

NEW RULES & FLEXIBLE TOOLS

An inquiry into the framework for the award of interlocutory injunctions in intellectual property matters at the Federal Court of Canada

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In this article the authors examine the criteria employed by the judges of the Federal Court in response to petitions for interlocutory orders in intellectual property disputes. The analysis centres on the tests set out in American Cyanimid, their application in such disputes and on arguments for a fresh approach.

Les auteurs examinent les critères utilisés par les juges de la Cour fédérale d'appel en matière d'injonction dans des litiges de propriété intellectuelle. L'analyse porte principalement sur les tests établis dans American Cyanimid, leur application dans de tels domaines, et des arguments pour une nouvelle approche.

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Introduction

Interlocutory injunctions have become an indispensable tool for practitioners in intellectual property disputes. Not surprisingly, a great deal of attention has been paid to establishing the appropriate test to be used for the award of this remedy. The issue which has most dominated judicial and academic discussion on this topic is the extent to which the merits of the case should be considered.

The contemporary approach to the award of interlocutory injunctions was enunciated by Lord Diplock in *American Cyanamid Co. v. Ethicon Ltd.*¹ He set out a tripartite model that has been formally adopted in Canada by the Supreme Court² and the Federal Court of Appeal.³ Following this model, an injunction will be awarded if the plaintiff can satisfy the motions judge that: 1) there is a serious issue to be tried; 2) the plaintiff will suffer irreparable harm if the defendant is not restrained; and 3) the balance of convenience weighs in a plaintiff's favour.

In *American Cyanamid*, Lord Diplock severely restricted the extent to which the merits of a claim are determinative of entitlement to interlocutory injunctive relief, stating that such proceedings were not meant to be "mini-trials"⁴ and that the focus should be on the relative irreparable harms. However, this approach was not without its difficulties. Shortly thereafter, the need for flexibility with regard to merits adjudication was recognized by the House of Lords in the case of *N.W.L. v. Woods*.⁵

The authors argue that in the context of intellectual property litigation at the Federal Court, the *American Cyanamid* test is too restrictive to adequately deal

¹ [1975] 1 All E.R. 504 (H.L.).

² Most recently by the Supreme Court of Canada in *RJR- MacDonald v. Canada (Attorney-General)*, [1994] 1 S.C.R. 311.

³ *Turbo Resources Ltd. v. Petro Canada Inc.* (1989), 24 C.P.R. (3d) 1 at 15 (F.C.A.).

⁴ *Supra* footnote 1 at 510.

⁵ [1979] 1 W.L.R. 1294 at 1306 (H.L.).

with the variety of circumstances in which interlocutory injunctions should appropriately be used. There are times when an in—depth examination of the merits is necessary or inevitable due to the intimate link between the merits and the anticipated harm.

In this light, a new model for the award of interlocutory injunctions will be proposed, which redefines the parameters for the adjudication of the merits while seeking to respond to the concerns raised by Lord Diplock in *American Cyanamid*. A fundamental aspect of this new model is the need to consider the interlocutory injunction as part of a general framework for the pre—trial defence of rights. Indeed, the other weapons in the plaintiff's quiver — the motion for summary judgment and motion for expedited trial — are in certain circumstances better suited to protect these rights, particularly where an examination of the merits is necessary.

While the focus of this paper is Federal Court intellectual property litigation, the comments made and the proposed model are generally applicable. Indeed, some of the suggestions made in this paper are already being applied by Canadian courts, in their quest to manage litigation more effectively and expeditiously.

I. Current State of the Law

To date, the *American Cyanamid* test remains the rule of thumb in interlocutory injunction applications in intellectual property matters in Canada, especially in the Federal Court. It is important to emphasize that a consideration of the relative irreparable harms lies at the heart of the test for granting injunctions. Lord Diplock appeared to recognize this balancing in *American Cyanamid* when he stated:

The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial.

⁶ *Supra* footnote 1 at 509.

⁷ See D. Cairns, *The Remedies for Trademark Infringement* (Toronto: Carswell, 1988) at 15 who stated "There was, until the House of Lord's decision in [*America Cyanamid*], considerable authority in favour of requiring the plaintiff to show, firstly a 'prima facie' case of infringement of his rights by the defendant." Cited as examples are *Stratford & Son v. Lindley*, [1965] A.C. 269 at 331 and 338; *F. Hoffman-Laroche & Co. v. Secretary of State for Trade & Industry*, [1975] A.C. 295 at 360.

*The court must weigh one need against another and determine where "the balance of convenience" lies.*⁶

1.1 The Merits

Prior to the *American Cyanamid* decision, a plaintiff was often,⁷ but not always,⁸ required to demonstrate a strong *prima facie* case in order to obtain an interlocutory injunction. This requirement was soundly rejected by Lord Diplock, who stated as follows:

...The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words *that there is a serious issue to be tried*.

*It is no part of the court's functions at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature consideration...*⁹ [emphasis added]

It is not clear whether this approach was also motivated by the fact that interlocutory injunctions were increasingly being used by English lawyers, faced with lengthy delays in getting to trial in civil courts, as a relatively inexpensive and speedy method of determining the probable outcome of cases:

Affidavits would be filed by both sides and, since the court was required to determine whether a *prima facie* case existed, the parties received a good indication of the probable outcome of the trial. They usually settled accordingly.¹⁰

In any event, the establishment of the "serious issue" requirement in place of the "*prima facie* case" standard transformed the "merits" branch of the test for injunctive relief into a simple threshold to be met by applicants and thus diminished the importance of the merits within the overall decision-making

⁸ See, for example, *Lido Industrial Products Ltd. v. Melnor Manufacturing Ltd.* (1968), 69 D.L.R. (2d) 256 (S.C.C.); *Yule Inc. v. Atlantic Pizza Delight Franchise (1968) Ltd.* (1977), 17 O.R. (2d) 505 at 510-11 (Ont. Div. Ct.); *Evans Marshall v. Bertola*, [1973] 1 All E.R. 992 (C.A.); *Halsbury's Laws of England*, 3d ed., vol. 21. See also R.J. Sharpe, *Interlocutory Injunctions and Specific Performance*, 2d ed. (Toronto: Canada Law Book, 1992) at 2-8, in which he notes pre-*Cyanamid* cases in which the plaintiff needed to show that there is a "fair question", "a serious question to be tried"; or a "substantial question to be tried" and see Baker, "Interlocutory Injunctions — a Discussion of the 'New Rules'" (1977) 42 Sask. L.Rev. 53.

⁹ *Supra* footnote 1 at 510. Note that in many Canadian jurisdictions, cross-examination is permitted on affidavits, which was not the case in the United Kingdom.

¹⁰ J.N. Ahern, "Interlocutory Injunctions in Administrative Law: What is the Test?" (1992) 5 C.J.A.L.P. 1 at 6-7. Note that in *Turbo Resources*, the relative strength of the parties' cases could be considered to "tip the balance of convenience" provided the relative irreparable harms did not "differ widely".

scheme. It would appear that Canadian courts, in particular the Federal Court, have adopted this test.

The question to be asked, however, is whether the hands-off approach to consideration of the merits in interlocutory injunction proceedings should be applied as a rigid rule or whether there are circumstances where in-depth examination of the merits may be justified. As will be discussed below, there are a number of circumstances where merits should be allowed - and court occasionally do allow them - to play more than a peripheral role in the outcome of interlocutory injunction proceedings, including: (1) in the assessment of irreparable harm in certain circumstances, (2) in the consideration of the balance of convenience¹¹; (3) in the examination of "special factors" in the balance of convenience; and (4) where it can be shown that the interlocutory injunction will effectively put an end to a case¹².

1.2 Irreparable Harm

Not all situations in which a party faces injury in the intervening period between the genesis of a cause of action and the trial warrant the award of an interlocutory injunction. The applicant must demonstrate that the harm will be irreparable. The main features of the "irreparable harm" branch of the test, as set out by the Federal Court of Appeal in *Turbo Resources*¹³ are as follows (assuming that a serious issue exists):

(a) where a plaintiff's recoverable damages resulting from the continuance of the defendant's activities pending trial would be an adequate remedy that the defendant would be financially able to pay, an interlocutory injunction should not normally be granted;

(b) where such damages would not provide the plaintiff an adequate remedy but damages (recoverable under the plaintiff's undertaking) would provide the defendant with such a remedy for the restriction on his activities, there would be no ground for refusing an interlocutory injunction;

(c) where doubt exists as to the adequacy of these remedies in damages available to either party, regard should be had to where the balance of convenience lies;

(d) where other factors appear to be evenly balanced, it is prudent to take such measures as will preserve the status quo;

¹¹ Lord Denning makes reference to these in *Fellowes v. Fisher* [1976] Q.B. 122 (C.A.). However, Professor Sharpe has written that "it seems clear from the context, and from the application of the 'special factors' consideration to the facts of *Cyanamid* itself, that this was intended only to qualify the suggested approach for determining the balance of convenience." at 2-32, *supra* note 8.

¹² See the discussion pertaining to the *Woods* exception in chapter 2.3 below.

¹³ *Supra* footnote 3 at 19-20.

(e) where the evidence on the application is such as to show one party's case to be disproportionately stronger than the other's, this factor may be permitted to tip the balance of convenience in that party's favour provided the non-compensable disadvantage to each party would not differ widely;

(g) (*sic*) other unspecified special factors may possibly be considered in the particular circumstances of individual cases.

Two issues arise with respect to the irreparable harm requirement. The first issue concerns the substance and scope of "irreparability" itself. The second issue pertains to the standard of proof to be met in establishing the requisite level of harm.

1.2.1 *The substance and scope of "Irreparability"*

As stated by the Federal Court of Appeal in *Turbo Resources*, the harm caused by the defendant's unrestrained activity prior to the trial must be such that damages calculated at trial would not be an adequate remedy. In *Manitoba (A.G.) v. Metropolitan Stores Ltd.*,¹⁴ the Supreme Court of Canada defined irreparable harm simply as "...harm not susceptible or difficult to be compensated in damages". More recently, in *RJR-MacDonald v. Canada (A.G.)*,¹⁵ Sopinka and Cory JJ. expanded on this definition somewhat, stating:

"Irreparable" refers to the nature of the harm suffered rather than its magnitude. *It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.* Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid, supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).¹⁶

Certain types of harm — the bankruptcy of a plaintiff, the permanent loss of reputation or the inability of a defendant to pay damages following a loss at trial due to a precarious financial position — can be described as "heritage house" losses which are incurable by way of damages in almost all circumstances.¹⁷ There is thus no difficulty in identifying such harm as "irreparable". Such is not the case, however, when the harm flowing from the infringing activity is a loss of market share.

¹⁴ [1987] 1 S.C.R. 110 at 128.

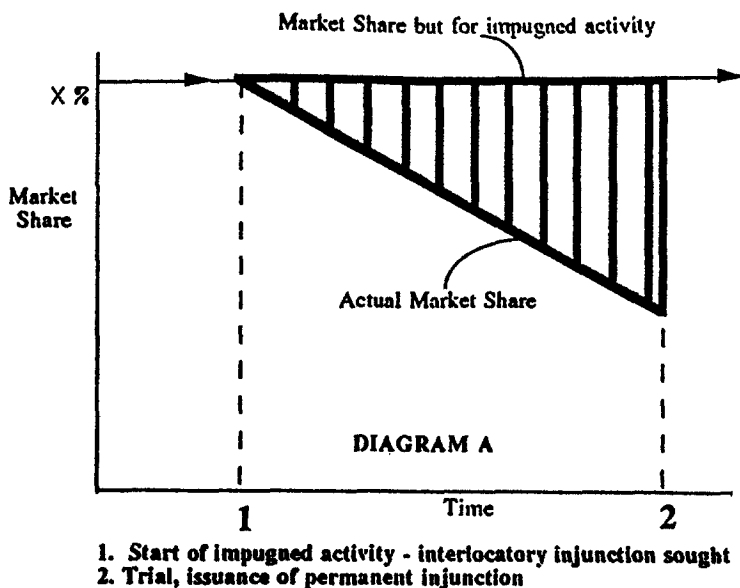
¹⁵ *Supra* footnote 2 at 341.

¹⁶ *Ibid.*

¹⁷ The term "heritage house" is meant to describe the kind of permanent loss that occurs when a building of historical value is destroyed. It is difficult or impossible to compensate the loss of such a unique property with damages and therefore the harm is by definition "irreparable".

The question thus arises whether *all* market losses which are impossible or difficult to quantify constitute irreparable harm, or whether something more is required such as permanence. The answer is not clear.

If, for example, none of the alleged harm continues beyond the final injunction stage and the harm is completely attributable to the activity of the respondent, there is no irreparable harm. As Diagram A illustrates, although the harm resulting from the impugned activity may be difficult or even impossible to assess *at the time of the application*, it will be calculable *at trial* (the finite shaded area) and is therefore compensable.

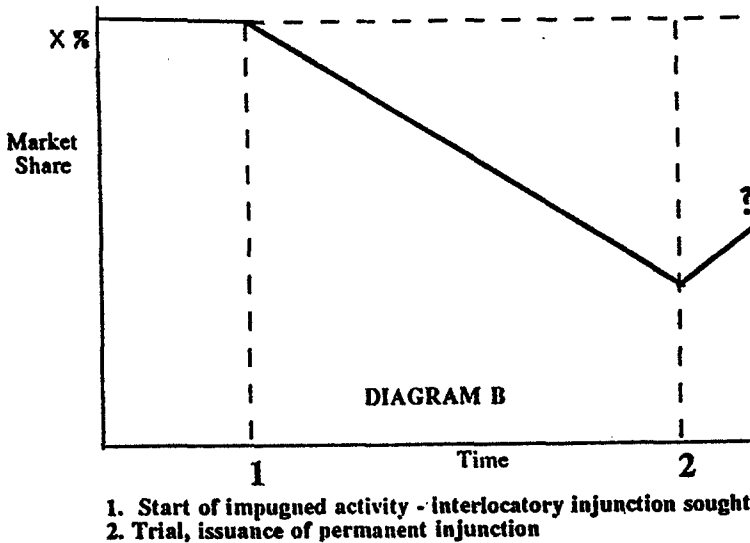


This is often the case in patent infringement situations, where the issuance of a permanent injunction at trial restores the patent holder's monopoly, thereby allowing the patent holder to regain its prior market share relatively quickly.¹⁸ It must be remembered that, in the case of market losses, the issue of calculability is prospective in nature, and therefore the question to be answered at the application stage is whether, at trial, it will be possible to look back at the harm suffered and calculate or quantify the damage.¹⁹

¹⁸ This assumes that no spin-off products which create their own unique market or permanently convert a proportion of the market for the original product have resulted from the patent infringement.

¹⁹ An example of this scenario in the context of passing-off is found in *Boots Co. Ltd. v. Approved Prescription Services Ltd.*, [1988] F.S.R. 455 (C.A.), where it was clear on the evidence that every sale by the defendant would have been made by the plaintiff but for the passing-off.

The more complicated scenario is depicted in Diagram B. This could be a passing—off situation where the loss of market share due to the infringement cannot be isolated from that due to legitimate competition. The difference between the post—trial (following the issuance of the permanent injunction) and pre—trial market shares is determinable only where it can be established that all customers who switched to the “illegitimate” product prior to the permanent injunction did so because of the impugned activity. This is often not the case.



There are two ways of treating the harm in such circumstances. The difference between the two is the degree to which resort must be made to the underlying merits of the claim to justify the award of an interlocutory injunction.

On the one hand, it may argued that, just as courts award damages in the context of tort remedies to compensate for the loss of a limb in personal injury cases, so too may they compensate for an economic loss that can truly not be compensated in the intellectual property context. In that light, only the *permanence* of such a loss or the defendant—respondent's inability to compensate the plaintiff—applicant at trial make damages an inadequate remedy and render the loss truly uncompensable. Under such an approach, no reference need be made to the merits in order to justify granting the injunction. The fact that a loss is suffered, which may not be compensated and which will persist over time, is sufficient to justify the award of the injunction.

On the other hand, it could be said that the *incalculability per se* of the injury suffered by a party forced to wait until trial in order to obtain relief renders such harm “irreparable”. This approach seems to have been accepted in the United

Kingdom.²⁰ It recognizes that the right—holder bears the burden at trial of establishing what proportion of its loss is due to illegitimate versus legitimate activity. As such, it should not be saddled with the potential loss associated with the difficulty in calculating the harm at the interlocutory injunction stage.²¹

It must be remembered, however, that it is the respondent who bears the burden of establishing the loss attributable to an interlocutory injunction in the event that it is issued and the respondent subsequently wins at trial. Ultimately, then, both parties are faced with the dilemma of incalculability.

Assuming that no other factors exist to tilt the balance of convenience in favour of either party, the only additional variable that can justify a decision to grant an interlocutory injunction based merely upon the incalculability of a loss is if the merits lie in favour of the applicant. Thus, although not explicitly acknowledged by courts, the award of interlocutory injunctions based on incalculable market losses is often likely implicitly determined by the merits. This clearly conflicts with the spirit of *American Cyanamid*.

²⁰ See, *inter alia*, *Combe International Ltd. and Others v. Scholl (U.K.) Ltd.*, [1980] R.P.C. 1 (C.A.), where Fox J. states at 8:

It would be exceedingly difficult to ascertain how many sales which were lost by Combe were lost as a result of legitimate trade, and how many were lost as a result of passing-off. I am assuming, as I must for present purposes, that the plaintiffs succeed at the trial. There is no doubt, I think, that some people will know the difference between the two products perfectly well and will buy the defendants' product as a matter of deliberate choice. The difficulty, and I think it is a very great one, is to ascertain with any sort of certainty the extent of the latter class.

See also *Sodastream Ltd. v. Thorn Cascade Co Ltd. and Another*, [1982] R.P.C. 459 (C.A.) and *Ciba-Geigy PLC v. Parke-Davis & Co. Ltd.*, [1994] F.S.R. 8 (Ch. D). In *Reckitt and Colman Products v. Borden Inc. and Others*, [1987] F.S.R. 228 (C.A.), Nicholls L.J. stated:

For my part, I have to say that I think that if this inquiry ever had to be made in this case, *the court could easily find itself having to make little more than a guess at this figure*. If Borden were to sell its Mark II and Mark III lemons at outlets not currently selling JIF lemons, *it might be very difficult to arrive at a figure fairly, if roughly, representing sales acquired by deception*. I differ with much diffidence from a judge so experienced in this particular field, but on this I am unable to share his view on the adequacy of damages.

²¹ This remains a contentious issue in Canada. As Professor Sharpe notes, *supra* footnote 8 at 2-26, there is little authority on how such damages are to be assessed. However, in *International Pediatric Products Ltd. v. Lambert* (1967), 66 D.L.R. (2d) 157 and *Algonquin Mercantile Corp. v. Dart Industries Canada Ltd.*, [1988] 2 F.C. 305 (C.A.), the onus was placed on the defendant to prove damages resulting from the issue of an interlocutory injunction.

Little clear guidance has been offered by the Federal Court of Appeal regarding which approach is preferable. For example, in refusing the application for an injunction, Stone J.A. in *Turbo Resources* concluded that:

Here, refusal of the interlocutory injunction will expose the appellant to disadvantages which, though no doubt severe, can be adequately remedied in damages for any losses suffered by reason of the respondent continuing to sell its motor oil under the alleged infringing mark. It may, if so advised, request an accounting to assist in determining the extent of any such losses.²²

However, in the next sentence he stated that the "loss of goodwill that may be recoverable at common law *would not be easily measurable*"²³ and then proceeded to examine other factors in the balance of convenience, including the delay in initiating the application by the party seeking the injunction. In light of such conflicting signals, it is not surprising that the trial level authority can be found for both approaches for irreparability.²⁴

1.2.2 "Clear and Non Speculative" Proof of Irreparable Harm: the Standard at the Federal Court

The condition that proof of irreparable harm be clear and non—speculative appears to be unique so far to injunction applications in intellectual property matters at the Federal Court and adds a further dimension of complexity to the question of irreparability. This requirement was first put forth in the judgment

²² *Supra* footnote 3 at 22.

²³ *Ibid.*

²⁴ On the one hand, consider Walsh J.'s comments in *Smith Kline & French Canada Ltd. v. Frank W. Horner Inc.* (1982), 68 C.P.R. (2d) 42 at 53 (F.C.T.D.):

...it has frequently been held that the *mere difficulty or even impossibility of calculating the quantum of damages by the use of any mathematical calculations does not justify a finding that no damages can be awarded* when a finding of fault will result in entitlement to such damages, and the same would apply to an accounting of profits. The court must simply do the best it can under the circumstances and fix a global amount.

See also *Upjohn v. Apotex* (1993), 51 C.P.R. 292 at 302 (F.C.T.D.) and *Ciba Geigy v. Novopharm* (1993), 52 C.P.R. (3d) 497 at 507 (F.C.T.D.).

On the other hand, Mr. Justice Teitelbaum, in *Eli Lilly and Co. v. Interpharm* (1992), 42 C.P.R. (3d) 4 at 23 (F.C.T.D.) concluded:

Notwithstanding that irreparable harm need not be shown, I am satisfied that when one clearly appropriates the trade mark of another and attempts, as in this case, to sell another product for that of the product of the holder of the registered trade mark, there is immediate loss of goodwill and reputation to the owner of the trade mark thus causing irreparable harm *as this harm is not calculable in dollars*. [emphasis added]

See also *Lubrizol Corp. v. Imperial Oil Ltd.* (1989), 22 C.P.R. (3d) 493, 25 F.T.R. 33 (T.D.) upheld on appeal 26 C.P.R. (3d) 461 (Fed. C.A.) and *Alberta Distillers Ltd. v. Highwood Distillers Ltd.* (1993), 49 C.P.R. (3d) 342 at 345-46 (F.C.T.D.).

of Thurlow C.J. in *Cutter Ltd. v. Baxter Travenol Laboratories of Canada, Ltd.*²⁵ It was later clearly enunciated by Heald J.A. in *Imperial Chemical Industries PLC v. Apotex Inc.*²⁶

In trade—mark infringement and passing—off cases, the harm claimed to have been suffered is often the loss of goodwill, as opposed to the loss of reputation or the loss of market share. Requiring that the applicant prove, as Heald J.A. suggested in *Syntex*,²⁷ that it “*would suffer*” irreparable harm rather than “*is likely*” to do so, creates something of a paradox, particularly in trade—mark infringement and passing off cases.²⁸ On the one hand, Federal Court decisions abide by the prohibition set out in *American Cyanamid* against assessing

²⁵ (1980), 47 C.P.R. (2d) 53 (F.C.A.). Thurlow C.J. stated as follows at 57:

Nor do I think the evidence shows that the sale of the appellant's blood bag systems to the Canadian Red Cross Society will have any effect on the respondent's sales of their other products to Canadian customers. In my view, the evidence that it may is *speculative at best*.

²⁶ (1989), 27 C.P.R. (3d) 345 (F.C.A.). Heald J.A. stated at 351 that “the jurisprudence in this court establishes that the evidence as to irreparable harm *must be clear and not speculative*”. See also *Syntex Inc. v. Novopharm Ltd.* (1991), 36 C.P.R. (3d) 129 at 135 (F.C.A.); *Nature Co. v. Sci-Tech Educational Inc.* (1992), 41 C.P.R. (3d) 359 at 367 (F.C.A.); and *National Hockey League et al. v. Centre Ice Ltd.* (1994), 53 C.P.R. (3d) 34 (F.C.A.).

²⁷ *Ibid.* at 135.

²⁸ It appears that copyright cases differ in that irreparability is presumed. In *Thinkway Toys v. Vicki Collections* (1989), 28 C.P.R. (3d) 572 at 573 (F.C.T.D.), for example, Cullen J. noted that “the plaintiff is entitled to rely on the validity of the registered design and copyright unless or until it is expunged. This is of course a rebuttable presumption”.

According to Strayer J. in *Overseas Enterprises v. Feathers Publishing & Marketing* (1990), 34 C.P.R. (3d) 78 at 81 (F.C.T.D.), once the plaintiff has established *prima facie* entitlement to the copyright as registered, “the owner is entitled to an injunction instead of damages”. He stated at 81:

In respect of interlocutory injunctions, there are several decisions of this court to the effect that where there is blatant copying of material in respect of which the copyright is registered, the court need not consider the balance of convenience nor the appropriateness of damages in lieu of an injunction, but may issue the injunction: see, e.g., *Universal City Studios, Inc. v. Zellers Inc.* (1983), 73 C.P.R. (2d) 1 at 10-2, [1984] 1 F.C. 49; *Duomo Inc. v. Giftcraft Ltd.* (1984), 1 C.P.R. (3d) 165 at 169-70, 3 C.I.P.R. 70; *Jeffrey Rogers Knitwear Productions Ltd. et al. v. R.D. International Style Collections Ltd.* (1985), 6 C.P.R. (3d) 409 at 410, 411, [1985] 2 F.C. 220, 6 C.I.P.R. 263.

Jerome A.C.J. confirmed this rule in *Sommerville House Books Ltd. v. Tormont Publications Inc.* (July 20, 1993), T-822-93 (F.C.T.D.).

In patent infringement and industrial design cases, the “harm” at issue most often involves commercial losses such as loss of market share, or sales etc. The actual validity of the patent is assumed and is not a component of the irreparable harm branch of the test. Injunctions are granted or refused based on whether these commercial losses are quantifiable. As Thurlow C.J. states, “in most instances” the damages are calculable and supported by an undertaking from the defendant to account. In other words, the merits are not often relevant to the injunction application.

the merits beyond establishing that the "serious issue" threshold has been met. On the other hand, by requiring applicants to demonstrate distinctiveness, confusion and loss of goodwill (i.e. the harm) on a "clear and non—speculative" basis,²⁹ courts ultimately undertake an assessment of the merits since these are the very questions that must be resolved at the trial of the action.³⁰

In *Baxter Travenol*, *supra* footnote 29 at 55 Thurlow C.J. concluded that:

In this Court the grant of an interlocutory injunction in a patent infringement action is not a common occurrence. In most instances, the result of an application for an interlocutory injunction, where infringement and validity are in issue, is that the defendant gives a satisfactory undertaking to keep an account and upon that being done the application is dismissed with costs in the cause. The same practice has been followed in industrial design actions and was the ultimate result of the application in *Lido Industrial Products Ltd. v. Melnor Mfg. Ltd. et al.* (1968), 55 C.P.R. 171, 69 D.L.R. (2d) 256, [1968] S.C.R. 769. The principal reason for this practice is, in my opinion, the fact that in most instances the nature of the patent rights involved is such that damages (provided there is some reasonably accurate way of measuring them) will be an adequate remedy for such infringement of the rights as may occur pending the trial and because when the matter turns on the balance of convenience if the defendant undertakes to keep an account and there is no reason to believe that he will be unable to pay such damages as may be awarded, the balance will generally be in favour of refusing the injunction.

²⁹ This test for proving passing-off was enunciated by Gonthier J. in *Ciba-Geigy Canada Ltd. v. Apotex Inc.* (1992), 44 C.P.R. (3d) 289 (S.C.C.).

³⁰ It has been suggested that the "clear and non speculative" standard also confronts applicants with the insurmountable challenge of having to prove a harm that has not yet occurred or else risk being penalized for delay should they wait until the harm has been suffered before seeking the injunction. This difficulty is heightened by the words of Heald J.A. in *Centre Ice* to the effect that proof of irreparable harm cannot be inferred from either proof of (in passing-off cases) distinctiveness or of confusion but must be established by "clear evidence". Martin J.A. dealt with this question in *Popsicle Industries Ltd. v. Ault Foods Ltd.* (1987), 17 C.P.R. (3d) 1 at 5-6 (F.C.T.D.), where he stated:

There is a difference between speculative argument unsupported by evidence and conclusions which can be reasonably drawn from the evidence...[The Court] is entitled to draw reasonable conclusions from proven facts...

In *Ciba-Geigy Canada Ltd. v. Novopharm Ltd. and Apotex Inc.* (1994), 56 C.P.R. (3d) 344 (F.C.T.D.), Rothstein J. suggested the following interpretation of the statement by Heald J.A. in *Centre Ice*:

In the context in which he says that inferences are not acceptable, I think Heald J.A. was saying that evidence on one element, e.g. deception, could not by inference, prove what was required in respect of another related but distinct element, e.g. loss of goodwill. Proof of each element requires its own evidentiary basis. But once some evidence of an element is present, inferences that logically and reasonably flow from that evidence may be drawn.

It will be remembered that this is a *quia timet* application. There is no actual evidence of harm because the defendants are not yet in the market place. The evidence relating to loss resulting in irreparable harm must, of necessity, be inferred. I do not think that Heald J.A. was precluding the drawing of such inferences or other inferences that logically follow from the evidence.

As an example, the plaintiff in *Centre Ice*³¹ claimed that the marketing activities of the National Hockey League in relation to its "Centre Ice" or "Authentic Centre Ice Collection" brand names infringed the plaintiff's trade—name "Centre Ice". Heald J.A. concluded that, based on the record, a loss of goodwill had not been established despite the fact that the defendant had proven that confusion existed. In *Nature Co.*,³² there was some evidence of actual confusion. However, the evidence did not go so far as to show that the confusion caused irreparable harm to the respondent in the form of a loss of goodwill. Again, insufficient evidence had been presented to prove the case on *all* components of the merits.³³

1.3 *The Balance of Convenience*

It has been suggested that the questions of irreparable harm and the "balance of convenience" are "closely linked".³⁴ Indeed, the irreparable harm suffered by parties has been called "the most critical factor"³⁵ and "the primary element"³⁶ of the balance of convenience test. Nevertheless, other considerations such as delay,³⁷ "clean hands",³⁸ the public interest, a defendant's undertaking to pay damages if unsuccessful at trial, and harm to third party interests, do play a role in assessing the balance of convenience.

The conundrum which confronts the applicant is, therefore, more apparent than real. In the context of passing-off cases, for example, the loss of goodwill can be inferred from evidence of a loss of sales, or a loss of distinctiveness resulting from the activities of the defendant.

³¹ *Supra* footnote 26.

³² *Supra* footnote 26.

³³ In *Nestlé Enterprises Ltd. v. Edan Food Sales Inc.* (August 9, 1991), T-1109-91 (F.C.T.D.), Strayer J. concluded that since there was no evidence of confusion, the applicant had not succeeded in establishing on a clear and non speculative basis that the continued activity of the defendant would cause irreparable harm to its goodwill. The applicant had failed to demonstrate an important element of the passing-off case and therefore no injunction would issue.

In the application of the tri-partite *American Cyanamid* test, Rothstein J. in *Ciba-Geigy Canada Ltd. v. Novopharm Ltd. and Apotex Inc.* *supra* footnote 33, linked irreparable harm in the same fashion to proof of passing-off.

³⁴ Sharpe, *supra* footnote 8 at 2-29.

³⁵ B. Rogers & G. Hatley, "Getting the Pre-Trial Injunction" (1982) 60 Can. Bar. Rev. 1 at 18.

³⁶ D. Cairns, *supra* footnote 7 at 22.

³⁷ See Rogers & Hatley, *supra* footnote 35 at 19; S. Joffie & C. DiFrancesco, "Interlocutory Injunctions in Intellectual Property Cases" in *Where, When and Why to Seek Injunctions*, (Mississauga, Ont: Insight Press, 1990) at 10; and D. Cairns, *supra* footnote 7 at 26.

³⁸ Coming to the court with clean hands has been described as "especially important" for the applicant, see Rogers & Hatley, *supra* footnote 35 at 19, with reference to *Massie and Renwick, Ltd. v. Underwriters' Survey Bureau Limited et al.*, [1937] S.C.R. 265.

It has also been suggested that the preservation of the status quo is a relevant factor where all else is equal.³⁹ Professor Sharpe disputes the relevance of preserving the status quo, writing that it "adds little or nothing to the analysis and, in fact, may be a possible source of confusion".⁴⁰ Professor Leubsdorf suggests that freezing the situation may "inflict irreparable injury on a plaintiff deprived of his rights or a defendant denied the right to innovate".⁴¹

Perhaps the most useful and realistic comment on the balance of convenience criterion is enunciated by Lord Diplock in *American Cyanamid*. He states that the number of factors related to the balance of convenience is so numerous that it "would be unwise to attempt even to list [them] ... let alone to suggest the relative weight to be attached to them."⁴² Professor Sharpe adds that this list includes "an indefinable array of elements".⁴³

An important point to be made is that, although *American Cyanamid* led courts away from assessing the merits, Lord Diplock acknowledged that the merits nevertheless have a place in measuring the balance of convenience. He wrote that where the non-compensable disadvantages do not "differ widely, it may not be improper to take into account in tipping the balance *the relative strength of each party's case*..."⁴⁴

As previously noted, the consideration of the merits at the balance of convenience stage was also contemplated by Stone J.A. in *Turbo Resources*,⁴⁵ where he wrote:

(e) where the evidence on the application is such as to show one party's case to be disproportionately stronger than the other's, *this factor may be permitted to tip the balance of convenience in that party's favour* provided the uncompensated disadvantage to each party would not differ widely.

The difficulty lies in distinguishing whether the merits lie "clearly" or disproportionately in one party's favour or whether sufficient doubt arises from the evidence so as to render assessment of the merits at an interlocutory stage inappropriate [see discussion *infra*, in section II]. Nevertheless, one wonders why this aspect of the balance of convenience test is not cited more frequently in intellectual property cases given that disputing parties must often stand to suffer relatively equal harms (i.e. being put out of business, permanent loss of market share, incalculable market losses etc.) depending on the outcome of the application.

³⁹ *American Cyanamid*, *supra* footnote 1 at 511.

⁴⁰ See Sharpe, *supra* footnote 8 at 2-29. For an example of the "unhelpfulness of the concept", the author points to the case of *Babic v. Milinkovic* (1972), 25 D.L.R. (3d) 752 (B.C.C.A.).

⁴¹ R. Leubsdorf, "The Standard for Preliminary Injunctions" (1978) 91 Harv. L. Rev. 525 at 546.

⁴² *Supra* footnote 1 at 511.

⁴³ *Supra* footnote 8 at 2-28.

⁴⁴ *Supra* footnote 1 at 511.

1.4 The "Woods Exception"

In *NWL Ltd. v. Woods*,⁴⁶ Lord Diplock recognised the difficulty raised by a general rule limiting a consideration of the merits in interlocutory injunction proceedings, admitting that where:

...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 refusal *is complete and of a kind for which money cannot constitute any worth—while 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. [emphasis added]

Thus, *Woods* refined the general principle of *American Cyanamid* by recognizing that the strength of the parties' case should be taken into account in situations where the interlocutory application would effectively decide the action. Canadian courts appear to have accepted the *Woods* exception as law.⁴⁷ However in *RJR—MacDonald, Cory and Sopinka JJ.* contend that this exception is rarely applicable:

⁴⁵ See paragraph (e) of *Turbo's* "guiding principles", set out at Section II, *supra* footnote 16.

⁴⁶ *Supra* footnote 3 at 19-20.

⁴⁷ In a survey of Canadian judgments carried out in July 1994 on QuickLaw (CJ database), the authors found at least 59 cases in which *NWL Ltd v. Woods* was referred to, 25 in the Federal Court — Trial Division, 3 in the Federal Court of Appeal, 18 in the Supreme Court of Ontario and the General Division, 6 in the Saskatchewan Court of Queen's Bench, 2 in the Nova Scotia Supreme Court, 2 in the British Columbia Supreme Court, 1 in the Supreme Court of Canada, and 1 in the Saskatchewan Court of Appeal. A Canadian Law Online search revealed that among reported cases, *NWL Ltd v. Woods* had been applied in 5 decisions, distinguished in 1, considered in 17, referred to in 18 and not followed in one case. The authors also found another 23 cases from 1994 to the present referring to the *Woods* case: 13 in the Ontario Court (General Division); 1 in the Newfoundland Supreme Court; 1 in the British Columbia Supreme Court; 1 in the British Columbia Court of Appeal; 1 in the Saskatchewan Court of Appeal; 4 in the Federal Court - Trial Division; 1 in the Federal Court of Appeal and 1 in the Supreme Court of Canada. Among the cases, *Woods* was applied in 11 decisions, distinguished in 6 and referred to in 6.

In June 1994, Stone, J.A. for the Federal Court of Appeal wrote in *Searle Canada Inc. v. Novopharm* (15 June 1994), A-405-90 and A-776-90 at Q.L. 36, paragraph 19:

It has been held that the threshold test of a "serious question to be tried" is inapplicable in some circumstances. Application of a more stringent test (such as "a *prima facie* case") was recognized by Lord Diplock himself in *NWL Ltd. v. Woods*, [1979] 1 W.L.R. 1294 (H.L.) at 1307. ... The *American Cyanamid* tests are otherwise to be applied. It has not been suggested that the Motions Judge was wrong in applying the *American Cyanamid* tests in the circumstances of this case.

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. ... *The circumstances in which this exception will apply are rare.*⁴⁸

Other judges and commentators have disagreed, noting that the scope of cases in which the *Woods* exception applies "is quite broad"⁴⁹ and that individual cases "are numerous and important",⁵⁰ incorporating "many fields of law."⁵¹

The *Woods* exception has been applied in cases involving picketing,⁵² restrictive covenants (restraint of trade)⁵³ and other commercial cases,⁵⁴ the termination of a pregnancy,⁵⁵ participation in a televised debate,⁵⁶ passing-off actions⁵⁷ and others.⁵⁸

⁴⁸ *Supra* footnote 2 at 339.

⁴⁹ Sharpe, *supra* footnote 8 at 2-18, 2-19.

⁵⁰ Lord Denning in *Fellowes v. Fisher*, [1975] 2 All E.R. 829 at 836 (C.A.).

⁵¹ *Ibid.*

⁵² See, for example, *Woods* itself and *Hubbard v. Pitt*, [1976] Q.B. 142; and *Halifax Antiquities Ltd. v. Hildebrand* (1985), 22 D.L.R. (4th) 289 (N.S.S.C.). See also Wallington, "Injunctions and the Right to Demonstrate" (1976) 35 Camb. L.J. 82, Elias, "Pickets and Interlocutory Injunctions" (1975) 34 Camb. L.J. 191 and the cases cited by Denning MR in *Fellowes*, *supra* footnote 53 at 837. See as well *Dairy Bureau of Canada v. Amable Foods Ltd.* (1993), 46 C.P.R. (3d) 289 (B.C.S.C.); *Deloitte Haskins and Sells v. Brooker* (1983), 23 Sask R. 58 (Q.B.).

⁵³ See the cases cited by Denning MR in *Fellowes*, *supra* footnote 50 at 837, including *Home Counties Dairies Ltd v. Skilton*, [1972] 3 All E.R. 689 and *Clifford Davis Management Ltd v. WEA Records Ltd.*, [1975] 1 All E.R. 237. In Canada, see Sharpe, *supra* footnote 8 at 2-16 and cases cited at footnote 54, including *Cantol Ltd. v. Brodi Chemicals Ltd.* (1978), 94 D.L.R. (3d) 265 (Ont. H.C.J.) and *Erickson v. Wiggins Adjustments Ltd.*, [1980] 6 W.W.R. 188 (Alta C.A.); and see Jefferson, "Interlocutory Injunctions and Covenants in Restraint of Trade Affecting Employees" (1989) 133 Sol. J. 232.

⁵⁴ *Bryanston Finance Ltd. v. De Vries (No.2)*, [1976] Ch. 63; and see the cases referred to by Denning MR in *Fellowes*, *supra* footnote 53 at 837 under the heading "many commercial cases" as well as the breach of confidence cases.

⁵⁵ *Tremblay v. Daigle*, [1989] 2 S.C.R. 530.

⁵⁶ *Trieiger v. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143 (Ont. H.C.).

⁵⁷ See, for example, *Athletes Foot Marketing Associates Inc. v. Cobra Sports Ltd.*, [1980] 1 R.P.C. 343 (Ch. D.) and *Newsweek Inc. v. British Broadcasting Corp.*, [1979] R.P.C. 441 (C.A.).

⁵⁸ See the cases cited by Sharpe, *supra* footnote 8 at 2-14, footnote 44, in which *Cyanamid* was not followed. See also Rogers and Hatley, "Getting the Pre-Trial Injunction" *supra* footnote 35 at 14-15 and 21; Sofronoff, "Interlocutory Injunctions Having Final Effect" (1987) 61 Aust. L.J. 341; and the articles cited in N. Campbell, "The Interlocutory Injunction in Canada: Reading Smoke Signals"; Special Lectures of the Law Society of Upper Canada (1995) 211 at 216, nn. 26 to 28.

1.5 *The application of the Woods exception at the Federal Court*

The Federal Court has not often had recourse to the *Woods* exception as a means of expressly introducing a discussion of the merits. Of the 29 intellectual property cases⁵⁹ which have referred to this decision, only 6 ultimately relied on it.⁶⁰ It is the opinion of the authors, however, that there exist many situations in the intellectual property context in which the *Woods* criteria are met.

The authors carried out three empirical studies to determine what proportion of intellectual property matters go on to trial when an interlocutory injunction application has been made.

i) In the first study, of 32 reported intellectual property proceedings where interlocutory injunctive relief was sought in the Federal Court, Trial Division in 1988 and 1989, only one case went on to full adjudication on the merits at trial (approximately 3%),⁶¹ while in five cases (approximately 16%)⁶² the interlocutory injunction was appealed.⁶³

ii) In the second study, of 25 interlocutory injunction cases (including non-intellectual-property matters) decided in 1991 and 1992 in Ontario, as of August, 1994, none went on to trial. In addition, only one was appealed to the Ontario Court of Appeal.⁶⁴

⁵⁹ In a Quicklaw search as of July 1994 using the search terms "n.w.l." and "nwl". There have been more which used "n w l", but this proved difficult to search. This search also included a Canadian Law Online note up of *NWL Ltd. v. Woods*.

⁶⁰ The six are: *Apotex Inc. v. Smith Kline & French Canada Ltd.* (10 July 1984), A-509-83 and A-34-83 (F.C.A.), *Wyeth Ltd. v. Novopharm Ltd.* (16 August 1985), T-1340-85 (F.C.T.D.), *Cooper v. Barakett International Inc.* (21 October 1992), T-1569-92 (F.C.T.D.) (*Woods* relied upon in part), and *R.W. Blacktop Ltd. v. Artec Equipment Co.* (1991), 35 C.P.R. (3d) 254 (because of imminent bankruptcy); *Ciba-Geigy (d) v. Novopharm (d)*, T-2582-93; and *S.C. Johnson & Son Inc. v. Colonan (Overseas) (d)*, T-2397-94. In two other cases, the judge mentioned *Woods*, but did not say whether he relied upon it in coming to his conclusion: *Popsicle Industries Ltd. v. Ault Foods Ltd.*, *supra* footnote 29 and *Digital Equipment Corp. v. C. Itoh (Can.)* (1985), 6 C.P.R. (3d) 511 (F.C.T.D.).

⁶¹ *Lubrizol Corp. v. Imperial Oil Ltd.* (1990), 33 C.P.R. (3d) 1 (F.C.T.D.).

⁶² *Lubrizol Corp. v. Imperial Oil Ltd.* (1989), 26 C.P.R. (3d) 361 (F.C.A.); *Syntex Inc. v. Apotex Inc.* (1991), 36 C.P.R. (3d) 139 (F.C.A.); *Syntex Inc. v. Novopharm Ltd.* (1991), 36 C.P.R. (3d) 129 (F.C.A.).

⁶³ Of those published in the Canadian Patent Reporter, of cases released in 1988 and 1989. The survey was conducted in the fall of 1994. For detailed results, please see Appendix A.

⁶⁴ Note that the short time frame between the interlocutory decision and the time at which this aspect of the survey was conducted (2 to 3 years) may account for the low numbers of cases going on to appeal or to final adjudication.

iii) Finally, of 72 interlocutory injunction trial level decisions released in 1993 (and published in the Dominion Report Service), *none* went on to a final adjudication at trial. Five of the 72 cases were appealed and three had further hearings on matters such as costs determinations.⁶⁵

The conclusion drawn is that interlocutory injunctions rarely (less than 5% of the time) go on to trial. As Lord Denning wrote in *Fellowes*, "in 99 cases out of 100, the matter goes no further [than the interlocutory injunction stage]".⁶⁶ Our research of Canadian cases has shown this to be only a slight exaggeration. Indeed, it may be that the interim injunction remedy, available pursuant to Rule 469 of the *Federal Court Rules*, is playing the role of a truly interlocutory remedy,⁶⁷ given that interlocutory injunctions often decide the matter, and can be lengthy enough to be described as "mini-trials".

According to the House of Lords and the Supreme Court of Canada, the *Woods* exception, which allows an examination of the merits, is to be applied where the injunction will "practically" or "effectively" put the matter to rest. The low rate of trial adjudication cited above is strong evidence that interlocutory injunctions proceedings often settle the matter both "effectively" and "practically". Given this reality, and given the multitude of other circumstances, described above, where courts are either explicitly or implicitly engaging in merits adjudication in interlocutory proceedings, it is submitted that the time has

⁶⁵ The study was carried out on February 13, 1996 in the "drs" database of Quicklaw. The search terms used were "interlocutory /p injunction & @3 1993." There were undoubtedly more than 72 interlocutory injunction cases decided in 1993, but the search is reasonably representative. Only first instance interlocutory decisions were considered. 1993 was chosen to allow for the first time it normally takes between the interlocutory stage and the final injunction stage.

⁶⁶ *Supra* footnote 50 at 836.

⁶⁷ Rule 469 of the *Federal Court Rules* provides in part:

469.(1) An application for an interlocutory injunction may be made by any party before or after the commencement of the trial of the action whether or not a claim for an injunction was included in that party's statement of claim or declaration, counterclaim or cross-demand or third party notice, as the case may be; and any such application shall be supported by an affidavit establishing the facts that render the injunction necessary and shall be made by motion upon notice to all other parties.

(2) Notwithstanding paragraph (1), in case of urgency, an application under that paragraph may be made without notice and the Court may, on any such application, grant an interim injunction for a period not exceeding 10 days.

The interplay of interim and interlocutory injunctions is beyond the scope of this paper.

come to recognize that there is a place for merits adjudication in such proceedings in certain circumstances. This does not mean that parties should be permitted to force courts to adjudicate complex matters in the context of interlocutory injunction proceedings, each and every time where it can be shown that the injunction will amount to final determination of the merits. Rather, as is discussed in the next section, what seems to be required is to acknowledge the inappropriateness of *America Cyanamid*'s "general rule" against engaging in anything but a cursory review of the merits in interlocutory injunction proceedings.

II. Guiding Principles

We may draw the following conclusions from the above discussion:

1. The award of an interlocutory injunction and indeed, any form of judicial remedy that allows for the expedited enforcement of rights without a full trial, should be exceptional. In interlocutory injunction proceedings, the applicant seeks to prevent the respondent from engaging in certain activities at a time when the validity of the applicant's rights to the intellectual property and the existence of an actual violation of those rights have not been determined with all of the procedural and evidentiary safeguards of a trial. Therefore, an applicant for expedited relief should, at a minimum, establish that the merits are in its favour to such an extent that there is no genuine issue for trial or that it will suffer irreparable harm if expedited relief is not granted.
2. Where the applicant alone will suffer harm that will be "incurable" at trial (e.g. bankruptcy, permanent significant market loss or the respondent's inability to compensate in damages following trial), that harm in itself will often justify the award of an interlocutory injunction, assuming that the applicant's case on the merits is not frivolous and that other factors in the balance of convenience do not militate against the award of such a remedy.
3. Where, however, *both* parties face the prospect of "incurable" harm depending on the outcome of the interlocutory injunction application, or where relatively equal "incalculable" losses are at stake, examination of the merits is generally necessary in order to justifiably enjoin the respondent prior to trial.
4. Due to the close link between harm and the rights to which harm is caused in intellectual property matters (particularly in trade-mark and passing-off cases), an examination of the merits beyond the scope envisaged by Lord Diplock in *American Cyanamid* is often inevitable in assessing 'irreparable harm'.
5. Regardless of whether the merits are being considered in default in interlocutory injunction proceedings, the reality is that, in most

cases, interlocutory injunctions amount to a final determination of an action.

Conclusions number 3 and 4 clearly conflict with the "hands-off-the-merits" rule enunciated in *American Cyanamid*. The obvious solution to this conflict would be to concede that the *American Cyanamid* test is not a rule of general application and that the merits should actively determine the outcome of interlocutory injunction proceedings in circumstances where the alleged harms in question are relatively equal or where the facts are not the issue and the legal questions are not complex.⁶⁸ This is consistent with the flexible approach to interlocutory injunctions that has been advocated by certain English and Canadian courts on a number of occasions.⁶⁹

This position should not be adopted unconditionally, however. As Lord Diplock warns in *American Cyanamid*, cases often involve factual disputes, which, while not complex, are not easily resolved on the basis of affidavit evidence. While this concern may not be fatal in itself, particularly given that cross-examination is permitted on affidavits in Canada and given the confidence which some writers have argued should be placed in the ability of judges to assess factual matters in such situations,⁷⁰ the value of *viva voce* testimony to supplement more technical affidavit evidence should not be underestimated. This is especially true because interlocutory injunction applications amount generally to a final adjudication on the matter.

⁶⁸ Some commentators have argued that the ratio in *American Cyanamid* should be restricted to like cases, in other words, those with complicated factual patterns that can only with difficulty be resolved on the basis of affidavit evidence.

⁶⁹ Denning MR emphasized this in *Hubbard v. Vosper*, [1972] 2 Q.B. 84 at 96 (C.A.), when he stated that "the remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules". In Canada, the Supreme Court in *Metropolitan Stores Ltd.*, *supra* footnote 14 at 128, acknowledged the importance of flexibility, as did the Federal Court of Appeal in *Turbo Resources*, *supra* footnote 3 (see also the judgment of MacKinnon A.C.J.O. in *Chitel et al. v. Rothbart et al.* (1982), 69 C.P.R. (2d) 62 (Ont. C.A.) as well as the reasons in *B.C. (A.G.) v. Wale*, [1986] 2 W.W.R. 331 (B.C.C.A.)). Professor Sharpe, *supra* footnote at 2-38, cautions against the fettering of judicial discretion when he states that the elements of the *Cyanamid* test — strength of the case, irreparable harm and balance of convenience — should be seen as guides which take colour and definition in the circumstances of each case. He further notes that these requirements are not to be seen as water-tight compartments but rather "should be seen in the nature of evidence relevant to the central issue of assessing the relative risks of harm to the parties from granting or withholding interlocutory relief".

⁷⁰ R.G. Hammond, "Interlocutory Injunctions: Time for a New Model" (1980) 30 U.T.L.J. 240 at 280, argues for a "variable threshold model", allowing judges to take into account the merits in certain circumstances. C. Gray writes in "Interlocutory Injunctions Since *Cyanamid*" (1981) 40 Camb. L.J. 307 at 325, "However, in some cases ... it should be possible for a judge to make a decision on the merits ...".

Where both parties stand to suffer “incurable” or “incalculable” harm, depending on the outcome of the interlocutory injunction application, the feasibility of dangers of merits adjudication at the interlocutory injunction stage will depend on: (1) the complexity of the facts of the particular case; (2) the depth of the evidence available at the proceeding; and (3) the ability of the adjudicator to deal with the evidence and the subject matter effectively and expeditiously. In situations where the merits may be judged quickly and effectively from affidavit evidence to lie in one party’s favour, the danger associated with allowing the merits to play a more active role in interlocutory injunction proceedings is not as great. Examples include clear cases of copyright or trade-name infringement. However, when the facts and issues at stake are more complex, it is more likely that the restricted level of inquiry at the interlocutory injunction hearing will be insufficient to adequately deal with the issue. Given the stakes for both parties, they as well as the courts must have a means to “escape” the interlocutory proceeding if matters become too complex. Those means of escape are described hereunder as part of a comprehensive scheme for the resolution of intellectual property disputes through interim proceedings.

III. A Model Proposed

It is submitted that the recent addition to the *Federal Court Rules*⁷¹ of the motion for summary judgment and the motion for an expedited trial presents the Federal Court with a unique opportunity to redefine the role of the interlocutory injunction and the appropriate conditions under which this remedy should be awarded, but also to chart a new course whereby it can more effectively ensure the expeditious conduct of litigation.

There are two guiding premises to the suggested approach. The first is the need to openly acknowledge that merits can and do play a role in the assessment of interlocutory injunction applications. The second is the need to recognize that there are particular circumstances in relation to which the summary judgment and the expedited trial are more appropriate means of resolving the dispute between parties. There is, inevitably, some “overlap” in the applicable range of each remedy. However, recognition of the differences between them and providing a means to switch from one remedy to another when it is recognized that the remedy being sought is inappropriate, can go a long way toward preventing the remedies from being “stretched” and applied to circumstances beyond their appropriate scopes.

⁷¹ C.R.C. 1978, c. 663, as amended.

3.1 Motion for Summary Judgment (Rule 432.1)

There is little relevant jurisprudence from the Federal Court⁷² concerning the motion for summary judgment pursuant to Rule 432.1 *et seq.*⁷³

⁷² As of January 1998 only 24 decisions have considered Rule 432.1. Madame Justice Tremblay-Lamer summarized the general principles to be applied on Rule 432.1 motions in *Granville Shipping Co. v. Pegasus Lines Ltd. S.A.* (1996), 111 F.T.R. 189, 193 (T.D.):

1. "the purpose of the provisions is to allow the court to summarily dispense with cases which ought not proceed to trial because there is not genuine issue to be tried (*Old Fish Market Restaurants v. 1000357 Ontario Inc. et al.*) at p.222;
2. there is no determinative test (*Feoso Oil Limited v. Sarla*) but Sonte, J.A., seems to have adopted the reasons of Henry, J., in *Pizza Pizza Ltd. v. Gillespie (Pizza Pizza)*. It is not whether a party cannot possibly succeed at trial, it is whether the case is so doubtful that it does not deserve consideration by a trier of fact at a future trial;
3. each case should be interpreted in reference to its own contextual framework (*Blyth, supra*, and *Feoso, supra*);
4. provincial practice rules (especially rule 20 of the Ontario Rules) can aid in interpretation (*Feoso, supra*, and *Collie, supra*);
5. this court may determine questions of fact and law on the motion for summary judgment if this can be done on the material before the court (this is broader than rule 20 of the Ontario Rules of Civil Procedure) (*Patrick*);
6. on the whole of the evidenc , summary judgment cannot be granted if the necessary facts cannot be found or if it would be unjust to do so (*Pallman, supra*, and *Sears, supra*);
7. in the case of a serious issue with respect to credibility, the case should go to trial because the parties should be cross-examined before the trial judge (*Forde, supra*, and *Sears, supra*). The mere existence of apparent conflict in the evidence does not preclude summary judgment; the court should take a "hard look" at the merits and decide if there are issues of credibility to be resolved (*Stokes, supra*)."
[citations omitted]

There are a number of decisions relating to Rule 341, which states:

341. A party may, at any stage of a proceeding, apply for judgment in respect of any matter
 - (a) upon any admission in the pleadings or other documents filed in the Court, or in the examination of another party, or
 - (b) in respect of which the only evidence consists of documents and such affidavits as are necessary to prove the execution of documents and such affidavits as are necessary to prove the execution or identity of such documents, without waiting for the determination of any other question between the parties.

Cases that have dealt with this rule include: *Bourgault Industries Cultivator Division Ltd. v. Nichols Tillage Tools Inc.* (1988), 21 C.I.P.R. 109 (F.C.T.D.), Finally, in *Preston v. 20th Century Fox Corp.* (1987), 15 C.I.P.R. 110 (F.C.T.D.), *The Queen v. Gary Bowl Limited*, [1974] 2 F.C. 146 (C.A.); *Cyrus J. Moulton Ltd. v. The Queen*, [1976] 1 F.C. 437 (C.A.); *Diamond Shamrock Corporation v. Hooker Chemicals & Plastics Corp. et al.* (1982), 66 C.P.R. (2d) 145 (F.C.T.D.). Although Rule 341 has to do with judgment on the

This body of case law from Ontario⁷⁴ has recognized, in the words of Boland J. in *Vaughan v. Warner Communications*,⁷⁵ that "the Court

basis of an admission, either in the pleadings or other documents, the reasoning is of some assistance here.

⁷³ Rules 432.1 to 432.7 constitute the new summary judgment rules at the Federal Court added by Amending Order No.16, January 13, 1994. In particular, Rules 432.1(1), 432.2 and 432.3 read:

432.1 (1) A plaintiff may, after the defendant has filed a defence, or earlier with leave of the Court, and at any time prior to the fixing of the time and date for trial, make a motion to a judge, with supporting affidavit material or other evidence, for summary judgment on all or part of the claim in the statement of claim.

(2) A defendant may, after filing and serving a defence and at any time prior to the fixing of the time and date for trial, make motion to a judge, with supporting affidavit material or other evidence, for summary judgment dismissing all or part of the claim in the statement of claim.

432.2 (1) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest on mere allegations, or denials of the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial.

(2) An affidavit for use on a motion for summary judgment may be made on information and belief as provided in subsection 332(1), but on the hearing of the motion, an adverse inference may be drawn, if appropriate, from the failure of a party to provide the evidence of persons having personal knowledge of material facts.

432.3(1) Where a judge is satisfied that there is no genuine issue for trial with respect to the a claim or defence, the judge shall grant summary judgment accordingly.

(2) Where a judge is satisfied that the only genuine issue is the amount to which the moving party is entitled, the judge may order a trial of that issue or grant summary judgment with a reference to determine that amount.

(3) Where a judge is satisfied that the only genuine issue is a question of law, the judge may determine the question and grant summary judgment accordingly.

(4) Where a judge decides that there is a genuine issue with respect to a claim or defence, the judge may nevertheless grant summary judgment in favour of any party, either upon an issue or generally, unless

(a) the judge is unable on the whole of the evidence to find the facts necessary to decide that questions of fact or law; or

(b) the judge considers that it would be unjust to decide the issues on the motion for summary judgment.

(5) Where a motion for summary judgment is dismissed, either in whole or in part, a judge may order the action, judgment, to proceed to trial in the usual way, but upon the request of any party, a judge may order an expedited trial under rule 327.1.

⁷⁴ R.R.O. 1990, Reg. 194. The key provision is Rule 20.04(2), which reads:

(2) Where the court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the court shall grant summary judgment accordingly.

Rule 20 was introduced with the new Rules of Civil Procedure, promulgated pursuant to the *Courts of Justice Act 1984*, S.O. 1984, c.11. It represented a dramatic departure from the previous practice in which summary judgment was only available to the plaintiff on a specially endorsed writ. Now it is available to both parties and the motion may be brought with respect to all or part of the claim.

⁷⁵ (1986), 56 O.R. (2d) 242 at 247 (H.C.).

now has the duty to take a hard look at the merits of an action at this preliminary stage". Sutherland J., in *Greenbaum v. 619908 Ont.*,⁷⁶ noted that since "evidence by way of affidavit and cross-examination thereon are now permitted on a Rule 20 summary judgment motion, Courts should approach such motions with less diffidence and more assurance than under the previous rules where such evidence was not received".

In *Pizza Pizza Ltd. v. Gillespie*,⁷⁷ Henry J. outlined what Rule 20 was designed to do and what it was not designed to do. In that case, the plaintiffs' claim was dismissed in spite of the fact that there was much conflicting evidence concerning whether the defendant had copied certain software material for use in his new business which he incorporated under the name "Chicken Chicken". Henry J. concluded that final determination of the case depended not on the resolution of those factual conflicts, but on whether, based on uncontested facts, the plaintiffs had a proprietary right to the software. Regarding the general the function of the motions judge under Rule 20, Henry J. stated:

the rule now contemplates that the motions judge will have before him sworn testimony in the affidavits and other material required by the rule in which the parties put their best foot forward. The motions judge, therefore, is expected to be able to assess the nature and quality of the evidence supporting "a genuine issue for trial"; *the test is not whether the plaintiff cannot possibly succeed at trial; the test is whether the court reaches the conclusion that the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial.*⁷⁸

Because the summary judgment proceeding is focused solely on a "hard look at the merits", it can function as a conduit for expedited judicial

⁷⁶ (1986), 11 C.P.C. (2d) 26 at 28 (Ont. H.C.). Rule 432.1(1) of the Federal Court Rules, requires that "affidavit material or other evidence" be filed in support of a motion for summary judgment.

⁷⁷ (1990), 75 O.R. (2d) 225 (H.C.).

⁷⁸ After canvassing the jurisprudence in relation to Rule 20, Henry J. set out the general thrust of the rule at 238:

... the objective is to screen out claims that in the opinion of the court, based on evidence furnished as directed by the rule, ought not to proceed to trial because they cannot survive the "good hard look".

There is no arbitrary or fixed criterion that the motions judge must apply. It is a case by case decision to be made on the law and on the facts that he is able to find on the evidence submitted to him in support of the claim or defence, whether the plaintiff has laid a proper foundation in its affidavit and other evidence to sustain the claims made.

It is not sufficient for the responding party to say that more and better evidence will (or may) be available at trial. The occasion is now. The respondent must set out specific facts [as opposed to mere allegations] and coherent evidence organized to show that there is a genuine issue for trial.

Apparent factual conflict in evidence does not end the inquiry.

intervention where, for example, the merits lie clearly in favour of the applicant but where the relative harms lie in favour of the respondent or are relatively equal. Under such circumstances, the summary judgment has two advantages over the interlocutory injunction. First, the summary judgment offers the applicant more certainty of success than the interlocutory injunction given the lack of an irreparable harm requirement. The summary judgment can also arguably be used as a means of circumventing the onerous "clear and not speculative" standard of proof for harm for interlocutory injunctions.⁷⁹ Second, the summary judgment represents a truly final disposition of the matter. Rule 432.1 is, and should be, an extraordinary remedy since it denies litigants their common law right to a trial where evidence is given *viva voce* and where witnesses are examined and cross-examined before a judge or a judge and a jury.⁸⁰

The court may, on a common sense basis, draw inferences from the evidence.

The court may look at the overall credibility of the plaintiff's action, *i.e.*, does the plaintiff's case have the ring of truth about it such that it would justify consideration by the trier of fact?

Matters of credibility requiring resolution in a case of conflicting evidence ought to go to trial; however, that depends upon the circumstances of the case; the court in taking the "hard look" at the merits must decide if any conflict is more apparent than real, *i.e.*, whether there is really an issue of credibility that must be resolved in order to adjudicate on the merits.

Motions under Rule 20 must be made sparingly and judiciously; the court will control abuse of this process if necessary by its order for costs.

See also *Irving Ungerman Ltd. and Karl Ungerman Ltd. v. Galania and Haut* (1991), 4 O.R. (3d) 545 at 551 (C.A.).

⁷⁹ Compare the standard of proof required in *Centre Ice* (an interlocutory injunction case), *supra* footnote 26:

... confusion does not, *per se*, result in a loss of goodwill, and a loss of goodwill does not, *per se*, establish irreparable harm not compensable in damages. The loss of goodwill and the resulting irreparable harm cannot be inferred, it must be established by "clear evidence".

with the standard required in *Penthouse International (d) v. 163564 Can. Inc* (1997), 58 C.P.R. (3d) 200 (F.C.T.D.) (a summary judgment case), *supra* footnote 72:

I am satisfied that the evidence clearly indicates (paragraph 8 of the Sutter Affidavit) that the use of plaintiff's trademark *could* lead to the belief that defendants' "club" is one either owned by Plaintiff or associated with Plaintiff. I am also satisfied that the use of plaintiff's trademark PENTHOUSE by the Defendants Savard and 163564 Canada Inc. (Bar Penthouse-1) albeit the use being for different classes of goods, magazines for Plaintiff and an alleged "strip bar" for Defendants, *could* lead to confusion. The use of the trademark by the Defendants in the manner used by the Defendants, the use being for a "strip bar" would, because of the reputation of the Plaintiff, as stated by Sutter, have a detrimental effect on Plaintiff's goodwill. [emphasis added]

⁸⁰ See comments by Henry J. in *Pizza Pizza*, *supra* footnote 77 at 239 and Bouck J. in *Adia S.A. v. MacLean et al.* (1985), 6 C.P. (2d) 42 (B.C.S.C.).

3.2 Expedited Trial (Rule 327.1)

Rule 432.1 contemplates that where a motion for summary judgment is dismissed, the judge may, upon the request of any party, order an expedited trial under Rule 327.1 of some or all of the issues in the action.⁸¹ An order pursuant to this rule may, of course be sought independently of the summary judgment proceedings.

Ultimately, recourse to Rule 327.1 provides parties with greater flexibility in situations where the stakes are high but where a detailed examination of the merits is necessary in order for a determination to be made. It is not yet clear how Rule 327.1 will be applied. However, if it is to be an effective part of the proposed model, courts must be sensitive to the fact that it is in the interest of the infringing party to delay final adjudication and courts should intervene accordingly. Another potential weakness of the text of Rule 327.1 is that it indicates that the motion may only be made by the parties. Rule 327.1 would be most effective if judges were given the right to order expedited trials on their own motion, when dealing with applications for expedited relief, particularly in

⁸¹ Rule 327.1 was also added by Amending Order No. 16, effective January 13, 1994 and reads:

327.1 A judge may, on motion by any party to a proceeding, order the expedited trial or hearing of an action, application or appeal or any issue therein, and may order:

- a) that the facts specified in the order are not in dispute;
- b) that the pleadings be amended or closed within a time fixed by the judge;
- c) that the interlocutory proceedings be brought within a time fixed by the judge;
- d) that the procedures for discovery or cross-examination be completed within a time fixed by the judge;
- e) that the nature and scope of discovery or cross-examination be limited and, where there has been a motion for summary judgment, that the discovery be limited to matters not covered by the affidavits filed on the motion and any cross-examination on them, and that the affidavits and cross-examination may be used at the trial in the same manner as an examination for discovery;
- f) that evidence be adduced by affidavit, and that any cross-examination thereon be completed within a time fixed by the judge;
- g) that a pre-trial conference be held at a time and place to be fixed by the judge, at which any of the order in this rule may be made; and
- h) that a pre-trial conference be dispensed with and the proceeding be set down for trial or hearing.

There are few decisions on Rule 327.1, none of which outline the principle to be followed. There were as of January 1998 only 19 cases which referenced the Rule. Rules 369(1) and 381(1) of the Draft Federal Court Rules 1998 may indeed address this question.

the case of interlocutory injunction applications, where expedited trials are not legislatively provided for among the relief available for the adjudicator to choose.

3.3 *The Model Per Se*

In light of the above discussion, the key features of the proposed model are as follows:

a) *Merits in Favour of Applicant*

In circumstances where the merits lie in favour of the applicant, both the summary judgment and the interlocutory injunction would be, at least in theory, available as remedies. The remedy of choice would depend on the degree to which the merits lie in favour of the applicant and the relative harms faced by the applicant and the respondent in the event that expedited relief is granted.

Where the merits are such that there is a genuine issue for trial, it is inappropriate to seek summary judgment. A combination of incurable or incalculable harm to the applicant and merits lying in favour of the applicant may, however, be sufficient to justify the award of an interlocutory injunction, even if the respondent stands to suffer similar incurable or incalculable harm and/or the merits are such that there is a genuine issue for trial. The worthiness of an injunction would depend on the judge's assessment of the merits-harm mix.

Where, however, the merits are such that there is no genuine issue for trial, there may be circumstances where the summary judgment offers more certainty of success to an applicant than the interlocutory injunction. This would be particularly the case where the respondent alone stands to suffer irreparable harm or when the respondent stands to suffer more harm than the applicant in the event that a pre-trial remedy is granted.

b) *The American Cyanamid Branch — “Heritage House” / “Incurable” or “Incalculable” Harm to Plaintiff Only*

In either of the following two scenarios, the interlocutory injunction is the remedy of choice and the *American Cyanamid* model remains appropriate. The first is if “heritage house” harm accrues only to the applicant-plaintiff (i.e. immediate threats of permanent and incurable loss such as bankruptcy, insolvency of the defendant, etc.) and if there are no overriding balance of convenience issues. The second is in those rare circumstances where only the applicant stands to suffer incalculable harm. There, the plaintiff need only satisfy the serious issue threshold and demonstrate that it will suffer irreparable harm. It is then incumbent upon the defendant to either attack the existence of a serious

issue or demonstrate that it too will suffer a "heritage house" harm or incalculable harm. If the defendant fails to do so, the urgency of the situation justifies the issuance of an interlocutory injunction (assuming equitable factors in the balance of convenience do not weigh against the applicant). If the defendant succeeds, recourse to the post-Cyanamid branch of the proposed model must be made.

c) *"Heritage House" Harm or "Incalculable Loss of Market Share"*
Harm to Both Parties: The Post-Cyanamid Branch

If both parties stand to suffer a "heritage house"-type or incalculable harm, it may still be appropriate to grant an interlocutory injunction if the harm to one party is significantly greater the harm to the other in the event of an opposite outcome. In such circumstances, the balance of convenience simply favours one party.

Where, however, the "incurable" or "incalculable" harms are relatively equal, an examination of the merits is generally necessary. In such circumstances, if the merits of the case are so clearly in favour of one party that there is no genuine issue for trial, parties could opt to move for summary judgment immediately. While offering the expeditiousness of an interlocutory injunction, the summary judgment also provides the additional benefits, discussed above, of greater certainty and of true "finality". Otherwise, the expedited remedy of choice should be the interlocutory injunction.

As in the above discussion in section 3.3(a), the worthiness of an injunction would depend on the court's assessment of the merits-harm mix. The effectiveness of the interlocutory injunction as a remedy in these circumstances will depend on two factors: 1) frank acknowledgement by courts of the role of merits in interlocutory injunction proceedings. This could be accomplished perhaps through a more widespread application of the *Woods* exception or by applying the merits-based analysis referred to in the balance of convenience criterion of the *American Cyanamid* test when comparative harms are relatively equal; and 2) prudent use by both parties and courts of the expedited trial and a recognition of situations where the merits should more appropriately be dealt with subject to the safeguards of a full trial.

The forthcoming amendments to the *Federal Court Rules* underscore flexibility. For counsel, the judgment in *Nadel Entreprises Inc. v. Vivitar Canada Ltd.*⁸² provides a practical illustration of the interaction between the summary judgment and interlocutory injunction. There, the plaintiff moved for summary judgment or, in the alternative, for an interlocutory injunction pursuant to the *Trade Marks Act*⁸³ to restrain the defendant from selling a

⁸² (1995), 60 C.P.R. (3d) 289 (F.C.T.D.).

⁸³ R.S.C. 1985, c. T-13.

particular brand of camera equipment. Jerome A.C.J. dismissed the motion for summary judgment on the ground that there were several serious issues to be tried in relation to goodwill, confusion, etc. However, the interlocutory injunction was granted because Jerome A.C.J. was satisfied that the defendant's use of the identical trade name would cause irreparable injury to the plaintiff's goodwill.

The combination of these procedures offers a speedier resolution relative to the normal trial process and ensures that genuine disputes in which the stakes are high for both parties are fairly governed and involve sufficient evidentiary disclosure to allow for an equitable adjudication on the merits.

DIAGRAM C: THE PROPOSED MODEL

<i>Situation</i>	<i>Remedy</i>
a) <i>No harm to applicant</i>	
i) No genuine issue for trial	Summary judgment
ii) Justiciable issues	Regular trial
b) <i>More harm to respondent</i>	
i) No genuine issue for trial	Summary judgment
ii) Justiciable issues	Regular trial
c) <i>Incurable or incalculable harm to the applicant only</i>	
i) No genuine issues for trial	Summary judgment or interlocutory injunction
ii) Justiciable issues	Interlocutory injunction
d) <i>Incurable or incalculable harm to both</i>	
(i) No genuine issue	Summary judgment or Interlocutory injunction
(ii) Straightforward justiciable issues	Interlocutory injunction
(iii) Complex justiciable issues	Expedited trial

Conclusions

The problems associated with the prohibition in *American Cyanamid* against a trial of the merits and the inevitability of such assessments at many levels of the interlocutory injunction determination process can be attenuated by a more flexible and forthright approach to the awarding of injunctions. A common sense approach, in our opinion, is one in which the courts examine the merits where appropriate and make use of the new procedures available in a coherent manner. Although the role played by the summary judgment and expedited trial procedures in the realm of intellectual property litigation and their relationship with the interlocutory injunction have yet to be fully defined, they offer further flexibility and have the potential of becoming the foundations upon which the Federal Court can play not only an active, but also a proactive litigation management role. In the past, courts have tended to exercise restraint when it came to directing the parties in the conduct of their actions. It is trite to observe that today, the overburdening of our court system is such that courts are compelled to act. The new case management tools under the 1998 Rules will create, in our submission, a potentially valuable mesh within which a wide variety of disputes can be disposed of prior to trial without stretching the boundaries of the interlocutory injunction and other sources of expedited relief beyond the area which they were meant to cover. The lessons which can be learned from a study of expedited proceedings at the Federal Court can most certainly inform the crafting of solutions in other jurisdictions.

Appendix A

This appendix includes trade mark interlocutory injunction cases decided in 1988 and 1989 at the Federal Court Trial Division and reported in Canadian Patent Reporter. Where the interlocutory injunction refusal or grant was appealed, or where the injunction went on to final trial, cites are given. This chart is based upon the initial work done by Hughes, in "Interlocutory Injunctions in Trade-Mark Cases", *supra* at 278.

Style of Cause	Interlocutory Injunction (F.C.T.D.)	Interlocutory Appeal	Trial on Merits
<i>Allergan Inc. v. Bausch & Lomb Can. Inc.</i>	28 C.P.R. (3d) 327 (1989)		
<i>Imperial Chemical Industries PLC v. Apotex Inc.</i>	23 C.P.R. (3d) 1 (1989)	27 C.P.R. (3d) 345 (1989)	
<i>Lubrizol Corp. v. Imperial Oil Ltd.</i>	22 C.P.R. (3d) 493 (1989)	26 C.P.R. (3d) 361 (1989)	33C.P.R. (3d) 1 (1990)

<i>F.P. Bourgault Industries Cultivator Div. Ltd. v. Nichols Tillage Tools Inc.</i>	23 C.P.R. (3d) 219 (1988)		
<i>Monarch Marketing systems Inc. v. Glenwood Label & Box Mfg. Ltd.</i>	21 C.P.R. (3d) 246 (1988)		
<i>Samsonite Corp. v. Holiday Luggage Inc.</i>	20 C.P.R. (3d) 291 (1988)		
<i>Euclid Industries Can. Ltd. v. Reg Holloway Sales Inc.</i>	27 C.P.R. (3d) 281 (1989)		
<i>Atlas Cartes M.A.P. Inc. v. Trudel</i>	25 C.P.R. (3d) 349 (1988)		
<i>California Raisin Advisory Bd. v. 132832 Can. Inc.</i>	25 C.P.R. (3d) 530 (1988)		
<i>Thinkaway Toys v. Vicki collections</i>	28 C.P.R. (3d) 572 (1989)		
<i>Zivin v. Gilbro Ltd.</i>	19 C.P.R. (3d) 516 (1988)		
<i>L.M. Lipski Ltd. v. Dorel Industries Inc.</i>	20 C.P.R. (3d) 226 (1988)		
<i>Joseph E. Seagram & Sons Ltd. v. Hiram Walker & Sons Ltd.</i>	28 C.P.R. (3d) 529 (1989)		
<i>Syntex Inc. v. Apotex Inc.</i>	28 C.P.R. (3d) 40 (1989)	36 C.P.R. (3d) 139 (1991)	
<i>Pizza Pizza Ltd. v. Little Caesars Int. Inc.</i>	27 C.P.R. (3d) 525 (1989)		
<i>Sunoco Inc. v. Shell Can. Products Ltd.</i>	28 C.P.R. (3d) 521 (1989)		
<i>Russell Harrington Cutlery Inc. v. JA Henckels Zwillingwerk Can. Ltd.</i>	28 C.P.R. (3d) 333 (1989)		
<i>Mattel Can. Inc. v. GTS Acquisitions Ltd.</i>	27 C.P.R. (3d) 358 (1989)		
<i>Groupe Lavo Inc. v. Bristol-Myers Products Can. Inc.</i>	28 C.P.R. (3d) 358 (1989)		
<i>Edmonds v. Kealy</i> <i>Syntex Inc. v. Novopharm Ltd.</i>	27 C.P.R. (3d) 434 (1989) 26 C.P.R. (3d) 481 (1989)	36 C.P.R. (3d) 129 (1991)	
<i>Larny Holdings Ltd. v. T.G. Quickly's Food Corp.</i>	26 C.P.R. (3d) 545 (1989)		

<i>Stadium Corp. of Ont. v. Wagon-Wheel Concessions Ltd.</i>	25 C.P.R. (3d) 293 (1989)		
<i>CJMF-FM Ltée. v. Radio-Mutuel Inc.</i>	28 C.P.R. (3d) 357 (1989)		
<i>Ritz-Carlton Inc. v. Jardins Viaritz Inc./Viaritz Gardens Inc.</i>	24 C.P.R. (3d) 358 (1989)		
<i>Stadium Corp. of Ont. v. Wagon-Wheel Concessions Ltd.</i>	24 C.P.R. (3d) 144 (1989)		
<i>Windemere Corp. v. Charlescraft Corp.</i>	23 C.P.R. (3d) 60 (1988)		
<i>Monarch Marketing Systems Inc. v. Glenwood Label & Box Mfg. Ltd.</i>	21 C.P.R. (3d) 246 (1988)		
<i>Coca-Cola Ltd. v. Fisher Trading Co.</i>	25 C.P.R. (3d) 200 (1988)		
<i>Safematic Inc. v. Sensodec Oy</i>	21 C.P.R. (3d) 12 (1988)		
<i>Beam of Can. Inc. v. Arnold Holdings Ltd.</i>	19 C.P.R. (3d) 475 (1988)		
<i>Turbo Resources Ltd. v. Petro-Can. Inc.</i>	22 C.P.R. (3d) 481 (1988)	24 C.P.R. (3d) 1 (1989)	