

A STRONG PRIMA FACIE CASE FOR RATIONALIZING THE TEST APPLICABLE TO INTERLOCUTORY MANDATORY INJUNCTIONS

Marie-Andrée Vermette*

I. INTRODUCTION

The test for granting an interlocutory injunction is well-known. The party seeking an interlocutory injunction must show that: (1) there is a serious issue to be tried; (2) she would suffer irreparable harm if the injunction were not granted; and (3) the balance of convenience favours the granting of the injunction pending a decision on the merits.¹ This test, as set out in the decision of the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)* (“*RJR*”),² has been routinely applied by Canadian courts for many years in cases of prohibitory injunctions, i.e. injunctions restraining the defendant from committing a specified act.³ However, its applicability to the granting of interlocutory mandatory injunctions, which require the defendant to act positively, is not as clear. In particular, Canadian courts are divided on the issue of whether a party seeking an interlocutory mandatory injunction is required to show a strong *prima facie* case or, rather, merely a serious issue to be tried.

In this article, we review briefly the evolution of the test applicable to the granting of interlocutory injunctions, with particular emphasis on the first part of the test. Next, we discuss the line of cases dealing with interlocutory mandatory injunctions and the different criteria applied by the courts. Finally, we analyze the grounds for treating prohibitory and mandatory injunctions differently and we conclude that the same test should apply to both types of interlocutory injunctions.

II. GENERAL TEST FOR GRANTING AN INTERLOCUTORY INJUNCTION

Before the 1975 decision of the House of Lords in *American Cyanamid Co. v.*

* Marie-Andrée Vermette is a partner at WeirFoulds LLP.

The author wishes to thank Anastasija Sumakova and Erin Pleet, students at WeirFoulds LLP, for their assistance in conducting research for the purpose of this article.

¹ *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 348.

² *Ibid.*

³ R.J. Sharpe, *Injunctions and Specific Performance*, loose-leaf (Aurora, Ontario: Canada Law Book, 2010) at 1-1.

Ethicon Ltd. ("American Cyanamid"),⁴ the test applied by the courts for the granting of an interlocutory injunction required a party to demonstrate a "*prima facie* case" or a "strong *prima facie* case" on the merits. In *American Cyanamid*, Lord Diplock held that the court's discretion to grant an injunction was not conditional upon the showing of a *prima facie* case. Rather, before turning to the other parts of the test, all that was required was that the court be satisfied that the claim was not frivolous or vexatious, i.e. that there was a serious question to be tried.⁵ In reviewing the principles applicable to the granting of interlocutory injunctions, Lord Diplock stated the following:

In those cases where the legal rights of the parties depend upon facts that are in dispute between them, the evidence available to the court at the hearing of the application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination. The purpose sought to be achieved by giving to the court discretion to grant such injunctions would be stultified if the discretion were clogged by a technical rule forbidding its exercise if upon that incomplete untested evidence the court evaluated the chances of the plaintiff's ultimate success in the action at 50 per cent. or less, but permitting its exercise if the court evaluated his chances at more than 50 per cent.

.....

Your Lordships should in my view take this opportunity of declaring that there is no such rule. The use of such expressions as "a probability," "a *prima facie* case," or "a strong *prima facie* case" in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.

It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.⁶

Lord Diplock also stated that in assessing where the balance of convenience lied in a case where the irreparable harm to each party would not differ widely, it could be appropriate to take into account the relative strength of each party's case as revealed by the evidence. However, this was to be done "only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party."⁷ He repeated that the court was "not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the

⁴ *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 (U.K. H.L.).

⁵ *Ibid.* at 407.

⁶ *Ibid.* at 406, 407.

⁷ *Ibid.* at 409.

strength of either party's case."⁸

Some comments in *American Cyanamid* appear to suggest that Lord Diplock's reasons concerned interlocutory prohibitory injunctions.⁹ However, given that the rationale for the adoption of the "serious issue to be tried" criterion (i.e. the incompleteness of the record) applies equally to the grant of an interlocutory mandatory injunction, and given that no reference is made to mandatory injunctions in the reasons, it is unclear whether Lord Diplock's comments were meant to purposefully exclude interlocutory mandatory injunctions from the new test or whether they were simply referring to the most common type of interlocutory injunctions for the purpose of the discussion.

In *Manitoba (A.G.) v. Metropolitan Stores Ltd.*,¹⁰ the Supreme Court of Canada stated that the "serious question to be tried" criterion set out in *American Cyanamid* was sufficient in a constitutional case. However, Beetz J. expressly refrained from expressing any view as to the sufficiency or adequacy of this criterion in any other type of cases.¹¹ Seven years later, in *RJR*, the Supreme Court confirmed that the three-part test set out in *American Cyanamid* should be applied in both private law and constitutional cases.¹² With respect to the first part of the test, the Court stated that the threshold set by "a serious question to be tried" was a low one, and that "[a] prolonged examination of the merits is generally neither necessary nor desirable."¹³ If satisfied that the request for an injunction is neither vexatious nor frivolous, the court should consider the second and third criteria, even if it is of the opinion that the plaintiff is unlikely to succeed at trial.

Two exceptions to the general rule that a judge should not engage in an extensive review of the merits were outlined in *RJR*. The first exception arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This is the case, for example, when the right which the applicant seeks to protect can only be exercised immediately or not at all. When this exception applies, a more extensive review of the merits of the case must be undertaken, and the anticipated result on the merits should be borne in mind when applying the second and third stages of the test.¹⁴ The second exception arises when the question in issue can be determined as a pure question of law. In cases where this exception is present, the judge need not consider the issues of irreparable harm and the balance of convenience because the question can be finally determined and there is no

⁸ *Ibid.*

⁹ See, e.g., *ibid.* at 406. These passages include the following: "My Lords, when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made upon contested facts [. . .]"; and "[. . .]if it should be held at the trial that the plaintiff had not been entitled to restrain the defendant from doing what he was threatening to do" [emphasis added].

¹⁰ *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*) [1987] 1 S.C.R. 110.

¹¹ *Ibid.* at 128.

¹² *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 347.

¹³ *Ibid.* at 337.

¹⁴ *Ibid.* at 338-339.

need for an injunction.¹⁵

Like *American Cyanamid*, *RJR* does not contain any discussion regarding the applicability of the three-part test to interlocutory mandatory injunctions. A few passages of the Supreme Court's reasons could be interpreted as restricting the analysis to prohibitory orders.¹⁶ However, the fact that the Court refers to a case involving an interlocutory mandatory injunction to illustrate the first exception to the rule that a judge should not engage in an extensive review of the merits at the first stage of the test casts doubt on such an interpretation.¹⁷

Given the lack of clarity in the case law regarding the test applicable to interlocutory mandatory injunctions and the view that such an injunction is an exceptional remedy, the issue of whether the test set out in *RJR* applies to interlocutory mandatory injunctions as well as interlocutory prohibitory injunctions arose after the Supreme Court's decision in *RJR*, and was answered differently across the country.

III. PARALLEL TEST FOR GRANTING AN INTERLOCUTORY MANDATORY INJUNCTION

1. Evolution of the Test in England

The seminal decision on interlocutory mandatory injunctions is the decision of Megarry J. in *Shepherd Homes Ltd. v. Sandham* ("*Shepherd Homes*").¹⁸ In that case, which pre-dates *American Cyanamid*, the plaintiff was seeking a mandatory injunction ordering the defendant to demolish a fence that he had erected in breach of a covenant. Megarry J. refused to grant the injunction. After outlining the differences between prohibitory and mandatory injunctions, Megarry J. stated as follows:

The subject is not one in which it is possible to draw firm lines or impose any rigid classification. Nevertheless, it is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will, of course, grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think that *the case has to be unusually strong and clear before a mandatory injunction will be granted*, even if it is sought in order to enforce a contractual obligation. If, of course, the defendant has rushed on with his work in order to defeat the plaintiff's attempts to stop him, then on the plaintiff promptly resorting to the court for assistance, that assistance is likely to be available; for this will in substance be restoring the status quo, and the plaintiff's promptitude is a badge of the

¹⁵ *Ibid.* at 339-340.

¹⁶ See, e.g., *ibid.* at 346.

¹⁷ *Ibid.* at 338. The case referred to is *Trieiger v. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143 (Ont. H.C.) where the leader of the Green Party applied for an interlocutory mandatory injunction that would have allowed him to participate in a party leaders' debate.

¹⁸ *Shepherd Homes Ltd. v. Sandham*, [1970] 3 All E.R. 402 (Ch. Div.).

seriousness of the complaint.

.....

I may summarize my conclusions as follows: [...]

Third, on motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must, *inter alia*, *feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted*; and this is a higher standard than is required for a prohibitory injunction. Fourth, it follows that the statement in 21 Halsbury's Laws (3rd Edn) p 369, para 774, founded on *Morris v Grant*, namely:

... if the defendant, after express notice, has committed a clear violation of an express contract ... a mandatory injunction will be granted on an interlocutory application,

is too wide. Both the case itself and the statement founded on it have to be qualified in the light of the other authorities to which I have referred, especially *Bowes v Law* and *Kilbey v Haviland* (which, although decided earlier, do not seem to have been cited) and *Sharp v Harrison*. No doubt a mandatory injunction may be granted *where the case for one is unusually sharp and clear*; but it is certainly not a matter of course.¹⁹ [footnotes omitted and emphasis added]

Although there are a number of possible tests that could be extracted from the reasons of Megarry J. (including the statements in italics above), the test that has been the most cited in subsequent cases is "a high degree of assurance that at the trial it will appear that the injunction was rightly granted".

In the 1985 case *Locabail International Finance Ltd. v. Agroexport* ("Locabail"),²⁰ the English Court of Appeal, Civil Division held that the principles outlined by Megarry J. in *Shepherd Homes* with respect to mandatory injunctions were not affected by the House of Lords' decision in *American Cyanamid*.²¹ However, less than one year later, Hoffmann J. stated in *Films Rover International Ltd. v. Cannon Film Sales Ltd.* ("Films Rover") that the classification of injunctions as mandatory or prohibitory was "barren".²² After acknowledging the Court of Appeal's holding in *Locabail*, Hoffmann J. stated the following:

I would respectfully agree that there is no inconsistency between the passage from Megarry J and what was said in the *Cyanamid* case. But I think it is important in this area to distinguish between fundamental principles and what are sometimes described as "guidelines", i.e. useful generalisations about the way to deal with the normal run of cases falling within a particular category. The principal dilemma about the grant of interlocutory injunc-

¹⁹ *Ibid.* at 409-410, 411, 412.

²⁰ *Locabail International Finance Ltd. v. Agroexport* (1985), [1986] 1 All E.R. 901 (C.A.).

²¹ *Ibid.* at 906.

²² *Films Rover International Ltd. v. Cannon Film Sales Ltd.*, [1986] 3 All E.R. 772 at 781 (Ch. Div.).

tions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the "wrong" decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong" in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle.

The passage quoted from Megarry J in *Shepherd Homes Ltd v Sandham*, [1970] 3 All ER 402 at 412, [1971] Ch 340 at 351 qualified as it was by the words "in a normal case", was plainly intended as a guideline rather than an independent principle. It is another way of saying that the features which justify describing an injunction as "mandatory" will usually also have the consequence of creating a greater risk of injustice if it is granted rather than withheld at the interlocutory stage unless the court feels a "high degree of assurance" that the plaintiff would be able to establish his right at a trial. I have taken the liberty of reformulating the proposition in this way in order to bring out two points. The first is to show that semantic arguments over whether the injunction as formulated can properly be classified as mandatory or prohibitory are barren. The question of substance is whether the granting of the injunction would carry that higher risk of injustice which is normally associated with the grant of a mandatory injunction. The second point is that in cases in which there can be no dispute about the use of the term "mandatory" to describe the injunction, the same question of substance will determine whether the case is "normal" and therefore within the guideline or "exceptional" and therefore requiring special treatment. *If it appears to the court that, exceptionally, the case is one in which withholding a mandatory interlocutory injunction would in fact carry a greater risk of injustice than granting it even though the court does not feel a "high degree of assurance" about the plaintiff's chances of establishing his right, there cannot be any rational basis for withholding the injunction.*²³ [emphasis added]

Hoffmann J. listed some of the reasons why mandatory injunctions are seen generally to carry a higher risk of injustice if granted at the interlocutory stage: they usually go further than the preservation of the status quo; they often give a party the whole of the relief claimed in the action; they are difficult to formulate with sufficient precision to be enforceable; an order requiring a party to take positive steps usually causes more waste of time and money if it turns out to have been wrongly granted; and an order requiring someone to do something is usually perceived as a more intrusive exercise of the coercive power of the state than an order requiring a person temporarily to refrain from action. According to Hoffmann J., however, none of these characteristics was a necessary concomitant of a mandatory injunction.²⁴

The views expressed in *Films Rover* were recently adopted by the Judicial

²³ *Ibid.* at 780-781.

²⁴ *Ibid.* at 781.

Committee of the Privy Council in *National Commercial Bank Jamaica Ltd. v. Olint Corp. Ltd.* (“*Olint*”).²⁵ Writing for the Privy Council, Lord Hoffmann stated that there was no reason to suppose that the principles set out in *American Cyanamid* were intended to apply only to prohibitory injunctions.²⁶ This is because the principle underlying both types of injunctions is the same, i.e. “the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other”.²⁷ He further stated:

[. . .] What is true is that the features which ordinarily justify describing an injunction as mandatory are often more likely to cause irremediable prejudice than in cases in which a defendant is merely prevented from taking or continuing with some course of action: see *Films Rover International Ltd v Cannon Film Sales Ltd*, [1987] 1 WLR 670, 680. But this is no more than a generalisation. What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J said in *Shepherd Homes Ltd v Sandham*, [1971] Ch 340, 351, “a high degree of assurance that at the trial it will appear that at the trial [sic] the injunction was rightly granted.”

For these reasons, arguments over whether the injunction should be classified as prohibitive or mandatory are barren: see the *Films Rover* case, *ibid*. What matters is what the practical consequences of the actual injunction are likely to be.²⁸

While Lord Hoffmann held that the “serious issue to be tried” criterion from *American Cyanamid* should apply to interlocutory mandatory injunctions, he appeared to contemplate that the court’s view of the merits of the case could play an important role at the balance of convenience stage.²⁹ This is in contrast with the statements of Lord Diplock in *American Cyanamid* to the effect that the relative strength of each party’s case should only be considered in assessing the balance of convenience in cases where the irreparable harm to each party does not differ widely, and “only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party’s case is disproportionate to that of the other party.”³⁰

The approach set out in *Olint* with respect to the granting of interlocutory mandatory injunctions was recently applied, among others, in *Jet2.com Ltd. v.*

²⁵ *National Commercial Bank Jamaica Ltd. v. Olint Corp. Ltd.*, [2009] U.K.P.C. 16 (P.C.).

²⁶ *Ibid.* ¶19.

²⁷ *Ibid.*

²⁸ *Ibid.* ¶19-20.

²⁹ *Ibid.* ¶17-19, 21.

³⁰ *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 at 409 (U.K. H.L.).

*Blackpool Airport Ltd.*³¹ and *Khan v. Western Health and Social Services Trust*.³² *Olint* does not appear to have been cited in Canadian decisions yet.

It is noteworthy that in Australia, interlocutory mandatory injunctions are also granted on the same principles as interlocutory prohibitory injunctions, and that applicants are only required to show that there is a serious issue to be tried.³³

2. Tests Applied in Canada

In Canada, the test applicable to the granting of interlocutory mandatory injunctions varies from one common law province to another. While the courts in some provinces apply the *RJR* test and only require the plaintiff to show a serious question to be tried, the courts in other provinces still apply the pre-*RJR* test set out in *Shepherd Homes*, or a close variant of it. Thus, plaintiffs in Manitoba,³⁴ Saskatchewan,³⁵ and Alberta³⁶ generally must convince the court that they have a strong *prima facie* case. In New Brunswick, a plaintiff must establish a *prima facie* case or show that there are excellent prospects of success.³⁷ In Nova Scotia, the Court of Appeal declined to confirm what the appropriate test for granting interlocutory mandatory injunctions was. In *D.E. & Son Fisheries Ltd. v. Goreham*,³⁸ it found that the motions judge had erred in equating the test for granting summary judgment and the test for granting an interlocutory mandatory injunction, and stated the following:

The requirements for a mandatory interim injunction have been discussed

-
- ³¹ *Jet2.com Ltd. v. Blackpool Airport Ltd.*, [2010] E.W.H.C. 3166, ¶34 (Q.B. Comm.).
- ³² *Khan v. Western Health and Social Services Trust*, [2010] N.I.Q.B. 92, ¶28, 34 (H.C.).
- ³³ *Ringtail Asia Pacific Pty Ltd. v. FTI Technology, LLC*, [2010] F.C.A. 314, ¶10; *Inetstore Corporation v. Southern Matrix International* (2005), 55 A.C.S.R. 178, ¶13 (N.S.W. S.C.); *Businessworld Computers Pty Ltd. v. Australian Telecommunications Commission* (1988), 82 A.L.R. 499 (Fed. Ct.).
- ³⁴ See, e.g., *Good Shepherd Pharmacy Ltd. v. First Canadian Health Management Corp.* (2009), 76 C.P.C. (6th) 386, ¶18, 21 (Man. Q.B.).
- ³⁵ See, e.g., *St. Brieux (Town) v. Three Lakes (Rural Municipality No. 400)*, 2010 CarswellSask 190, [2010] S.J. No. 177, ¶26–38 (Q.B.).
- ³⁶ See, e.g., *Medical Laboratory Consultants Inc. v. Calgary Health Region*, 2003 CarswellAlta 1731, [2003] A.J. No. 1500 (Q.B.); affirmed 2005 CarswellAlta 333, [2005] A.J. No. 276 (C.A.); *Conway v. Zinkhofer*, 2006 CarswellAlta 228, [2006] A.J. No. 209, ¶28–29 (C.A.); additional reasons at 2006 CarswellAlta 721 (C.A.); and *B-Filer Inc. v. TD Canada Trust* (2008), 65 C.P.C. (6th) 274, ¶17–19 (Alta. Q.B.).
- ³⁷ See, e.g., *Caraquet (Town) v. New Brunswick (Minister of Health and Wellness)*, 2005 CarswellNB 359, [2005] N.B.J. No. 445, ¶14–15, 43 (Q.B.); leave to appeal refused 2005 CarswellNB 203 (C.A.) and *Robichaud v. Conseil scolaire numéro 39*, 1989 CarswellNB 358, [1989] N.B.J. No. 1185, ¶8–10, 12 (C.A.). In *Imperial Sheet Metal Ltd. v. Landry*, 2007 CarswellNB 298, 2007 CarswellNB 299, [2007] N.B.J. No. 226, ¶16 (C.A.), the New Brunswick Court of Appeal expressed the view that there was no substantive difference between “strong *prima facie* case” and “*prima facie* case”.
- ³⁸ *D.E. & Son Fisheries Ltd. v. Goreham*, 2004 CarswellNS 133, [2004] N.S.J. No. 137 (C.A.).

and debated in numerous authorities. It suffices, here, to say that the plaintiff is not required to "clearly prove" his claim to the exclusion of any defence which may be set up by the defendant. The application is, instead, assessed by the strength of the applicant's case coupled with a consideration of the issues of irreparable harm and the balance of convenience. We agree with the submission of the appellant that the judge erred at law in failing to make an independent inquiry into the merits of the application and to clearly recognize that the test for a mandatory interim injunction differs from that for summary judgment.³⁹

Despite the lack of guidance from the Court of Appeal, lower courts in Nova Scotia appear to generally require an applicant to show a strong *prima facie* case or that it is "clearly in the right".⁴⁰

In Ontario, the test set out by Megarry J. in *Shepherd Homes* or an equivalent test is applied in the great majority of cases involving interlocutory mandatory injunctions. While there are a few decisions of the Divisional Court dealing with interlocutory mandatory injunctions, there is no decision of the Court of Appeal analyzing the question of the applicable test or providing guidance on the issue. The case that is probably the most often referred to in relation to the test applicable to interlocutory mandatory injunctions is the 1987 decision *Ticketnet Corp. v. Air Canada* ("*Ticketnet*").⁴¹ In that case, Ticketnet Corp. was seeking an injunction ordering Air Canada to deliver copies of a software package and associated files. Air Canada was also seeking a mandatory order requiring Ticketnet Corp. to deliver under oath to the court some computer programs. White J. declined to grant the orders sought. He stated that the applicable law was found in *Shepherd Homes*. Since he was unable to find that there was a binding software development agreement between Air Canada and Ticketnet, White J. concluded that he could not have a "high degree of assurance" that it would appear at trial that the injunctions were rightly granted.⁴²

Ticketnet was referred to in *Esmail v. Petro-Canada*,⁴³ a decision of the Divisional Court. The mandatory interlocutory injunction that was sought in this case was an order restraining Petro-Canada from terminating its Lease and Performance Agency Agreement with the plaintiff until the final disposition of the action. O'Driscoll J., with whom White J. agreed, refused to grant the injunction on the basis that damages would constitute adequate compensation if the plaintiff were successful at trial. He did not address the issue of what the plaintiff was required to

³⁹ *Ibid.* ¶11.

⁴⁰ See, e.g., *Movie Gallery Canada, Inc. v. 9070-7720 Quebec Inc.*, 2005 CarswellNS 128, [2005] N.S.J. No. 111, ¶16 (S.C.) and *AMEC E & C Services Ltd. v. Whitman Benn and Associates Ltd.*, 2003 CarswellNS 183, [2003] N.S.J. No. 173, ¶18-20 (S.C.); affirmed 2003 CarswellNS 412, [2003] N.S.J. No. 432 (C.A.).

⁴¹ *Ticketnet Corp. v. Air Canada* (1987), 21 C.P.C. (2d) 38 (Ont. H.C.).

⁴² *Ibid.* at 43-44.

⁴³ *Esmail v. Petro-Canada* (1995), 86 O.A.C. 385 (Div. Ct.); leave to appeal refused 1996 CarswellOnt 38, [1996] O.J. No. 33 (C.A.); leave to appeal refused (1996), 93 O.A.C. 79 (note) (S.C.C.).

show with respect to the strength of his case. However, he referred to both *Shepherd Homes* and *Ticketnet* in his reasons.⁴⁴

White J. wrote separate reasons. He stated that before granting a mandatory injunction, the court must "have a high degree of assurance that at trial it will appear that the injunction was rightly granted."⁴⁵ In his view, the material before the court did not give rise to such an assurance, and damages were an appropriate remedy.⁴⁶

Adams J. dissented. He would have applied the test set out in *American Cyanamid*, which had been adopted by the Divisional Court in *Yule Inc. v. Atlantic Pizza Delight Franchise (1968) Ltd.*,⁴⁷ and would have granted the relief requested.⁴⁸

The Divisional Court revisited the question of the test applicable to the granting of interlocutory mandatory injunctions in *TDL Group Ltd. v. 1060284 Ontario Ltd.* ("*TDL Group*").⁴⁹ The issue in that case was "whether the motions judge erred in applying the standard set out in [*RJR*] rather than the standard of the strong prima facie case applicable to mandatory injunctions."⁵⁰ Writing for the Court, Lane J. noted that the order under appeal contained, on its face, both prohibitory and mandatory components. He remarked that the categories of positive and negative orders were not clear cut, and held that "the essence of the order in its factual matrix is what is to be looked at" in determining whether a particular order is mandatory or prohibitory.⁵¹ After discussing the case law, he stated as follows:

In the present case, there is a contractual right to renew. Any continued occupation of the premises and continued business relationship with the plaintiff is a matter that was agreed to by the parties in their contract. The issue is whether the notice required to trigger the renewal clause was waived by the franchiser's alleged anticipatory breach of contract.

In prohibiting the franchiser from taking steps to evict the defendants or interfering with the ordinary course of business, the court is enforcing a right created by the parties. An order preventing the denial of a right previously agreed to is very different from an order establishing a new right never agreed to and requiring a party to act accordingly. In our view, this order was not a mandatory injunction. Its essence is the prohibition of what is alleged to be a breach of contract. That one effect of this is to require both parties to act in accordance with their contract while the dispute is being tried, does not change the essence of the matter. It follows, therefore, that

⁴⁴ *Ibid.* ¶ 7-9.

⁴⁵ *Ibid.* ¶13.

⁴⁶ *Ibid.* ¶16.

⁴⁷ *Yule Inc. v. Atlantic Pizza Delight Franchise (1968) Ltd.* (1977), 17 O.R. (2d) 505 (Div. Ct.).

⁴⁸ *Esmail v. Petro-Canada* (1995), 86 O.A.C. 385, ¶22, 27 (Div. Ct.); leave to appeal refused 1996 CarswellOnt 38, [1996] O.J. No. 33 (C.A.); leave to appeal refused (1996), 93 O.A.C. 79 (note) (S.C.C.).

⁴⁹ *TDL Group Ltd. v. 1060284 Ontario Ltd.* (2001), 150 O.A.C. 354 (Div. Ct.).

⁵⁰ *Ibid.* at ¶1.

⁵¹ *Ibid.* ¶4.

Mesbur J. committed no error in applying the *R.J.R.-MacDonald* test.⁵²

The distinction set out in *TDL Group* between a prohibitory injunction and a mandatory injunction in a contractual context (i.e. an order requiring the parties to act in accordance with their contract is prohibitory while an order requiring the parties to act in accordance with a new right never agreed to is mandatory) has been applied in numerous cases in Ontario.⁵³ The *TDL Group* case is discussed further below.

In British Columbia, the *RJR* test is applied to all applications for an interlocutory injunction, whether the relief sought is prohibitory or mandatory. The nature of the order sought (i.e. prohibitory or mandatory) is relevant to the question of irreparable harm and the balance of convenience, and is a factor to be considered in determining whether the granting of an injunction is just and equitable in all the circumstances of the case.⁵⁴

In *Hart Leasing & Holdings Ltd. v. St. John's (City)*,⁵⁵ the Newfoundland Court of Appeal held that the *American Cyanamid* test applied to interlocutory mandatory injunctions. However, the "unusually clear and sharp" test set out in *Shepherd Homes* was also applied in subsequent cases in this province.⁵⁶

In Prince Edward Island, the Supreme Court — Appeal Division discussed at length the issue of the test applicable to the granting of interlocutory mandatory injunctions in *Summerside Seafood Supreme Inc. v. Prince Edward Island*

⁵² *Ibid.* ¶8-9.

⁵³ See, e.g., *Struik v. Dixie Lee Food Systems Ltd.*, [2006] O.J. No. 3269, 2006 CarswellOnt 4932, ¶72 (S.C.J.); *Erinwood Ford Sales Ltd. v. Ford Motor Co. of Canada* (2005), 6 B.L.R. (4th) 182, ¶60-61 (Ont. S.C.J.); additional reasons at 2005 CarswellOnt 2797 (S.C.J.); *Quality Pallets v. Canadian Pacific Railway Co.*, 2007 CarswellOnt 2477, [2007] O.J. No. 1567, ¶19 (S.C.J.); additional reasons at 2007 CarswellOnt 3606 (S.C.J.); *Cana International Distributing Inc. v. Standard Innovation Corp.*, 2010 CarswellOnt 8696, [2010] O.J. No. 4919, ¶15-17 (S.C.J.); additional reasons at 2011 CarswellOnt 709 (S.C.J.); *Hamburg Honda v. Honda Canada Inc.*, 2009 CarswellOnt 7521, [2009] O.J. No. 5152, ¶8, 13 (S.C.J.); *C.M. Takacs Holdings Corp. v. 122164 Canada Ltd. (c.o.b. New York Fries)* (2010), 71 B.L.R. (4th) 247, ¶30 (Ont. S.C.J.); *674834 Ontario Ltd. (c.o.b. Coffee Delight) v. Culligan of Canada, Ltd.* (2007), 28 B.L.R. (4th) 281, ¶33, 37 (Ont. S.C.J.); *Quizno's Canada Restaurant Corp. v. 1450987 Ontario Corp.*, 2009 CarswellOnt 2280, [2009] O.J. No. 1743, ¶43 (S.C.J.); leave to appeal refused 2009 CarswellOnt 3455 (Div. Ct.); additional reasons at 2009 CarswellOnt 3569 (Div. Ct.); additional reasons at 2009 CarswellOnt 3512 (S.C.J.); *Look Communications Inc. v. Bell Canada*, 2007 CarswellOnt 4902, [2007] O.J. No. 2995, ¶12 (S.C.J. [Commercial List]).

⁵⁴ See, e.g., *Hedstrom v. Manufacturers Life Insurance Co.* (2002), 26 C.P.C. (5th) 55, ¶8, 32, 36 (B.C. S.C.) and *P.D. v. British Columbia*, 2010 CarswellBC 571, [2010] B.C.J. No. 405, ¶141-142 (S.C.).

⁵⁵ *Hart Leasing & Holding Ltd. v. St. John's (City)* (1992), 97 D.L.R. (4th) 697 at 704-705 (Nfld. C.A.).

⁵⁶ See, e.g., *Simoni v. Blue Cross of Atlantic Canada*, 1999 CarswellNfld 327, [1999] N.J. No. 327, ¶15-20 (T.D.).

(*Minister of Fisheries, Aquaculture & Environment*) (“*Summerside Seafood*”).⁵⁷ The Court concluded that there should only be one set of principles applying to both prohibitory and mandatory injunctions. It described the applicable test as follows:

I would adopt the view that, while there must be a serious issue to be tried, to begin with all that is required is a finding that the issue is neither frivolous not [sic] vexatious. Once that is determined the court must consider the issues of irreparable harm and balance of convenience. Those latter two issues may be weak for the applicant, in which case it may be necessary to take another look at the seriousness of the issue to be tried. Where the case for the applicant appears almost certain to be found in his favor, then the other issues may not need to have a particularly strong weight in their favor, they could even be neutral. However, even where a judge is doubtful about the success of a case, but cannot find the issue to be frivolous, then irreparable harm to the applicant and/or overwhelming inconvenience to the applicant as opposed to very little inconvenience to the respondent, can decide the issue in the applicant’s favor.⁵⁸

The Federal Court of Appeal has also held that the test set out in *RJR* should be applied to all interlocutory injunction applications, whether they are prohibitory or mandatory. The fact that the applicant is asking the Court to require the defendant to take positive action is considered in assessing the balance of convenience.⁵⁹

While the courts are familiar with the “serious issue to be tried” criterion and generally describe it in a uniform manner (referring to the language used by the Supreme Court of Canada in *RJR*), the description of the higher standard applicable to mandatory injunctions in certain provinces is far from being uniform. As alluded to above, a number of expressions have been used to describe this higher standard, including the following:

- the applicant must establish a strong *prima facie* case;⁶⁰
- the applicant must establish a “strong and clear chance of success”;⁶¹

⁵⁷ *Summerside Seafood Supreme Inc. v. Prince Edward Island (Minister of Fisheries, Aquaculture and Environment)* (2006), 271 D.L.R. (4th) 530 (P.E.I. C.A.).

⁵⁸ *Ibid.* ¶65.

⁵⁹ *Sawridge Band v. Canada*, [2004] 3 F.C.R. 274, ¶46.

⁶⁰ *Cana International Distributing Inc. (c.o.b. Sexy Living) v. Standard Innovation Corp.*, 2010 CarswellOnt 8696, [2010] O.J. No. 4919, ¶16 (S.C.J.); additional reasons at 2011 CarswellOnt 709 (S.C.J.); *Toronto (City) v. Republic Services Inc.*, 2006 CarswellOnt 4837, [2006] O.J. No. 3184, ¶2 (S.C.J.); *Barton-Reid Canada Ltd. v. Alfresh Beverages Canada Corp.*, 2002 CarswellOnt 3653, [2002] O.J. No. 4116, ¶9 (S.C.J.); *Bark & Fitz Inc. v. 2139138 Ontario Inc.*, 2010 CarswellOnt 2082, [2010] O.J. No. 1428, ¶12 (S.C.J.); leave to appeal refused 2010 CarswellOnt 4407 (S.C.J.); *674834 Ontario Ltd. v. Culligan of Canada Ltd.* (2007), 28 B.L.R. (4th) 281, ¶26 (Ont. S.C.J.).

⁶¹ *H&R Block Canada, Inc. v. Inisoft Corp.*, 2009 CarswellOnt 4261, [2009] O.J. No. 3026, ¶24 (S.C.J. [Commercial List]); additional reasons at 2009 CarswellOnt 5480 (S.C.J. [Commercial List]).

- the applicant must show that his case is strong and clear, or unusually strong and clear;⁶²
- the applicant must satisfy the court that he is clearly in the right;⁶³
- the applicant must show a high probability, great likelihood or substantial likelihood of success at trial;⁶⁴
- the court must have a high degree of assurance that the applicant will be successful at trial;⁶⁵
- there must be a significant prospect that the plaintiff will succeed at trial;⁶⁶
- the court must be almost certain that the applicant will win at trial and that a mandatory injunction will be granted at trial;⁶⁷ and
- the court must be satisfied that there will normally be no question that the permanent mandatory injunction would be granted at trial.⁶⁸

Perell J. recently discussed the meaning of the expression “strong *prima facie* case” in *Quizno’s Canada Restaurant Corp. v. 1450987 Ontario Corp.*⁶⁹ He stated

⁶² *Boehringer Ingelheim (Canada) Inc. v. Bristol-Myers Squibb Canada Inc.* (1998), 83 C.P.R. (3d) 51, ¶49, 52 (Ont. Gen. Div.); *Fradenburgh v. Ontario Lottery and Gaming Corp.*, 2010 CarswellOnt 7316, [2010] O.J. No. 4112, ¶14 (S.C.J.); *Benjamin v. Toronto Dominion Bank* (2006), 80 O.R. (3d) 424, ¶27 (S.C.J.); *Niagara Industrial Mall Inc. v. Green Bridge Waste Systems Inc.*, 2001 CarswellOnt 1161, [2001] O.J. No. 1288, ¶20, 21 (S.C.J.).

⁶³ *Brown’s Linens Ltd. v. Fieldcrest Cannon Inc.*, 1993 CarswellOnt 2563, [1993] O.J. No. 844, ¶20 (Gen. Div.); *Barton-Reid Canada Ltd. v. Alfresh Beverages Canada Corp.*, 2002 CarswellOnt 3653, [2002] O.J. No. 4116, ¶9, 12 (S.C.J.); *Bark & Fitz Inc. v. 2139138 Ontario Inc.*, 2010 CarswellOnt 2082, [2010] O.J. No. 1428, ¶12 (S.C.J.); leave to appeal refused 2010 CarswellOnt 4407 (S.C.J.); *674834 Ontario Ltd. v. Culligan of Canada Ltd.* (2007), 28 B.L.R. (4th) 281, ¶26 (Ont. S.C.J.).

⁶⁴ *Quality Pallets v. Canadian Pacific Railway Co.*, 2007 CarswellOnt 2477, [2007] O.J. No. 1567, ¶16 (S.C.J.); additional reasons at 2007 CarswellOnt 3606 (S.C.J.); *Benjamin v. Toronto Dominion Bank* (2006), 80 O.R. (3d) 424, ¶237 (S.C.J.).

⁶⁵ *West Nipissing Economic Development Corp. v. Weyerhaeuser Co.*, 2002 CarswellOnt 4165, [2002] O.J. No. 4731, ¶16 (S.C.J.); *Benjamin v. Toronto Dominion Bank* (2006), 80 O.R. (3d) 424, ¶27 (S.C.J.); *674834 Ontario Ltd. v. Culligan of Canada Ltd.* (2007), 28 B.L.R. (4th) 281, ¶26 (Ont. S.C.J.).

⁶⁶ *Parker v. Canadian Tire Corp.*, 1998 CarswellOnt 1633, [1998] O.J. No. 1720, ¶11 (Gen. Div.).

⁶⁷ *Natrel Inc. v. Four Star Dairy Ltd.*, 1996 CarswellOnt 1205, [1996] O.J. No. 1145, ¶9 (Gen. Div.); additional reasons at 1996 CarswellOnt 1987 (Gen. Div.); *Barton-Reid Canada Ltd. v. Alfresh Beverages Canada Corp.*, 2002 CarswellOnt 3653, [2002] O.J. No. 4116, ¶9, 12, 17 (S.C.J.).

⁶⁸ *Niagara Industrial Mall Inc. v. Green Bridge Waste Systems Inc.*, 2001 CarswellOnt 1161, [2001] O.J. No. 1288, ¶20 (S.C.J.).

⁶⁹ *Quizno’s Canada Restaurant Corp. v. 1450987 Ontario Corp.*, 2009 CarswellOnt 2280, [2009] O.J. No. 1743 (S.C.J.); leave to appeal refused 2009 CarswellOnt 3455

the following:

The strong *prima facie* case standard involves a more intensive examination of the merits of the plaintiff's case. Since a "*prima facie* case" is established when on the balance of probabilities it is likely that the plaintiff will succeed, I understand a "strong *prima facie* case" to involve a higher level of assurance at the interlocutory stage that it is likely that the plaintiff will succeed at the trial. In the context of claims for mandatory injunctions, a strong *prima facie* case has been interpreted to mean that the plaintiff must satisfy the court that he or she is clearly right and is almost certain to be successful at trial. Given the very intrusive nature of a mandatory injunction, there must be a high assurance that the injunction would be rightly granted. [. . .]

I do not, however, understand the requirement of showing a strong *prima facie* case to go so far as to require the plaintiff to actually prove his or her case. If this were true, a trial would be superfluous and the interlocutory motion would move from being an examination of the strength of the case to an actual determination of the merits of the case. In paragraph 2.130 of the leading Canadian text about injunctions and specific performance, *Injunctions and Specific Performance* (Canada Law Book: Aurora, 2008, loose leaf), Justice Robert Sharpe states that the question of whether the plaintiff has shown a strong *prima facie* case "probably means no more than, if the court had to finally decide the matters on its merits, on the basis of the material before it, would the plaintiff succeed?"

.....

In the case at bar, for Quizno's claim for injunctive relief, I will apply the standard of showing a strong *prima facie* case, by which I mean a showing of a strong case with a high although not absolutely assured likelihood of success based on the material presently before the court.⁷⁰

Adams J. made similar comments in *Simoni v. Blue Cross of Atlantic Canada* with respect to the "unusually clear and sharp" test. He also stated that the probable success of the plaintiff's case should be reasonably clear on its face without a detailed analysis of the facts and law, and that an interlocutory mandatory injunction should not ordinarily be granted in cases that require the assessment of credibility of witnesses or where the plaintiff is asserting novel theories to support its case.⁷¹

Although the different formulations of the higher standard applicable to mandatory injunctions are similar, they are not identical, and some appear to impose different standards. The fact that so many different expressions are used, often in the same case, to describe the applicable test suggest a certain definitional malaise and a lack of clarity as to the meaning and requirements of the higher standard. This, in itself, is a compelling reason to advocate for a rationalization of the test

(Div. Ct.); additional reasons at 2009 CarswellOnt 3569 (Div. Ct.); additional reasons at 2009 CarswellOnt 3512 (S.C.J.).

⁷⁰ *Ibid.* ¶¶39-40, 42.

⁷¹ *Simoni v. Blue Cross of Atlantic Canada*, 1999 CarswellNfld 327, [1999] N.J. No. 327, ¶20 (T.D.).

applicable to interlocutory mandatory injunctions.⁷² This is not the only one.

IV. STRONG CASE FOR THE APPLICATION OF A SINGLE TEST TO ALL INTERLOCUTORY INJUNCTIONS

The difference in treatment between interlocutory prohibitory injunctions and interlocutory mandatory injunctions appears to be based principally on the assumption that requiring a defendant to act positively will affect the balance of burden and benefit, and on concerns related to the need for precision in the formulation of the order and the need for ongoing judicial supervision.⁷³ Other reasons given for the difference in treatment include the fact that mandatory injunctions usually go further than the preservation of the status quo, and the fact that they often give a party the whole of the relief claimed in the action.⁷⁴ As pointed out by Hoffmann J. in *Films Rover*, however, none of these characteristics is a necessary concomitant of a mandatory injunction.⁷⁵ Further, and in any event, all of these points can be properly dealt with at the balance of convenience stage or otherwise under the *RJR* test, and none of them justify imposing a higher threshold for the granting of an interlocutory mandatory injunction.

We discuss these reasons below.

1. Impact on the Balance of Burden and Benefit

The assumption with respect to the impact of an interlocutory mandatory injunction on the balance of burden and benefit is described as follows by Justice Robert J. Sharpe:

If an injunction is granted before the defendant has commenced wrongful activity, the burden it imposes on the defendant is relatively low. Faced with an order requiring respect for the plaintiff's rights, the defendant will have incurred no cost and expended no effort before being stopped. More often, however, the defendant will have committed a wrong or at least be well on

⁷² Definitional malaise and lack of conceptual clarity were some of the reasons relied upon by the Supreme Court of Canada to review the standards of judicial review and eliminate the patent unreasonableness standard: see *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, ¶34, 39–41.

⁷³ R.J. Sharpe, *Injunctions and Specific Performance*, loose-leaf (Aurora, Ontario: Canada Law Book, 2010) at 1-21 - 1-22.

⁷⁴ *Films Rover International Ltd. v. Cannon Film Sales Ltd.*, [1986] 3 All E.R. 772 at 781 (Ch. Div.). The additional reason referred to by Hoffmann J. (i.e. that mandatory injunctions are perceived as a more intrusive exercise of the coercive power of the state than an order requiring a person temporarily to refrain from action) is not listed here as there is no question that the courts have the power to grant mandatory injunctions, and the intrusiveness of a mandatory order can be considered to constitute an added burden. Therefore, the reasoning in the next section dealing with the balance of burden and benefit applies to the issue of the perceived intrusiveness of a mandatory order.

⁷⁵ *Ibid.*

the way and an injunction in favour of the plaintiff will, on account of costs already incurred, impose more of a burden than would be represented only by the cost of stopping itself. Some, if not all, of the costs incurred by the defendant in reliance on the belief that the acts complained of would not be stopped are lost. A mandatory order imposes an obligation to take positive steps to set matters right and hence involves not only forgoing the benefit of costs already incurred but also the imposition of additional costs which will be incurred by that positive course of action. To the extent that the availability of injunctive relief is determined by a balance of burden and benefit, mandatory injunctions are often relatively costly remedies and, for that reason, more difficult to obtain.⁷⁶

However, this author also points out that “it is easy to overstate the added burden imposed by a mandatory order”,⁷⁷ and that “undue attention to this factor in mandatory cases is uncalled for as significantly higher costs are often imposed by prohibitive injunctions when considerably less concern is expressed.”⁷⁸

Whether or not an interlocutory mandatory injunction has an impact on the balance of burden and benefit should, by definition, be considered at the balance of convenience stage. The issue of additional costs and burden can be properly analyzed at that stage based on the actual facts of the case rather than based on general assumptions about mandatory injunctions. Requiring an applicant for a mandatory injunction to establish a strong *prima facie* case instead of a serious issue to be tried does not address the issue of added costs and burden and is over-inclusive as it also applies in cases where the impact of the mandatory injunction on the balance of burden and benefit would not be significant. A higher merits-related criterion also penalizes applicants in cases where the defendant is to be blamed for creating the situation that makes the requested injunction a mandatory one. A defendant who would have been stopped from interfering with the plaintiff’s right by a prohibitory injunction, under the “serious issue to be tried” criterion, should not be in a better position having accomplished the wrong.⁷⁹

2. Need for Precision in the Formulation of the Order and for Ongoing Judicial Supervision

The concerns related to the formulation of orders flow from the requirement that the terms of an order must be clear and specific, and the need for the parties to know exactly what has to be done to comply with an order.⁸⁰ In his leading textbook on injunctions, Justice Robert J. Sharpe explains that more specificity is required for mandatory orders than for prohibitory injunctions, “not only so that the defendant will have a clear idea of what is required to be done, but also so that the

⁷⁶ R.J. Sharpe, *Injunctions and Specific Performance*, loose-leaf (Aurora, Ontario: Canada Law Book, 2010) at 1-22.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.* at 1-23.

⁷⁹ *Ibid.* at 1-25.

⁸⁰ *Ibid.* at 1-17; *Pro Swing Inc. v. ELTA Golf Inc.*, [2006] 2 S.C.R. 612, ¶24.

court will be able to assess accurately the burden its order imposes.”⁸¹

Although it may be difficult in many cases to assess the cost of compliance at the time the order is made and to state precisely what must be done, supplementary direction or qualification as to the defendant’s obligation can subsequently be made by the court, if required.⁸² However, keeping the matter alive so as to make subsequent directions raises the issue of ongoing judicial supervision. In *Pro Swing Inc. v. ELTA Golf Inc.*, the Supreme Court of Canada stated the following on this issue:

Despite their flexibility and specificity, Canadian relief orders are fashioned following general guidelines. The terms of the order must be clear and specific. The party needs to know exactly what has to be done to comply with the order. Also, the courts do not usually watch over or supervise performance. While the specificity requirement is linked to the claimant’s ability to follow up non-performance with contempt of court proceedings, supervision by the courts often means relitigation and the expenditure of judicial resources. [. . .]

Doucet-Boudreau v. Nova Scotia (Minister of Education), [2003] 3 S.C.R. 3, 2003 SCC 62, a case in which the judge retained jurisdiction to supervise compliance with an order enjoining the Government of Nova Scotia to use its best efforts to provide French language facilities and programs, demonstrates the possible extent of judicial involvement where injunctive relief is ordered. This burden on the judicial system may be justified in the context of the constitutional protection afforded to linguistic minorities, but may not be warranted when the cost is not proportionate to the importance of the order. The Latin maxim *de minimis non curat praetor* conveys the long-established rule that claims will be entertained only if they are important enough to warrant the expenditure of public resources.⁸³

In *Toronto (City) v. Republic Services Inc.*, Swinton J. declined to grant an interlocutory mandatory injunction requiring the respondents to cause the Brent Run Landfill in Michigan to receive biosolids from the City of Toronto for disposal. His decision was based, in part, on concerns regarding the need for both precision in the formulation of the order and ongoing judicial supervision. He stated the following:

This is not an appropriate case in which to order the mandatory relief sought for a number of reasons. First, the City has not shown it has a strong *prima facie* case. Second, this Court is not in a position to craft an order for the disposal of the City’s biosolids to ensure that proper engineering practices are followed and Michigan laws are observed at Brent Run. Third, the respondents should not be placed in the position that they risk either violation of Michigan law by complying with an Ontario court order or a finding of contempt if they do not follow the order. Finally, a mandatory order would

⁸¹ R.J. Sharpe, *Injunctions and Specific Performance*, loose-leaf (Aurora, Ontario: Canada Law Book, 2010) at 1-18.

⁸² *Ibid.* at 1-18.1 - 1-19.

⁸³ *Pro Swing Inc. v. ELTA Golf Inc.*, [2006] 2 S.C.R. 612, ¶24.

require ongoing supervision by this Court in order to decide disputes about whether discontinuance of disposal would breach the order or whether the order should be varied to deal with odour and structural problems.⁸⁴

While the issue of judicial supervision should be considered by the court on a motion for an interlocutory mandatory injunction, it should not be given undue emphasis. In *Doucet-Boudreau v. Nova Scotia (Department of Education)*, the majority of the Supreme Court of Canada stated that while “[t]he difficulties of ongoing supervision of parties by the courts have sometimes been advanced as a reason that orders for specific performance and mandatory injunctions should not be granted [. . .], courts of equity have long accepted and overcome this difficulty of supervision where the situations demanded such remedies”.⁸⁵ The majority of the Supreme Court also noted that courts are often called on to supervise fairly complex and ongoing transactions in bankruptcy and receivership cases, and to supervise and support the administration of trusts and estates in a detailed and continuing fashion.⁸⁶ As pointed out by Justice Robert J. Sharpe in *Injunctions and Specific Performance*, the courts have clearly not been stopped from making orders requiring supervision where necessary, and “techniques have long been available to enable the court to see justice done through the carrying out of complex obligations and at the same time minimize the burden imposed upon the court itself.”⁸⁷ In other words, when there is a will, there is a way. This is illustrated by the fact that although the need for judicial supervision is mentioned in some cases where a request for a mandatory injunction was declined, there do not appear to be any cases where the only or main reason for denying a mandatory injunction was the need for judicial supervision.⁸⁸

In contrast, there are numerous cases where the court did not accept arguments based on the need for judicial supervision, and ordered the continuance of a contractual relationship between the parties, even where there had been a breakdown in

⁸⁴ *Toronto (City) v. Republic Services Inc.*, 2006 CarswellOnt 4837, [2006] O.J. No. 3184, ¶39 (S.C.J.).

⁸⁵ *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, ¶72.

⁸⁶ *Ibid.* ¶71.

⁸⁷ R.J. Sharpe, *Injunctions and Specific Performance*, loose-leaf (Aurora, Ontario: Canada Law Book, 2010) at 1-11 - 1-12.

⁸⁸ See, e.g. *West Nipissing Economic Development Corp. v. Weyerhaeuser Co.*, 2002 CarswellOnt 4165, [2002] O.J. No. 4731, ¶24-26 (S.C.J.); *Natrel Inc. v. Four Star Dairy Ltd.*, 1996 CarswellOnt 1205, [1996] O.J. No. 1145, ¶13 (Gen. Div.); additional reasons at 1996 CarswellOnt 1987 (Gen. Div.); *Jordash Co. v. R.E.D. Restaurant Equipment Distributors of Canada Ltd.*, 2001 CarswellOnt 3659, [2001] O.J. No. 3981, ¶19, 28 (S.C.J.); *Healthy Body Services Inc. v. Muscletech Research and Development Inc.*, 2001 CarswellOnt 2853, [2001] O.J. No. 3257, ¶20 (S.C.J.); *Cana International Distributing Inc. v. Standard Innovation Corp.*, 2010 CarswellOnt 8696, [2010] O.J. No. 4919, ¶23 (S.C.J.); additional reasons at 2011 CarswellOnt 709 (S.C.J.); *Toronto (City) v. Republic Services Inc.*, 2006 CarswellOnt 4837, [2006] O.J. No. 3184, ¶39 (S.C.J.).

the relationship.⁸⁹ Some of the reasons given for this lack of concern include: the absence of problems in the performance of the contract since the dispute arose (even if there was a breakdown in the relationship);⁹⁰ the plaintiff's obligation to comply with certain industry standards;⁹¹ the possibility to include suitable wording in the order to deal with the issue;⁹² and the fact that the individuals involved were all seasoned business people with experience.⁹³

Thus, in light of the case law and the different techniques that are available to the courts, where an injunction is an appropriate remedy, a plaintiff should not be deprived of its benefit unless the cost of ongoing judicial involvement clearly outweighs the advantage of granting appropriate remedial relief.⁹⁴ Again, the balancing of the benefit to the plaintiff and the burden on the judicial system should be performed at the balance of convenience stage. For the same reasons stated above, requiring an applicant for a mandatory injunction to meet a higher merits-related criterion does not address the need for precision and for ongoing judicial supervision, and is over-inclusive.

3. Preservation of the Status Quo

In *RJR*, the Supreme Court stated that seeking to preserve the status quo was an approach "of limited value in private law cases", and of "no merit" in cases of alleged violation of fundamental rights.⁹⁵ Therefore, according to the Supreme Court, the issues have to be balanced in accordance with the three-part test, without

⁸⁹ See, e.g., *Axiom Group Inc. v. Intier Automotive Closures Inc.* (2005), 2 B.L.R. (4th) 171, ¶52 (Ont. S.C.J.); additional reasons at 2005 CarswellOnt 10148, [2005] O.J. No. 2584 (S.C.J.); *Jet2.com Ltd. v. Blackpool Airport Ltd.*, [2010] E.W.H.C. 3166, ¶46–48 (Q.B. Comm.); *Struik v. Dixie Lee Food Systems Ltd.*, [2006] O.J. No. 3269, 2006 CarswellOnt 4932, ¶80 (S.C.J.); *Erinwood Ford Sales Ltd. v. Ford Motor Co. of Canada* (2005), 6 B.L.R. (4th) 182, ¶94 (Ont. S.C.J.); additional reasons at 2005 CarswellOnt 2797 (S.C.J.); *Bark & Fitz Inc. v. 2139138 Ontario Inc.*, 2010 CarswellOnt 2082, [2010] O.J. No. 1428, ¶40 (S.C.J.); leave to appeal refused 2010 CarswellOnt 4407 (S.C.J.).

⁹⁰ *Axiom Group Inc. v. Intier Automotive Closures Inc.* (2005), 2 B.L.R. (4th) 171, ¶52 (Ont. S.C.J.); additional reasons at 2005 CarswellOnt 10148, [2005] O.J. No. 2584 (S.C.J.); *Erinwood Ford Sales Ltd. v. Ford Motor Co. of Canada* (2005), 6 B.L.R. (4th) 182, ¶94 (Ont. S.C.J.); additional reasons at 2005 CarswellOnt 2797 (S.C.J.).

⁹¹ *Axiom Group Inc. v. Intier Automotive Closures Inc.* (2005), 2 B.L.R. (4th) 171, ¶52 (Ont. S.C.J.); additional reasons at 2005 CarswellOnt 10148, [2005] O.J. No. 2584 (S.C.J.).

⁹² *Jet2.com Ltd. v. Blackpool Airport Ltd.*, [2010] E.W.H.C. 3166, ¶48 (Q.B. Comm.); *Bark & Fitz Inc. v. 2139138 Ontario Inc.*, 2010 CarswellOnt 2082, [2010] O.J. No. 1428, ¶40 (S.C.J.); leave to appeal refused 2010 CarswellOnt 4407 (S.C.J.).

⁹³ *Struik v. Dixie Lee Food Systems Ltd.*, [2006] O.J. No. 3269, 2006 CarswellOnt 4932, ¶80 (S.C.J.).

⁹⁴ R.J. Sharpe, *Injunctions and Specific Performance*, loose-leaf (Aurora, Ontario: Canada Law Book, 2010) at 1-21.

⁹⁵ *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 347.

regard to the question of status quo.⁹⁶ Similarly, Justice Sharpe expresses the view in *Injunctions and Specific Performance* that the concept of preserving the status quo “adds little or nothing to the analysis and, in fact, may produce a possible source of confusion.”⁹⁷ The concept of status quo is also rife with difficulty.⁹⁸ Among other things, it is ambiguous and subjective (e.g. is the relevant status quo the state of affairs existing during the period immediately preceding the commencement of proceedings or the state of affairs existing during the period immediately preceding the alleged breach?),⁹⁹ and both parties usually claim that they are seeking to uphold the status quo.¹⁰⁰ In light of the foregoing, the concept of status quo is not a solid basis for distinguishing between prohibitory and mandatory injunctions and for imposing a stricter test for the granting of the latter.

4. Final Determination of the Action

As stated above, the Supreme Court of Canada held in *RJR* that there are two exceptions to the general rule that a judge should not engage in an extensive review of the merits. One of these exceptions is when the result of the interlocutory motion will in effect amount to a final determination of the action. When this exception applies, a more extensive review of the merits of the case must be undertaken, and the anticipated result on the merits should be borne in mind when applying the second and third stages of the test.¹⁰¹ Given that the concern that interlocutory mandatory injunctions often give a party the whole of the relief claimed in the action is fully satisfied by this exception, there is no need to require an extensive review of the merits in all cases where a mandatory injunction is sought, including those that would not have the effect of giving the applicant the whole of the relief claimed in the action.¹⁰²

5. Reasons to Apply the Same Test to Prohibitory and Mandatory Injunctions

While the traditional reasons to explain the difference in treatment between interlocutory prohibitory injunctions and interlocutory mandatory injunctions do not, in fact, support differential treatment, there are reasons that militate in favour

⁹⁶ *Ibid.*

⁹⁷ R.J. Sharpe, *Injunctions and Specific Performance*, loose-leaf (Aurora, Ontario: Canada Law Book, 2010) at 2-54.

⁹⁸ *Khan v. Western Health and Social Services Trust*, [2010] N.I.Q.B. 92, ¶47-51 (H.C.).

⁹⁹ T.R. Lee, “Preliminary Injunctions and the Status Quo” (2001) 58 Wash. & Lee L. Rev. 109 at 164-166.

¹⁰⁰ *Films Rover International Ltd. v. Cannon Film Sales Ltd.*, [1986] 3 All E.R. 772 at 785 (Ch. Div.).

¹⁰¹ *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 338-339.

¹⁰² Examples of interlocutory mandatory injunction cases where the exception set out in *RJR* would apply include *Canadian Tire Corp. v. Dufrat* (1993), 108 D.L.R. (4th) 363 at 368 (Ont. Gen. Div.) and *Niagara Industrial Mall Inc. v. Green Bridge Waste Systems Inc.*, 2001 CarswellOnt 1161, [2001] O.J. No. 1288, ¶37 (S.C.J.).

of applying the same test to both prohibitory and mandatory injunctions.

First, the principle underlying both prohibitory and mandatory injunctions is the same, i.e. “the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other”.¹⁰³ Second, the rationale for adopting the “serious issue to be tried” criterion applies equally to both prohibitory and mandatory injunctions. In both cases, the evidence available to the court at the hearing of the application is incomplete, and the court is not in a position to resolve conflicts of evidence. Further,

[t]he purpose sought to be achieved by giving the court discretion to grant such injunctions would be stultified if the discretion were clogged by a technical rule forbidding its exercise if upon that incomplete untested evidence the court evaluated the chances of the plaintiff’s ultimate success in the action at 50 per cent. or less, but permitting its exercise if the court evaluated his chances at more than 50 per cent.

.....

The use of such expressions as “a probability,” “a prima facie case,” or “a strong prima facie case” in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief.¹⁰⁴

Third, in addition to the definitional malaise and the lack of conceptual clarity identified above in relation to the higher standard applied to mandatory injunctions, similar difficulties arise with respect to the concept of mandatory injunctions. This is because the same order can be framed in positive or negative language, and the court can infer the negative from positive wording and vice versa.¹⁰⁵ Megarry J. himself recognized in *Shepherd Homes* that it was not possible “to draw firm lines or impose any rigid classification” with respect to the nature of an injunction.¹⁰⁶ In England, it has now been held that semantic arguments over whether the injunction as formulated should be classified as mandatory or prohibitory are barren, and that a “box-ticking” approach to interlocutory injunctions does not do justice to the complexity of a decision to grant or not to grant an interlocutory injunction.¹⁰⁷ Similarly, in *Summerside Seafood*, the Prince Edward Island Supreme Court — Appeal Division rejected a formalistic approach to interlocutory injunctions, and advocated instead decision-making in context with a particular emphasis on preserving

¹⁰³ *National Commercial Bank Jamaica Ltd. v. Olint Corp. Ltd.*, [2009] U.K.P.C. 16, ¶19 (P.C.).

¹⁰⁴ *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 at 407-408 (U.K. H.L.).

¹⁰⁵ *Yule Inc. v. Atlantic Pizza Delight Franchise (1968) Ltd.* (1977), 17 O.R. (2d) 505 (Div. Ct.) at 508-509; R.J. Sharpe, *Injunctions and Specific Performance*, loose-leaf (Aurora, Ontario: Canada Law Book, 2010) at 1-21.

¹⁰⁶ *Shepherd Homes Ltd. v. Sandham*, [1970] 3 All E.R. 402 at 410 (Ch. Div.).

¹⁰⁷ *National Commercial Bank Jamaica Ltd. v. Olint Corp. Ltd.*, [2009] U.K.P.C. 16, ¶20-21 (P.C.); *Films Rover International Ltd. v. Cannon Film Sales Ltd.*, [1986] 3 All E.R. 772 at 780-781 (Ch. Div.).

the *lis* between the parties. It expressed the view that the remedy should not depend upon the form in which an application is made as “[t]his would be akin to reverting back to the days of formal writs in which if you used the wrong writ, you were deprived of the remedy you would have been granted under a different form of writ.”¹⁰⁸

The difficulties in classifying an injunction as prohibitory or mandatory are illustrated by the rule set out in the decision of the Ontario Divisional Court in *TDL Group*. In that case, the Divisional Court held that an order requiring the parties to act in accordance with their contract was prohibitory while an order requiring the parties to act in accordance with a new right never agreed to was mandatory.¹⁰⁹ Despite its apparent simplicity, this test is rife with difficulty in that, in practice, it requires the court to assess the merits of the case and to come to a conclusion as to the rights of the parties under the contract in order to determine whether the injunction sought is prohibitory or mandatory. This is because parties do not usually rely on “a new right never agreed to” in a contractual dispute. Parties advance different interpretations of the contract in issue, argue implied terms or oral agreements,¹¹⁰ but their case and positions are generally premised on an agreement between the parties. To find that one party’s position is based on the contract and the other party’s position is based on a new right never agreed to amounts to a finding that one party’s interpretation of the contract is correct while the other party’s interpretation is incorrect and not based on the contract. Having to decide the merits of the parties’ positions in order to determine whether the test that the court should apply in reviewing the merits of the case should be “a serious issue to be tried” or “a strong *prima facie* case” defeats the purpose of having a test for interlocutory injunctions that prescribes a limited review of the merits.

Karakatsanis J. recently discussed the rule set out in *TDL Group* in somewhat critical fashion. She stated the following:

The franchisor frames the relief as a prohibition: enjoining the franchisees from breaching the contract. Because it seeks to maintain the status quo with an order that the respondents act in accordance with the agreements, the franchisor submits that it is not seeking an order requiring any positive action from the respondents or establishing a new right never agreed to. It submits that it is not a mandatory injunction, relying upon *TDL Group Ltd.* [. . .]

To the extent that the franchisor in this motion seeks to enjoin the franchisees from competing in breach of the restrictive covenant, it clearly seeks prohibitive relief. However, an order that the franchisees comply with the contractual provisions that preserve the terms of the franchise relationship agreed to between the parties, including the provisions regarding products, depends to some extent upon the interpretation of the rights and obligations under the contract. This case does not, unlike *TDL*, depend upon a determi-

¹⁰⁸ *Summerside Seafood Supreme Inc. v. Prince Edward Island (Minister of Fisheries, Aquaculture and Environment)* (2006), 271 D.L.R. (4th) 530, ¶52, 55 (P.E.I. C.A.).

¹⁰⁹ *TDL Group Ltd. v. 1060284 Ontario Ltd.* (2001), 150 O.A.C. 354, ¶4–9 (Div. Ct.).

¹¹⁰ See, e.g., *Quality Pallets v. Canadian Pacific Railway Co.*, 2007 CarswellOnt 2477, [2007] O.J. No. 1567 (S.C.J.); additional reasons at 2007 CarswellOnt 3606 (S.C.J.).

nation of the right to continue the relationship. The nature of the relationship and the rights and obligations of the parties is subject to interpretation: in particular, the extent to which the franchisor may insist that the franchisees carry core products, approved products and the discounts, fees and mark-ups associated with those products.

Obviously, almost any relief can be framed in the negative, as a prohibition against breaching the terms of the contract. However, whether or not an injunction is mandatory should not simply be a matter of semantics. The import of an order that the respondents comply with contract provisions that each party interprets differently is dependent upon the outcome of this litigation. Adherence to those provisions, in particular those that are not monetary, may well require supervision of the court and may be inherently difficult to supervise, especially in a relationship of mistrust. Fundamentally, the franchisor seeks to require the franchisees to take steps to restore this broken franchise relationship. The restorative nature of the order sought and the positive actions required to comply suggests to me that for the most part, this may well be a mandatory injunction.

In this particular case, however, the determination of whether or not the injunction is in part mandatory is not determinative, given my findings relating to the strength of the case presented by the franchisor.¹¹¹ [emphasis added]

Thus, determining whether a particular order is prohibitory or mandatory can be a difficult task, and the classification may vary from one judge to another.

In light of the foregoing, the distinction between prohibitory and mandatory injunctions appear to serve very little purpose. When the case law is analyzed, it becomes clear that the courts have been using the nature of the order (i.e. mandatory or prohibitory) as a proxy for their evaluation of the balance of convenience. On the one hand, an interlocutory prohibitory injunction may be justified on a minimal showing of likely success on the merits because the balance of convenience tends to favour the applicant. On the other hand, an interlocutory mandatory injunction requires a strong showing of likely success on the merits because the balance of convenience tends to favour the responding party.¹¹² However, given that the nature of the order is not always related to the balance of convenience as set out above, the use of the nature of the order as a proxy is unreliable and can lead to injustice in certain cases. Further, it produces "litigation costs" in that litigants invest time and resources in attempting to convince the court of their own view of the nature of the order at issue, and courts themselves spend their own time and resources on this inquiry.¹¹³ Given these drawbacks, the courts should abandon the hollow inquiry of whether a particular injunction is mandatory or prohibitory, and focus their efforts on the balance of convenience and the need to do justice in each

¹¹¹ *Bark & Fitz Inc. v. 2139138 Ontario Inc.*, 2010 CarswellOnt 2082, [2010] O.J. No. 1428, ¶5, 8–10 (S.C.J.); leave to appeal refused 2010 CarswellOnt 4407 (S.C.J.).

¹¹² T.R. Lee, "Preliminary Injunctions and the Status Quo" (2001) 58 Wash. & Lee L. Rev. 109 at 161.

¹¹³ *Ibid.* at 166.

individual case.

V. CONCLUSION

The practice of applying different tests to the granting of interlocutory prohibitory injunctions and interlocutory mandatory injunctions has been abandoned in England, Australia and a number of Canadian provinces. However, it remains the practice in the majority of provinces, including Ontario. As demonstrated above, there is no justification for imposing different tests to these two types of interlocutory injunctions. The main reason supporting the difference in treatment between interlocutory prohibitory injunctions and interlocutory mandatory injunctions, i.e. the assumption that requiring a defendant to act positively will affect the balance of burden and benefit, is a broad generalization without a solid foundation. Whether or not an interlocutory mandatory injunction has an impact on the balance of burden and benefit should, by definition, be considered at the balance of convenience stage where the issue of additional costs and burden can be properly analyzed based on the actual facts of the case rather than based on general assumptions about mandatory injunctions. Similarly, the issues of whether a particular interlocutory injunction would require ongoing judicial involvement and whether the cost of such involvement would outweigh the advantage of granting appropriate remedial relief can be addressed at the balance of convenience stage. Requiring an applicant for a mandatory injunction to establish a strong *prima facie* case instead of a serious issue to be tried does not address the issue of added costs and burden and is over-inclusive as it also applies in cases where the impact of the mandatory injunction on the balance of burden and benefit would not be significant.

While there is no rational justification for imposing different tests to these two types of interlocutory injunctions, there are reasons that militate in favour of applying the serious issue to be tried criterion to both prohibitory and mandatory injunctions. In both cases, the evidence available to the court at the hearing of the motion is incomplete, and the court is not in a position to resolve conflicts of evidence. Further, in both cases, the court is pursuing the same objective, namely, to take whichever course of action that seems likely to cause the least irreparable harm to one party or the other. Applying the same test to prohibitory and mandatory injunctions also obviates the need for the court to engage into the unavailing exercise of trying to determine whether a particular injunction is prohibitory or mandatory. In addition, it makes it unnecessary for the court to wrestle with the lack of conceptual clarity over the meaning and requirements of the higher standard applied to interlocutory mandatory injunctions.

Instead of spending unnecessary time trying to determine whether the requested order is mandatory or prohibitory, courts should use the flexible test set out in *RJR* in order to determine, based on the particular facts of the case, the likely consequences of granting or withholding the injunction. Like many other interlocutory proceedings, most cases involving interlocutory mandatory injunctions will be decided at the balance of convenience stage.¹¹⁴ This is how it should be given that the main concerns raised by mandatory injunctions relate to the additional burden

¹¹⁴ *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 342.

A STRONG PRIMA FACIE CASE FOR RATIONALIZING THE TEST APPLICABLE
TO INTERLOCUTORY MANDATORY INJUNCTIONS 391

they sometimes impose on defendants and the justice system. Given that such concerns are not always present in mandatory injunction cases, however, each case should be decided on its own facts, rather than general assumptions about interlocutory mandatory injunctions, so as to ensure that justice is done in each particular case.