"THE DEATH OF THE IRREPARABLE INJURY RULE" IN CANADA

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RJR-MacDonald *establishes the current tripartite Canadian test for injunctions. The applicant must establish first, a serious question to be tried, second, that irreparable harm will result if the injunction is not granted, and third, that the balance of convenience favours an injunction. The author argues that the entrenchment in the test of irreparable harm, with its multiplicity of meanings, has caused confusion in the jurisprudence. The author starts by tracing the genealogy and substance of the doctrine of irreparable harm in the English case of* American Cyanamid *and the Canadian cases of* Metropolitan Stores *and* RJR. *The author argues that despite judicial protestations to the contrary, irreparable harm survives as a condition precedent which will sometime unfairly deny an injunction. The author explores alternative Canadian tests for injunctions, with an explicit or implicit two-stage process better promoting the overall balancing necessary for the injunctive enquiry. The author points to doctrinal confusion surrounding the tripartite test as evidenced by lower court decisions. The author cites the works of Denning, Fiss, Hammond and particularly Laycock in arguing that the current tripartite test, with its elevation of irreparable harm, imposes an artificial rigidity in judicial reasoning. The author further applies the thesis of Laycock, evoked in the title of this article, to suggest that Canadian judges, like their American counterparts, do not usually employ the phrase irreparable harm in its traditional sense of inadequacy of damages. The article concludes by endorsing the two-stage balancing approach as a more coherent and flexible test, forwarding the ends of equity while avoiding the multifaceted confusion of irreparable harm.*

RJR MacDonald *présente les trois critères de la preuve permettant actuellement de justifier la nécessité des injonctions au Canada. Le premier critère consiste à établir qu'il s'agit d'une question sérieuse à juger; le second doit prouver un risque de dommage irréparable; et le troisième est celui de la prépondérance des inconvénients. Selon l'auteur, la constitutionnalisation de la preuve du préjudice irréparable, et son caractère polysémique, sème la confusion dans la jurisprudence. L'auteur retrace d'abord les origines et la substance du principe du préjudice irréparable dans la cause anglaise* American Cyanamid *et les causes canadiennes* Metropolitan Stores *et* RJR. *Il estime que, contrairement à ce qu'affirme la magistrature, le préjudice irréparable subsiste à titre de condition suspensive justifiant parfois indûment un refus d'injonction. L'auteur examine d'autres preuves canadiennes possibles à cet égard — un processus explicite ou implicite en deux temps se prêtant mieux à une détermination globale des conséquences d'une injonction. Il souligne la confusion doctrinale à l'égard de la preuve tripartite, comme le démontrent certaines décisions des cours inférieures. Citant les travaux de Denning, Fiss, Hammond et Laycock, surtout, l'auteur affirme que les trois critères actuels, et l'importance accordée au préjudice irréparable, sclérosent artificiellement le raisonnement judiciaire. Il applique ensuite la thèse de Laycock évoquée dans le titre du présent article, pour suggérer que les juges canadiens, comme leurs homologues américains, n'emploient généralement pas l'expression « préjudice irréparable » dans son sens traditionnel (de dommages-intérêts insuffisants). En conclusion, l'auteur se dit en faveur d'une approche en deux temps plus souple et cohérente, à même de servir les fins d'équité tout en évitant la confusion multiple que suscite le critère de préjudice irréparable.*

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As the cost of litigation rises, and the speed of destruction prompting such litigation increases, the interlocutory injunction plays an increasingly important role in law. Although the trial is viewed as the procedural forum for dispensing justice, much litigation will never proceed to the trial stage. In many cases, it is the judicial grant or denial of an injunction which will settle the dispute. The not uncommon trial delay of one or two years will dissipate the money or morale of many unsuccessful applicants. Conversely, a successful injunction may effectively halt the activities of many respondents, who will be unable to tie up their money and time waiting for trial. The recent prominence of environmental disputes, such as those over old-growth forests, provides examples of these winner-take-all scenarios. If the court denies the injunction, a seemingly irreplaceable natural heritage will be destroyed. If the court grants the injunction, money and jobs could be lost in delayed or discontinued work. Given the high stakes in the modern injunction decision, the contents of the injunctive test are of crucial importance to law and to society. This article will argue that the current requirement of "irreparable harm" distorts and confuses the increasingly important injunctive enquiry.

From the traditional test for injunctions, to the modern redefinition in *American Cyanamid*,[1] to the Canadian Supreme Court adoption of the *Cyanamid* test in the cases of *Metropolitan Stores*[2] and *RJR-MacDonald*,[3] courts have insisted that the plaintiff show irreparable harm before an equitable remedy such as injunctive relief or specific performance is granted. The Supreme Court cases establish a tripartite test examining first, a serious case to be tried; second, irreparable harm; and third, the balance of convenience between the two parties. Yet despite its jurisprudential authority, the

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1 *American Cyanamid* v. *Ethicon*, [1975] A.C. 396; [1975] 2 W.L.R. 316 (H.L.) [hereinafter *Cyanamid* cited to A.C.].

2 *Manitoba (A-G)* v. *Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110 [hereinafter *Metropolitan*].

3 *RJR-MacDonald Inc.* v. *Canada (A-G)*, [1994] 1 S.C.R. 311 [hereinafter *RJR*].

Metropolitan-RJR test is not unchallenged in Canada. Courts still cite older tests such as those in *Yule*[4] and *Wale*,[5] which subsume considerations of irreparable harm into the more general exercise of balancing the convenience of an injunction between the litigants. The fact that courts apply a variety of tests stems from reasons beyond provincial jurisdiction over civil matters. The survival of these tests, and the birth of new precedents downplaying the centrality of irreparable harm in the overall injunctive enquiry reflect the limitations and ambiguities of the phrase "irreparable harm." As a consequence, it is a disconcerting convention that writers examining irreparable harm start by recognizing the lack of principle and coherence in that concept. Grant Hammond cites the New Zealand Supreme Court judge who stated that "the authorities as to when an interim injunction should be issued are in a state of disarray."[6] Paul Perell calls irreparable harm an "illusive concept" still unclear after a decade of debate among jurists.[7] Robert Sharpe states that "[w]hile it is easy to see why this requirement should be imposed, it is difficult to define exactly what is meant by irreparable harm."[8]

This article will build on the works of these commentators and others to describe the continuing evolution of the irreparable harm doctrine in Canada. It advances both a positive and normative thesis. Irreparable harm, with its multiplicity of meanings, has caused confusion in the jurisprudence. Concomitant with this is the move away from strict tests for injunctive relief towards a more flexible balancing approach. In the words of Sharpe:

> As is the case with specific performance, in deciding whether to grant injunctions, modern courts are less and less willing to be bound by tradition alone, and more and more willing to base their discussions on the relative advantages and disadvantages of damages in an injunction. The courts seem to be moving steadily closer to a "non-hierarchical" scheme of remedy selection.[9]

Spry similarly notes increasing judicial flexibility in the weight accorded to irreparable harm and the adequacy of damages:

> ...there must be borne in mind the present tendency of the courts not to treat the availability of damages as an independent consideration, but rather to regard it as one of a number of matters to be taken into account in determining what order will operate most justly.[10]

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4 *Yule Inc.* v. *Atlantic Pizza Delight Franchise* (1977), 17 O.R. (2d) 505 (Div.Ct.) [hereinafter *Yule*].

5 *British Columbia (A-G)* v. *Wale et al.* (1987), 9 B.C.L.R. (2d) 333 (C.A.) aff'd [1991] 1 S.C.R. 62 [hereinafter *Wale* cited to B.C.L.R.].

6 Now Hammond J.: R.G. Hammond, "Interlocutory Injunctions: Time for a New Model ?" (1980) 30 U.T.L.J. 240 at 240, quoting *Greenwich* v. *Murray* (2 December 1977), Wellington, A/no.507/77 (S.C.), Barker J.

7 P.M. Perell, "The Interlocutory Injunction and Irreparable Harm" (1989) 68 Can. Bar Rev. 538 at 540.

8 Now Sharpe J.: R.J. Sharpe, *Injunctions and Specific Performance*, 2d ed. (Aurora: Canada Year Book, 1992) (looseleaf edition) at para. 2.390.

9 *Ibid.* at para. 1.90.

10 I.C.F. Spry, *The Principles of Equitable Remedies*, 4th ed. (Toronto: Carswell, 1990) at 448.

This article will continue with the normative claim that this progression is both logical and desirable for more fair and coherent outcomes in injunction applications. Instead of the current Canadian tripartite test, which gives an unwarranted sense of precision and consistency, courts should apply a two-part test, examining the strength of the plaintiff's case and the balance of convenience between the parties.

To these ends, Part I will examine the traditional elevation of irreparable harm as a condition precedent for a specific equitable remedy. Part II will examine the 1975 House of Lords decision in *American Cyanamid* and explore whether the factors within the *Cyanamid* test represent sequential hurdles that the applicant must clear before receiving an injunction, or whether the factors represent holistic considerations encompassed in an overall balancing exercise.[11] Part III will examine Canadian academic and judicial considerations of the *Cyanamid* sequential model. Part IV will explore alternative Canadian tests for injunctions, with an explicit or implicit two-stage process better promoting the overall balancing necessary for the injunctive enquiry. Part V will argue for the desirability of a two-step balancing test by pointing out that confusions surrounding irreparable harm will still arise in the jurisprudence despite clarifications by the Supreme Court. Part VI will further attack the primacy of irreparable harm as a separate prong of the test by applying the criticism of various commentators to the Canadian jurisprudence. The article will conclude by endorsing the two-stage balancing approach as a more coherent and flexible test, forwarding the ends of equity while avoiding the multifaceted confusion of irreparable harm.

I. EQUITY'S INSISTENCE ON IRREPARABLE HARM

Equity has traditionally required irreparable harm before granting an injunction.[12] As the norm, common law courts provided substitutional relief in the form of monetary damages. Within its limited jurisdiction, the Court of Equity would only grant specific relief where ordinary substitutional damages would be inadequate. Stated positively, equity could order specific performance of a contract in the rare case where the good in question was unique or irreplaceable; land was the main example.[13] As a negative corollary to specific performance, equity would grant injunctions. Enjoining an action was considered less offensive to personal autonomy and mercantile flexibility than ordering the performance of a specific action.[14] Nonetheless, monetary damages

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11 *Cyanamid, supra* note 1.

12 This principle finds its source in the pre-*Judicature Act* dual court structure of Law and Equity. See generally Sharpe, *supra* note 8 at para. 1.60.

13 The recent Supreme Court case of *Semelhago* v. *Paramadevan*, [1996] 2 S.C.R. 415 [hereinafter *Semelhago*] challenges the presumption of specific performance for breaches of land contracts absent evidence that the land in question is unique.

14 With regard to the market base for the irreparable harm doctrine, law and economics theorists are divided about whether monetary damages actually do produce optimum market results. For an advocate of specific performance as the efficient, and thus desirable remedy, see Schwartz, "The Case for Specific Perfomance" (1979) 89 Yale L.J. 271. For an advocate of the irreparable harm rule, see A. Polinksy, *An Introduction to Law and Economics*, 2d ed. (Boston: Little, Brown, 1989).

following trial would be the assumed remedy for disputes. As the English Court of Appeal stated in 1886:

> The very first principle of injunction law is that *prima facie* you do not obtain injunctions to restrain actionable wrongs, for which damages are the proper remedy.[15]

Thus in both equity and law, the plaintiff was expected to mitigate his losses until trial and if successful ultimately receive a monetary award. The court would deny injunctive relief if the plaintiff could not establish that he would suffer harm that could not adequately be compensated for in damages.[16]

This brief history reveals the jurisdictional importance of irreparable harm to the injunction. Courts have, however, insisted upon irreparable harm in differing degrees, with differing consequences for injunctions. The pre-*Cyanamid* injunction test consisted of three hurdles that the plaintiff had to clear. First, the plaintiff had to establish a "strong *prima facie* case" likely to succeed at trial. Having crossed this first threshold, the plaintiff had to show irreparable damage uncompensable by damages at trial. Lord Wilberforce's description of this irreparable harm is one of the most often cited:

> The object of [an interim injunction] is to prevent a litigant, who must necessarily suffer the law's delay, from losing by that delay the fruit of his litigation; this is called "irreparable damage," meaning that money obtained at trial may not compensate him.[17]

The final hurdle required the plaintiff to show that the balance of convenience favoured the granting of an injunction.

In this, the three stages resemble the current three-pronged Canadian test for injunctions, set down in *Metropolitan* and *RJR*. The primary difference between these pre-*Cyanamid* English cases and the Canadian cases is that the earlier cases appeared to be strictly sequential; if the plaintiff failed to clear any one of the sequential hurdles, the injunctive enquiry would cease without continuing on to the next stage. Irreparable harm was thus a *sine qua non* to any injunctive enquiry.[18] It is granted that courts always retained a wide degree of discretion over the process and the test. It is further granted that a demonstration of irreparable harm, while required for the injunction, was a less exigent and daunting threshold than the initial test of *prima facie* case. Nonetheless, the role of irreparable harm in the pre-*Cyanamid* test represented a sequentialist requisite which blocked many plaintiffs from injunctive relief.

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15 *London & Blackwall Ry. Co.* v. *Cross* (1886), 31 Ch. 354 at 369 (C.A.), Lindley L.J., cited by Sharpe, *supra* note 8 at para. 1.60. *Lord Cairns' Act*, 21 & 22 Vict., c.27 (1858), allowing Equity to award damages in lieu of specific remedies statutorily encouraged this remedial option.

16 See generally Perell, *supra* note 7 at 541-45; Hammond, *supra* note 6 at 241-50.

17 *Hoffman LaRoche & Co. Ltd.* v. *Secretary of State for Trade and Industry*, [1975] A.C. 295 at 355 (H.L.), quoted by Hammond, *supra* note 6 at 249.

18 The judgment of McRuer C.J.H.C. in *Chesapeake & Ohio Railway Co.* v. *Ball*, [1953] O.R. 843 at 854-55 (C.A.) represented this conception of the injunction test in Canada for many years, and is still cited. In *Metropolitan*, *supra* note 2 at 127, Beetz J. offered this as an example of a Canadian sequentialist test.

II. *AMERICAN CYANAMID*: SEQUENTIALISM SURVIVES

In 1975 a patent dispute over catgut sutures prompted the House of Lords to re-examine the test for injunctions in the famous case of *American Cyanamid* v. *Ethicon Ltd.*[19] *Cyanamid* overruled the classic sequential model on the initial threshold requirement that the plaintiff had to show a strong *prima facie* case.[20] Now the plaintiff needed only to establish that the claim was not "frivolous or vexatious," and that there was "a serious issue to be tried."[21] In lowering the accessibility threshold, it arguably made injunctions easier to obtain. Academic debate in the wake of *Cyanamid* has focused on this first prong of the injunction test.

As for the requirement of irreparable harm, Lord Diplock reasserted the traditional equation of the doctrine with 'inadequacy of damages':

> *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.[22]

Cyanamid left two matters unclear, however. First, would failure on the part of the plaintiff to prove irreparable harm will terminate the injunction enquiry? Second, did courts retain the discretion to permit a lessened degree of irreparable harm? As Sharpe states, "[i]t is not clear that the *Cyanamid* approach allows for this and the decision suggests a misleadingly mechanical approach."[23] Hammond also argues for the interpretation that the test is sequential: "[i]t seems clear that Lord Diplock intended these 'tests' as distinct and logical sequential steps which a plaintiff must progressively surmount."[24]

The second confusion remained whether Lord Diplock proposed a test of two or three parts. At first His Lordship suggested that the enquiry consists first, of the lowered initial threshold of 'reasonable case' and second, of the balance of convenience:

> So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a

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19 *Cyanamid*, *supra* note 1.

20 As represented by *Stratford and Son* v. *Lindley*, [1965] A.C. 269 at 338 [hereinafter *Stratford*], Upjohn J.: a plaintiff "must establish a *prima facie* case of some breach of duty ... to him." It is beyond the scope of this article to explore the debate over the requisite strength of the plaintiff's case subsequent to *Cyanamid*.
Incidentally, this same case exhibits how a two-pronged test was in use before *Cyanamid*. Irreparable harm was little discussed in *Stratford*, being subsumed into the balance of convenience:
> This [a strong *prima facie* case] being so, an injunction may be granted if it is just and convenient so to do, the remedy being purely discretionary. The balance of convenience in the cases is always of great importance... (*ibid.* at 338).

21 *Cyanamid*, *supra* note 1 at 407.

22 *Ibid.* at 408 [emphasis added].

23 Sharpe, *supra* note 8 at para. 2.600.

24 Hammond, *supra* note 6 at 254.

> permanent injunction at the trial, 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.[25]

As noted above, His Lordship describes irreparable harm as inadequacy of damages. On the next page, however, Lord Diplock seems to suggest that inadequacy of damages forms a separate, second prong in the test:

> It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises.[26]

This second passage prompted the Canadian Supreme Court to posit a three-step test. However, Lord Diplock's references to the adequacy of damages to both sides of the litigation throughout his discussion of balance of convenience,[27] as well as the above inclusion of irreparable harm under the heading of balance of convenience, seems to indicate that he intended a two-part test. Further, in the subsequent case of *Eng Mee*, Lord Diplock once again held that the overall balance of convenience consideration to be paramount: "[t]he guiding principle in granting an interlocutory injunction is the balance of convenience."[28] Thus while ambiguities remained which could allow the elevation of irreparable harm as a separate prong of the test by the Supreme Court, it is not clear that *Cyanamid* intended to insulate that factor from the overall balance of convenience enquiry.[29]

III. CONFUSION: THE SUPREME COURT OF CANADA ADOPTS *CYANAMID*

Metropolitan Stores remains the case most cited by Canadian courts deciding injunction applications.[30] In that case, the applicants sought to block the imposition of a first collective agreement by the Manitoba Labour Relations Board. The applicant requested a stay of proceedings pending the determination of the constitutionality of the law granting the Board this power. The unanimous Court held that the imposition of the contract would prejudice the applicant in a manner uncompensable by damages. Beetz J. held that the test for a stay and an injunction were identical, and entrenched in the Canadian jurisprudence the familiar tripartite test of serious question to be tried, irreparable harm, and balance of convenience. The Court, however, was tentative in endorsing *Cyanamid*, and instead of a lengthy exposition of the proper test to be

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25 *Cyanamid*, *supra* note 1 at 408.

26 *Ibid.*

27 See for example *ibid.* at 409: "The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies...."

28 *Eng Mee Yong* v. *Letchuman*, [1980] A.C. 331 at 337 (P.C.), Lord Diplock.

29 Lord Diplock declined to provide an exhaustive list of the other factors to be considered along with inadequacy of damages in the balance of convenience enquiry. Some of these other factors include the relative strength of each party's case, the preservation of the status quo, and other "special factors to be taken into consideration in the particular circumstances of the case."

30 *Metropolitan*, *supra* note 2. See statistics *infra* note 49.

applied for injunctions, Beetz J. offered the caveat that "the formulation of a rigid test for all types of cases, without considering their nature, is not to be favoured."[31]

In the 1994 Supreme Court case of *RJR*, two tobacco companies sought unsuccessfully to stay the implementation of the *Tobacco Products Control Act* regulating cigarette advertising.[32] The unanimous decision co-written by Cory and Sopinka JJ. more firmly endorsed *Cyanamid* as the Canadian test for injunctive relief, retaining the tripartite structure of *Metropolitan*. As for irreparable harm, the Court relied on the traditional formulation of inadequacy of damages:

> At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.[33]

Here, however, the Court did not limit such a post-trial "remedy" to damages, and thus allowed a more liberal scope of irreparable harm than that of the traditional model. A court, for example, could order that either the plaintiff or defendant account for profits, or offer undertakings, to protect the parties in a non-injunctive manner. The Court, however, goes on to offer damages as the touchstone of irreparable harm:

> "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.[34]

Later in the judgment, the Court states that money spent by the applicants to comply with the situation created by the defendants "will not usually amount to irreparable harm in private law cases," indicating that the traditional conception will apply in most situations.[35]

While the Court does not explicitly state that the test is non-sequential, it would appear that the only condition precedent for the plaintiff to establish is the first, that the application is a serious one:

> 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.[36]

Thus a failure to show irreparable harm should not halt the enquiry, and the court should not decide the application until both irreparable harm and the balance of

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31 *Ibid.* at 128.

32 S.C. 1988, c. 20.

33 *RJR*, *supra* note 3 at 341.

34 *Ibid.* at 341.

35 *Ibid.* at 350.

36 *Ibid.* at 337-38. Some cases, however, do not commence with this condition precedent if the other two factors are *prima facie* inadequate: see for example *Gupta* v. *Canada (Revenue)* (1997), 97 D.T.C. 5228 at 5229 (F.C.T.D.).

convenience have been considered. Nonetheless, the onus is clearly upon the applicant to show irreparable harm. In stating that an applicant in a public law application will bear a lessened onus of demonstrating irreparable harm than would the private litigant, the Court indicates that the private plaintiff does, in fact bear this burden.[37] As irreparable harm is not a condition precedent, an applicant would presumably have to compensate for a weak showing of irreparable harm by presenting a strong case in the other categories.[38]

As Sharpe ventures realistically, "[w]hile judges seldom explicitly acknowledge that there is an 'overflow' effect produced by strength or weakness of other factors, it cannot be doubted that, as a practical matter, it exists."[39] If irreparable harm is not a condition precedent, then this overflow must exist, because the presence or absence of irreparable harm will not in itself be determinative. It is the position of this article that this unspoken "overflow" effect would be more coherently balanced against other factors in the balance of convenience section, as part of a two-part test.

To this end, the remainder of this article will seek to blunt the universal application of *Metropolitan* and *RJR*. Two factors indicate that the tripartite test, and the role of irreparable harm therein, may not be an appropriate one for all contexts of litigation. The first is the very summary treatment of irreparable harm in both *Metropolitan* and *RJR*, first in formulating the test, and second in applying it to the facts under review.[40] This brevity reflects in part the public nature of the two cases, which will be discussed further below. It also reflects a tacit recognition on the part of the Court that, of the three prongs, irreparable harm is procedurally the least distinct and important, and may be dealt with in a cursory fashion by the court in many cases.[41]

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37 *RJR, supra* note 3 at 346.

38 Or the corollary, that a strong showing in other categories will lessen the need to prove irreparable harm. As Reed J. held in *Samsonite Corporation* v. *Holiday Luggage*, (1998) 20 C.P.R. (3d) 291 at 294 (F.C.T.D.), "if a plaintiff appears to have a strong case he will be required to prove less by way of irreparable harm (or balance of convenience)." But see *Ochapowace Indian Band No. 71* v. *Canada (Department of Indian Affairs and Northern Development)*, [1998] S.J. No. 337 (Q.B.) (QL), where the failure to show irreperable harm stopped the inquiry without an examinaiton of overall balance of convenience.

39 Sharpe, *supra* note 8 at para. 2.450.

40 In *Metropolitan*, Beetz J. dedicated a single brief paragraph to the issue of irreparable harm. His observation that irreparable harm had been shown in this case was a perfunctory acceptance of the trial judge's findings (*Metropolitan, supra* note 2 at 151). In *RJR*, the Court dedicated five paragraphs to its discussion of irreparable harm, in contrast to thirteen each to the strength of the plaintiff's case, and the balance of convenience (*RJR, supra* note 3 at 340-41). The Court spent two paragraphs applying the principle to the case (at 350).

41 One indicator of the move to a more holistic test for injunction is the case of the impecunious defendant. Were irreparable harm, representing the insufficiency of monetary damages, required before an injunction could be granted, then an impecunious plaintiff would almost always lead to an injunction. See *Morning Star Co-operative Society Ltd.* v. *Express Newspapers Ltd.*, [1979] F.S.R. 113, and *Wale, supra* note 5 at 345, where McLachlin J.A. indicates the defendant's ability to pay is of great importance. In the post-*Cyanamid* world the defendant's finances remain a strong factor. As Brundell J. stated in *Och Jonsson AB* v. *Johnson Enterprises Inc.* (1993), 49 C.P.R. (3d) 347 (F.C.T.D.) at 348, "the inability of the defendant to satisfy an award of damgages is a very serious consideration in establishing irreparable harm." In *Hubbard* v. *Pitt*, [1976] 1 Q.B. 142 (Q.B. and C.A.) [hereinafter *Hubbard*], however, Lord Denning urged a contextual and

The second limitation to the universality of the Supreme Court three-pronged test is that it is based upon a public law dispute.[42] While most injunction enquiries concern disputes between private litigants, the two Supreme Court cases relatively anomalously addressed the public law, and more specifically, constitutional realms. In *Metropolitan*, Beetz J. thus took pains to narrow the application of his test:

> ...the *American Cyanamid* "serious question" formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience. But I refrain from expressing any view with respect to the sufficiency or adequacy of this formulation in any other type of case.[43]

This public law origin affects the role of irreparable harm in the injunction test in two ways. First, irreparable harm is less relevant to the public law enquiry because of the remedial assumptions underlying the doctrine. The jurisprudence of irreparable harm has continually emphasized its relation to the inadequacy of monetary damages. Yet, as the Court noted in *RJR*, damages are not the usual remedy for constitutional breaches.[44] With irreparable harm notably detached from the usual touchstone of damages, it becomes an abstract and unhelpful concept.[45]

Flowing from this limitation is the second distortive effect of the public law test: irreparable harm will almost always be found in a public law dispute. The violation of the plaintiff's constitutional right is *prima facie* evidence of irreparable harm, as was noted in both *RJR* and *Metropolitan*.[46] This would explain the cursory examination of irreparable harm in the two Supreme Court cases. Subsequent constitutional case law, applying the Supreme Court cases, reveals a similar passing over of the irreparable harm prong of the test.[47] Given the limited utility of irreparable harm in constitutional

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discretionary treatment of the defendant's ability to pay and thus, without comment, emphasized that irreparable harm as inadequacy of damages was not sacrosanct. *RJR* endorsed *Hubbard* in stating that while a party's impecuniosity may be relevant, it is not determinative: (*RJR*, *supra* note 3 at 341). See also the recent case of *Desrosiers* v. *MacPhail* (3 February 1998), C.A. No. 144651 at para. 22 (N.S.), which stated in the context of a stay of execution that non-recovery of damages could constitute irreparable harm in certain circumstances.

42 One could also distinguish the Supreme Court cases in that they were not in fact, decisions on injunctions, but decision on stays of pending legislation. While the Supreme Court emphasized in both that the test was to be the same for stays and injunctions, the appropriateness of the test for the latter category was not of course directly tested in those cases.

43 *Metropolitan*, *supra* note 2 at 128.

44 *RJR*, *supra* note 3 at 341.

45 Its intangible nature makes it of limited utility even in the immediate constitutional enquiry. In the British Columbia Court of Appeal case of *Moore* v. *British Columbia Securities Commission* (1996), 24 B.C.L.R. (3d) 231 at 236 (C.A.) [hereinafter *Moore*], Rowles J.A. thus noted that most *Charter* injunction enquiries will be determined in the balance of convenience section.

46 *RJR*, *supra* note 3 at 346.

47 Similarly, Doug Rendleman, an injunction sceptic, notes the almost automatic assumption of irreparable harm in the US jurisprudence: "[j]udges passing on interlocutory injunctions conclude that constitutional violations cause irreparable injury" (D. Rendleman, "The Inadequate Remedy at Law Prerequisite for an Injunction" (1981) 33 U. Florida L. Rev. 346 at 352. Cassels makes the same observation: (J. Cassels, "An Inconvenient Balance: The Injunction as a *Charter* Remedy" in J. Berryman, ed., *Remedies: Issues and Perspectives* (Toronto: Carswell, 1991) at 299).

enquiries, most cases will be decided, as Beetz J. notes in *Metropolitan*, at the stage of the balance of convenience.[48]

One could respond that while these observations should limit the use of the tripartite model in public law disputes, it should not block its use in private law disputes. Indeed, the Supreme Court has in effect imposed the private law model of injunctions on the public realm. The cursory treatment of irreparable harm in the Supreme Court cases, however, does not only reflect the nature of the public law disputes before the court, but also the limitations of a universal model for injunctions. In these public law disputes, and indeed, in many private law disputes, an enquiry into irreparable harm will be redundant or perfunctory. In these cases it may distract and obscure more than help the judicial enquiry. In focusing on the first and third prongs of the traditional test, and giving minimum attention to the issue of irreparable harm, the Supreme Court unintentionally shows the preferability of a two-part test.

IV. COMPETING VISIONS OF IRREPARABLE HARM AND INJUNCTIVE RELIEF

While less nationally influential than the two Supreme Court cases discussed above, the Ontario case of *Yule* and the British Columbia case of *Wale* offer alternative tests that downplay the centrality of irreparable harm.[49] It is significant that each of these tests was written by a judge since elevated to the Supreme Court of Canada: Cory J. and McLachlin J., respectively.

Yule, arising from a pizza franchising dispute, remains the dominant Ontario test for interlocutory injunctions.[50] Writing two years after *Cyanamid*, Cory J. made irreparable harm a central consideration: "the essential question the Court must ask itself is, 'is it just in all the circumstances that the plaintiff should be confined to a remedy in damages?'"[51] His Lordship then considered three possible tests: a sequential "multi-requisite" test in which the factors are each condition precedents, a "multi-factor" test in which many considerations are weighed together, and the *Cyanamid* test, which posits that after clearing the "frivolous and vexatious" prerequisite, the injunction will be determined "upon a consideration of other matters."[52] His Lordship endorsed the *Cyanamid* test for the case at bar, and concluded that the issue would ultimately be determined by the balance of convenience. To support this conclusion, he cites two older Ontario cases employing two-part tests. Thus *Yule*, in its advocacy of contextual flexibility, prompts a balancing test which is better supported by a two-part enquiry.

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48 *Metropolitan*, *supra* note 2 at 129.

49 As of 28 August 1998, *Metropolitan* had been cited 329 times, *Yule* 216 times, *RJR* 374 times, and *Wale* 162 times. The age of *Metropolitan* and *Yule*, and the large numbers of cases emerging from Ontario exaggerate the numbers for the three leading cases: Quickcite and ABRC databases (QL).

50 For recent applications, see *Esmail* v. *Petro-Canada* (1995), 86 O.A.C. 385 (Gen. Div.); *Mott-Trille* v. *Steed* (1996), 27 O.R. (3d) 486 (Gen. Div) [hereinafter *Mott-Trille*]; *Kanda Tsushin Kogyo Co.* v. *Coveley* (1997), 96 O.A.C. 324 (C.A.) [hereinafter *Kanda Tsushin Kogyo*]; and *Voxcom Inc.* v. *Ansel*, [1998] O.J. No. 2212 (Gen. Div.) (QL).

51 *Yule*, *supra* note 4 at 509.

52 *Ibid.* at 510.

Wale similarly continues to serve as the British Columbian test for interlocutory injunctions, despite more recent Supreme Court pronouncements.[53] For jurisprudential purists, it may also be noted that the Supreme Court endorsed *Wale*, albeit without comment. The *Wale* application arose after the Attorney-General sought to block three Indian bands from fishing in three rivers contrary to Ministry of Fishery regulations. In reviewing the chambers, McLachlin J.A. (as she then was) noted that British Columbian courts have traditionally employed a two-pronged test for interim injunctions:

> First, the applicant must satisfy the Court that there is a fair question to be tried as to the existence of the right which he alleges and a breach thereof, actual or reasonably apprehended. Second, he must establish that the balance of convenience favours the granting of an injunction.[54]

Her Ladyship noted that while *Cyanamid* suggests a three-stage test, she preferred to view "irreparable harm as integral to the assessment of the balance of convenience between the parties."[55] Within the balance of convenience prong, the first enquiry concerns the adequacy of damages, the usual measure of irreparable harm.[56] In contrast to the one-sided *Cyanamid* irreparable harm test, this enquiry would be bipolar, balancing the irreparable harm suffered by the respondent if an injunction were granted, with the irreparable harm suffered by the applicant if it were not. In complicated cases with an even balance of convenience between the parties, the court would look to other factors, such as those mentioned in *Cyanamid,* to determine the application.

McLachlin J.A. concludes by emphasizing that a balance of convenience test offers a flexible and contextual approach to injunctions:

> Notwithstanding her failure to expressly allude to irreparable harm, she [the chambers judge] clearly had in mind the relative risks of harm to the parties from granting or withholding interlocutory relief and the fact that damages might not provide adequate compensation.... *The question of irreparable harm may be properly reviewed as part of the assessment of the balance of convenience between the parties, notwithstanding its treatment as a separate element in Amer. Cyanamid....*[57]

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53 In *Tlowitsis-Mumtaglia Band* v. *MacMillan Bloedel Ltd.* (1990), 53 B.C.L.R. (2d) 69 at 75 (C.A.), decided before *R.J.R.* but after *Metropolitan*, Legg J.A. stated that neither *Metropolitan* nor *Cyanamid* were binding on British Columbia courts, and that *Wale* remained the test in that jurisdiction. See recent applications of *Wale* in *Gill* v. *Dhillon* (1997), 89 B.C.A.C. 187 (C.A.); *Lookin Trading Co. Ltd.* v. *Honey House Beddings & Housewares Ltd.* (1997), 72 C.P.R. (3d) 297 (B.C.S.C.); *Air Canada* v. *C.A.L.P.A* (1997), 28 B.C.L.R. (3d) 159 (S.C.); *Peerless* v. *British Columbia School Sports* (1998), 157 D.L.R. (4th) 345 (B.C.C.A.) [hereinafter *Peerless*]; and *Vancouver Telephone Company* v. *Zanjani*, [1998] B.C.J. No. 593 (S.C.) (QL).

54 *Wale*, *supra* note 5 at 345.

55 *Ibid.*

56 *Ibid.*

57 *Ibid.* at 348 [emphasis added]. With specific reference to the case at bar, McLachlin J.A. concluded that the trial judge did not err by omitting express reference to the requirement of irreparable harm. In stating that the property in question should be preserved, the trial judge had indirectly considered irreparable harm, through her application of the earlier test in *Wheatley* v. *Ellis*, [1944] 3 W.W.R. 462 (B.C.C.A.). This earlier test included irreparable harm within a more general balance of convenience enquiry. As the trial judge found an even balance between the parties, she favoured the preservation of the status quo, one of the tie-breaking considerations offered by

More clearly than *Yule*, therefore, *Wale* supports a two-part test for injunctions.[58]

Other cases, both before and after *RJR* and *Metropolitan*, have explicitly or implicitly endorsed the more bipolar two-part test. In *Turbo Resources*, Stone J.A. posited a two-part test consisting of the threshold and balance of convenience:

> ...flexibility is to be achieved in the end under the full *American Cyanamid* formulation by having regard for the balance of convenience as between the parties, which thus becomes decisive in the exercise of the trial judge's discretion. Satisfying the threshold test of "a serious question to be tried" does no more, so to speak, than unlatch the door to a plaintiff; it neither opens it nor, less still, permits him to pass on through. That he may do only if the balance of convenience is found to lie in his favour.[59]

Similarly, in his lengthy examination of the tripartite test in *Gould*, Reilly J. stated that, "the issue of "irreparable harm" and the concept of "balance of convenience" must be considered together."[60] Courts have also endorsed a two-part test in more indirect ways, recognizing that the overlap between the categories of irreparable harm and balance of convenience is great. As Robertson J.A. stated in *David Hunt,* "the questions of irreparable harm and balance of convenience are inextricably linked."[61] While recognizing that the *Metropolitan* test was tripartite, Heald J.A. of the Federal Court of Appeal held that a trial judge who had considered irreparable harm within the balance of convenience test had committed no error.[62] He further stated that irreparable harm is but one of many factors to be weighed. Courts have also endorsed a two-part test through their blending of irreparable harm and balance of convenience. In *Mott-Trille*, for example, the Court merged the balance of convenience test into the second prong; it was sufficient that the plaintiff had shown that he might suffer irreparable harm were the injunction not granted.[63] Thus both directly and indirectly,

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Cyanamid.

58 A third province endorses a flexible test. While Saskatchewan follows a tripartite test, in *HMW-Bennett and Wright Constractors Ltd.* v. *BW Investments* (1992), 95 Sask. R. 211 at 218-19 (Q.B.), the Court recognized that some judges view irreparable harm as part of the third, balance of convenience test.

59 *Turbo Resources Ltd.* v. *Petro Canada Inc.* (1989), 24 C.P.R. (3d) 1 at 14 (F.C.A.) [hereinafter *Turbo Resources*].

60 *Gould Outdoor Advertising Co.* v. *Clark*, [1994] O.J. No. 3094 at para. 27 (Gen. Div.) (QL) [hereinafter *Gould*]. Kiteley J. similarly recognized the great overlap between the considerations of irreparable harm and balance of convenience and thus considered them together in *Cash Converters Pty. Ltd.* v. *Armstrong*, [1997] O.J. No. 2505 at para. 6 (Gen. Div.) (QL). See also *Spectech Alloys Ltd.* v. *Trinex Corp.*, [1997] O.J. No. 4685 (Gen. Div.) (QL).

61 *David Hunt Farms Ltd.* v. *Canada (Minister of Agriculture)* (1994), 112 D.L.R. (4th) 181 at 188 (F.C.A.) [hereinafter *David Hunt*]. See also Sharpe, *supra* note 8 at para. 2.530: "The questions of "irreparable harm" and balance of convenience of convenience are closely linked, but balance of convenience also relates to matters difficult to quantify in monetary terms."

62 *Nintendo of America* v. *Camerica Corp.* (1991), 36 C.P.R. (3d) 352 (F.C.A.).

63 *Mott-Trille, supra* note 50 at 492-93.

courts have presented a plausible and applicable two-step alternative to the tripartite Supreme Court tests for injunctive relief.[64]

V. FOUR CANADIAN CONFUSIONS

The previous two sections examined the ambiguities in *RJR*'s adoption of *Cyanamid*, and the competing bipartite tests for injunctions also prevalent in Canada. One obvious criticism of the bipartite test is that it leaves too much to judicial discretion: after dispensing with the substantive threshold test, the judge is left staring into an amorphous abyss of "balance of convenience." The entrenchment of "irreparable harm" offers a clear criterion guiding the injunctive enquiry. Yet as this section will argue, the Supreme Court's solid endorsement of *Cyanamid*'s three factors has not ushered in an era of clarity and consistency in courts below. *RJR* leaves ambiguous four crucial procedural and substantive issues discussed below. In the wake of this confusion, the tripartite test, with its more clear criteria, is revealed to offer no more certainty than would the bipartite model.

A. STANDARD OF PROOF

In contrast to the non-sequentialist manifestations of the irreparable harm test established by other courts, the Federal Court of Appeal has actually elevated the irreparable harm section of the test for an injunction, such that lawyers have practically given up on the interlocutory injunction as a remedy in that forum.[65] In a much-cited phrase, the Federal Court of Appeal held in *Syntex* that "evidence as to irreparable harm must be clear and not speculative."[66] In *Syntex*, the trial judge had concluded that the respondent's production of sodium tablets resembling those of the plaintiff would cause the plaintiff irreparable harm.[67] In allowing the appeal, Heald J.A. stated that "perceptions" of harm are insufficient, and that the jurisprudence of the Federal Court

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64 Incidentally, both Australia and New Zealand use more flexible and holistic two-part tests for injunctions. Both Commonwealth jurisdictions look first to see if there is a serious question to be tried, and then proceed to the balance of convenience, which enjoys a wide and varied ambit in the tests of both countries. Hammond sees the Australia model in particular as the most sophisticated manifestation of the injunction test, eschewing the insistence on irreparable harm in favour of greater judicial discretion in formulating a test and assigning weight to the factors therein (Hammond, *supra* note 6 at 265-67). For Australia, see the leading case of *Beecham Group Ltd.* v. *Bristol Laboratories Pty. Ltd.*, [1968] A.L.R. 469 (H.C.), and *Richardson* v. *Forestry Commission* (1987), 73 A.L.R. 589 (H.C.). For New Zealand, see *New Zealand Commentary*, "Injunctions," C956.

English Courts also seem to favour dividing the test in two parts. The recent case, of *Baywatch Production Co. Inc.* v. *The Home Video Channel*, [1997] F.S.R. 22 (Ch.), for example, considered first the threat of irreparable harm to the plaintiff, and then to the defendant, all under the heading of balance of convenience.

65 N. MacInnes, "IP interlocutory injunctions hard to come by" *Lawyers' Weekly* (6 March 1998) 2. The article observes that only those litigants wealthy enough to commission survey evidence will be able to obtain relief.

66 *Sytnex Inc.* v. *Novopharm Ltd.* (1991), 36 C.P.R. (3d) 129 at 135 (F.C.A.) [hereinafter *Syntex* (F.C.A.)]. See also *Nature Co.* v. *Sci-Tech Educational Inc.* (1992), 41 C.P.R. (3d) 359 (F.C.A.) [hereinafter *Nature Co.*].

67 *Sytnex Inc.* v. *Novopharm Ltd. (No. 1)* (1989), 28 F.T.R. 124 at 139, 26 C.P.R. (3d) 481.

of Appeal insisted on a strict standard of irreparable harm. In *Nature Co.*, despite evidence of actual confusion, the Court refused to grant an injunction as such a finding would have had to assume that the patent itself was valid.[68] *Centre Ice* reinforced this strict standard: in that case, the Court refused an injunction as it was not clear that confusion between competing products would necessarily lead to a loss of goodwill for which the plaintiff could not be compensated in damages.[69]

Four observations problematize this high standard of irreparable harm. The first two are raised by Diane Cornish in a case comment. She argues that despite the stern promulgations of the Federal Court of Appeal, the form and nature of irreparable harm demanded by the court is still unclear.[70] Given the multiple manifestations of irreparable harm established by Laycock and Perell, it should be easy to prove that irreparable harm, in some form, will be suffered by the plaintiff.[71] Thus the Federal Court's strict insistence gives a false sense that irreparable harm has become a new sequentialist threshold test. In the absence of "clear and not speculative proof" no injunction should be granted. Yet this would, if taken at face value, ensure that no injunction would ever be granted. As Rendleman states,

> In a vital society, certainty and definiteness are illusory. In fashioning rules for a particular controversy or for a healthy future, policymakers may conclude that in certain instances, specific relief will vindicate an important interest better than damages. Some interests worth recognizing are speculative and conjectural ... [or] are simply too important to be valued only in money. The remedy, however, often fails to comport with the substance of the interest.[72]

In this context, the "clear and speculative" test appears to be a form of judicial sabre-rattling used in lieu of the "*prima facie*" test to scare off frivolous or vexatious claims.[73]

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68 *Nature Co.*, *supra* note 66.

69 *Centre Ice Ltd.* v. *National Hockey League* (1994), 53 C.P.R. (3d) 34 at 53 (F.C.A.).

70 D.E. Cornish, "'Clear and Not Speculative' evidence of Prospective Harm: The Conundrum of Proving Irreparable Harm" 10 C.I.P.R. 589 at 591.

71 The Laycock and Perell sub-categories of irreparable harm are discussed below in Part VI.

72 Rendleman, *supra* note 47 at 358.

73 It is granted that this strictness arises in the context of patents, and this proposition may be limited to such cases. As Heald J.A. states in *Syntex* (F.C.A.) the granting of an interlocutory injunction will likely be the final disposition of the matter in patent cases:

> [w]hen a court decides via an interlocutory injunction that an aggrieved party has "proprietary rights in a trade mark," that court is deciding the very issue which is to be determined at trial (*Syntex* (F.C.A.), *supra* note 66 at 138. See also *Ault Foods Ltd.* v. *Weston (George) Ltd.* (1996), 112 F.T.R. 245).

Yet the formal mechanisms for filing patents should in fact lessen these evidentiary concerns. In this, a patent breach resembles a breach of a negative covenant, the violation of which seems to provide the plaintiff a *prima facie* case, along with clear evidence of irreparable harm. Many Canadian cases have held that such a breach allows the plaintiff to bypass the first hurdle in the injunction enquiry (see for example *Montréal Trust Co.* v. *Montréal Trust Co. of Canada* (1988), 24 B.C.L.R. (2d) 238 (C.A.), McLachlin J.A. (as she then was), and *Miller* v. *Toews*, [1991] 2 W.W.R. 604 at 606 (Man. C.A.): "In regarding proof of irreparable harm as an indispensable requirement, the learned judge erred in principle." Here Sharpe, like Twaddle J.A. in the case above, cautions that this only stands where the plaintiff's case is strong and where there is little

The third problem is that while the Federal Court of Appeal unambiguously insists upon clear proof of irreparable harm, this is not the case in other jurisdictions. In the British Columbia case of *Wale*, McLachlin J.A., as she then was, stated that, "[i]t is important to note that clear proof of irreparable harm is not required. Doubt as to the adequacy of damages as a remedy may support an injunction."[74] The Alberta Court of Queen's Bench recently allowed an injunction on "some evidence" "somewhat speculative" that the defendant's conversion into a discount store would harm the image of the plaintiff shopping mall.[75] In *Cunningham*, the Saskatchewan Court of Queen's Bench allowed an injunction without proof of irreparable harm.[76] In *Matrix Photocatalystic*, the Ontario Court General Division stated that where a plaintiff had established that the defendant's breach of fiduciary duty resulted in loss of customers, the plaintiff, "does not have to demonstrate irreparable loss beyond doubt or even, at this stage, on a balance of probabilities."[77] In *Capital Safe & Lock Service Ltd.* v.

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doubt on the merits (Sharpe, *supra* note 8 at para. 2.410). Thus the certainty of patents should prompt a lessened insistence on harm, subject to proof that the patent is actually valid. This ironic imposition of a strict standard in the face of relative certainty reminds one of *Yule*, where Cory J. states that the *Cyanamid* test may not be suitable in all situations. As an example, His Lordship gives, "the highly specialized, technical, and esoteric field of patent law has established a long-standing practice that might be offended by the application of the *Cyanamid* test" (*Yule*, *supra* note 4 at 513). This assertion is especially ironic given that the of *Cyanamid* itself concerned a patent dispute. Thus the strict Federal Court of Appeal standard should not serve as a model for injunctions generally, not because of the uncertainty of patent law, but in spite of their relative certainty. Yet its effects have gone beyond the narrow realm of patent law. While the majority of cases citing *Syntex* are patent cases, other kinds of injunction applications have also cited the case [Quickcite database (QL), May 12, 1998. See for example *Gould, supra* note 60 at para. 23, and *Kanda Tsushin Kogyo*, *supra* note 50 at para. 14]. Further, while Sharpe does not endorse this as a general principle, he does not limit this proposition to patent cases (Sharpe, *supra* note 8 at para. 2.410). The Federal Court of Appeal standard thus threatens to promote a return to the pre-*Cyanamid* days, elevating irreparable harm as a condition precedent in a quasi-sequentialist test.

74 *Wale*, *supra* note 5 at 348. But see the recent decisions of *Mark Anthony Group Inc.* v. *Vincor International Inc.* (1998), 80 C.P.R. (3d) 564 (B.C.S.C.), aff'd [1998] B.C.J. No. 2475 (C.A.) (QL) and *Westin License Co.* v. *Westin Construction Ltd.* (8 April 1998), Vancouver Reg. No. C973211 at para. 45 [hereinafter *Westin*] where the British Columbia Supreme Court cited the Federal Court authorities to insist upon clear and not speculative irreparable harm. This jurisprudential intrusion into *Wale* territory can perhaps be limited to the immediate context of these cases, trademark disputes resembling those of the Federal Court precedents cited.

75 *Capilano Plaza (Edmonton) Ltd.* v. *Saan Stores Ltd* (1997), 201 A.R. 220 (Q.B.). But see *Thermo Star Products* v. *Tomlinson* (1997), 201 A.R. 191 at 201, para. 25 (Q.B.) [hereinafter *Thermo Star*], where another judge of the same Court held that 'speculative' allegations of irreparable harm would not ground an injunction. Evidence of the confused state of Alberta law on this issue is provided by the fact that these two conflicting cases appear almost back-to-back in the same volume of the reporter series.

76 *Regina (City)* v. *Cunningham*, [1994] 7 W.W.R. 90, 119 Sask R. 299 (Q.B.) In an action enjoining the proprietor of a club showing burlesque shows from operating, the Court held that the irreparable harm requirement could be lessened where the respondent had repeatedly flouted the municipal law. The Ontario Court of Appeal held similarly in *Zanzibar Tavern Inc.* v. *Las Vegas Restaurant & Tavern Ltd* (1996), 50 C.P.C. (3d) 90.

77 *Matrix Photocatalystic Inc.* v. *Purifics Environmental Technologies* (1994), 58 C.P.R. (3d) 289 at 302 (Ont. Ct. (Gen. Div.)), Killeen J.

Steeves, the Court of Queen's Bench of New Brunswick held that proof of the possiblity of irreperable harm would suffice.[78]

Fourth and finally, the Federal Court of Appeal itself does not always insist upon "clear and not speculative proof." In the recent case of *Mott-Trille*, the Federal Court itself uses language indicating that the standard may fall below "clear and not speculative":

> If an interim injunction is not granted, there is a *very real possibility* that Mr. Mott-Trille will be disfellowshipped before the conclusion of the Law Society hearings. As indicated, this *could* have a significant impact on Mr.Mott-Trille's ability to answer the charges against him at the Law Society.[79]

In *David Hunt*, as well, the Court emphasizes that irreparable harm is not a prerequisite to granting an injunction.[80]

B. SEQUENTIAL OR NON-SEQUENTIAL?

What are the consequences of a plaintiff failing to establish irreparable harm? Whether the enquiry ends, as in a strictly sequential test, or continues, under a non-sequential test, relates closely to the issues discussed in the previous section. In *Yule*, Cory J. discuses three kinds of injunction tests. The first and strictest is the "multi-requisite test," in which "[c]ourts have held that it is incumbent upon the plaintiff to clear a number of hurdles."[81] As stated above, *Cyanamid* has been criticized for leaving the impression that its test is a multi-requisite one. While *RJR* indicates that irreparable harm is not a condition precedent to the granting of an injunction, there still exists ambivalence in the courts below about the necessity for the plaintiff to show irreparable harm.[82] This ambiguity will prove fatal to many applications for injunctions. If irreparable harm serves as a threshold test, however, it is axiomatic that the failure to establish such harm, whatever that harm may be, will result in the immediate denial of the injunction to the applicant.

It is conceded that most Canadian courts do not consider a showing of irreparable harm to be a condition precedent. *David Hunt* states twice that a finding of irreparable harm to the applicant "is not a condition precedent to the application of the third prong

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78 *Capital Safe & Lock Service Ltd.* v. *Steeves*, [1998] N.B.J. No. 273 at para. 18 (Q.B.).

79 *Mott-Trille*, *supra* note 50 at 493-94 [emphasis added]. See also *Fednav Ltd* v. *Fortunair Canada Inc.* (1994), 59 C.P.R. (3d) 1 (F.C.T.D.), where an injunction was granted where trademark confusion *could* have resulted in irreparable injury [emphasis added].

80 *David Hunt*, *supra* note 61.

81 *Yule*, *supra* note 4 at 510.

82 *RJR*, *supra* note 3 at 337. This confusion is reasonable, given that the constitutional breaches in the two Supreme Court cases will always serve as *prima facie* evidence of irreparable harm, thus avoiding any problems that a sequentialist approach may bring: see discussion above, under Part II, *supra*.

of the tripartite test."[83] Yet continued confusion is perhaps a reasonable reflection of Canadian applications of *Cyanamid*. In *Ominayak* v. *Norcean Energy Resources*, the leading Alberta case for injunctions, Kerans J.A. makes irreparable harm a condition precedent:

> ...courts should not forget that an interim injunction is emergent relief. The claimant seeks a remedy without proof of his claim. This inversion should only be considered in cases where the harm is of such seriousness and of such nature that any redress available after trial would not be fair or reasonable. *The hurdle must be met before the balance of convenience is weighed.*[84]

A recent exchange in the Manitoba court system evidences the continuing confusion. In *Apotex*, the Court of Appeal stated that a court is to examine irreparable harm along with the other two considerations, which often overlap. They are to be considered not as condition precedent "separate hurdles but as interrelated considerations." [85]In this the Court overturned the Chambers Judge, who had dutifully applied the Manitoba Court of Appeal precedent of *Periera*, decided the year before. The *Periera* Court had stated the opposite principle:

> ...the inadequacy of damages as a *remedy is always a condition precedent to the granting of an injunction*. That is the first principle of injunction law.[86]

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83 *David Hunt, supra* note 61 at 188. See also *Goodsman* v. *Saskatchewan Power Corp.* (1997), 145 D.L.R. (4th) 213 at para. 16 (C.A.) for an affirmation that all three tests are to be applied, even after the failure to show a strong case or irreparable harm.
As it is a Federal Court decision, *David Hunt*, however, should not offer much solace in this proposition. Under the strict Federal Court insistence on "clear and not speculative" evidence of irreparable harm, a failure to prove such harm should, in fact, mandate a sequentialist test which should cease upon failure at the second stage. For logical applications of this premise, see the recent Federal Court (Trial Division) decisions of *ITV Technologies, Inc.* v. *WIC Television Ltd.* (22 December 1997), Vancouver, File No. T-1459-97 at para. 18 and *Fournier Pharma Inc.* v. *Warner Lambert Canada Inc.* (22 December 1997), Montréal, File No. T-2000-97 at para. 33, where the Courts ceased the injunctive enquiry upon failure at the second stage.

84 [1985] 3 W.W.R. 193 at 202 (Alta. C.A.) [emphasis added]. The Court explicitly rejected the two-part test. Subsequent cases such as *Thermo Star, supra* note 75 and *Noise Solutions Inc.* v. *Commerical Insulation Contracting Ltd.*, [1998] A.J. No. 883 (C.A.) (QL) have followed this authority. But see *409790 Alberta Ltd.* v. *TransWest Energy Inc.* (1997), 200 A.R. 302 (C.A.), where O'Leary J.A. finds that there was insufficient irreparable harm to ground an injunction, yet still proceeds to measure the balance of convenience. It should be noted that the balance of convenience merely confirmed the negative finding in irreparable harm, and thus this may not represent a departure from a sequentialist condition precedent approach.
Similarly, in the applications for stays in *Medicine Shoppe Canada Inc.* v. *Ottawa Barton Pharmacy Inc.*, [1997] A.J. No. 1124 at para. 5 (Q.B.) (QL); *Alberta Mortgage and Housing Corp.* v. *Tarpon Holdings Ltd.*, [1997] A.J. No. 1154 at para. 12 (Q.B.) (QL); and *702011 Alberta Ltd.* v. *Franco Investments Inc.*, [1998] No. 664 at para. 23 (Q.B.) (QL), Veit J. confirms that in Alberta the test is considered to be sequentialist and a failure to establish irreparable harm will halt the enquiry. The Court nonetheless confirms that the application would also fail on a balance of convenience test.

85 *Apotex Fermentation Inc.* v. *Novopharm Ltd.*, [1994] 7 W.W.R. 420 at 423-24, 29 C.P.C. (3d) 48 (Man. C.A.); affirmed recently in *Zipper Transportation Services Ltd.* v. *Korstrom*, [1998] M.J. No. 82 at para. 11 (C.A.).

86 *Pereira* v. *Smith*, [1993] 8 W.W.R. 607 at 610 (Man. C.A.), Twaddle J.A. [emphasis added].

One can sympathize with any chambers judge faced with such precedential ambiguity.[87]

C. IRREPARABLE HARM TO THE PLAINTIFF, OR BOTH SIDES?

Further evidence both of the confusion surrounding irreparable harm, and the desirability of merging the test into the balance of convenience, is seen where courts examine irreparable harm to both the plaintiff and the defendant in the second prong. Even under the non-sequentialist vision generally endorsed by courts, the applicant has the onus of showing irreparable harm. As Beetz J. noted in *Metropolitan*, however, many courts balance the irreparable harm posed to both sides at this stage.[88] Thus *Yule* balances irreparable harm first to the plaintiff and immediately after to the defendant.[89] As an example, in the recent case of *David Hunt*, concerning a Federal government initiative to destroy cattle possibly afflicted by bovine spongiform encephalopathy the Federal Court of Appeal examined irreparable harm to both sides. Robertson J.A. stated that,

> The second prong of the tripartite test is concerned with the issue of irreparable harm. It must be remembered however that while an applicant may be exposed to irreparable harm if injunctive relief is withheld, so too may a respondent should an injunction be granted. *Obviously, the issue of irreparable harm must be addressed from the perspective of both parties.*[90]

In the 1996 *Investor First Financial*, Gibbs J.A., citing *Cyanamid*, balanced the harm to the applicant and then to the respondent.[91] Similarly, in *Burlington* v. *Video Matic*,

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87 Judicial hesitancy about the weight to be attached to a failure by the plaintiff to prove irreparable harm is not limited to the western provinces. In *Repap New Brunswick* v. *Pictou* (1996), 182 N.B.R. 228 at 234 (C.A.), Bastarache J.A. (as he then was) for the New Brunswick Court of Appeal stated that there was no need to apply the balance of convenience test because the second test, of irreparable harm, had failed. However, in *Canada East Manufacturing Inc.* v. *Harvey* (1996), 183 N.B.R. (2d) 293 at 303 (C.A.), decided a month later, the same judge seems to have changed his sequentialist stance, overruling a trial judge who had failed to explore the balance of convenience even after the plaintiff's failure to show irreparable harm. In *Duarte* v. *LensCrafters International Inc.* (1994), 57 C.P.R. (3d) 418 (Ont. Ct. (Gen. Div.)), E.M. MacDonald J. stated that irreparable harm acts as a condition precedent for the injunctive enquiry. In *Chen* v. *Canada Trustco Mortgage Corp.*, [1997] O.J. No. 2834 at para. 8 (Gen. Div.) (QL), Molloy J. stated that as "a failure to establish irreparable harm is fatal to the application," there was no need to consider the balance of convenience. The Ontario Court General Division noted in *754223 Ontario* v. *R-M Trust Co.*, [1997] O.J. No. 282 at para. 46 (QL), that a failure to show irreparable harm should terminate the entire injunction enquiry. The Court nonetheless proceeded to examine the balance of convenience, essentially redundant after the failure of the second prong. While the Court here reiterated the *RJR* holding that the test was not sequentialist, its hesitation to stop the enquiry indicates a lack of confidence in the determinacy of irreparable harm. See also *Abbott Laboratories Ltd.* v. *Apotex Inc.* (1988) 81 C.P.R. (3d) 85 at 94 (Ont. Ct. (Gen. Div.)). If the failure or success at proving irreparable harm will not determine the injunction enquiry, its entrenchment in the tripartite test seems dubious.

88 *Metropolitan*, *supra* note 2 at 128-29.

89 *Yule*, *supra* note 4 at 509.

90 *David Hunt*, *supra* note 61 at 185 [emphasis added].

91 *Investor First Financial* v. *Lawton* (8 November 1996), Vancouver No. CA022424 (C.A.) [hereinafter *Lawton*]. See similarly *Westin*, *supra* note 74 at para. 45.

the Ontario Court General Division focused on the harm to the defendant, who would suffer "multi-faceted, severe, and wide-reaching harm," and thus denied the injunction.[92]

Cyanamid is to blame for some of this confusion. Courts reading its discussion of the adequacy in damages to "either party or to both," would justifiably be confused about this crucial evidentiary and procedural issue.[93] *Mott-Trille* illustrates how this bipolar enquiry is at times laudable.[94] However, the examination of the relative risk of harm to both sides of the litigation would be logically and procedurally better suited to the balance of convenience section of the test. *RJR*'s assertion that the court should consider harm to the respondent in the third stage will clarify this confusion somewhat.[95] The current ambiguity over the considerations judges must weigh, however, leads to inconsistent judgments and thereby erodes the predictability of the injunction application.[96]

D. IRREPARABLE HARM TO THE PUBLIC?

The above discussion shows how courts examine irreparable harm not only to the applicant but also to the respondent. Here, we will examine the addition of the public as a third party affecting the outcome between the two sides to the litigation. In *RJR* and *Metropolitan Stores*, the Supreme Court reasonably posited that the court should take into account the public interest in an injunction enquiry where the constitutional validity of a law is challenged. As Beetz J. stated in *Metropolitan*,

> The reasons for this disinclination become readily understandable when one contrasts the uncertainty in which a court finds itself with respect to the merits at the interlocutory stage, with the sometimes far-reaching albeit temporary practical consequences of a stay of proceedings, *not only for the parties to the litigation but also for the public at large*.[97]

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92 *Burlington (City)* v. *Video Matic 24 Hr Movie Rentals Inc.* (1994), 34 C.P.C. (3d) 54 (Ont. Ct. (Gen. Div.)). See also *Siska Indian* v. *British Columbia (Minister of Forests)*, [1998] B.C.J. No. 1661 at para. 24 (S.C.) (QL), *Mascot International* v. *Harman Investments Ltd.* (1993), 46 C.P.R. (3d) 161 (F.C.T.D.), and *R.W. Blacktop Ltd.* v. *Artec Equipment Co.* (1990), 31 C.P.R. (3d) 484 (F.C.T.D.). In contrast, other cases fail to weigh the harm to both sides where such a bipolar balancing of harm would inform the injunction exercise. In *Mott-Trille*, *supra* note 50, for example, the Court faced two challenging issues: the plaintiff's right to a fair hearing before a professional review board on one hand, and the defendant's right to religious freedom. The Court granted an interim injunction blocking the Jehovah's Witnesses from "disfellowshipping" Mr.Mott-Trille from their ranks until after his hearing. While the Court concluded that this decision represented the least drastic means to achieve fairness in the circumstances, it failed to consider its encroachment upon the curtailing of the freedom of religion and association of the defendant religious order. Indeed, as has been noted above, the Court omitted the balance of convenience stage of the injunction enquiry. Were the test bifurcated instead of tripartite, the need to balance the relative risks to both parties would be more clear to lower courts.

93 *Cyanamid*, *supra* note 1 at 408.

94 *Supra* note 50.

95 *RJR*, *supra* note 3 at 340-41.

96 It appears that English courts weigh the potential harm to each litigant at the same time. D. Bean, *Injunctions*, 5th ed. (London: Longman, 1991) at 28.

97 *Metropolitan*, *supra* note 2 at 129-30 [emphasis added].

RJR clarifies this by stating that the public interest should be considered at both the irreparable harm and balance of convenience stages of the test in the case of *Charter* injunctions.[98]

The public interest, however, has played a role beyond constitutional challenges. For example, in *David Hunt*, which challenged not the constitutionality of a law but a ministerial order to destroy cattle, the Court also considered the public interest in assessing irreparable harm.[99] It remains unclear, however, whether irreparable harm to the public interest should intrude upon interlocutory applications between two purely private litigants. In *Edmonton Northlands* v. *Edmonton Oilers Hockey Club*, for example, the Federal Court of Appeal upheld an injunction blocking the owners of the team from moving it to Minneapolis. There the Court upheld a consideration of irreparable harm to the public interest, which did not require proof.[100] In *Winford Insulation* and *Ochiichagwe'babigo'ining First Nation Council* the Court considered irreparable harm to third-party interests under the rubric of balance of convenience, as represented respectively by third party customers and Aboriginal voters for a band council.[101]

While a full exploration of public and private injunctions is beyond the scope of this article, a possible solution to this confusion is to avoid a strict dichotomy between public and private litigation. Increasingly, courts and academia are recognizing that even the most ostensibly private litigation has public dimensions.[102] In the case of an intellectual property dispute, for example, there may arise the public law concerns of freedom of expression, and public access to the product.[103] It is granted that the public should not always intrude as a consideration in cases that fit the classic bipolar model of private litigation. A two-pronged balancing test would avoid the rigid necessity of stating whether or not the public should be considered in a private law dispute, and allow the judge to weigh the public interest in appropriate degree against other considerations.

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98 *RJR*, *supra* note 3 at 340-41.

99 "I would add that it is not always self-evident whether the public interest will suffer irreparable harm if injunctive relief is either granted or denied. I am prepared to assume for purposes of appeal that the public interest will be harmed if the interlocutory injunction issues" (*David Hunt*, *supra* note 61 at 188, Robertson J.A.).

100 *Edmonton Northlands* v. *Edmonton Oilers Hockey Corp.* (1994), 23 C.P.C. (3d) 72 (F.C.A.) [hereinafter *Edmonton Northlands*].

101 *Winford Insulation Ltd.* v. *Andarr Industries Inc.*, [1995] 10 W.W.R. 155 (Alta. Q.B.), *Ochiichagwe'babigo-'ining First Nation Council* v. *Beardy* (1996), 50 C.P.C. (3d) 203 at 208 (Ont. Ct. (Gen. Div.)). See also *Ashby* v. *Bracebridge*, [1998] O.J. No. 2451 at para. 22 (Gen. Div.), which considers the economic advantages to the public of snowmobiling.

102 See for example Cassels, *supra* note 47 at 309.

103 American courts have long recognized this public law dimension to private litigation. Under the leading US *Virginia Jobbers* test for injunction, for example, the public interest serves as a fourth major consideration the court must always weigh in granting an injunction: *Virginia Petroleum Jobbers Association* v. *F.P.C.*, 259 F.2d 921 (D.C. Cir. 1958). The test weighs each of the four factors together, in a manner urged by this article. See Hammond, *supra* note 6 at 262.

VI. NORMATIVE ATTACKS ON IRREPARABLE HARM

In addition to these jurisprudential confusions, many critics have denounced the doctrine of irreparable harm and its distortive effect on the injunctive enquiry. The discussion below shows how Lord Denning, Owen Fiss, Grant Hammond, and Douglas Laycock, four experts on injunctions, argue for an injunctive enquiry in which irreparable harm melds into a more discretionary balancing test.

A. LORD DENNING

Lord Denning upheld the primacy of judicial discretion in granting injunctions, both before and after *Cyanamid*. Writing three years before *Cyanamid*, Lord Denning stated that:

> the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then decide what is best to be done ... 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.*[104]

In *Fellowes*, Lord Denning fought a rear-guard action, criticizing the perceived inflexibility of *Cyanamid*. His Lordship sought to exempt the case at bar by stating that it was one of the "individual cases" in which the courts should follow *Stratford*, rather than *Cyanamid*.[105] For this principle, he cited *Cyanamid* itself:

> ...there may be many other special factors to be taken into consideration in the particular circumstances of individual cases.[106]

These remarks were directed towards the initial threshold question of "*prima facie* case." However, the emphasis on a discretionary remedy based on a broad examination of all of the individual circumstances promotes a more general balance of convenience test than the tripartite examination. In some cases irreparable harm will be an unhelpful or irrelevant enquiry, to be outweighed by other factors. It can be argued in response that Lord Denning's vision promotes rule by judges, conferring upon them extraordinary discretion, reducing law to "the wilderness of single instances." Predictability and fairness between plaintiffs will suffer. Yet the promotion of an equitable and contextual remedy between the immediate plaintiff and defendant will ensure that as a remedy, the injunction, in the words of Cory J. in *Yule*, will remain flexible so as to be applicable to changing times and circumstances.[107] Judges should eschew strict adherence to a set requisite test, lest it "unduly restrict and fetter the discretion of the Court."[108]

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104 *Hubbard* v. *Vosper*, [1972] 2 Q.B. 84 at 96, Lord Denning [emphasis added].

105 *Fellowes & Son* v. *Fisher*, [1976] 1 Q.B. 122 at 134 (C.A.). For further criticism see *Hubbard*, *supra* note 41.

106 *Cyanamid*, *supra* note 1 at 409.

107 *Yule*, *supra* note 4 at 512.

108 *Ibid.*

B. OWEN FISS

In his influential tract, *The Civil Rights Injunction*, Fiss sees a more holistic test as rightly challenging what he calls the hierarchy of remedies,[109]

> ...the view that in our legal system the relationship among remedies is hierarchical and that in this hierarchy the injunction is disfavoured, ranked low. This hierarchical relationship and the subordination of the injunction is ... primarily the handiwork of the irreparable injury requirement.[110]

While this discussion arises, as the title indicates, in the markedly public law domain of civil rights, the empowerment offered by a specific performance remedy is the same in public or private law. As he states, "[t]he injunctive process essentially allocates power to the citizen-grievant (the power of initiation) and to the judiciary (the power of decision)."[111] The traditional disfavouring of injunctive relief served as an overbroad limitation on remedies available to the plaintiff, with a corresponding stifling of litigation possibilities.[112] This leads Fiss to advocate what he calls the "context-dependency proposition — the view that reasons for disfavouring the injunction cannot be generalized across the legal system."[113] It would perhaps distort Fiss's thesis to urge a similar generalization in downplaying the irreparable injury requirement for all interim applications. Yet in treating irreparable harm merely as one of many factors to be considered in an overall enquiry based on the context of individual cases, Fiss, like Denning, knocks irreparable harm off its formalist pedestal.

C. GRANT HAMMOND

Writing in 1980, Hammond, like Denning, focuses his attack on the threshold question of the strength of the plaintiff's case. He sees the insistence on irreparable harm, however, as an equally "antiquated" bar to the coherent and effective granting of injunctions:

> The adequacy test which comprised a second-level standard under the classical model was part of that received tradition — if the common law could prospectively satisfy a plaintiff's claim in damages, the remedy simply was not needed. Never mind that that remedy might be several years down the road and that the vagaries of life and commerce might intercede.[114]

As a solution, he advocates a more flexible model, in which the "judge should not be deterred by the historical law/equity dichotomy or even by inherited maxims."[115] Irreparable harm, in its broadest sense, becomes the overarching purpose of his new-

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109 O.M. Fiss, *The Civil Rights Injunction* (Bloomington: Indiana University Press, 1978) [hereinafter Fiss].

110 *Ibid.* at 38.

111 *Ibid.* at 88.

112 *Ibid.* at 58-60.

113 *Ibid.* at 86.

114 Hammond, *supra* note 6 at 276.

115 *Ibid.* at 278.

model injunction: "the preservation of litigation for effective later determination." [116] Procedurally, however, he grants the judge a principled discretion to apply a "variable threshold model." The judge would ask three preliminary questions focusing on the nature of the dispute, and the appropriate threshold tests fitting that dispute. Following this context-based threshold, the judge would undertake a nuanced balancing of other factors, including the public interest, the adequacy of other forms of relief, including other forms of non-pecuniary damages. It is submitted that this tailored model for injunctions, which crafts an injunction test to suit the individual nature of the case, is more readily realized through the flexible two-step model.

D. DOUGLAS LAYCOCK

Douglas Laycock criticizes irreparable harm as a distracting and infinitely malleable phrase. Judges decide cases not through the guide of irreparable harm, but in spite of it, basing their decisions upon an intuitive sense of justice rather than the presence or absence of irreparable harm. For his treatise, evocatively entitled *The Death of the Irreparable Injury Rule*, Laycock examined some 1400 American cases. From his research Laycock surmised not only that judges do ignore the irreparable injury rule, but that judges should ignore the rule.[117] Like Fiss, he sees the rule as promoting an outmoded hierarchy of remedies, quashing injunctive relief in theory if not practice, and thereby promoting inconsistency between plaintiffs. In place of an injunctive test elevating irreparable harm he argues for a "functional approach to choosing remedies." This approach would balance the plaintiff's presumptive right to a specific remedy against "burdens on the defendant, the court, or the public, and countervailing policies of substantive law."[118] The remainder of this section will relate Laycock's assertions to the Canadian context. It will also refer to Perell's article on irreparable harm, written contemporaneously with Laycock's work.[119]

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116 *Ibid.*

117 D. Laycock, *The Death of the Irreparable Injury Rule* (New York: Oxford University Press, 1991) at vii.

118 *Ibid.* at 266. The substantive law exceptions to specific relief include a presumption against personal service contracts, protection of free speech, the right to civil jury trial, equality among creditors, and interference with other courts, tribunals, or agencies. For clarity, these exceptions would be carefully spelled out in a statute, a draft of which he provides at the end of his book. *Ibid.* at 268-70.

Laycock's solution would be to shift the onus from the plaintiff having to prove irreparable harm to the defendant having to prove why equitable relief should not be granted as of course (at 242). In his advocacy of a presumptive right to specific performance advocated he would support Ernest Weinrib's right-based approach to private law remedies:

> The bipolarity of corrective justice also fashions the remedy, that is, the rectification, that corrective justice accomplishes. The rectification responds to — indeed corresponds to — the injustice that is being rectified. Because the defendant has realized a gain correlative to the plaintiff's loss, the correction entails a loss to the defendant that is simultaneously a correlative gain to the plaintiff. In this way the rectification reverses the unjust act by undoing the excess and the deficiency that constitute the injustice (E.J. Weinrib, *The Idea of Private Law* (Cambridge: Harvard U.P., 1995) at 65).

119 Perell, *supra* note 7.

The first thrust of Laycock's argument is that while judges pay homage to the irreparable harm doctrine, they base their decisions on a variety of factors which do not necessarily reflect "irreparable" or "harm" in any consistent or coherent sense:

> When a judge believes that the irreparable injury rule requires a wrong result, he may do what he thinks is right whether or not he can explain it.[120]

He argues that a very small category of cases actually evokes the irreparable injury rule in its traditional sense of inadequacy of damages.[121] In an intermediate category of cases, some judges escaped the irreparable injury rule by granting specific remedies on legal grounds such as replevin for personal property, *lis pendens*, or *res judicata*.[122] In a third category of cases the plaintiff seeks to recover goods which are fungible and easily quantifiable. Here the irreparable injury rule survives only as a "tiebreaker," tipping the balance where all other considerations are equal.[123]

The second stage of Laycock's argument is that the phrase "irreparable injury" suffers from an ambiguous myriad of meanings, rendering its utility negligible:

> *The irreparable injury rule is not a significant barrier to equitable relief, because the legal remedy is almost never adequate.* Principled doctrine and ample precedent support any articulable need for equitable relief. A plaintiff with any plausible need for an equitable remedy has a *prima facie* malpractice suit against a lawyer who fails to fit his need into a doctrinal niche.[124]

Laycock tabulates four categories of irreparable harm, with sub-tabulations of situations encompassed by the excessively broad notion of irreparable injury. According to Laycock, courts award the specific remedy of an injunction when faced with any of four situations: real or unique property; great inconvenience; cases where damages would be difficult to calculate; and attacks on sentiment or dignity. Perell, writing of the Canadian jurisprudence, also recognizes the manifold manifestations of irreparable harm, but is less alarmed than Laycock by the imprecision of the phrase. Perell adds three commercial categories to the Laycock list, further illustrating the multiple meanings of irreparable harm.[125] In the following discussion, this article will further explore these seven meanings of irreparable harm in the Canadian context to illustrate the imprecision of the phrase, and to show how irreparable harm will not in itself solve injunction disputes.

Laycock's first group concerns losses that cannot be replaced, including real property and unique personal property. This category encompasses the classic and plain meaning of irreparable harm, concerning goods truly irreplaceable by monetary damages. Here Laycock notices a retreat in the rationale behind granting specific remedies for real

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120 Laycock, *supra* note 117 at 82.

121 *Ibid.* at 105.

122 *Ibid.* at 100.

123 *Ibid.*

124 *Ibid.* at 237 [emphasis added]. See also Perell, *supra* note 7 at 558.

125 Perell, *supra* note 7 at 552-57.

property. One of a thousand identical condominium units, for example, is readily compensable in monetary damages. Yet specific relief is still granted in this case, showing the artifice of the irreparable injury rule.[126] Likewise, in the context of personal property, even where the defendant threatens to destroy an otherwise replaceable good, Laycock argues that most U.S. courts would grant an injunction to bar this destruction in advance.[127]

A similar false sense of "irreparable" plagues Laycock's second group of cases. Where replacement is possible, but would impose significant inconvenience, the court can find irreparable injury. Here, although monetary damages would clearly compensate, and the harm would not be irreparable in the literal sense, most courts ignore the strict rule and grant specific relief. As Perell concedes, "[i]rreparable harm simply means that in a particular context an equitable remedy is better than damages. Indeed, damages remain a viable alternative remedy in all cases."[128]

In Laycock's third group "irreparable harm" serves as a proxy for situations where the calculation of damages would be difficult.[129] As examples of this, Laycock and Perell offer injury to reputation or goodwill, and intellectual property disputes.[130] Other cases, however, have held that complication in computing damages will not in itself bar damages as an appropriate remedy, and thus will not be considered irreparable harm.[131] Once again, irreparable harm is not determinative.

Laycock's fourth group of cases includes intangible violence to the dignity of the plaintiff, or to the status of otherwise fungible but sentimentally cherished property. Environmental concerns which look beyond the market value of ore or lumber to more spiritual or historical values would fall into this category.[132] Yet truly irreparable damage, such as the destruction of old-growth forests, may not in fact pass the

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126 Laycock, *supra* note 117 at 37-38. But see *Semelhago*, *supra* note 13, which indicates a change in Canadian judicial practices towards injunctions in this case. The intersection of *Semelhago* with the new injunction jurisprudence has not been entirely clear or felicitous. In the recent case of *White Room Ltd.* v. *Calgary (City)* (14 April 1998), Calgary 98-17552, the Alberta Court of Appeal lifted an injunction protecting a dilapidated but historic building. The Court cited the general *Semelhago* release of realty from presumptive specific relief to lift the injunction, despite evidence that the building had unique properties which alternative premises, while financially substitutional, would not truly replace: see the strong dissent of Conrad J.A. at para. 49ff.

127 Laycock, *ibid.* at 41.

128 Perell, *supra* note 7 at 544. For a Canadian example see *Litwin Engineers & Constructors Inc.* v. *M & M Manufacturing Ltd.* (1994), 139 N.S.R. (2d) 12 (S.C.), where a time-sensitive construction contract would have been compensable but whose breach would have caused great inconvenience. See also *Dawson* v. *Northumberland County Truckers Association Inc.* (1990), 110 N.B.R. (2d) 145 (Q.B.); and *Olsen* v. *Gamache* (18 March 1993), Kamloops 19499 (B.C.S.C.).

129 Laycock, *supra* note 117 at 44. See for example *Edmonton Northlands*, *supra* note 100 at 79, and *525044 Alberta Ltd.* v. *Triple 5 Corp.* (1993), 13 Alta. L.R. (3d) 128 (Q.B.).

130 Perell, *supra* note 7 at 554. This is also given as an example in *RJR*, *supra* note 3 at 341.

131 *General Mills Canada Ltd.* v. *Maple Leaf Mills Ltd.* (1980), 52 C.P.R. (2d) 218 (Ont. H.C.), *Unitel Communications Inc.* v. *Bell Canada* (1994), 17 B.L.R. (2d) 63, 29 C.P.C. (3d) 159 (Ont. Ct. (Gen. Div.)), and *Gould*, *supra* note 60 at para. 26.

132 *RJR*, *supra* note 3 at 341 provides the environmental destruction as an example of irreparable harm.

irreparable harm test.[133] Violations of individual autonomy, as seen in the potential denial of a fair hearing in *Mott-Trille*, also represent this manifestation of irreparable harm.[134] Here, however, Perell points out an inconsistency. Loss of human life represents harm that is truly irreplaceable and yet is fully quantifiable in damages.[135] While the threat of loss of human life would, of course, satisfy the irreparable harm branch of the injunction test, this observation reveals the fallibility of the language of irreparable harm.

To Laycock's categories, Perell adds more specific examples of situation deemed by courts to constitute irreparable harm. While Perell's article predates Laycock's book, and while Perell gives this list of examples to describe, rather than criticize, the doctrine of irreparable harm, his list supports Laycock's thesis in two ways. First, the multiplicity of "irreparable harm" situations shows the imprecision of the phrase, a problem that Perell himself notes.[136] Second, these situations can, in fact, be compensable in damages, and generally are not truly irreparable. Thus Perell points to irreparable harm where the plaintiff's business relies upon the performance of the defendant,[137] where the defendant's unfair competition threatens to destroy the business of the plaintiff,[138] and where the defendant's unfair competition merely threatens to harm the business of the plaintiff.[139] A recent example of these categories is seen in the 1996 case of *Lawton*.[140] In that case the Court granted an injunction as otherwise the appellants would be unable to work during the busiest time of year. In *Lawton*, however, the lost business would be fully compensable and calculable in monetary damages. These examples show how the revelation that apparent irreparable injuries in the commercial

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133 *Western Canada Wilderness Committee* v. *A.G. British Columbia* (1991), 76 B.C.L.R. (2d) 85 (C.A.). For a case finding the destruction of old-growth forests to constitute irreparable harm, see *MacMillan Bloedel Ltd.* v. *Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.).

134 See for example the recent case of *Peerless*, *supra* note 53, where the majority judgment identified at para. 35 the "immeasurable, non-economic value which young athletes attach to the ability to play other young athletes as part of a team sport in inter-school competition" as irreparable harm prompting the relief of a mandatory injunction allowing the appellant to play basketball despite his having transferred schools contrary to the rules of the respondent organization.

135 Perell, *supra* note 7 at 559.

136 *Ibid.* at 558.

137 *Ibid.* at 552.

138 *Ibid.* at 553. The Supreme Court gives this as another example in *RJR*, *supra* note 3 at 341. See *Munsingwear Inc.* v. *Promafil Canada Ltée.* (1994), 56 C.P.R. (3d) 458 (F.C.T.D.), where the threat to the development of a clothing line constituted irreparable harm, even though this harm could presumably be compensable in damages.

139 Perell, *supra* note 7 at 553. See for example *Church & Dwight Ltd.* v. *Sifto Canada* (1994), 20 O.R. (3d) 483 (Gen. Div.), where an advertising campaign insinuating that the plaintiff's baking soda was inferior comprised irreparable harm prompting an injunction. See also *National Helicopters* v. *Curry*, [1997] O.J. No. 4660 at para. 3 (Gen. Div.) (QL) and *Survival Systems Industrial Ltd.* v. *Syrett* (15 January 1998), S.H. No. 140996 at para. 24 (N.S.S.C.) (QL), where the defendants, former employees of the plaintiffs, were enjoined from soliciting and siphoning the plaintiffs' clients.

Perell's remaining categories of irreparable harm are *Mareva* injunctions, a *prima facie* nuisance which would ground a permanent injunction at trial, and the broad category of loss which would impair the ability of a Court to do justice at trial. See also Spry, *supra* note 10 at 463.

140 *Lawton*, *supra* note 91.

context would in fact be reparable through compensation, and corroborate Laycock's thesis that in Canada, too, the irreparable injury rule is dead.

The above discussion shows the multiple meanings of irreparable harm. Laycock's final, more serious attack on irreparable harm is that its ambiguities cloak judicial reasoning, and promote blind adherence to traditional legal doctrine:

> The irreparable injury rule distracts analysis from the real relationships among remedial choices. It highlights the obsolete distinction between law and equity, and subordinates more functional schemes for classifying remedies.[141]

To balance interests successfully and thereby effect justice between the parties, it is first necessary to identify those interests, and the magnitude of harm each side will suffer. As shorthand for a vast range of situations, which a judge can cite to identify or ignore actual irreparable harm, the rule causes more harm than good. The subtextual explanations of irreparable harm will not allow litigants to predict the outcome of the hearing. Its ambiguity thus promotes uncertainty not only as to the process of the injunctive decision, but also with regard to the substantive factors to be considered. Addressing this fear, Laycock concludes with an effective jeremiad against the empty phrase:

> If "irreparable injury" has come to mean such things, it is only as a code phrase. It would be just as plausible to agree that "orange banana" will be the code phrase. The rule could be that equity will not act unless plaintiff has an orange banana. To a reader who understood the real reasons for choosing remedies, "orange banana" would communicate as well as "irreparable injury." To a reader who does not understand the real reasons, it would communicate about as badly....[142]

A balancing exercise, identifying which of these myriad examples of irreparable harm actually apply, would reveal the real reasons for preferring a specific or compensatory remedy. It would thereby promote clarity and coherence in the jurisprudence.

It is granted that Laycock's assessment reveals an extreme positivism. All words are mere tags, and "irreparable harm" may be as good a heading as any under which to align this list of examples provided by the jurisprudence. Certainly the word "convenience" in "balance of convenience" fails to illuminate what is essentially, as Beetz J. noted in *Metropolitan,* a balancing of *inconvenience* between the parties.[143] Nonetheless, while the self-confessed cornucopia of considerations within the balance of convenience enquiry admits to indeterminacy, irreparable harm's centrality in the injunctive enquiry prompts some sort of expectation of a consistent meaning. This absence of consistency, coupled with the revelations by Laycock and Perell of the

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141 Laycock, *supra* note 117 at ix. As Rendleman observed eight years before Laycock, "[u]nfortunately, the legal conclusion that the legal remedy is inadequate masks the intellectual process of identifying and evaluating interests" (Rendleman, *supra* note 47 at 358).

142 Laycock, *supra* note 117 at 241-42.

143 *Metropolitan, supra* note 2 at 129 [emphasis added]. Also noted by Reid J. in *Steel Art Co.* v. *Hrivnak* (1979), 27 O.R. (2d) 136, 105 D.L.R. (3d) 716 (H.C.J.).

myriad and shifting meanings of irreparable harm, indicates that "irreparable harm" does not necessarily represent "irreparable harm" in its intuitive and linguistic sense. If "irreparable harm" serves merely as a proxy for a group of very disparate factors considered in the injunctive enquiry, it would be more logical and coherent to subsume it under the balance of convenience prong of the test.

VII. CONCLUSION: THE ADVANTAGES AND PRACTICALITIES OF THE HOLISTIC MODEL

The claim of this article is modest yet not, as has been argued, insignificant. As an imprecise category that may or may not be crucial to prove in an injunction application, "irreparable harm" may obfuscate more than illuminate. In some cases its artificial elevation results in an uncontextual resolution of the dispute between the parties. Some have rationalized that it is meant to be no more than a very rough guide to the court. Yet its imprecision and manifold meanings casts doubt on its continued utility. *Yule* and *Wale* suggest that the tripartite test exaggerates the importance of irreparable harm in the injunction enquiry, even if proof of irreparable harm is not prerequisite to an injunction. Lambert J.A., applying *Wale* in the British Columbia Supreme Court of Appeal, described this contextual and overarching approach as follows:

> ...the process of applying the second prong of the test is not a process of considering each possible factor separately, and then doing a tally, nor is it a process that can be regarded as effectively discharged by the mechanical application of a formula or checklist of points. Rather, it is a process of assessing all of the relevant factors at one time and in one unified context and reaching a single overall conclusion about where the balance of convenience rests.[144]

Such an approach would seem to better realize the conception of Sharpe, whose writings on injunctions served as the main influence in the *Metropolitan*, *Wale* and *RJR* tests. Sharpe argues that the elements within the *RJR* test are not "separate, watertight categories":

> [t]he terms 'irreparable harm,' '*status quo*,' and 'balance of convenience' do not have a precise meaning. They are more properly seen as guides which take colour and definition in the circumstances of each case.[145]

Sharpe goes on to criticize the current tripartite "checklist" approach, which gives a false sense of comprehensiveness in its catalogue of factors:

> The checklist does not specifically relate the factors to one another and, while it provides a valuable guide in coming to the proper result, it has failed to articulate clearly an appropriate overall approach.[146]

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144 *Canadian Broadcasting Corporation* v. *CKPG Television Ltd. et al.* (1992), 64 B.C.L.R. (2d) 96 at 103, [1992] 3 W.W.R. 279 (C.A.), Lambert J.A.

145 Sharpe, *supra* note 8 at para. 2.600.

146 *Ibid.* at para. 2.610.

It is submitted that a two-part test, with a clear list of sub-factors subsumed into the balance of convenience, will address Professor Sharpe's concerns.

What would be included in the expanded balance of convenience enquiry? A full discussion would be beyond the scope of this article, but is already provided in the jurisprudence. Some cases have suggested lists of considerations, which may or may not apply to a given case. In *Turbo Resources*, for example, Stone J.A. presented a more holistic list of other considerations, in which adequacy of damages are but one of many factors:

> (a) where a plaintiff's recoverable damages resulting in 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*;
>
> (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 uncompensatable disadvantage to each party would not differ widely;
>
> (f) other unspecified special factors may possibly be considered in the particular circumstances of individual cases.[147]

Cyanamid similarly offers a partial list of other considerations, all linked to the issue of irreparable harm, which should be examined in the balance of convenience. Lord Diplock declined to list these exhaustively, but stated 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.[148]

It is submitted that this passage does not reflect hesitation on the part of Lord Diplock. Instead, it shows his understanding that the court must customize the contents and

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147 *Turbo Resources, supra* note 59 at 19-20.

148 *Cyanamid, supra* note 1 at 408.

relative weight of the factors considered in the balance of convenience to fit each unique dispute before it. In a dispute it may or may not be appropriate to consider or to give great weight to irreparable harm. This downplaying of irreparable harm reminds us that essential to the injunctive enquiry is not a mechanical threshold of irreparable harm, but rather a thorough examination of the effects the granting or withholding of the injunction will have on each party.

Consistent with this overarching judicial weighing of the factors of inconvenience posed to each party is the consideration of the effects on them of the judicial decision itself. Sharpe thus notes that the recent jurisprudence suggests that "the 'irreparable harm' requirement can only be defined in the context of the risk-balancing exercise."[149] This involves a weighing of the relative risks of granting or withholding the remedy: "inherent in the exercise lies a risk of harming the defendant by enjoining a course of conduct which may ultimately be shown to be rightful."[150] The potential for irreparable harm lies not only in the bipolar relationship between the litigants, but also in the judicial injunctive decision itself. In this, Sharpe injects a realist consideration of judicial competence into the injunctive exercise which is more readily acknowledged by American than Commonwealth courts. The American jurist Leubsdorf elevates this fear as the primary consideration in deciding whether or not to grant an injunction:

> The danger of incorrect preliminary assessment is the key to the analysis of interlocutory relief. It requires investigating the harm an erroneous interim decision may cause and trying to minimize that harm.[151]

In *American Hospital Supply*, Posner J. endorsed the Leubsdorf focus on judicial error and translated the balancing exercise into a quasi-mathematical formula, criticized by many judges as more obfuscatory than clarifying.[152] Nonetheless, these considerations of judicially-imposed irreparable harm emphasize that in many cases the preliminary injunction will settle the issue and render trial nugatory. It also recognizes, as Rendleman argues, the limitations of judicial and administrative competence in crafting and enforcing an injunction appropriate to the issue in dispute. Shifting the focus from irreparable harm to a contextual consideration of balance of convenience brings this risk to the forefront of the enquiry.[153]

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149 Sharpe, *supra* note 8 at para. 2.450.

150 *Ibid.* at para. 2.100.

151 J. Leubsdorf, "The Standard of Preliminary Injunctions" (1978) 91 Harvard L.R. 525 at 541. At 544 Leubsdorf admits that his calculus mirrors that of *Cyanamid*, but stresses the interrelationship of the factors, rather than the sequentialist approach of *Cyanamid*.

152 *American Hospital Supply Corp.* v. *Hospital Products Ltd.* (1985), 780 F.2d 589 (7th Cir.). For criticism (and praise) see Laycock, *supra* note 117 at 119. For a vigorous attack on the Posnerian formula, see the dissent of Swygert J.

153 The expanded balance of convenience enquiry could prompt an observer to note that the proposed injunctive test resembles current Canadian processes of constitutional review. In essence, a section one *Charter* test examines an impugned law first for its rationality in seeking to remedy a given ill, and second for its proportionality, in ensuring that the implementation caused no adverse or overbroad hardship. [For an explanation of these pillars of constitutional review, see D.M. Beatty, *Constitutional Law in Theory and Practice* (Toronto: University of Toronto Press, 1995)]. Even

This article has argued the advantages of a two-prong balancing model mostly through negative reference to the tripartite test. In summarizing these advantages, it is important to remember that the goal of the court is justice between the parties. A flexible list of considerations, rather than a quasi-sequentialist test, will realize justice based more on the context of the litigation before the court than on legal abstractions. With this principle in mind, the evidence presented in the body of this article reveals four advantages of the holistic model. First, the subsuming of irreparable harm into the balance of convenience will promote the flexibility needed to adapt the injunctive test to infinitely various fact situations. Second, it will provide a coherent and principled approach in explicitly encouraging a nuanced assessment of the relative risks to each party. In removing the exaggerated focus on irreparable harm to the applicant, the court will directly engage in a risk balancing exercise, examining the clear effects the granting or withholding of the injunction will have upon both parties. Third, the two-part test will force judges to consider whether irreparable harm, and which of the myriad kinds of irreparable harm identified by Laycock and Perell above, will actually occur. Fourth, it will retain structure and principle by listing jurisprudential considerations, including that of potential irreparable harm, under the balance of convenience enquiry. If, as the jurisprudence indicates, irreparable harm is conceptually subsumed into this section, where it may be tempered against other considerations, the formal inclusion of one test into the other would promote conceptual coherence. The injunction test would thus resemble the two-part test of *Wale*: once the plaintiff had established a strong and non-frivolous case, the court could balance a range of factors, with no necessary supremacy of irreparable harm.

Sharpe cautions that *Cyanamid* should not be read as a statute.[154] He would extend that warning to the tripartite test established by *RJR* and *Metropolitan*. This article admits that in its strict scrutiny of the irreparable harm jurisprudence, it has sometimes tempted Sharpe's reproach. Nonetheless, the authority of these Supreme Court decisions will strongly influence future injunctive enquiries. As specific remedies, they have great potential to intrude upon the lives not only of the litigants, but of the public at large. As a corollary, the denial of the injunction as a remedy will also have profound effects on litigants and society. It is thus crucial that a court grant or deny the injunction only after a careful and thorough balancing of the effect of the order on all interested parties. As has been argued above, the elevation of irreparable harm as one of the three key considerations in the injunctive enquiry distracts from this process in some cases. With

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now, courts at times employ the language of *Charter* jurisprudence in their description of the injunction balancing process. As Dyson J. stated in *Mott-Trille*, "this order [granting an interim injunction] is the least intrusive to the Watch Tower Society's ability to conduct its own affairs, given the circumstances of the case." (*Mott-Trille*, *supra* note 50 at 494). This article has criticized that decision in that it failed to consider whether or not the remedy was, in fact, the least intrusive to the defendant. It is submitted that *Mott-Trille* reveals how a judicial fixation on irreparable harm to the applicant distorts what should be a bipolar, and at times, "polycentric" enquiry as to the effect of the remedy on the participants. [Cassels borrows the word "polycentric" to describe the manifold consideration a court must make in deciding whether to grant public law, and particularly *Charter* injunctions. (Cassels, *supra* note 47 at 302). The phrase is borrowed from L.L. Fuller, "The Forms and Limits of Adjudication" (1978-79) 92 Harvard L.R. 353].

154 Sharpe, *supra* note 8 at para. 2.360.

irreparable harm serving less as a hurdle and more as a holistic factor to be weighed against myriad other factors selected to suit the features of the particular case before the court, justice between the parties and coherence in the jurisprudence can be better achieved.