stage.

The *American Cyanamid* threshold test was later incorporated into Canadian law, first in constitutional cases in *Manitoba (A.G.) v. Metropolitan Stores Ltd.* and then more generally in *RJR-MacDonald Inc. v. Canada (A.G.)*.[21] The latter case was brought before the Supreme Court of Canada by tobacco manufacturers requesting that the enforcement of a statute regulating the advertisement of tobacco products be stayed pending the Court's decision on an application for leave to appeal from the decision of the Court of Appeal of Quebec upholding the statute's constitutional validity.

Although the case was cast in a very specific constitutional setting and involved the balancing of a fundamental right—freedom of expression—against the public interest in the timely enforcement of statutes enacted for the common good, Justices Sopinka and Cory, writing for a unanimous Court, laid down a threshold of general application for assessing the strength of the applicant's case:

> What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. ...
>
> Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.[22]

This threshold was to be applied in all cases, whether the remedy sought was an injunction or a stay, and whether it was sought in a constitutional or a private-law setting. The Court then summarized that the review of the case on the merits should be "extremely limited".[23]

The principle established in *American Cyanamid* and in *RJR-MacDonald*, according to which the court should only engage in a very limited analysis of the merits of the case at the interlocutory stage, has long been applied in Quebec.[24] For

---

[20] *Ibid.* at 409.

[21] See *Metropolitan Stores*, *supra* note 1 at 128-29; *RJR-MacDonald*, *supra* note 1 at 335.

[22] *Ibid.* at 337-38.

[23] *Ibid.* at 348.

[24] Although the power of the Superior Court of Quebec to grant interlocutory injunctions rests on statutory footing, namely art. 752 C.C.P., it is a discretionary power of the sort exercised by common law jurisdictions in equity, and therefore, Quebec courts tend to follow the precedents set by those jurisdictions. See e.g. *Coté v. Morgan* (1881), 7 S.C.R. 1; *Trudel v. Clairol Inc. of Canada* (1974), [1975] 2 S.C.R. 236 at 246, 54 D.L.R. (3d) 399; *Metropolitan Stores*, *supra* note 1 at 134, Pigeon J.; and more recently, *International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, Stage Local 56 v. Société de*

example, the Court of Appeal of Quebec stated in *Pérusse v. Commissaires d'écoles de St-Léonard de Port-Maurice*:

> Le juge auquel elle est demandée ne peut, soit pour l'accorder, soit pour la refuser, donner à la preuve qui lui est présentée, à ce stade, l'effet d'une preuve finale offerte pour adjudication sur le mérite de l'action; il lui suffit de l'apprécier de façon à être en mesure de décider si le requérant paraît ou ne paraît pas avoir un droit sérieux et valable à faire valoir.[25]

In *Brassard c. Société zoologique de Québec inc.*, which was rendered in the aftermath of *RJR-MacDonald*, Justice Lebel for the Court of Appeal of Quebec concluded that the tests in Quebec and in the common law jurisdictions were essentially the same when he mentioned that "le critère de la question dite sérieuse ... ne paraît pas exiger une démarche distincte de celle de la recherche de l'apparence de droit."[26]

Consequently, the general rule in both the United Kingdom and Canada, including in Quebec, is the same. Once an applicant for an interlocutory injunction has met the threshold test by showing that the rights he is asserting have a reasonable prospect of being recognized at trial or that there is a serious question to be tried, the court is bound to move on and consider (1) whether the applicant will suffer irreparable harm if the injunction is refused and (2) against whom the balance of inconvenience lies. Although as we will see, this is still widely viewed as being the applicable rule today, consideration of the strength of each party's case has regained some force in the wake of *American Cyanamid*.

B. The Attack on American Cyanamid *and its Upshot*

American Cyanamid is said to have provoked "some indignation at the apparent loss of a quick, relatively cheap means of settling cases by decision on an application for an interlocutory injunction, and considerable doubt as to the suitability of the principles set out by Lord Diplock in *Cyanamid* for use in all types of interlocutory action."[27] Indeed, almost immediately after the *American Cyanamid* decision was

---

la Place des Arts de Montréal, 2004 SCC 2, [2004] 1 S.C.R. 43, 235 D.L.R. (4th) 202. The case law in Quebec also shows a parallel trend pursuant to which the courts are entitled, whenever it is possible, to ascertain the relative strength of the parties' cases (see *infra* note 45).

[25] (1969), [1970] R.J.Q. 324 at 329, 11 D.L.R. (3d) 81 (C.A.). See also *Royal Bank of Canada c. Propriétés Cité Concordia ltée.*, [1983] R.D.J. 524 at 527 (C.A.).

[26] *Supra* note 1 at 582. Indeed, one of the formulations of the test set out by the House of Lords in *American Cyanamid* (i.e., that the applicant have a real prospect of succeeding in his claim at trial) is almost identical to the test set out in the same year by the Court of Appeal of Quebec in *Société de développement de la Baie James c. Kanatewat*, namely the applicant's right must have "a reasonable prospect of being recognized by the final judgment" ((1974), [1975] R.J.Q. 166 at 183, 8 C.N.L.C. 373 (C.A.) [*Kanatewat* cited to R.J.Q.]).

[27] Christine Gray, "Interlocutory Injunctions Since Cyanamid" (1981) 40 Cambridge L.J. 307 at 307.

rendered, various courts (and particularly the English C.A.) tried to distinguish it, as they were struggling to apply its directives to the cases before them.

In *Fellowes & Son v. Fisher*,[28] the English C.A. was presented with an application for an interlocutory injunction requesting the enforcement of a covenant in restraint of trade. The practice in English courts with respect to such proceedings had always been to determine the prima facie validity of the restrictive covenant. Lord Denning Master of the Rolls, as he then was, after mentioning that *American Cyanamid* had "perplexed the profession," went on to state that "[t]he difficulty [in this case] has arisen because some of the statements made in the House [in *American Cyanamid*] appear to undermine all we had previously understood."[29] In attempting to reconcile the old case law with *American Cyanamid*, Lord Denning pointed out:

> Where then is the reconciliation to be found? Only in this: the House did say … :
>
> > "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."
>
> That sentence points the way. These individual cases are numerous and important. They are all cases where it is urgent and imperative to come to a decision. The affidavits may be conflicting. The questions of law may be difficult and call for detailed consideration. Nevertheless, the need for immediate decision is such that the court has to make an estimate of the relative strength of each party's case. If the plaintiff makes out a prima facie case, the court may grant an injunction. If it is a weak case, or is met by a strong defence, the court may refuse an injunction. Sometimes it means that the court virtually decides the case at that stage. At other times it gives the parties such good guidance that the case is settled. At any rate, in 99 cases out of 100, the matter goes no further.[30]

Lord Browne and Sir John Pennycuick thought themselves bound by the guidelines laid down in *American Cyanamid*, but, acknowledging that the decision had caused difficulties and uncertainties, they added numerous qualifications. Lord Browne stated, "I confess that I cannot see how the 'balance of convenience' can be fairly or reasonably considered without taking *some* account as *a* factor of the relative strength of the parties' cases, but the House of Lords seems to have held that this is only the last resort."[31] Sir John Pennycuick was of the opinion that, as opposed to the

---

[28] (1975), [1976] Q.B. 122, [1975] 2 All E.R. 829 (C.A.) [*Fellowes* cited to Q.B.].

[29] *Ibid.* at 130.

[30] *Ibid.* at 133.

[31] *Ibid.* at 138 [emphasis in original]. He continued:

> I cannot believe that the House intended to lay down rigid rules for the exercise of this discretionary remedy. Lord Diplock himself said twice that the remedy is discretionary and referred with apparent approval to the decision of this court in *Hubbard* v. *Vosper* which "deprecated any attempt to fetter the discretion of the court by laying down any rules which would have the effect of limiting the flexibility of the remedy ... " Further,

American Cyanamid case, certain cases did not present the same difficulties in assessing their merits:

> By far the most serious difficulty, to my mind, lies in the requirement that the prospects of success in the action have apparently to be disregarded except as a last resort when the balance of convenience is otherwise even. In many classes of case, in particular those depending in whole or in great part upon the construction of a written instrument, the prospect of success is a matter within the competence of the judge who hears the interlocutory application and represents a factor which can hardly be disregarded in determining whether or not it is just to give interlocutory relief. Indeed many cases of this kind never get beyond the interlocutory stage, the parties being content to accept the judge's decision as a sufficient indication of the probable upshot of the action. I venture to think that the House of Lords may not have had this class of case in mind in the patent action before them.[32]

In *Hubbard v. Pitt*,[33] the English C.A. was given another occasion to comment on *American Cyanamid*. The case was quite simple: the respondents intended to organize a campaign that included picketing outside the applicants' (estate agents) offices to protest against development projects in a certain area. The applicants brought an interlocutory injunction to restrain the picketing.

Lords Stamp and Orr also considered themselves bound by the principles laid down in *American Cyanamid* and applied them to the facts of this case.[34] Yet, in the dissent, Lord Denning reiterated his doubts as to the universal application of these principles. He reasoned that "the court should assess the relative strength of each party's case before deciding whether to grant an injunction" since granting the interlocutory injunction would "virtually decide the whole action in favour of the plaintiffs: because the defendants will be restrained until the trial (which may mean two years, or more) from picketing the plaintiffs' premises, by which time the campaign will be over."[35]

A little over a year later, Sir John Pennycuick, sitting with the English C.A. in *Bryanston Finance Ltd. v. de Vries (No. 2)*,[36] had further occasion to comment on *American Cyanamid*. The English C.A. was there faced with an application by a company for an interlocutory injunction restraining the respondent from taking winding-up proceedings against it. Although the circumstances that gave rise to that case were most unusual, Sir John Pennycuick nevertheless carved out a broader exception to *American Cyanamid*:

---

the principles which he stated seem to have in themselves some elements of flexibility (*ibid.* at 139 [internal references omitted]).

[32] *Ibid.* at 141.

[33] (1975), [1976] Q.B. 142, [1975] 3 All E.R. 1 (C.A.).

[34] *Ibid.* at 185, 188.

[35] *Ibid.* at 178.

[36] (1975), [1976] Ch. 63, [1976] 1 All E.R. 25 (C.A.) [*Bryanston* cited to Ch.].

> The decision in the *American Cyanamid* case was, as I understand it, addressed to interlocutory motions in the sense of motions seeking interim relief pending determination of the rights of the parties at the hearing of the action. ...
>
> I do not think that the decision should be read as applicable to motions which, though interlocutory in form, seek relief which will finally determine the issue in the action and more particularly motions seeking to stop proceedings in limine. I appreciate the wide words used by Lord Diplock:
>
> > "In my view the grant of interlocutory injunctions in actions for infringement of patents is governed by the same principles as in other actions."
>
> But these words must be read in their context and I am sure Lord Diplock was not intending to say that the principles were applicable in a class of case not under consideration in which their application would be entirely inappropriate.[37]

In short, the prima facie test was an inflexible rule, ill-suited to respond to certain types of applications for interlocutory injunctions, such as cases hinging on complicated sets of fact and consisting in holding operations until the trial. However, *American Cyanamid* generated a rush of "indignation"[38] and perplexity,[39] because in an attempt to rid itself of that rule, the House of Lords imposed a new rule—that courts should only consider the strength of the parties' case as a last resort—that seemed equally rigid and ill-suited to address other types of cases, such as those in "need for immediate decision"[40] or "depending in whole or in great part upon the construction of a written instrument."[41]

The judicial response was twofold. First, several decisions rendered by the English C.A. in the wake of *American Cyanamid* sowed the seeds of two exceptions to the three-pronged test, which we will articulate in the first part of our analysis. In the next section, we will argue that on those interlocutory applications that "will finally determine the issue in the action,"[42] or on those that turn on pure questions of law or proceed on complete factual records, the strength of the parties' cases should not only be considered a relevant factor, but the predominant one to take into account, after the irreparability of the harm has been established. In these two types of cases, the premises underlying the traditional three-pronged test are plainly absent, and the balance of inconvenience test should yield to something akin to adjudication on the merits, even at the interlocutory stage.

---

[37] *Ibid.* at 81 [internal references omitted].
[38] Gray, *supra* note 27 at 307.
[39] See *Fellowes*, *supra* note 28 at 130.
[40] *Ibid.* at 133.
[41] *Ibid.* at 141.
[42] *Bryanston*, *supra* note 36 at 81.

Second, the criticisms by the English C.A. resulted in the revival of the relative strength of the parties' cases as a proper factor to consider in any application for an interlocutory injunction—along with irreparability of the harm and the balance of inconvenience. This culminated with the decision *Series 5* rendered by Justice Laddie in 1996 where he concluded, after a lengthy review of the authorities, that "Lord Diplock did not intend ... to exclude consideration of the strength of the cases in most applications for interlocutory relief," and that "[i]f ... the court is able to come to a view as to the strength of the parties' cases on the credible evidence, then it can do so."[43] Such an approach is gaining recognition in Canada,[44] and more particularly in Quebec where the courts have always taken into account the strength of the parties' cases.[45]

The last part of our analysis will propose a scheme for ascertaining the extent to which it is appropriate—that is, just and convenient—to venture deeper into the merits and give consideration to the strength of each party's case, as well as to

---

[43] *Supra* note 5 at 865. See also *Barclays Bank PLC v. RBS Advanta*, [1996] Reports of Patent, Design and Trade Mark Cases 307; *Antec International Ltd. v. South Western Chicks (Warren) Ltd*. (1996), [1997] Fleet Street Reports 278; *Barnsley Brewery Co. Ltd. v. RBNB*, [1997] Fleet Street Reports 462; *Guardian Media PLC v. Associated Newspapers Ltd*., 2000 WL 331035; *Berry Birch & Noble Financial Planning Ltd. v. Berwick*, [2005] EWHC 1803; I.C.F. Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages*, 6th ed. (Pyrmont, Austl.: Lawbook, 2001) at 464-67. Spry remarks:

> Although the analysis of Lord Diplock in the *American Cyanamid Co*. case accords with equitable principle in so far as it is left to the court to exercise its discretion unless it appears that the plaintiff's claim is vexatious or frivolous or that there is no serious question to be tried, to the extent that his observations suggest that, for example, evidence as to matters of fact may not be examined or that the apparent weight of the parties' cases should not be taken into account they go too far (*ibid.* at 467).

[44] See The Honourable Robert J. Sharpe, *Injunctions and Specific Performance*, looseleaf, 2d ed. (Aurora: Canada Law Book, 2007) ("[i]f relevant, the strength of a case should be considered, unless there is some compelling reason to disregard it" at para. 2.230). It would seem that the Court of Appeal of New Brunswick recently adopted Sharpe's approach in *Imperial Sheet Metal Ltd. v. Landry* (2007 NBCA 51, 315 N.B.R. (2d) 328, 815 Atlantic Provinces Reports 328 [*Landry*]), although it is arguable that the court did not wish to go as far as Sharpe J.A.: "If I understand Justice Sharpe correctly, he is saying that, in cases where the serious issue threshold should be displaced by the prima facie standard, it is appropriate at the first stage of the tripartite analysis to determine the relative strength of the plaintiff's case" (*ibid.* at para. 22). Indeed, Sharpe J.A. appears to go much further by saying that the relative strength of the parties' cases should be considered, as far as possible, in all cases. Finally, see also *Metropolitan Stores*, where the Supreme Court of Canada stated that "the formulation of a rigid test for all types of cases, without considering their nature, is not to be favoured" (*supra* note 1 at 128).

[45] See e.g. *Kanatewat*, where Owen J.A. recognized—implicitly at least—that courts were entitled to give a hard enough look at the merits to enable them to determine whether the right asserted by the applicant was clear, doubtful, or non-existent (*supra* note 26 at 183-84). Similarly, the Court of Appeal of Quebec was of the opinion in *Favre c. Hôpital Notre-Dame* ([1984] R.J.Q. 548 at 551, [1984] R.D.J. 319 (C.A.)) and *Brassard* (*supra* note 1 at 584) that the consideration of the strength of the parties' cases could actually vary in each case.

determine what weight should be given to the balance of inconvenience. In that section, we will suggest a novel approach to applications for interlocutory injunctions that consists in establishing where the circumstances of each application fall on two spectra: one spectrum focusing on the end result of interlocutory applications, and the other on their degree of factual complexity. This approach is intended to guide the court in deciding whether to place more emphasis in any given case on the first or third prong of the three-pronged test.

II. Propounded Approach: Revisiting the Three-Pronged Test

A. The First Exception: Final Determination of the Rights of the Parties

1. The Nature and Scope of the Exception

Ironically, the first exception to the *American Cyanamid* guidelines was laid down by Lord Diplock himself speaking for the House of Lords. Indeed, faced with a barrage of reproaches, requests for guidance, and attempts to distinguish the ruling in *American Cyanamid*, Lord Diplock elected to qualify the principles he had stated therein.

In *N.W.L. Ltd. v. Woods*,[46] the House of Lords was faced with a motion for an interlocutory injunction ordering the respondents to cease a particular industrial action. In reaction to *American Cyanamid*, Parliament had added a statutory duty to take into account the respondent's chances of success when ruling on an interlocutory injunction in the context of a trade dispute.[47] While the House of Lords had no choice but to apply the statutory provision specific to the case at hand, Lord Diplock took it upon himself to explain the court's ruling in *American Cyanamid* and qualify it in the way suggested by the English C.A. in *Fellowes*, and more particularly by Sir John Pennycuick in *Bryanston*:

> American Cyanamid Co v Ethicon Ltd, which enjoins the judge on an application for an interlocutory injunction to direct his attention to the balance of convenience as soon as he has satisfied himself that there is a serious

[46] [1979] 3 All E.R. 614 (H.L.) [*Woods*].

[47] See *Employment Protection Act 1975* (U.K.), 1975, c. 71, sch. 16, part 3, s. 6, becoming *Trade and Labour Relations Act 1974* (U.K.), 1974, c. 52, s. 17(2). The subsection reads:

> It is hereby declared for the avoidance of doubt that where an application is made to a court, pending the trial of an action, for an interlocutory injunction and the party against whom the injunction is sought claims that he acted in contemplation or furtherance of a trade dispute, the court shall, in exercising its discretion whether or not to grant the injunction, have regard to the likelihood of that party's succeeding at the trial of the action in establishing the matter or matters which would, under any provision of section 13, 14(2) or 15 above, afford a defence to the action (*ibid.*).

> question to be tried, was not dealing with a case in which the grant or refusal of an injunction at that stage would, in effect, dispose of the action finally in favour of whichever party was successful in the application, because there would be nothing left on which it was in the unsuccessful party's interest to proceed to trial.[48]

Lord Diplock, after repeating the thrust of the reasons for his approach in *American Cyanamid*, enunciated a set of guiding principles for a court faced with the type of interlocutory injunction that would effectively bring an end to the action:

> Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.[49]

Once bitten twice shy, Lord Diplock refused this time to fetter the discretion of the motions judge by creating a second threshold test such that the failure of the applicant to establish that he is more likely than not to succeed—a prima facie case—would now be fatal.[50] He made it quite plain however that it would take exceptional circumstances for the court to grant an interlocutory injunction absent at least a prima facie case made by the applicant. He did this by stating,

> [T]his does not mean that there may not be cases where the consequences to the employer or to third parties or the public and perhaps the nation itself, may be so disastrous that the injunction ought to be refused, unless there is a high degree of probability that the defence will succeed.[51]

In articulating this exception (the "*Woods* exception") to *American Cyanamid*, Lord Diplock did not have to specify the strength of the applicant's case that would generally be required before the court would issue an injunction. Indeed, in this case, the respondents had a "virtual certainty" of success on the merits.[52]

After the English C.A. had its interpretation as to the scope of application of the *American Cyanamid* principles confirmed by the House of Lords, the court had a chance to apply the *Woods* exception in *Cayne v. Global Natural Resources PLC*.[53] The facts of the case were the following. The applicants were about to move for resolutions to remove the directors of the respondent company at its upcoming annual general meeting. After notice of such resolutions had been given, but before the

---

[48] *Woods*, *supra* note 46 at 625.
[49] *Ibid.* at 626.
[50] See *ibid.*
[51] *Ibid.* Beware the use of the double negative in the last sentence.
[52] *Ibid.*
[53] (1982), [1984] 1 All E.R. 225 (C.A.) [*Cayne*].

annual general meeting took place, the directors had the respondent company enter into a transaction with an American company ("Amco") pursuant to which Amco would merge with the respondent's wholly-owned subsidiary. In compensation, Amco's shareholders would obtain 3.25 million shares in the respondent.[54]

The applicants sought an interlocutory injunction to prevent the respondent company from implementing the transaction and from issuing any shares without first obtaining the approval of its shareholders at a general meeting. They contended that the dominant motive for the transaction was to muster support for the existing board of directors, rather than to strike a bargain for the true benefit of the company. One of the particularities of this case was that Amco had a right to terminate the transaction if the merger did not occur before a specific date that turned out to be about five days after the injunction hearing. Therefore, there was a real risk that the respondent would lose its transaction if the injunction were granted. Correlatively, the applicants would obtain exactly what they sought if the injunction were granted, that is, a better chance of having the current directors removed from the board.

In *Cayne*, Lord Kerr further developed the exception, whose strong basis had already been laid down by Lord Denning and Sir John Pennycuick and nuanced by Lord Diplock's motives in *Woods*. He started his speech by setting out the test for determining whether the *American Cyanamid* guidelines should apply to a given case: "The test for the application of Cyanamid is therefore whether the case is one where the court can see that it is likely to go to trial at the instance of the plaintiffs, and whether the grant of an injunction is therefore appropriate or not, as a way of holding the situation in the interim."[55]

In this case, Lord Kerr concluded that the applicants would have no interest in moving forward to trial if the injunction were granted, and therefore, the *American Cyanamid* guidelines were inappropriate. Lord Eveleigh agreed:

> I now turn to the third ground [of appeal], that in the Vice-Chancellor's alternative finding he wrongly concluded that this case fell within the spirit of NWL Ltd v Woods. The view that the Vice-Chancellor took on the facts was this. If an injunction was granted to the plaintiffs, that would be an end to the substance of the matter and the injunction would not in effect amount to a holding operation: it would be giving the plaintiffs all that they came to the court to seek, namely their injunction, and when the time came for trial there would be no point in a trial because the object of the plaintiffs would have been achieved seeing that the annual general meeting would have been held. He said:
>
> "In the present case, what really matters to the parties is whether or not the 3.25m shares in Global should be issued; and the possibility

[54] *Ibid.* at 226-28.

[55] *Ibid.* at 235. He continued, "[T]he overriding consideration for present purposes is that, if an injunction is granted, the effective contest between the parties is likely to have been finally decided summarily in favour of the plaintiffs" (*ibid.* at 236).

> of proceeding to trial for damages is but a pale shadow of the real claim."
>
> With that I agree. If the injunction is granted the general meeting will be the next step. The plaintiffs will succeed or they will not succeed in mustering the support that they seek to remove the directors from the board. If an injunction is refused then the agreement will be implemented and there will be no point in seeking an injunction thereafter. It will not be possible to unscramble the situation, so that whichever way this decision goes it seems highly likely that it will finally determine the issue.[56]

The English C.A. reiterated these principles in *Cambridge Nutrition Ltd. v. British Broadcasting Corp*.[57] In this case, the applicant, Cambridge Nutrition, was seeking an injunction to prevent the BBC from broadcasting a program critical of its low-calorie diet. The applicant sought the injunction on the basis of an oral agreement pursuant to which the BBC had agreed to postpone delivery of its program until a governmental publication on the matter had been issued. It was recognized that the program would be of little—if any—interest after the publication of the report and that Cambridge Nutrition would have no interest in going to trial if the injunction were granted, since it would have already obtained all it came to court for, namely, the cancellation of the program. And given the public interest in the program, it was clear that damages would not constitute an adequate remedy were an injunction wrongfully granted. Indeed, preventing a public service broadcaster from informing the public of an important health issue in a timely fashion could hardly be compensated by damages. Consequently, the BBC would also have limited interest in going forward to trial.

Lord Kerr reaffirmed the impropriety of applying the *American Cyanamid* principles to such a case:

> It is important to bear in mind that the American Cyanamid case contains no principle of universal application. The only such principle is the statutory power of the court to grant injunctions when it is just and convenient to do so. The American Cyanamid case is no more than a set of useful guidelines which apply in many cases. It must never be used as a rule of thumb, let alone as a strait-jacket. Admittedly, the present case is miles away on its facts from the Global Natural Resources case, and it is also much weaker than NWL Ltd v Woods, where Lord Diplock himself recognised the limitations of the Cyanamid guidelines. But nevertheless, I do not consider that it is an appropriate case for the Cyanamid guidelines because the crucial issues between the parties do not depend on a trial, but solely or mainly on the grant or refusal of the interlocutory relief. The American Cyanamid case provides an authoritative and most helpful approach to cases where the function of the court in relation to the grant or refusal of interlocutory injunctions is to hold the balance as justly as possible in situations where the substantial issues between the parties can only be resolved by a trial. In my view, for reasons which

[56] *Ibid.* at 232. See also the reasons of May L.J. (*ibid.* at 238).
[57] (1987), [1990] 3 All E.R. 523 (C.A.).

> require no further elaboration, the present case is not in that category. Neither side is interested in monetary compensation, and once the interlocutory decision has been given, little, if anything, will remain in practice.[58]

Lord Kerr concluded that in such cases the applicant's chances of success at trial are relevant in determining whether it is just and convenient to grant interlocutory relief.[59]

In *RJR-MacDonald*, the Supreme Court of Canada recognized that the *Woods* exception is applicable in Canada. After mentioning that the *American Cyanamid* test was applicable in Canada "subject to the occasional reversion" to the strong prima facie case threshold,[60] Justices Sopinka and Cory stated:

> Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial. Indeed Lord Diplock modified the American Cyanamid principle in such a situation in N.W.L. Ltd. v. Woods ...
>
> The circumstances in which this exception will apply are rare. *When it does, a more extensive review of the merits of the case must be undertaken.* Then when the second and third stages of the test are considered and applied the anticipated result on the merits should be borne in mind.[61]

In Quebec, the Court of Appeal of Quebec applied the *Woods* exception in a commercial case, *Gravino c. Enerchem Transport inc.*[62] The respondents, as officers of the applicant, had entered into negotiations with Ultramar, a petrol company, regarding a possible assignment of Ultramar's rights to operate three oil tankers. After leaving the applicant company, the respondents joined another company and pursued the negotiations with Ultramar, eventually succeeding in obtaining the assignment sought by the applicant. Less than two weeks later, the applicant moved for an

---

[58] *Ibid.* at 534-35 [internal references omitted].

[59] Kerr L.J. mentioned:

> In such cases it *should* matter whether the chances of success in establishing some binding agreement are 90% or 20%. I use that phraseology because counsel for the plaintiffs referred us to the decision of this court in *Alfred Dunhill Ltd v Sunoptic SA* [1979] FSR 337 at 373, where Megaw LJ said that in the application of the *Cyanamid* test it did not matter whether the chances of success in establishing liability were 90% or 20%. The *Dunhill* case, like *Cyanamid* itself, was a typical case in which the *Cyanamid* guidelines are of great value, because everything depended on the trial and the long-term rights of the parties. The present type of case is not in the same category (*ibid.* at 535 [emphasis in original]).

[60] *RJR-MacDonald*, *supra* note 1 at 335.

[61] *Ibid.* at 338-39 [emphasis added].

[62] (1 June 1998), Montreal 500-09-005321-971, J.E. 98-1337 (C.A.).

interlocutory injunction to suspend the effects of that agreement, and it was granted by the motions judge. Although the non-competition clause between the parties could not be invoked, the motions judge based his decision on the duty of loyalty that the respondents owed to the applicant.

After discussing the right asserted by the applicant, Justice Pidgeon of the Court of Appeal of Quebec, with whom Justice Chouinard concurred, concluded that "lorsque le résultat de la demande interlocutoire équivaut au règlement final de l'action, c'est le cas ici, il doit procéder à un examen approfondi sur le fond."[63] In the circumstances of this case, the court did not have to consider what type of standard an applicant would have to meet, since none of the conditions (appearance of right, irreparable harm, balance of convenience) favoured the applicant. The court did however show its readiness to apply the *Woods* exception and venture deeper into the merits of a case at the interlocutory stage.

The *Woods* exception has also been recognized by other appellate jurisdictions in Canada, providing further evidence that it is now firmly entrenched in Canadian law. In *HSBC Capital Canada Inc. v. First Mortgage Nova Scotia Fund (III) Inc.*,[64] HSBC Capital was the custodian of monetary assets belonging to the respondent funds under agreements that had come to an end. The respondent funds sought the return of their monies by summary judgment after HSBC Capital announced that it would hold the assets until the rights of a third party against both the respondent funds and HSBC Capital were determined in another court docket.[65]

The respondents succeeded on their application for summary judgment and obtained an order for the return of their assets. HSBC Capital then sought a stay of execution of this order pending its appeal.[66] The particularity of this case was that if a stay were ordered, the rights as between HSBC Capital, the respondent funds, and the third party would be determined before the appeal of the summary judgment could be heard, effectively granting HSBC Capital precisely what it was pursuing on appeal. Considering these circumstances, Justice Bateman concluded "that where, as here, the granting of the stay will essentially afford the applicant party the relief sought in the main action and where there is no dispute on the facts, leaving only a question of law which can be readily resolved, it is appropriate to consider the merits of the appeal."[67]

---

[63] *Ibid.* at 16.

[64] 2002 NSCA 32, 203 N.S.R. (2d) 29, 635 Atlantic Provinces Reports 29 [*HSBC*].

[65] *Ibid.* at paras. 1-4.

[66] See *Metropolitan Stores*, *supra* note 1 ("[a] stay of proceedings and an interlocutory injunction are remedies of the same nature" and are "governed by the same rules" at 127).

[67] *Supra* note 64 at para. 26. A very similar class of cases are immigration cases where applicants, pending judicial review of the decision not to defer their removal, ask for a stay of their removal. In such instances, granting the stay is tantamount to granting the remedy sought at trial, and therefore, the court must engage in a more extensive review of the merits of the application. Recent examples include *Wang v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148, [2001] 3 F.C. 682, 204 F.T.R. 5; S*klarzyk v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 336; *Moray v.*

Hence, the court ventured into the merits of the case and "upheld" the decision of the motions judge.

More recently, in *UA Local 740 v. Peter Kiewit Sons*,[68] the applicant union sought leave to appeal an interlocutory injunction enjoining it from encouraging its members not to work for Peter Kiewit Sons and thereby interfering with the performance of one of the company's contracts. UA Local 740 argued that the first-instance judge should have applied a higher standard than the "serious issue to be tried"[69] because the interlocutory injunction would have given Peter Kiewit Sons all it came to court for, namely, the performance of the contract in question, and consequently the company would have no interest in proceeding to trial.

While the Newfoundland and Labrador Supreme Court (Court of Appeal) agreed with the motions judge that the interlocutory injunction would not in fact put an end to the dispute between the parties, it did recognize the *Woods* exception:

> Rather, correctly expressed, the proposition should be: the less onerous test of a serious issue to be tried is inappropriate where the grant or refusal of an interlocutory injunction will have the practical effect of putting an end to the action. It would then be correct to observe that this is frequently the case in labour disputes, particularly where an applicant seeks to restrain picketing. Such a circumstance can, however, arise in cases not involving a labour dispute. It is not the general nature of the dispute, or the nature of the parties, that makes the difference. It is the principle that the granting of the interlocutory remedy will have the practical effect of putting an end to the action.[70]

Finally, the scope of the *Woods* exception is much broader than the Supreme Court of Canada had envisioned in *RJR-MacDonald*, as demonstrated by the series of cases that have applied it both in Canada and the United Kingdom. Indeed, while conscious of the words of caution used by the Court—that cases that fall within the

---

Canada (Minister of Citizenship and Immigration) (30 April 2002), IMM-1751-02 (F.C.T.D.); *Manohararaj v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 376.

[68] *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 740 v. Peter Kiewit Sons Co.*, 2005 NLCA 8, 244 Nfld. & P.E.I.R. 342, 726 Atlantic Provinces Reports 342 [*Peter Kiewit*].

[69] *Ibid.* at para. 9.

[70] *Ibid.* at para. 28. Note that the same exception was also expressly recognized by the British Columbia Court of Appeal in *Prince Rupert Grain Ltd. v. Grain Workers' Union, Local 333*, 2002 BCCA 641, 8 B.C.L.R. (4th) 91, 27 C.P.C. (5th) 205 [*Grain Workers*]. It was also applied in commercial cases (see e.g. *Scozzafava v. Prosperi*, 2003 ABQB 248, [2003] 6 W.W.R. 351 at para. 26, 13 Alta. L.R. (4th) 236; *Engrais Chaleur ltée v. PricewaterhouseCoopers Inc*., 2003 NBQB 227, 265 N.B.R. (2d) 209 at paras. 18-19, 42 C.B.R. (4th) 194; *Mr. Submarine Ltd. v. Davidson*, 2001 ABQB 569, 288 A.R. 308 at para. 23, 13 Canadian Patent Reporter (4th) 269). See also *Alberta (Information and Privacy Commissioner) v. Alberta Federation of Labour*, 2005 ABQB 927, 37 Admin. L.R. (4th) 314 at paras. 17-19, 22 C.P.C. (6th) 141, where an interlocutory injunction sought to enforce privilege would effectively have granted final relief. Finally, see *Tsartlip First Nation v. Morris*, where the judge held that the immediate construction of a duplex—the activity which the applicant sought to prevent—would render the issue at trial moot (2007 BCSC 1012 at para. 8).

purview of the *Woods* exception would be "rare"[71]—Justice Richard J. Sharpe could not refrain from recognizing a wholly different reality:

> Although there is some indication that the [*Woods*] case was intended to have narrower application, the category of case in which the matter will end at the interlocutory stage is quite broad. It will include picketing cases, acts of civil disobedience, cases involving restrictive covenants, threatened winding-up proceedings, corporate "strike suits", breach of confidence actions, industrial property cases, passing off cases and probably other cases as well.[72]

Hence, in light of the Canadian and English case law, the *Woods* exception seems to be anything but exceptional. Rather, it resembles some kind of alternative to the *American Cyanamid* type of interlocutory application. This was anticipated by Lord Denning in *Fellowes* when he stated that cases in need of final adjudication at the interlocutory stage were "numerous and important".[73]

Once the necessity of applying a different threshold test in cases where the courts are called upon to order interlocutory injunctions that are in fact anything but interlocutory has been established, the question arises as to what would be the proper standard to apply. To this question we now turn.

2. The Return of the Strong Prima Facie Case

One material difference between the *Cayne* and *Woods* cases is that in the latter the respondents had a "virtual certainty"[74] of succeeding at trial whereas in the former there existed "a triable issue".[75] Given this divergence, the English C.A. in *Cayne* undertook to establish a new standard or threshold for granting an interlocutory injunction in cases falling within the *Woods* exception.

The court held that where the injunction, if granted, would finally dispose of the matter and would consequently deny the respondent the right to a full trial, the applicant must make an overwhelming case or show some other overriding consideration (such as "disastrous" consequences in the words of Lord Diplock in

---

[71] *Supra* note 1 at 339. However, the Supreme Court of Canada in *RJR-MacDonald* did recognize that "[s]everal cases indicate that this exception is already applied to some extent in Canada" (*supra* note 1 at 338). Although it is unclear whether the Court was referring to the *Woods* exception generally or its application in picketing cases, it is difficult to reconcile these "several cases" (*ibid.*) with the Court's pronouncement that cases falling within this exception would be "exceedingly rare" (*ibid.* at 348).

[72] *Supra* note 44 at para. 2.350 [internal references omitted]. That reality had already been recognized prior to *RJR-MacDonald* by Gavin MacKenzie in his annotation to the case *C-Cure Chemical Co. v. Olympia & York Developments Ltd.*, in which he listed ten types of cases where the *Woods* exception applied in Canada ((1983) 33 C.P.C. 192 at 193 at 195-96, 71 C.P.R. (2d) 153).

[73] *Supra* note 28 at 133.

[74] *Woods*, *supra* note 46 at 626.

[75] *Cayne*, *supra* note 53 at 236.

Woods)[76] in order to convince the court to issue an interlocutory injunction. Lord Kerr, distinguishing *Woods* on the basis that "the outcome on the merits was easily foreseeable,"[77] stated:

> In these circumstances it seems to me that it would be wholly wrong for this court, in effect, to decide the entire contest between the parties summarily in the plaintiffs' favour on the untested material before us. This does not present any overwhelming balance on the merits in the plaintiffs' favour, or any other overriding ground for an immediate injunction without a trial. There is only a triable issue whose outcome is doubtful; and that issue should be tried and not pre-empted.[78]

---

[76] *Supra* note 46 at 626.

[77] *Cayne*, *supra* note 53 at 235.

[78] *Ibid.* at 236. Lord Eveleigh concurred:

> On behalf of the plaintiffs it is submitted that to refuse to make an order will be depriving the plaintiffs of the right to trial. ... [B]ut the plaintiffs come to this court and ask the court to exercise its discretion; it is not [the defendant] which is making that application. It seems to me that, with the risk that this decision will produce an injustice on one side or the other, it would be wrong to run the risk of causing an injustice to a defendant who is being denied the right to trial where the defence put forward has been substantiated by affidavits and a number of exhibits in this case.
>
> In saying that I wish to express no view as to the strength of that defence. What I can safely say is that on the evidence before the court the case for the plaintiffs is not overwhelming. It does not mean it is not a good one, but counsel for the plaintiffs quite properly could not contend in this court that he was presenting an overwhelming case. If that was so, it may be that the court would be entitled to come to a different conclusion, even though it meant in effect depriving [the defendant] of a right to trial (*ibid.* at 233).

Finally, Lord May added:

> Where a plaintiff brings an action for an injunction, I think that it is, in general, an injustice to grant one at an interlocutory stage if this effectively precludes a defendant from the opportunity of having his rights determined in a full trial. There may be cases where the plaintiff's evidence is so strong that to refuse an injunction and to allow the case to go through to trial would be an unnecessary waste of time and expense and indeed do an overwhelming injustice to the plaintiff. But those cases would, in my judgment, be exceptional (*ibid.* at 238).

See also Spry, *supra* note 43 at 468 ("it may be necessary to take into account that if an interlocutory injunction is granted the plaintiff will in substance obtain all the relief that he needs, without proceeding to a final hearing, and here he may be required to establish a stronger case then would otherwise have been appropriate").

For the Canadian perspective, see *Trieger v. Canadian Broadcasting Corp*. ((1988), 66 O.R. (2d) 273, 54 D.L.R. (4th) 143 (H.C.)), where Campbell J. stated,

> This is not the sort of relief that should be granted on an interlocutory application of this kind. The legal issues involved are complex and I am not satisfied that the applicant has demonstrated there is a serious issue to be tried in the sense of a case with enough

That the applicant should have to surmount a higher standard than usual (i.e., than the mere balance of probabilities) in order to obtain an interlocutory injunction in cases where the outcome of the motion is determinative of the proceedings is consistent with two policy considerations raised by the English C.A.

First, the higher standard serves the purpose of making the applicant bear the risk that the court may make an erroneous finding due to incomplete evidence. If the applicant only had to demonstrate its rights based on a mere balance of probabilities, the brunt of the risk would be borne by the respondent. Since the applicant is the one coming forward to ask the court to exercise its discretion, he should assume the risk.[79]

Second, the higher standard yields to practical reality by recognizing that while the applicant often—though not always—has the benefit of coming to court fully prepared to argue its case, the respondent is almost inevitably left with more limited time to prepare its legal and factual arguments. The respondent thus suffers most from the lack of a trial.

The previously cited passage of the Supreme Court of Canada in *RJR-MacDonald* stating that the *Woods* exception, which calls for a greater scrutiny of the merits, is applicable in Canada,[80] has since been relied on several times by Canadian courts to revert to the old threshold of a strong prima facie case (or, as stated in *Cayne*, an overwhelming case on the evidence).

This strong prima facie case threshold was adopted by the British Columbia Court of Appeal in *Prince Rupert Grain Ltd. v. Grain Workers' Union, Local 333*,[81] endorsing the position taken by the courts of first instance. In that case, the court faced an application for an interlocutory injunction by an employer wishing to restrain picketing on its property. Justice Donald made the following comments about the test to be applied in the case at bar:

> In the ordinary case, the threshold test for an injunction is whether the applicant has raised "a fair question to be tried". ...
>
> However, in cases where the order may effectively provide the whole of the relief sought in the action, and particularly in picketing cases, the threshold test is much higher: whether the applicant has established a strong prima facie case.

> legal merit to justify the extraordinary intervention of this court in making the order sought without any trial at all (*ibid.* at 283).

This extract was cited by the Supreme Court of Canada in *RJR-MacDonald* (*supra* note 1 at 339). For a more recent case, see *Fibron Machine Corp. v. Sawley* (1999), 43 C.P.C. (4th) 35, 86 C.P.R. (3d) 448 at para. 46 (B.C.S.C.).

[79] This resounds more greatly in Quebec, where the undertaking in damages taken by the applicant seldom leads to the respondent being compensated in damages in the event that an interlocutory injunction is granted wrongfully against him or her. See 293, below.

[80] See *supra* note 60 and accompanying text.

[81] *Supra* note 70 at para. 27.

> In RJR-MacDonald Inc. v. Canada (Attorney General), the Court contemplated the higher standard ...[82]

The same conclusion was reached by the Newfoundland and Labrador Supreme Court (Court of Appeal):

> The Court, in [RJR-MacDonald], stated the general rule to be that, on hearing an application either for a stay of proceedings or for an interlocutory injunction, "a judge should not engage in an extensive review of the merits". Thus the test must be "a serious issue to be tried". The Court did, however, recognize two exceptions, one of which bears on our considerations here, namely: "when the result of the interlocutory motion will in effect amount to a final determination of the action". For the reasons explained, in the excerpt quoted in the preceding paragraph, when that is the situation the more onerous test of "a strong prima facie case" should be applied.[83]

This test has also been consistently applied in cases involving the enforcement of restrictive covenants, one of the most recent examples being *Hargraft Schofield LP v. Schofield*, in which Justice Himel stated that "where the injunction involves enforcing a restrictive covenant, a higher test is imposed, namely a strong *prima facie* case."[84]

Where this test of strong prima facie case lies relative to the overwhelming case standard suggested by the English C.A. in *Cayne* is unclear. They both require more than a mere conclusion by the court that, on the basis of the available evidence, the applicant has prima facie[85] proved its rights on a balance of probabilities (i.e., a prima facie case). However, to require an overwhelming case would appear to impose a higher threshold than to require a strong case. If that is true, we believe that a strong

---

[82] *Ibid.* at para. 26 [internal references omitted].

[83] *Peter Kiewit*, *supra* note 68 at para. 27. See also the discussions by the Saskatchewan Court of Appeal in *Potash Corp. of Saskatchewan Mining Ltd. v. Todd* (1987), [1987] 2 W.W.R. 481, 53 Sask. R. 165 (C.A.); *Garry v. Sherritt Gordon Mines Ltd*. (1987), 45 D.L.R. (4th) 22, [1988] 1 W.W.R. 289 (Sask. C.A.); *Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd*. (1998), 172 Sask. R. 40, 167 D.L.R. (4th) 220 (C.A.), aff'd 2002 SCC 8, [2002] 1 S.C.R. 156; and a more recent decision by the Court of Queen's Bench of Alberta, *Telus Communications Inc. v. Telecommunications Workers Union*, 2005 ABQB 719, 385 A.R. 43 at paras. 11-13.

[84] [2007] O.J. No. 4400 at para. 16 (Sup. Ct.) (QL) [*Schofield*]. Himel J. explained that the basis for this higher test was that the court was merely upholding a contract entered into between two parties of equal bargaining power. However, it would seem that what also had an influence on the nature of the test that was applied was the fact that these are cases where the interlocutory injunction often ends the dispute and cases where the relative strength of the parties' cases is easier to ascertain. See also *BMO Nesbitt Burns Inc. v. Ord*, 2007 CarswellOnt 4252 (WLeC) (Sup. Ct.); *Gold In the Net Hockey School Inc. v. Netpower Inc*., 2007 ABQB 520, 39 B.L.R. (4th) 57, 51 C.P.C. (6th) 244; *Singh v. 3829537 Canada Inc.*, [2005] O.T.C. 492 (Sup. Ct.); *Windship Aviation Ltd. v. deMeulles*, 2002 ABQB 669, [2003] 1 W.W.R. 393, 5 Alta. L.R. (4th) 133, aff'd 2005 ABCA 239, 141 A.C.W.S. (3d) 527; *Gerrard v. Century 21 Armour Real Estate Inc.* (1991), 4 O.R. (3d) 191, 35 C.C.E.L. 128 (Gen. Div.); *Jet Print Inc. v. Cohen* (1999), 43 C.P.C. (4th) 123 (Ont. Sup. Ct.); *Provincial Plating Ltd. v. Steinkey* (1997), [1998] 3 W.W.R. 1, 162 Sask. R. 241 (Q.B.).

[85] Although the New Brunswick Court of Appeal is of the opinion that both expressions carry the same meaning. See *Landry*, *supra* note 44 at para. 16.

case should generally be sufficient to warrant the issuance of an interlocutory injunction. Indeed, requiring an overwhelming case may very well cause a significant injustice to the applicant for a reason (i.e., the necessity to adjudicate based on an incomplete evidentiary record) which is not of his own making. In contrast, requiring a strong case properly takes into account the thorough analysis and uncontested conclusions of the English C.A. in *Cayne*.

3. The Irrelevance of the Two Other Prongs of the Traditional Test

Once the court has determined whether or not the applicant has passed the strong prima facie case threshold, the question then arises as to whether the court must go on to consider the other two conditions—the tests of irreparable harm and the balance of convenience. The answer is no.

a. Redundancy of the "Irreparable Harm" Prong

The necessity of proving "irreparable harm" stems from the nature of the relief usually sought by an applicant for an interlocutory injunction: the preservation of its rights pending trial.[86] In the event that the prejudice the applicant would suffer from the violation of its rights is reparable by way of damages, it cannot be said that an interlocutory injunction is necessary. As Lord Diplock stated in *American Cyanamid*, "If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage."[87] While it is true that courts may sometimes grant injunctions even absent a showing of (truly) irreparable harm on the part of the applicant,[88] the general rule stated in *American Cyanamid* still stands.

---

[86] See Sharpe, *supra* note 44. Justice Sharpe states that "[t]he rationale for requiring the plaintiff to show irreparable harm is readily understood. If damages will provide adequate compensation, and the defendant is in a position to pay them, then ordinarily there will be no justification in running the risk of an injunction pending the trial" (*ibid.* at para. 2.390).

[87] *Supra* note 1 at 408. See also *Bath & North East Somerset District Council v. Mowlem PLC*, [2004] EWCA Civ 115, [2004] B.L.R. 153; *Brassard*, *supra* note 1 at 582; *Metropolitan Stores*, *supra* note 1 at 128-29; *RJR-MacDonald*, *supra* note 1 at 341.

[88] See e.g. Sharpe, *supra* note 44 at paras. 2.32, 2.33; Spry, *supra* note 43 at 457-58; *Vidéotron ltée c. Industries Microlec produits électroniques inc.*, [1987] R.J.Q. 1246 at 9, 5 Q.A.C. 207 (C.A.) [*Vidéotron* cited to R.J.Q.]; *Brassard*, *supra* note 1 at 584; *Laboratoires Constant inc. c. Beauchamp*, J.E. 97-2170 at 32 (C.A.), Forget J.A.; *Landry*, *supra* note 44 at paras. 27-28. It should also be noted that in many cases courts have been willing to consider difficult-to-ascertain damages as constituting irreparable harm. See e.g. *Cayne*, *supra* note 53 at 231; *Vidéotron*, *ibid.*; *Brasserie Labatt ltée c. Montréal (Ville de)*, [1987] R.J.Q. 535, 7 Q.A.C. 81 (C.A.) (where the Court of Appeal of Quebec applied this rule in a commercial case). See also the opinion of Gendreau J. of the Court of Appeal of Quebec, along with other authors, in Paul-Arthur Gendreau *et al.*, *L'injonction* (Cowansville, Qc.: Yvon Blais, 1998) at 35. Moreover, in cases of clear breaches of negative covenants or trespass,

It is equally true that the respondent must show that he would suffer irreparable harm if the injunction were granted.[89] If the respondent can be adequately compensated for the damages he sustained due to the issuance of an injunction without underlying right, there is no risk of ultimate harm and injustice in granting the injunction. In fact, in common law jurisdictions, the respondent is generally entitled to compensation for any damage sustained as a result of the injunction if the final judgment comes down in his favour.[90]

The legal position in Quebec is the exact opposite. There, the respondent has a right to damages for injury sustained as a result of the injunction only if he can demonstrate that the motion for interlocutory injunction was taken abusively by the applicant.[91] Under this highly questionable approach,[92] whenever an interlocutory injunction is granted, the respondent will almost invariably suffer irreparable harm as he will only be able to recuperate the damages resulting therefrom if he proves that the applicant sought the remedy abusively—a very high standard to meet. Hence, the condition that the respondent must show irreparable harm flowing from the injunction is almost automatically fulfilled in Quebec.

---

various courts have held that the second and third prongs of the three-pronged test are to be applied less rigorously, if at all. See e.g. *Miller v. Toews* (1990), [1991] 2 W.W.R. 604, 70 Man. R. (2d) 4 (C.A.); *West Edmonton Mall Ltd. v. McDonald's Restaurants of Canada Ltd*. (1993), 141 A.R. 266, 49 Canadian Patent Reports (3d) 539 (C.A.). More recently, see *Terbasket v. Harmony Co-ordination Services Ltd.*, 2003 BCSC 17, 28 C.P.C. (5th) 364 at para. 30, aff'd 2003 BCCA 238; *B.C. Ferry Services Inc. v. Tsawwassen Rental Connection Ltd*., 2004 BCSC 982, 4 C.P.C. (6th) 307; *Domo Gasoline Corp. v. St. Albert Trail Properties Inc*., 2005 ABQB 69, 366 A.R. 13, 44 Alta. L.R. (4th) 280; *Sol Sante Club v. Biefeld*, 2005 BCSC 1908, 155 A.C.W.S. (3d) 947; *Schofield*, *supra* note 84. Likewise in cases of violation of municipal bylaws, see e.g. *Whistler (Resort Municipality) v. Wright*, 2003 BCSC 1192, 40 M.P.L.R. (3d) 74 at para. 4.

[89] This factor is usually treated as part of the analysis on the balance of inconvenience. See *American Cyanamid*, *supra* note 1. However, it is more convenient for the purposes of this discussion to treat it in this section.

[90] See *Vieweger Construction Co. Ltd. v. Rush & Tompkins Construction Ltd*. (1964), [1965] S.C.R. 195, 48 D.L.R. (2d) 509.

[91] See *Malouin v. Drummondville (Cité de)* (1943), [1944] R.J.Q. 262 (B.R.) (constantly applied to date). See also *Hamelin & associés ltée c. Dolard Lussier ltée* (1990), J.E. 90-704 (Sup. Ct.); *Groupe Mil inc. c. St. John Shipbuilding ltd.* (1991), J.E. 91-1354 (Sup. Ct.); *Chum Ltd. v. Ryan*, 2004 CanLII 7340 (Qc. Sup. Ct.).

[92] The author strongly disagrees with the approach of the Quebec courts. The debate on this approach of the Quebec courts could very well be the object of another article. It suffices to say, for the moment, that it is unfathomable why the respondent, rather than the applicant who takes him to court, should bear the risk that the court may unduly restrain his rights at the interlocutory hearing. This especially rings true since it is hard to imagine circumstances where a court would grant an application for interlocutory injunction and later find that it was not only made without right, but it was also made abusively and maliciously. Moreover, the terms of art. 755 C.C.P., that "the applicant must be ordered to give security, in a prescribed amount, *to pay the costs and damages which may result* [*from the injunction*]" [emphasis added], suggest that the rule should be the same as in the other Canadian provinces.

In any event, this condition will invariably be satisfied in cases falling within the *Woods* exception, as it is the nature of such cases that the true relief sought by the applicant cannot be obtained (or its loss compensated) at trial because of timing. Likewise, if the purported damage caused to the respondent were reparable, he would certainly have an interest in proceeding to trial. Thus, the nature of the harm likely to be caused either to the applicant or respondent will become a relevant factor in determining whether the case falls within the *Woods* exception rather than in balancing the inconvenience caused to either party.

The *Cayne* example is telling. On the one hand, the prejudice the applicant would suffer if the injunction were refused would be (1) the loss of their right to elect a new board of directors and (2) witnessing the company in which they hold shares carry out a bad bargain. On the other hand, the respondent's prejudice would be the risk of losing a potentially lucrative transaction. Hence, the English C.A. held that there would be no real interest for either party to go forward to trial after the interlocutory hearing, and, applying *Woods*, concluded that because the applicant had not shown an overwhelming case, it was not entitled to the relief it sought.

Thus, the criterion of irreparable harm is redundant in cases falling within the *Woods* exception as it is in the nature of these cases that regardless of whether the injunction is granted or refused, neither party would have an interest in proceeding to trial to seek redress. It follows that once a case falls within the *Woods* exception, the only relevant determination is whether the applicant can make a strong prima facie case. The criterion of irreparable harm is redundant, and, as will be shown next, the balance of inconvenience test is simply inapplicable.

b. Inapplicability of the "Balance of Inconvenience" Prong

The "balance of inconvenience" prong is usually most significant in cases resembling *American Cyanamid*. It is also the most difficult to define of the three prongs. Lord Diplock recognized in *American Cyanamid* that "[i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them."[93] Justice Sharpe also wrote that "[i]t is impossible to develop a precise calculus or calibration of such a question beyond restating the nature of the risk-balancing exercise that is involved."[94] Nonetheless, the court's mission as laid out by the Supreme Court of Canada in *Metropolitan Stores* is to determine "which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction."[95]

---

[93] *Supra* note 1 at 408.
[94] *Supra* note 44 at para. 2.540.
[95] *Supra* note 1 at 129. See also *ibid.* at at para. 2.41.

This prong is by and large irrelevant to the determination of cases falling within the *Woods* exception.[96] Indeed, the measurement of the balance of inconvenience makes sense as a criterion only where the interlocutory injunction is sought as a holding operation until trial. Since there will inevitably be no trial in cases falling within the *Woods* exception, it is nonsensical to apply a test used to determine the most equitable way to preserve the rights of the parties pending trial.[97]

An alternative approach to cases falling within the *Woods* exception, where the court only considers whether or not the applicant is entitled to a permanent injunction based on a final assessment of its rights—without regard to the balance of inconvenience, was endorsed and explained by Justice Sharpe:

> In certain situations, the issue is not balancing risks but deciding the case in a final way. In those cases, the balance of risk approach should be abandoned as inappropriate. If it is apparent, as a practical matter, that the interlocutory injunction will be the final determination of the dispute, then the judge must make the best of a difficult situation and base the decision solely on an assessment of the merits.[98]

To summarize, in cases falling within the *Woods* exception, the court's only task is to evaluate whether the applicant has made a strong prima facie case, failing which the interlocutory injunction must be refused. If the applicant is successful in making out a strong prima facie case, there should be no need to consider the balance of inconvenience because the respondent should be given no opportunity to cause irreparable harm to the applicant without a strong justification to pursue his course of conduct.

---

[96] In taking this position, the author might appear to part company with the Supreme Court of Canada in *RJR-MacDonald*, where it stated that after a more extensive review of the merits, and "when the second and third stages of the test are considered and applied the anticipated result on the merits should be borne in mind" (*supra* note 1 at 339), leaving no doubt that in the minds of Sopinka and Cory JJ. the balance of inconvenience still played a role in cases falling within the *Woods* exception. However, it may very well be that the Supreme Court of Canada was of the opinion that the strength of the parties' cases should be considered within the analysis of the balance of inconvenience, and therefore, it does not preclude our conclusion that it should be decisive. In any event, as the case before the Court did not even come close to falling within the *Woods* exception, we can only surmise as to the precise meaning of this comment.

[97] As Lord Eveleigh mentioned in *Cayne*:

> In my view, whether [*Woods*] is a complete case or not, it is not one which lends itself to the convenience test. The fact that there may be some further collateral matter to be tried and the fact that there cannot subsequently be a claim by [the defendant] for damages arising from the grant of an injunction does not mean that the case must be one which is suitable for the application of the balance of convenience guidelines laid down in the Cyanamid case (*supra* note 53 at 232).

[98] *Supra* note 44 at para. 2.380.

B. The Second Exception: No Obstacles to Adjudication on the Merits

As previously mentioned, the evidentiary constraints that obscure the strength of the parties' cases in certain applications for interlocutory injunctions made the three-pronged test set out in *American Cyanamid* necessary. In this context of uncertainty, the last two prongs of the test—the need to show irreparable harm and the weighing of the inconveniences that would be caused by granting or refusing the remedy—are supposed to allow the court to reach the most equitable resolution of the rights and obligations of the parties.

In reality, however, certain cases involve no material dispute over the facts even at the interlocutory hearing, and other cases, while disputed on their facts, nevertheless proceed upon a complete factual record at the interlocutory stage. Given those circumstances, the reason for refusing to venture deeper into the merits of the case—namely an incomplete factual record—is simply absent[99] and the balance of inconvenience becomes much less decisive. This is the basis for the second exception to the *American Cyanamid* guidelines, which is here divided into two subgroups: cases with undisputed facts and cases with complete factual records.

1. Cases with Undisputed Facts

a. The Nature of the Exception

Lord Diplock stated in *Woods* that when deciding a case, the court ought to "give full weight to all the practical realities."[100] Besides for cases falling within the Woods exception, there is at least one other line of cases in which practical considerations militate in favour of giving much greater weight to the merits of each party's application. In *RJR-MacDonald*, the Supreme Court of Canada itself recognized two other potential exceptions to *American Cyanamid*. One such exception is where the case rests on "a simple question of law."[101] The second potential exception propounded by the Court is where the facts are not substantially in dispute:

> The suggestion has been made in the private law context that a third exception to the American Cyanamid "serious question to be tried" standard should be recognized in cases where the factual record is largely settled prior to the application being made. Thus in Dialadex Communications Inc. v. Crammond (1987), 34 D.L.R. (4th) 392 (Ont. H.C.), at p. 396, it was held that:

---

[99] Lord Diplock appeared to recognize as much in *American Cyanamid*, claiming his guidelines applied "when an application ... is made upon contested facts" (*supra* note 1 at 406).

[100] *Supra* note 46 at 625.

[101] *RJR-MacDonald*, *supra* note 1 at 339. The second exception to the *American Cyanamid* prohibition on an extensive review of the merits arises when the question of constitutionality presents itself as a question of law alone.

> Where the facts are not substantially in dispute, the plaintiffs must be able to establish a strong prima facie case and must show that they will suffer irreparable harm if the injunction is not granted.[102]

These two exceptions to the three-pronged test should in fact be treated as one. This is because where there are no substantial facts in dispute on an application for interlocutory injunction (i.e., the second exception), all that remains to be decided are issues of law (i.e., the first exception).

Doubt has been expressed by the Supreme Court of Canada as to the validity of this exception—and more specifically that of its second embodiment.[103] However, where courts have an undisputed set of facts before them and time to make a proper determination as to the applicable law, it only makes sense that they should adjudicate on the merits,[104] if only temporarily. Refusing to determine the rights and obligations of the parties at the interlocutory stage would only increase the risk of subjecting a respondent to an injunction without underlying right or of letting an applicant's rights be infringed irreparably. In short, to quote Justice Sharpe, delaying a determination on the merits of each party's case in such circumstances would be tantamount to "judicial abdication".[105]

Justice Vallerand of the Court of Appeal of Quebec seems to have endorsed that approach in *Resfab Manufacturier de ressort inc. v. Bruno Archambault et Baultar inc.* where he noted that "puisque la qualité du droit relève de textes précis ou alors de principes fondamentaux et a trait à la liberté professionnelle de l'intimé, il nous faut à mon sens statuer, même à l'étape de l'interlocutoire."[106] Likewise, the Saskatchewan Court of Appeal recently applied this exception in *Rothmans, Benson & Hedges Inc. v. Saskatchewan* when it decided that "[s]ince the issue is a pure question of law, it falls within the second exception and I need not consider the second and third tests set out in *Metropolitan Stores* and *RJR-MacDonald*. Accordingly, I must determine whether to grant the stay upon a review of the merits of the issue."[107] Several authors have also sanctioned this approach.[108]

---

[102] *Ibid.* at 340.

[103] See *ibid.*

[104] Indeed, in predicting the outcome of the trial by determining who is most likely to win on the merits, the court will have no choice but to determine who, in its opinion, is right as between the applicant and the respondent, or in other words, to adjudicate on the merits. Lord Diplock appeared to be of the same opinion. See *supra* note 16 and accompanying text.

[105] S*upra* note 44 at para. 2.310.

[106] (1985), [1986] R.D.J. 32 at 41, 10 C.P.R. (3d) 102 (Qc. C.A.).

[107] 2003 SKCA 104 at paras. 7-8 [*Benson & Hedges*]. The British Columbia Court of Appeal also appears to have applied the exception in *HSBC*, *supra* note 64 at para. 26, although in this case both the *Woods* exception and this exception were present. See also *Simoni v. Sugarman* (2000), 185 Nfld. & P.E.I.R. 196, 44 C.P.C. (4th) 56, at para. 25 (S.C. (T.D.)) (although the *Woods* exception also applied); *590470 Alberta Ltd. v. Edmonton (City of)*, 2004 ABQB 373, 358 A.R. 122 at para. 18-25, 37 Alta. L.R. (4th) 216; *Metz v. Board of Education of the Prairie Valley School Division No. 208 of*

b. The Standard

Once it is accepted that cases with undisputed facts allow the judge to determine the relative strengths of each party's case with accuracy, one question remains: under this exception, must the applicant show an overwhelming (or at least a strong) case, or can it prove its case on the balance of probabilities?

This, however, is a trick question. Indeed, as there are no material facts in dispute in cases falling within this exception, there is no case to prove either on a balance of probabilities or on any other standard. Indeed, the standard of proof is simply inapplicable where there is no disputed evidence:[109] the court can proceed to directly apply the law. And the law is what it is; the law is not *probably* something rather than something else.

2. Cases with a Complete Record of Facts

a. The Nature of the Exception

The other line of cases (which should be treated in the same category) comprises those in which the facts are in dispute, but the whole factual record (or a material part thereof) is before the motions judge.[110] Just like the court has no valid reason to delay

---

Saskatchewan, 2007 SKQB 269 at paras. 20-23 (although in this case, the injunction sought was a mandatory injunction against a public authority and also called for a strong prima facie case).

[108] For example, Spry writes:

> [U]sually the court does not regard any matters of law in dispute as so difficult that it should decline to consider them if this may affect its decision, and hence it may be prepared to adopt a view, which is to be treated merely as provisional; and both that conclusion and the degree of confidence with which it has been reached may be duly taken into account in determining whether the balance of justice favours the grant of interlocutory relief (*supra* note 43 at 467).

See also Sharpe, *supra* note 44 at para. 2.260 ("[w]here the chance of accurate prediction [of the outcome of a trial] is higher, as for example, where the result turns on the construction of a statute or the legal consequence of admitted facts, the court hearing the preliminary application is in a very good position to predict the result").

[109] Indeed, the civil standard imposed upon an applicant (i.e., demonstrating its case on a balance of probabilities) is enunciated at art. 2804 C.C.Q. of Book Seven entitled "Evidence".

[110] This exception does not appear to have been considered by the Supreme Court of Canada in *RJR-MacDonald* (*supra* note 1). It should be noted, however, that some courts seem to have interpreted the "third exception" mentioned in *RJR-MacDonald* as referring to cases with complete records of facts. See e.g. *Tall Boys Ltd. v. Bennett*, 2002 NFCA 50, 216 Nfld. & P.E.I.R. 20, 216 D.L.R. (4th) 307 [*Tall Boys*]. In *Tall Boys*, the Newfoundland and Labrador Supreme Court (Court of Appeal) stated, "Obviously, there may be cases where the parties *agree* that all of the evidence they would bring before a trial judge is before the motions or applications judge and, in any such case it may well be appropriate to proceed [with an extensive review of the merits] as the applications judge did here" (*ibid.* at para. 21). Hence, the Court does not refer to a case where the facts are not

its evaluations of the merits of the parties' cases where there are no disputed facts, but only questions of law,[111] when all the facts are before it, the court can properly assess the strength of each party's case.

At least one particularity of the Canadian legal system as compared with the U.K. system should facilitate the development of this line of cases. Unlike the approach taken in Canada and in Quebec, in the United Kingdom, the evidence that comes before the court on an application for interlocutory injunction is generally untested by cross-examination, which leaves the evidentiary record quite incomplete.[112] Thus, one factor that bore heavily on the finding in *American Cyanamid* that a motion for interlocutory injunction should not turn into a mini-trial does not apply in Canada. This was recognized by the Court of Appeal of Ontario in *Chitel v. Rothbart*, where Chief Justice MacKinnon stated for the court, "It is my view, without stating any final opinion on the subject, that the availability of the cross-examination transcript makes more legitimate a preliminary consideration by the motions judge of the merits of the case."[113]

This essential distinction between the situation in the United Kingdom and the one in Canada and Quebec should make it all the more easy to recognize the exception advocated in this subsection. However, it must be emphasized that because this branch of the exception has not been specifically mentioned by the Supreme Court of Canada in *RJR-MacDonald*, its jurisprudential underpinnings are much weaker than those of its sister branch (i.e., cases with undisputed facts) or of the *Woods* exception.

b. The Standard

Unlike in cases where there are no disputed facts, where there is a complete but disputed factual record before the motions judge, a standard of proof must be imposed upon the applicant. Once again, the question is whether the standard should be the civil standard of the balance of probabilities or a higher standard such as the requirement to make a strong or overwhelming case.

The standard of proof under this exception should be the normal civil standard of the balance of probabilities. The main policy reason for requiring a higher standard of proof under the *Woods* exception was that the respondent was being effectively deprived of a trial. Under this exception, there is no such deprivation, because where

---

substantially in dispute, but instead to a case where the whole factual record is before the motions judge.

[111] In fact, the only foreseeable excuse would be a lack of time to consider the factual record.

[112] See arts. 93, 754.1, and 754.2 C.C.P.

[113] (1982), 39 O.R. (2d) 513 at 522, 141 D.L.R. (3d) 268 (C.A.) [emphasis added]. See also *Smith, Kline & French Canada Ltd. v. Novopharm Ltd*. (1983), 72 C.P.R. (2d) 197 (Ont. H.C.) at para. 23 (where the *Woods* exception was also applied). *Contra CIBA-Geigy Canada Ltd. v. Novopharm Limited* (1994), 83 F.T.R. 161, 56 C.P.R. (3d) 285 at para. 33 (F.C.T.D.).

all the facts are before the motion judge, a mini-trial is possible at the interlocutory stage.

In these applications for interlocutory injunction, there is no more risk (which it was argued, should be borne by the applicant) than at the trial stage that the motions judge will come to an erroneous conclusion on the facts before him, let alone on the application of the law thereto. It follows that there is no reason why a higher standard should be imposed upon the applicant.

3. The Limited Value of the Balance of Inconvenience

As was already mentioned, the irreparable harm prong must always be satisfied in applications for interlocutory injunction, otherwise the applicant has no need for this remedy and must simply wait for trial in order to vindicate his rights.[114] As for the balance of inconvenience test, however, it is argued that it should be invoked sparingly in cases falling within the two sub-categories of this exception.[115]

The most important risks that an interlocutory injunction hearing presents is that a respondent be deprived of exercising his rights due to a wrongfully issued injunction or that an applicant have his rights violated for failure to be awarded an injunction to which he was entitled. The surest way to avoid having those risks materialize is for the court to adjudicate based primarily on the strength of the parties' cases. However, because determining the rights and obligations of the parties is difficult on certain applications for interlocutory injunctions, the practice of balancing the harm that would be caused to both the applicant and the respondent came to be the next most equitable way to decide whether to grant the remedy or not.

The last two prongs of the traditional test should be recognized for what they are—a substitute for the proper determination of the rights and obligations of the parties. What may have been lost along the way is the recognition that where the problem that made this substitute necessary—difficulty in determining the parties' rights and obligations—is absent, the substitute becomes irrelevant. It follows that when the motions judge only has to determine a question of law or has the full factual record before him, he should adjudicate based on the strength of each party's rights

---

[114] However, courts may find it easier to find irreparable harm in cases falling within this exception, following the modern tendency described in *supra* notes 78, 83.

[115] This was recognized, again implicitly, by Owen J.A. in *Kanatewat* (*supra* note 26 at 183-84). Indeed, Owen J.A. expressed the opinion that if the rights invoked by the applicant were clear, it was unnecessary to consider the balance of inconvenience, and likewise if those rights turned out to be inexistent. In other words, not only did Owen J.A. endorse the relative strength of the parties' cases as a relevant factor to be weighed when deciding whether or not to grant an interlocutory injunction, he also seemed to be of the opinion that the balance of inconvenience was a test ill-suited to cases where a clear conclusion on the merits could be reached by the court. See also *Benson & Hedges*, although in that case, the Saskatchewan Court of Appeal also said that the irreparable harm prong was to be disregarded (*supra* note 107 at para. 7).

and obligations even at the interlocutory stage, and thereby avoid the risk of wrongfully depriving either party of its rights. This will lead to the most just and convenient result.

But there is more. In many cases, it is much more difficult for the court to make an assessment of the nature of the harm and inconvenience that either party will suffer than to determine the respective rights and obligations of the parties.[116] While the rights and obligations of the parties often depend on the interpretation of statutes, case law or written documents—an area in which courts are expert, the nature of the harm or inconvenience requires assessment that other professionals are often better equipped to make—such as accountants in commercial cases. That latter type of assessment is very difficult for a court to make, *a fortiori* at an interlocutory hearing. Therefore, good policy requires the court, where appropriate, to decide a case primarily on its merits rather than on the balance of inconvenience.

In addition to ensuring that courts adjudicate applications for interlocutory injunctions based on grounds that generate the most just and convenient result and in matters in which they are expert, adjudicating such applications as if they were at trial will also mean, to use the words of Lord Denning, that "in 99 cases out of 100, the matter goes no further."[117] As Sir John Pennycuick noted, the parties will often be "content to accept the judge's decision as a sufficient indication of the probable upshot of the action."[118] The ensuing reduction of cases destined for trial will of course be a positive development for the administration of justice. As Judge Laddie mentioned in *Series 5*, "[a]llowing parties to come to an earlier view on prospects would assist in reducing the costs of litigation. This is an issue to which much attention is being given at the moment."[119]

Yet some cases will nevertheless proceed to trial, thereby creating a risk most dreaded by judges on interlocutory applications, namely the risk that the trial judge will disagree with them on the merits of the case. This risk can be avoided if the motions judge applies the three-pronged test and adjudicates on the balance of inconvenience because then the trial judge can never *disagree* with the motions judge as their decisions will not be based on the same considerations.

But as Justice Sharpe noted, judges should not abdicate their judicial responsibility by deciding interlocutory motions based on irrelevant considerations out of fear of seeing their reasoning on the merits overturned by one of their colleagues. After all, there are many situations in which two judges will disagree on

---

[116] See *Series 5*, *supra* note 5 at 865, Laddie J. ("it would be somewhat strange, since *American Cyanamid* directs courts to assess adequacy of damages and the balance of convenience, yet these too are topics which will almost always be the subject of unresolved conflicts in the affidavit evidence").

[117] *Fellowes*, *supra* note 28 at 133.

[118] *Ibid.* at 141.

[119] *Supra* note 5 at 866. Obviously, the same concern about reducing the cost of litigation exists in Canada.

the same file. To name but one example, a judge, concluding that the applicant has standing on a motion to strike, may very well see the trial judge disagree with him. This, however, has never prevented judges from making these determinations, nor should it. At any rate, even if a case that truly falls within the second exception goes to trial, the risk of disagreement between the motions and trial judges will be limited by the latter's respect for the decisions of colleagues, especially since it will be impossible for the trial judge to attribute the divergence of opinion to the fact that the interlocutory judge did not have the benefit of seeing the whole record.

Cases that fall squarely within the ambit of this exception, and more particularly the second sub-exception, will probably not abound. Applicants with weaker cases on the merits or respondents with good cases on the balance of inconvenience are likely to argue that the file is incomplete and that it is therefore impossible to resolve disputed issues of fact and law at the interlocutory hearing, thus triggering the application of the *American Cyanamid* principles.[120] Of course, the judge hearing the interlocutory application would always have the final word (subject to appeal) in determining whether the evidentiary file is sufficiently complete to give him a clear enough idea of the merits of the case. But the risk that certain material facts may be missing will always preserve the need to venture deeper into the last prong of the three-pronged test.

Therefore, most cases with disputed facts will fall somewhere in between this exception and the *American Cyanamid* type of case. In such cases, the weighing of the merits should receive greater attention than *American Cyanamid* allows for, but the last two prongs of the test should also retain their significance. As we will now see, the same applies to cases falling between the *Woods* exception and the typical *American Cyanamid* cases. This body of intermediate cases will form the basis of a revisited three-pronged test.

C. The Amended Three-Pronged Test: Two Spectra

Although most applications for interlocutory injunction do not fall within the two categories of cases requiring adjudication akin to a final determination at trial, they should nevertheless command a more thorough examination of the merits than the one suggested in *American Cyanamid* and adopted in *RJR-MacDonald*. This is because in some cases, even when its success does not provide the applicant with all he came to court to seek, the injunction will nevertheless provide him with a tremendous advantage over the respondent. The same applies to cases that, although

---

[120] That is why the Newfoundland and Labrador Supreme Court (Court of Appeal) stated in *Tall Boys* that "where an application is based in part on affidavit evidence as to relevant factual circumstances, absent agreement of the parties that all relevant evidence intended to be adduced at trial is already before the court, it would seem most unwise, and in my view erroneous, to proceed simply on the basis of expressing doubt 'that there is any further relevant evidence to offer on these matters" (*supra* note 110 at para. 21).

falling to be determined on a disputed and incomplete evidentiary record, provide a clear enough picture for the judge to make an assessment of their merits.

In that sense, the premises upon which the three-pronged test was established in *American Cyanamid* (i.e., difficulty to adjudicate on the merits and necessity to preserve rights pending trial) and the circumstances which warranted the creation of the two exceptions to that test advocated in this article (i.e., no obstacles to adjudication on the merits and final effect of the interlocutory injunction) should be seen as respectively occupying opposite ends of two spectra.

In other words, there are two spectra against which every case should be assessed: the first is a spectrum at one end of which are cases falling to be determined essentially on incomplete and disputed factual records and at the other end of which are cases raising pure questions of law, and the second is a spectrum at one end of which are cases in which the interlocutory remedy is used merely to preserve the rights of the parties pending final determination at trial and at the other end of which are cases in which there is no incentive for either party to proceed to trial whether the injunction is granted or not.

When viewed against these two spectra, the test founded in *American Cyanamid* becomes more understandable. Indeed, the case before the House of Lords was one that primarily required an assessment of the facts rather than of the applicable law. As the decisive facts were contested and complex, the court was justified in feeling uneasy about examining the strength of each party's case beyond what was necessary to determine that there was a serious question to be tried. Moreover, the case was one in which the interlocutory remedy was a genuine holding operation pending trial. Therefore, considering the circumstances of this case, the development of the three-pronged test was logical.[121] What cannot be justified, however, is that this test was subsequently applied indiscriminately to all applications for interlocutory injunctions.

A more comprehensive assessment of applications for an interlocutory injunction might be as follows. First, we could presume that if the two spectra were each constituted of their two poles only, any given case would fall to be determined along the following lines, which we have already analyzed in detail:

[121] Even though Sharpe J.A. did suggest that "*Cyanamid* overstated the difficulty in accurately assessing the strength of the case on an incomplete record" (*supra* note 44 at para. 2.230).

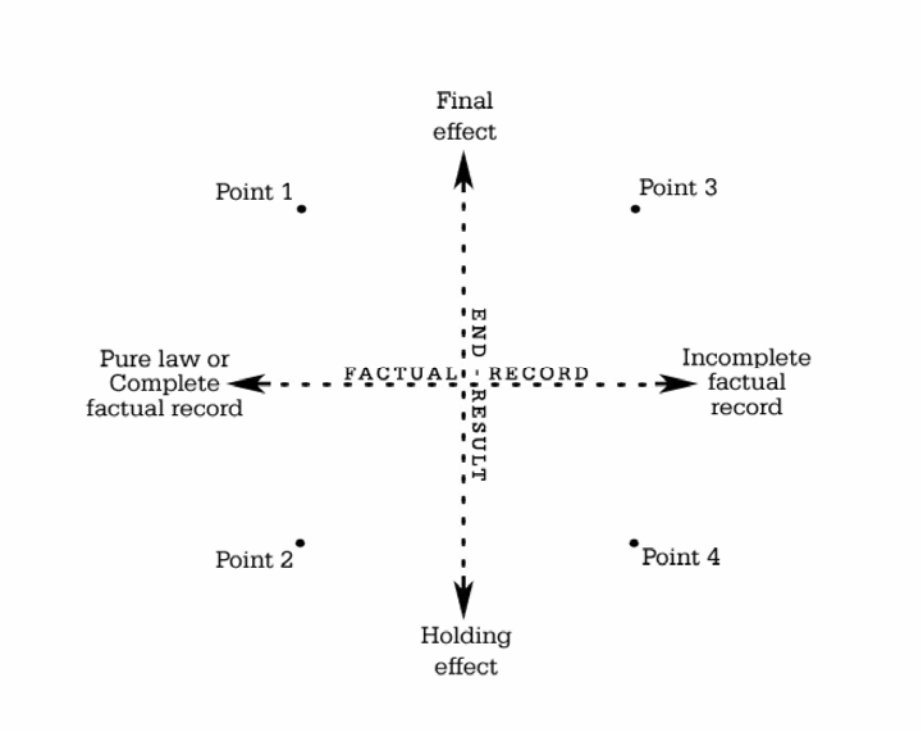
	Pure Law or Complete Factual Record	Incomplete Factual Record
Final Effect	Balance of probabilities (or determining question of law).[122]	Strong *prima facie* case.
Holding Operation	Balance of probabilities (or determining question of law).	*American Cyanamid* guidelines.

However, as most cases will fall somewhere in between the two poles of each spectrum, courts will often have to grapple more substantively than they did in *American Cyanamid* with the merits of the case in order to reach a just and convenient result, but will nevertheless have to take into account the balance of inconvenience suffered by both parties.[123] In fact, in most cases the merits will effectively be weighed against the balance of inconvenience, and thus the *American Cyanamid* guidelines turned on their head: only an imbalance in the inconvenience caused to each party would warrant going against the prima facie conclusion on the merits.[124] As cases move closer to the *American Cyanamid* prototype, the relative imbalance necessary to overrule the judge's preliminary assessment of the merits of each party's case would become less substantial. Only when a case falls near the two ends represented by the *American Cyanamid* case should the balance of inconvenience overrule the court's evaluation of the parties' cases. A few examples are illustrated in the following diagram:

[122] Indeed, when the two exceptions apply simultaneously, the reasons behind the application of the strong prima facie case threshold under the *Woods* exception (i.e., that the applicant should bear the burden of the risk of error on the merits), are inexistent as there is no more risk of error on the merits than at trial.

[123] It is probably unnecessary to repeat at this point that the irreparability of the harm prong will always have to be met.

[124] In *American Cyanamid*, the court ruled that the relative strength of the parties' cases was to be taken into account only once it was found that the balance of inconvenience was inconclusive, or, in other words, when the inconveniences sustained by each party were equal (*supra* note 1).



As a first example, imagine an application for an interlocutory injunction that, while proceeding upon an incomplete factual record, is nevertheless relatively simple and highly dependent upon issues of law. Imagine that this case is also of the type that would provide a great strategic advantage to whomever succeeds at the interlocutory hearing and would greatly limit the parties' interest in going forward to trial (point 1 on the diagram). In such a case, the court should be inclined to reach a conclusion on the merits of the case, unless it can be shown that the injustice caused to the party *who appears to be wrong* would be overwhelmingly greater than that caused to the party *who appears to be right*. An exceptional imbalance in the prejudices that each party would suffer if either the injunction were granted or not could warrant going against even a strong prima facie case on the merits.

A second type of case would be one that, while not presenting exceptional difficulties with respect to the underlying rights of each party, is only a holding operation to preserve the rights of the applicant until trial (point 2 on the diagram). In such cases, while greater consideration could be given to the merits of the case, a real imbalance in the inconveniences that would be suffered by each party if either the injunction is granted or not would be sufficient to overturn the prima facie conclusion on the underlying rights. Falling in the same category would be cases that provide a substantial strategic advantage to the successful party at the interlocutory hearing but that are very difficult to assess on their merits (point 3 on the diagram).

In the third category would be cases that, while providing some strategic advantage to the successful party, are more like holding operations until trial and are difficult but not near-impossible to assess on their merits (point 4 on the diagram). In such cases, almost any imbalance in the inconvenience caused to each party would be enough to warrant overriding a prima facie conclusion on the merits. These cases closely follow the *American Cyanamid* guidelines. However, only rarely should courts decline to consider the merits of a case in determining whether to grant an injunction or not, an approach suggested by modern case law and doctrine.[125]

In exercising their discretionary power to order an injunction, courts should always determine where the case before them falls along these two spectra in order to assess the weight to be given to an assessment of the merits.[126] The most important advantage yielded by this approach is allowing the courts to reach results that are more just and convenient by ensuring that neither rights are unduly violated or restrained. Furthermore, as was mentioned earlier, providing the parties with an open and fair hearing on the merits of their cases and an early judicial assessment will often encourage them to resolve their differences and consequently reduce the costs of litigation. As Justice Laddie remarked in *Series 5*:

> [Assessing the relative strength of each party's case] would preserve what is one of the great values of interlocutory proceedings, namely an early, though non-binding, view of the merits from a judge. Before *American Cyanamid* a decision at the interlocutory stage would be a major ingredient leading to the parties resolving their differences without the need for a trial. There is nothing inherently unsatisfactory in this. Most clients ask for and receive advice on prospects from their lawyers well before there has been cross-examination. In most cases the lawyers have little difficulty giving such advice. It should also be remembered that in many jurisdictions on the continent trials are conducted without discovery or cross-examination. There is nothing inherently unfair in a court here expressing at least a preliminary view based on written evidence. After all, it is what the courts managed to do for a century and a half.[127]

Finally, adopting the two-spectra scheme will help improve the predictability and consistency of the interlocutory injunction jurisprudence while preserving the

---

[125] See *supra* notes 43-45.

[126] One example of a recent case having adopted an approach similar to the two-spectra approach proposed in this paper is *Gateway Casinos v. BCGEU* (2007 BCSC 1175). This is a case of trespass by union organizers where Bauman J. held that although the application to prevent trespass did not represent the disposition of the entire proceedings, as was argued by the union, he would "approach the matter of serious question with more attention to the merits than would normally be the case, guided by the exception described in *RJR-MacDonald Inc*." (*ibid.* at para. 17). See also *Yellow Pages Group v. Anderson* (2006 BCSC 518), where the court appears to have reached a middle ground: "I am prepared, given the context of this case, to consider the merits of the argument that the restrictive covenants are not enforceable. However, I am not prepared to reach a final conclusion as [*sic*] all costs. This case is not one where the exigencies are so great as to require that a final determination be made on inadequate evidence, limited argument, or overly brief reflection" (*ibid.* at para. 25).

[127] *Supra* note 5 at 866.

equitable and flexible nature of this remedy. Modern case law generally recognizes that courts may, to a certain degree, take into account the relative strengths of each party's case on applications for interlocutory injunctions.[128] However, it does not provide any guidelines to help determine to what extent it is appropriate in any given case to make such an assessment of the merits and what weight should be given to that assessment as opposed to the balance of inconvenience. The two-spectra scheme, on the other hand, provides an analytical framework that is mindful of the particularities of the interlocutory process. In addition, it is far from revolutionary, as it is founded on the premises of the three-pronged test elaborated in *American Cyanamid* and on the exceptions carved out in its aftermath.

Conclusion

This article aims primarily to shed light on the three-pronged test elaborated in *American Cyanamid* and in its offspring, including *RJR-MacDonald* which imported the test to Canada. Once a hard look is taken at this established test—and more specifically at its premises—the test reveals itself to be ill-suited for a host of situations which seem to be anything but exceptional. Indeed, as shown, the premises underlying the three-pronged test are inapplicable in many cases, as not all applications for interlocutory injunctions will be (1) heard on incomplete and controversial evidence or (2) presented in order to preserve the rights of the applicant pending trial. Whenever applications for interlocutory injunctions are argued over a question of law, a complete factual record, or when they will finally resolve the dispute between the parties, the traditional three-pronged test will be inappropriate. In such circumstances, the court should adjudicate mainly on the relative strengths of each party's case in order to attain the most just and convenient result. However, most cases will fall between the *American Cyanamid* prototype and the type of cases that give rise to the two exceptions set out above. In these circumstances, the importance of the strength of the parties' cases in relation to the balance of inconvenience will vary according to where the particular case lies along the two spectra, that is, between *American Cyanamid* and its exceptions, as determined by the end-result of the application and the degree of factual complexity underlying it.

Of course, a cursory review of this article might lead one to conclude that it merely advocates something akin to a return to the pre-*American Cyanamid* era, where courts must proceed to a mini-trial at the interlocutory stage in order to ensure that neither party's rights are unduly infringed or restrained, even if only temporarily. This is not the intent. Indeed, the proposed approach aims to reach a just middle ground that takes into account the reasoning that led to the pre-*American Cyanamid* rule, the *American Cyanamid* guidelines, and the *RJR-MacDonald* exceptions. In other words, the approach aspires to make sense of the previous tests and rearrange

[128] See *supra* notes 43-45.

them to create a more effective and sensible method to adjudicate applications for an interlocutory injunction.

Far from proposing a radical change to the law of interlocutory injunctions, the seeds of the approach advocated in this article were already sown by the English C.A. in the aftermath of *American Cyanamid*, by the House of Lords in *Woods*, and perhaps more importantly, by the Supreme Court of Canada a little over a decade ago in *RJR-MacDonald*. These seeds have since developed in the case law of many Canadian appellate courts. Now is the time for a novel approach to interlocutory injunctions to reach the courtrooms so that the rigid version of the three-pronged test may be finally put to rest and interlocutory injunctions may once again fill their intended role of a truly just and convenient remedy.