GRANTING AN INTERLOCUTORY INJUNCTION: WHAT IS THE TEST?

Patricia Carlson *

I. Introduction

Much has already been written about the principles applicable to the granting of an interlocutory injunction.[1] Some would say too much. *American Cyanamid* v. *Ethicon Ltd.*[2] fueled an already ongoing academic and judicial debate as to the requirements for granting an interlocutory injunction. Prior to *American Cyanamid*[3] some courts had applied a "multi-factor"[4] test. This approach weighed all relevant factors without considering any particular fact to be a requirement.[5] An even greater number of cases had suggested a "multi-requisite"[6] test which established pre-requisites to the granting of an interlocutory injunction. While there was much discussion as to which factors were relevant or required, the most controversial issue was whether the plaintiff needed to show "a serious question to be tried"[7] or a "*prima facie* case"[8] of the existence and violation of a right. *American Cyanamid*,[9] a House of Lords decision, fanned the debate by advocating the lower burden of "serious question to be tried" and by advocating removal of the strength of case factor as a relevant consideration in the balance of convenience.

The debate continues today. Many jurisdictions have not made a clear choice between the multi-requisite and multi-factor models, or having adopted the multi-requisite approach, have not settled on the applicable burden of

---

* Professor, Faculty of Law, University of Manitoba

1. *Eg.*, A. Wilson, "Granting an Interlocutory Injunction" (1975), 125 New L.J. 302; P.J. Cornwell, M.N. Sturzenegger, "Interlocutory Injunctions: A serious question to be tried?" (1977), 8 Sydney L.R. 207; W. Baker, "Interlocutory Injunctions - A discussion of the 'New Rules'" (1978), 42 Sask. L.R. 53; J. Leubsdorf, "The Standard for Preliminary Injunctions" (1978), 91 Harv. L.R. 525; B.V. Harris, "Interim and Interlocutory Injunctions: Assessment of Probability of Success" (1979), N.Z.L.J. 525; A. Clarke, J. Bowers, "*American Cyanamid—N.W.L. Ltd.*: A Change of Heart?", [1980] 96 L.Q.R. 189; J.W. Castles III, "Interlocutory Injunctions in Flux: A Plea for Uniformity" (1979), 34 Bus. Lawyer 1359; R.J. Sharpe, "Interlocutory Injunctions: The Post American Cyanamid Position", in *Studies in Civil Procedure* (E. Gertner ed. 1979) 185; R.G. Hammond, "Interlocutory Injunctions: Time for a New Model?" (1980), 30 U. of T. L.J. 240; C. Gray, "Interlocutory Injunctions Since Cyanamid" (1981), 40 Camb. L.J. 307; B.M. Rogers, G. Hately, "Getting the Pre-Trial Injunction" (1982), 60 C.B.R. 1.

2. [1975] 2 W.L.R. 318 (H.L.) (hereinafter referred to as *American Cyanamid*).

3. *Ibid.*

4. The origin of this term and its synonyms are discussed *infra*, n. 31.

5. *Eg.*, *Saunders* v. *Smith* (1837), 3 My & Cr. 710; 40 E.R. 1100 (Ch.); *Ollendorff* v. *Black* (1850), 4 De G. & Sm. 209, 64 E.R. 801 (V. Ch.); *Virginic Petroleum Jobbers Assoc.* v. *F.P.C.* (1958), 259 F. (2d) 921 (D.C. Cir.); *Hubbard* v. *Vosper*, [1972] 2 Q.B. 84 (C.A.); *Evans Marshall & Co.* v. *Bertola S.A.*, [1973] 1 All E.R. 992 (C.A.); *Terra Communications Ltd.* v. *Communicomp Data Ltd.* (1973), 41 D.L.R. (3d) 350 (Ont. H.C.).

6. The cases referred to in n. 8 & 9 are all examples of the multirequisite approach. The origin of this term and its synonyms is discussed *infra*, n. 25.

7. *Eg.*, *Jones* v. *Pacaya Rubber and Produce Co.*, [1911] 1 K.B. 455 (C.A.); *LaForest* v. *Carriere* (1921), 21 O.W.N. 265 (H.C.); *Blue Funnell Motors Line Ltd.* v. *Vancouver*, [1918] 3 W.W.R. 405 (B.C.S.C.); *Home Oil Distributors Ltd.* v. *A.G. of B.C.*, *[1939] 1 D.L.R. 573 (B.C.C.A.)*; *Wheatley* v. *Ellis*, [1944] 61 B.C.L.R. 55 (C.A.); *Gladstone Petroleums Ltd.* v. *Husky Oil (Alta.) Ltd.* (1969), 9 D.L.R. (3d) 415 (Sask. Q.B.).

8. *Eg.*, *Challender* v. *Royle* (1887), 36 Ch. D. 425; *Preston* v. *Luck* (1884), 27 Ch. D. 497; *Smith* v. *Grigg, Ltd.*, [1924] 1 K.B. 655 (C.A.); *J.T. Stratford and Son, Ltd.* v. *Lindley*, [1965] A.C. 269 (C.A.); *Cavendish House (Cheltenham Ltd.* v. *Cavendish-Woodhouse Ltd.*, [1970] R.P.C. 234 (C.A.); *Intercontinental Container Transport Corp.* v. *New York Shipping Assoc.* (1970), 426 F. (2d) 884 (2d. Cir.); *Northern Drivers Union* v. *Kawau Island Ferries Ltd.*, [1974] 2 N.Z.L.R. 617 (C.A.); *Street Rwy. Advertising Co.* v. *Toronto R.W. Co.* (1904), 3 O.W.R. 849 (H.C.); *286880 Ont. Ltd.* v. *Parke* (1974), 6 O.R. (2d) 311 (H.C.); *Jones* v. *Victoria* (1890), 2 B.C.R. 8 (S.C.); *Pratt* v. *Scheveck*, [1926] 3 W.W.R. 657 (Sask. C.A.); *Miller* v. *Campbell* (1903), 14 Man. R. 437 (K.B.).

9. *Supra* n. 2, at 323-324 (per Lord Diplock). The strength of case may be considered in specified circumstances.

proof.[10] The two models are inconsistent in that one model establishes requirements while the other does not. The plaintiff may be granted an interlocutory injunction under the multi-factor approach, while the court may have denied the interlocutory injunction under the multi-requisite approach. The powerful effect of the interlocutory injunction demands that the principles applicable to its granting be clear.

Nevertheless, our Manitoba courts are not committed to either a model or a burden of proof. For example, in *Lambair Ltd.* v. *Aero Trades (Western) Ltd.*,[11] Matas J.A. said:

> In my respectful opinion, it is not necessary, in an application for interlocutory injunction in Manitoba, to follow the consecutive steps set out in the *American Cyanamid* judgment in an inflexible way; nor is it necessary to treat the relative strength of each party's case only as a last step in the process. The guidelines to be followed are those set out in 21 Hals., 3rd ed., pp. 364, *et seq.* (And see *Lido Industrial Products Ltd.* v. *Melnor Manufacturing Ltd. et al.* (1968), 69 D.L.R. (2d) 256 at p. 257, [1968] S.C.R. 769 at p. 771, where 21 Hals., 3rd ed., para. 766, on consideration of the balance of convenience was quoted with approval by Cartwright, C.J.C.).
>
> As for the question of the need to establish a *prima facie* case, it should be noted that traditionally, the absence of a *prima facie* case would not result inevitably in dismissal of an application for an interlocutory injunction although it would be a matter for serious attention: Hals., *ibid.* citing *Ollendorff* v. *Black* (1850), 4 De G. & Sm. 209, 64 E.R. 801. And see *Hubbard et al* v. *Vosper et al.*, [1972] 1 All E.R. 1023 at p. 1031, where Megaw, L.J., said:
>
> 'Each case must be decided on a basis of fairness, justice and common sense in relation to the whole of the issues of fact and law which are relevant to the particular case.' .... To recapitulate: I am of the opinion that the general rule applies in this case and that the plaintiff ought to show a *prima facie* case. I have concluded that it has not done so. In any event, if I am wrong on this point, it is myopinion (in line with the proposition expounded by Megaw, L.J., in *Vosper, supra*) that on balance it would not be just or convenient to grant an interlocutory injunction to the plaintiff.[12]

Although Matas J.A. clearly establishes that the Manitoba courts need not follow the steps outlined in *American Cyanamid*, [13] it is unclear whether there

---

10. For post *American Cyanamid* cases applying the lower burden of proof of "serious question" *see for example:* (England) *Hubbard* v. *Pitt*, [1975] 3 All E.R. 1 (C.A.); *Re Lord Cable; Garratt* v. *Waters*, [1976] 3 All E.R. 417 (Ch.); *Smith* v. *Inner London Educ. Auth.*, [1978] 1 All E.R. 411 (C.A.). (Ontario) *Wald* v. *Pape* (1978), 22 O.R. (2d) 163 (H.C.); *Carlton Realty Co.* v. *Maple Leaf Mills Ltd.* (1978), 93 D.L.R. (3d) 106 (Ont. H.C.); *Herbert* v. *Shawinigan Cataractes Hockey Club* (1979), 94 D.L.R. (3d) 153 (Ont. H.C.). (British Columbia) *Thomas Lindsay Ltd.* v. *Lindsay* (1975), 64 D.L.R. (3d) 761 (B.C.S.C.); *Jabour* v. *Law Society of B.C.* (1978), 34 C.P.R. (2d) 145 (B.C.C.A.); *Greenpeace Foundation of B.C.* v. *Min. of Environment*, [1981] 4 W.W.R. 587 (B.C.S.C.). (Alberta) *Erickson* v. *Wiggins Adjustments Ltd.*, [1980] 6 W.W.R. 188 (Alta. C.A.); *Bank of Montreal* v. *Calbax Prop. Ltd.* (1977), 4 A.R. 483 (S.C.). (Nova Scotia) *Aspotogan Ltd.* v. *Lawrence* (1976), 14 N.S.R. (2d) 501 (S.C. App. Div.); *McFetridge* v. *N.S. Barristers' Society* (1981), 122 D.L.R. (3d) 627 (N.S.S.C.T.D.). (New Brunswick) *Baker* v. *Gay* (1978), 20 N.B.R. (2d) 643 (Q.B.). (Manitoba) *Retail Store Employees' Union, Local 832 and Last* v. *Canada Safeway Ltd.* (1980), 2 Man. R. (2d) 100 (C.A.); *Burron* v. *Browning*, Man. Q.B., Unrep., Feb. 25, 1981, *per* Kroft, J. For post *American Cyanamid* cases applying the higher burden of "prima facie case" see for example: (England) *Fellowes* v. *Fisher*, [1975] 2 All E.R. 829 (C.A.) (*per* Denning, M.R.). (Ontario) *Cradle Pictures (Canada) Ltd.* v. *Penner* (1975), 10 O.R. (2d) 444 (H.C.); *Niagara Frontier Caterers Ltd.* v. *Lukey* (1975), 24 C.P.R. (2d) 280 (Ont. H.C.); *Indal Ltd.* v. *Halko* (1977), 28 C.P.R. (2d) 230 (Ont. H.C.). (Nova Scotia) *Tan* v. *Perger* (1976), 24 N.S.R. (2d) 351 (S.C.T.D.); *Mercator Enterprises Ltd.* v. *Harris* (1978), 29 N.S.R. (2d) 691 (S.C. App. Div.). (Saskatchewan) *Collver* v. *Baltzan* (1978), 26 C.B.R. (N.S.) 256 (Sask. Q.B.). (Manitoba) *41185 Manitoba Ltd.* v. *Braemar Bakery Ltd.*, Man. Q.B., Unrep., Feb. 9, 1982, *per* Deniset, J., *Retail Store Employees' Union, Local 832 and Last* v. *Canada Safeway Ltd.* (1980), 2 Man. R. (2d) 100 (C.A.) (*per* Monnin, J.A., dissenting); *Tweed* v. *The Assiniboine South School Div. No. 3*, Man. C.A., Unrep., April 2, 1982, *per* Freedman, C.J.M.

11. (1978), 87 D.L.R. (3d) 500 (Man. C.A.) (hereinafter referred to as *Lambair*).

12. *Id.*, at 508 and 511. The reference to the *Ollendorff* and *Vosper* cases suggests the multi-factor approach. *See* further discussion *infra*. Other Manitoba cases evidencing a lack of choice of model and burden of proof include *Lambair Ltd.* v. *Aero Trades (Western) Ltd.*, [1977] 6 W.W.R. 209 (Man. Q.B.) *per* Hamilton, J.; *Ducharme* v. *City of Winnipeg* (1979), 104 D.L.R. (3d) 239 (Man. C.A.); *Retail Store Employees' Union, Local 832 and Last* v. *Canada Safeway Ltd.* (1979), 1 Man. R. (2d) 131 (Q.B.) *per* Hamilton, J. and the Court of Appeal decision at (1980), 2 Man. R. (2d) 100.

13. *Supra* n. 2.

are requirements to be satisfied, and if so, what burden of proof must be met. Indeed, the *Lambair*[14] decision has been interpreted by Professor Hammond as following the multirequisite model and setting a burden of proof of "*prima facie* case",[15] while, Messrs. Rogers and Hately in referring to the *Lambair*[16] case have said, "The Manitoba Court of Appeal has rejected it [*American Cyanamid*], preferring a more amorphous traditional approach but without the threshold test of a *prima facie* case."[17] The lack of clarity and inconsistency of approach is also apparent in the decisions of the Manitoba Court of Queen's Bench.[18]

Moreover, even where a judge intended to make a choice of model, semantic ambiguities have created further difficulties of interpretation.[19] For example in *Stein* v. *City of Winnipeg*,[20] Freedman, C.J.A. refers to the plaintiff's showing of a violation of a right as "a factor of great relevance when balancing the considerations for or against an interim injunction."[21] Without more, this statement suggests a multi-factor approach. However, when referring to the same issue a few pages later, Freedman C.J.A. suggests a multi-requisite approach when he says, "That factor could and should have been decisive in the determination of the issue whether or not an interim injunction should be granted."[22] Similarly, where a judge intended to make a choice of burden of proof, semantic difficulties have resulted when certain terminology is used without definition. Words and phrases such as "serious question", "*prima facie* case", "substantial question", "possibility", and "probability" are notorious.[23]

Considering the extensive case law and literature, along with the time constraints and pressures which necessarily affect a motion court, the lack of analysis and current inconsistency of approach, even within a particular jurisdiction, is understandable. Nevertheless the issues must be dealt with and choices made. It is the aim of this paper to assist in making these choices. The most fundamental choice is between the multi-factor and multi-requisite models. If the multi-requisite model is chosen, further decisions must be made. While there is some debate as to whether violation of a right and inadequacy of alternate remedy ought to be requirements, the most controversial issue is

14. *Supra* n. 11.

15. R.G. Hammond, *supra* n. 1, at 268.

16. *Supra* n. 11.

17. B.M. Rogers, G. Hately, *supra* n. 1, at 13.

18. A comparison of the following decisions offers an example of the inconsistency of approach. In *Burron* v. *Browning*, Man. Q.B., Unrep., Feb. 25, 1981, Kroft, J. said at 8-9: "The following principles are, I think, relevant to this case: .... It is not necessary to establish that the plaintiff is certain to win. Rather it is sufficient that the Court find there is a substantial question to be investigated, and that the matters ought to be preserved in a status quo until the question can be finally disposed of." In *41185 Man. Ltd.* v. *Braemar Bakery Ltd.*, Man. Q.B., Unrep., Feb. 9, 1982, Deniset, J. said at 6: "It may be that at the trial of the action the plaintiff may obtain the injunction which it is seeking but I am not satisfied that it has established a *prima facie* case which would entitle it to an interim injunction."

19. The semantic problem is also apparent in Professor Sharpe's article, *supra* n. 1. At 187 he says, "The traditional approach has been to provide what may be called a checklist of factors which ought to be considered by the judge." This suggests the multi-factor approach. However, at 190, when referring to one of these factors, he says "An essential item on the checklist is the 'irreparable harm' consideration, a phrase familiar in equity jurisprudence". The word "essential" suggests the multi-requisite model. At 196, Professor Sharpe avoids the semantic problem and properly separates the two models, although he considers the multi-factor approach to be the traditional model.

20. (1974), 48 D.L.R. (3d) 223 (Man. C.A.).

21. *Id.*, at 225.

22. *Id.*, at 227.

23. Discussed *infra*.

whether we ought to apply the lower burden of proof or the higher burden of proof or vary the burden depending on the nature of the case. Our analysis begins with a description of the traditional multi-requisite and multi-factor models. Although there appear to be many other "models" on the market today, they are considered to be variations of the two basic models.[24]

II. The Multi-Requisite and Multi-Factor Models

The hallmark of the multi-requisite model[25] is the necessity for requirements which must be met before the court may consider whether it should exercise its discretion in favor of granting an interlocutory injunction. If a court was applying the multi-requisite test, and the plaintiff failed to meet the prescribed requirements, it would be an error in law for the court to grant the interlocutory injunction. The traditional model requires proof of violation of a right, proof of inadequacy of alternate remedy, and a balance of convenience in favor of the plaintiff.[26] Modified versions of this model advocate deleting one or two of the traditional requirements.[27] However, the central controversy within the multi-requisite camp centres on what the minimum burden of proof should be in relation to each of the requirements. The traditional model uses the phrase "prima facie case"[28] to describe the burden of proof, while a smaller number of cases, before and after *American Cyanamid*, use the phrase "serious question to be tried" to describe a lower burden.[29] Further disagreement exists as to what facts may properly be weighed in the balance of convenience. Some cases suggest that only hardship considerations are relevant, while others include fairness, preservation of the status quo and strength of plaintiff's case.[30]

The key feature of the multi-factor model[31] is that it does not establish any pre-requisites which must be met before the court may exercise its discretion in favor of granting an interlocutory injunction. As there are no requirements which must be met, the issue of burden of proof or minimum thresholds does not arise. The entire multi-factor approach may be compared with the technique the court utilizes in the balance of convenience stage of the multi-requisite model. In the multi-factor approach the court weighs all facts which it consid-

24. *See for example*, the *American Cyanamid* approach which varies the traditional multi-requisite model by lowering the threshold and removing strength of case as a valid consideration in the balance of convenience. Consider also the interests protected approach advocated by Denning, M.R. in *Fellowes* v. *Fisher*, [1975] 2 All E.R. 829 (C.A.), and *Hubbard* v. *Pitt*, [1975] 3 All E.R. 1 (C.A.), which varies the traditional multi-requisite model by raising or lowering the threshold depending on the nature of the right threatened. *See also* the discussion in J.W. Castles, *supra* n. 1 of the approach of many American courts which advocate a coupling of the higher threshold for violation of right with the lower threshold for inadequacy of alternate remedy.

25. This name was attributed to the model in *Yule, Inc.* v. *Atlantic Pizza Delight Franchise (1968) Ltd.* (1977), 80 D.L.R. (3d) 725 at 730 (Ont. H.C.) (*per* Cory, J.); Professors Hammond and Leubsdorf in their articles, *supra* n. 1, refer to the model as the "classical" model. Griffiths, J. in *Teledyne Industries Inc.* v. *Lido Industrial Products Ltd.* (1977), 79 D.L.R. (3d) 446 at 450 (Ont. H.C.), calls it the "traditional" approach. *But see* Professor Sharpe, *supra* n. 1, at 187, 196 where he refers to the *multi-factor* as the "traditional" model.

26. For a discussion of the historical background *see e.g.*, R.G. Hammond, *supra* n. 1, at 244, 245, 249, 250, 266; J. Leubsdorf, *supra* n. 1, at 532-537, W. Baker, supra n. 1, at 58.

27. *See e.g.*, *Lido Industrial Products Ltd.* v. *Melnor Manufacturing Ltd.*, [1968] S.C.R. 769 which suggests that where the plaintiff shows a clear case of violation of right, the balance of convenience need not be established in the plaintiff's favor. Discussed *infra*, *see also*, Professor Hammond's article *supra* n. 1, at 276 where he advocates dropping the requirement of inadequacy of alternate remedy. This is discussed *infra*.

28. *See* cases referred to in n. 9, 10 and discussion *infra*. *See also* C. Gray, *supra* n. 1, at 327-328, and W. Baker, *supra* n. 1, at 54, 56.

29. *See* cases referred to in n. 8 and 10 and discussion *infra*.

30. *See* discussion *infra*.

31. This name was attributed in the model in *Yule, Inc.* v. *Atlantic Pizza Delight Franchise (1968) Ltd.*, *supra* n. 25, at 730. Professor Hammond, *supra* n. 1, at 259 refers to this as the "balancing" approach. Professor Sharpe, *supra* n. 1, at 187, 196 refers to this as the "traditional" model.

ers relevant, without any fact being crucial or decisive.[32] It is generally agreed that the court may consider the strength of the plaintiff's case with respect to the violation of right, the extent of the irreparable harm to the plaintiff and defendant, along with fairness considerations.[33] Some dispute exists as to whether the court may consider the nature of the right allegedly violated, the need to preserve the status quo, and the existence or extent of the hardship to a particular non-party or the public generally.[34]

There is no substantive difference between the two models on the issue of what factors are relevant to the exercise of the court's discretion. A proponent of the multi-requisite approach and a proponent of the multi-factor approach may well agree on a list of relevant facts. They will not, however, agree on how to treat the proof or lack of proof of certain facts. Consequently, our discussion will centre on two issues. First, whether violation of right, inadequacy of alternate remedy, and a balance of convenience in favor of the plaintiff, should be treated as requirements. If so, the second issue is what should be the burden of proof or minimum threshold?

III. The Requirements

(i) Should proof of the existence and violation of a right be a requirement?

In the case law and literature advocating the multi-requisite approach there is much discussion as to whether a plaintiff must show a "serious question" or a "*prima facie* case" of violation of a right.[35] However, there is little discussion of the underlying issue of whether violation of a right ought to be a requirement or just one of the factors to be weighed in the balance of convenience. The paucity of comment on this point may reflect the view that proof of violation of a right must certainly be a requirement in a system of law which requires a cause of action, be it common law or equitable, as a condition precedent to relief. However trite this proposition may seem, it is not recognized in the multi-factor model which says no factor is required.

The multi-factor model which refuses to admit any requirements, attempts to justify its approach through a number of arguments, none of which are ultimately acceptable. The main argument is that equitable relief is different from common law relief, in that it is wholly discretionary. The argument concludes that any approach which fetters the exercise of the discretion, by setting up requirements, is untenable.[36] Indeed the flexibility of the multi-factor approach has been its most lauded quality.

An examination of the genesis of the equitable remedies reveals that the multi-factorists have overstated their case. I.C.F. Spry in his text *Equitable*

32. For examples of cases utilizing this approach *see* cases referred to in n. 6. *See also* W. Baker, *supra* n. 1, at 59; J. Leubsdorf, *supra* n. 1, at 539.

33. *See* discussion *infra*.

34. *See* discussion *infra*.

35. *See* cases cited in n. 8-10.

36. *Eg.*, *Saunders* v. *Smith* (1837), 3 My & Cr. 710 at 728, 40 E.R. 1100 at 1107; *Hubbard* v. *Vosper*, *supra* n. 6, at 98 (*per* Megaw, L.J.) *see also* the discussion in C. Gray, *supra* n. 1, at 313.

Remedies[37] provides an excellent discussion of the purpose and nature of the equitable remedies. The remedies were created to cure defects or alleviate deficiencies in the existing common law remedies. The new remedies did not create rights. They were said to be discretionary in contrast to the common law remedy of damages which was "as of right" upon proof of a cause of action. "As of right" meant upon proof of the cause of action, the court must grant damages, even if only nominal, without reference to discretionary factors relevant to equity, such as hardship and fairness. Nevertheless, to say, as the multi-factorists do, that the discretion to grant equitable relief is so wide as to include a discretion to grant relief without any showing of a violation of right, is to go too far.[38]

No doubt the multi-factorists would argue that in applying the multi-factor model no court would grant an interlocutory injunction where the plaintiff failed to provide some proof of violation of a right.[39] However, this argument misses the mark. Given our system of no remedy without right, we must recognize violation of right, cause of action, as a requirement.

The real issue on this point is what degree of proof should be required. At the interlocutory injunction stage should we insist on the civil burden required at final hearing? Should the burden be higher or lower or perhaps vary depending on the nature of the right? Our system does recognize different burdens of proof in different circumstances. The clearest example is in the difference between the civil and criminal law. However, even within our civil system we recognize different burdens in different circumstances,[40] and the interlocutory injunction may well qualify for special treatment due to the interim nature of the relief sought and lack of fact crystallization at that stage.

(ii) The burden of proof as to violation of a right.

The case law and literature are rife with words and phrases which purport to describe the burden of proof required for violation of a right. The suggested phrases include "reasonable chance of success", "probability of success", "not frivolous and vexatious", "substantial issue to be tried", "serious question", "*prima facie* case", "good chance of winning", "probability that the plaintiff is entitled to relief", and "real prospect of succeeding".[41] Some of the judges feel that there is no substantive distinction between the phrases. For example Steele J. in *Carlton Realty Co.* v. *Maple Leaf Mills Ltd.*[42] *said:*

---

37. I.C.F. Spry, *Equitable Remedies* (2d ed. 1980) at 58 ff, 356 ff. (hereinafter referred to as Spry).

38. It is extraordinary to suggest that a court would, for example, grant specific performance without proof of a valid contract, a cause of action. As Spry, *supra* n. 37, at 312 ff, 58 ff, puts it, the requirement of showing violation of a right is "jurisdictional" in the sense that a court would never grant equitable relief where there was no showing of a violation of a right.

39. Unfortunately, given the time pressures and the wholly discretionary approach of the multi-factor model, and given a reasonably difficult fact or legal issue as to cause of action, it is too easy for the motion judge to gloss over the issue of violation of right entirely. An example of this is the motion court decision of Wilson, J. in *Stein* v. *City of Winnipeg* (1974), 48 D.L.R. (3d) 223 (Man. C.A.), where he weighs the hardship of the plaintiff against that of the defendant, and ignores the issue of existence and violation of a right. This approach was criticized and considered an error by the Court of Appeal.

40. For example on a motion to strike for failure to state a cause of action, the applicant must show that the Statement of Claim is frivolous and vexatious. (Q.B.R. 121). The "relief" which the plaintiff seeks is a responsive pleading and discovery.

41. *See* cases referred to in n. 51.

42. (1978), 93 D.L.R. (3d) 106 (Ont. H.C.).

> While there are differences in degree in all of these phrases, I do not consider them to be substantially different. Each case must be considered on its own merits and then the discretion of the Court must be exercised. The exercise of a discretion by its nature is not an exact science. Different Judges may come to different conclusions, and provided that they have exercised their discretion within the jurisprudential framework, it is futile to quibble over the semantics of the words they may individually use. The *American Cyanamid* case sets standards that appear in their words to be more lenient than the words "*prima facie* case" or "probability of success". I am of the opinion that there is no serious difference. Surely a serious question to be tried equates to a *prima facie* case . . .[43]

An examination of the case law reveals that we are dealing with more than a semantic difficulty. There is a substantive distinction between "*prima facie* case" and "serious question" in the context of the interlocutory injunction.[44]

A typical dictionary definition of the term "*prima facie* case" is "a case which has proceeded upon sufficient proof to that stage where it will support finding if evidence to contrary is disregarded."[45] This definition raises two points. First, the defendant's case or defence is disregarded. Second, the definition uses the expression "sufficient proof" leaving open the question as to the minimum evidence plaintiff must adduce. The cases and literature are divided on the meaning of "*prima facie* case". At least four definitions are in use. The first says a "*prima facie* case" exists where on the basis of the plaintiff's evidence, without reference to the defendant's position, the plaintiff has shown a violation of right on the balance of probability.[46] The meaning most frequently attributed is that a "*prima facie* case" exists where on the basis of the plaintiff's and defendant's evidence the plaintiff has shown a violation of a right on the balance of probability.[47] There is really no distinction between this second definition of "*prima facie* case" and the civil burden at the final hearing. The only distinction rests in the timing, since there may be additional evidence at the final hearing which may change the result. Two other definitions are in existence, albeit in limited use. One says a "*prima facie* case" exists where on the basis of the plaintiff's evidence, without reference to the defendant's position, the plaintiff has shown a real chance[48] of a violation of right but not a balance of probability.[49] The other says a "*prima facie* case" exists where on the basis of the plaintiff's and defendant's evidence the plaintiff has shown a violation of right as a real chance, but not on the balance of probability.[50]

The various and inconsistent definitions create a great deal of ambiguity and confusion. For instance, if we equate "*prima facie* case" with proof of less than a balance of probability we cross over into the definition of "serious

---

43. *Id.*, at 111.

44. *See* e.g., *Fellowes* v. *Fisher*, *supra* n. 24 and *Hubbard* v. *Vosper*, *supra* n. 6 where the court found the plaintiff had shown "serious question" but not "*prima facie* case". There may well be only a semantic distinction between some of the other suggested phrases.

45. *Black's Law Dictionary* (5th ed. 1979) 1071.

46. *See* cases referred to in J.W. Castles, *supra* n. 1, at 1371.

47. Eg., *Fellowes* v. *Fisher*, *supra* n. 24, at 836, *per* Denning, M.R.; *Hubbard* v. *Vosper*, *supra* n. 6, at 96, *per* Denning, M.R.; *Shercliff* v. *Engadine Acceptance Corp.*, [1978] 1 N.S.W.L.R. 729 at 736 (C.A.). *See also* discussion and cases referred to in J.W. Castles, *supra* n. 1, at 1371; C. Gray, *supra* n. 1, at 308; R.J. Sharpe, *supra* n. 1, at 188.

48. "Real chance" is used to mean less than on a balance of probability but more than a mere possibility or speculative risk. *See* discussion *infra*.

49. *See* R.G. Hammond, *supra* n. 1, at 280.

50. *See* the analysis of *Beecham Group Ltd.* v. *Bristol Lab. Ltd.* (1968), 118 C.L.R. 618 (Aust. H.C.) in P.J. Cornwell, M.N. Sturzenegger, *supra* n. 1, at 216-217.

question''. ''Serious question'' has been considered synonymous with ''chance of success'', not ''frivolous and vexatious'', ''real prospect of succeeding'', ''reasonably capable of succeeding'', ''good chance of winning'', and ''probability that plaintiff is entitled to relief''.[51] Without attempting to precisely and conclusively redefine the phrase ''serious question'' we can say that it implies a burden of proof of less than the balance of probability, less than fifty-one per cent.

Further ambiguity results from the use of the words ''possibility'' and ''probability'' in the phrases which purport to be synonymous with ''serious question'' and ''*prima facie* case.'' Sometimes ''probability'' implies greater than a fifty per cent risk, in contradistinction to ''possibility'' which is used to suggest less than a fifty per cent risk but more than a ''speculative'' risk or ''mere possibility''. At other times ''probability'' suggests a chance which is more than speculative, in contradistinction to ''possibility'' which is equated with ''speculative risk or mere possibility''.[52]

If we use ''*prima facie* case'' to import more than a fifty per cent risk, a balance of probability, and ''serious question'' to import less than a fifty per cent risk but more than a ''speculative'' risk or ''mere possibility'', then the choices of burden of proof are:

1. looking at plaintiff's and defendant's case has the plaintiff proved a violation of right on a balance of probability?
2. looking only at plaintiff's case, has the plaintiff proved a violation of right on the balance of probability?
3. looking at plaintiff's and defendant's case has the plaintiff proved a ''serious question''?
4. looking only at plaintiff's case, has the plaintiff proved a ''serious question''?

Without too much further discussion, alternatives two and four may be eliminated. Why should we not consider the defendant's case at the interlocutory injunction stage? If the court is prepared to hear the plaintiff's side then it is only reasonable that it hear the defendant's case.[53] For example, if the defendant can adduce evidence which clearly shows that the contract, relied on by the plaintiff, is void, the court, as a practical matter would wish to deal with

---

51. *Eg., Hubbard* v. *Vosper*, supra n. 6; *Fellowes* v. *Fisher*, *supra* n. 24; *Carlton Realty Ltd.* v. *Maple Leaf Mills Ltd.*, *supra* n. 10; *Lambair Ltd.* v. *Aerotrades (Western) Ltd.*, *supra* n. 11; *Retail Store Employees' Union and Last* v. *Canada Safeway Ltd.*, *supra* n. 10; *Yule, Inc.* v. *Atlantic Pizza Delight Franchise (1968) Ltd.*, *supra* n. 25; *Robert Reiser and Co.* v. *Nadore Food Processing Equipment Ltd.* (1977), 81 D.L.R. (3d) 278 at 281 (Ont. H.C.); *Preston* v. *Luck* (1884), 27 Ch.D. 497; *American Cyanamid* v. *Ethicon*, *supra* n. 2, at 407, 408; *Smith* v. *Inner London Education Authority*, [1978] 1 All E.R. 411 at 419 (C.A.); *See also Yule, Inc.* v. *Atlantic Pizza Delight Franchise (1968) Ltd.*, *supra* n. 25, at 727 which equates ''substantial issue'' with ''*prima facie* case''; *Hubbard* v. *Vosper*, *supra* n. 6, *per* Megaw, L.J. who equates ''arguable case'' with ''mere possibility of success''; *Hubbard* v. *Pitt*, *supra*, n. 10, *per* Stamp, L.J. who equates ''real prospect of succeeding'' with ''serious question to be tried''; for examples of cases using the phrase ''strong *prima facie* case'' see *Retail Store Employees' Union and Last* v. *Canada Safeway Ltd.*, *supra* n. 10, *per* Monnin, J.A. dissenting; *Terra Communications Ltd.* v. *Communicomp Data Ltd.*, *supra* n. 6, at 358, 365; *Teledyne Industries Inc.* v. *Lido Industrial Products Ltd.*, *supra* n. 25, at 452; *Robert Reiser & Co.* v. *Nadore Food Processing Equipment Ltd.*, *supra* n. 51, at 281 where ''real chance of success'' is equated with ''strong *prima facie* case'' and ''strong arguable case''.

52. *See* the discussion in C. Gray, *supra* n. 1, at 309-311 and P.J. Cornwell, M.N. Sturzenegger, *supra* n. 1, at 216-217. This confusion is also a central issue in the areas of certainty and remoteness of damage. *See e.g., Turenne* v. *Chung* (1962), 36 D.L.R. (2d) 197 (Man. C.A.); *Schrump* v. *Koot* (1977), 18 O.R. (2d) 337 (C.A.); *Hadley* v. *Baxendale* (1854), 9 Ex. 341, 156 E.R. 145; *Victoria Laundry Ltd.* v. *Newman Indus. Ltd.*, [1949] 2 K.B. 528 (C.A.); *Koufos* v. *C. Czarnikow Ltd.*, [1969] 1 A.C. 350 (H.L.); *H. Parsons (Livestock) Ltd.* v. *Uttley Ingham & Co.*, [1978] Q.B. 791 (C.A.).

53. When the court is hearing an *ex parte* motion for an interim injunction the court must rely on the presentation of only one party.

this at the requirement stage of the motion and not wait until the balance of convenience stage. Thus it appears that the proper definition of "*prima facie* case" in the context of interlocutory injunction is the first alternative. Looking at the plaintiff's and defendant's case, has the plaintiff proved a violation of right on a balance of probability? As has already been indicated this is analogous to the usual civil burden.

Having determined the meaning of "*prima facie* case" to be analogous to the civil burden, let us consider whether there are characteristics of the interlocutory injunction motion which warrant the use of a different burden. One difference is that an interlocutory injunction is granted for a limited period, until trial or further order. This distinction relates to the impact that the interlocutory injunction will have on the parties. It relates to the issue of irreparable harm and hardship and will be discussed later.[54] Another difference between the interlocutory injunction stage and the final hearing is that the interlocutory injunction is granted at an earlier point in time without a full hearing. This has at least two ramifications. First, as a matter of natural justice, due process, and policy our legal system is reluctant to grant relief without a full hearing. Second, because of the lack of time to prepare, present, test the evidence, research the case and because at such an early stage in the proceedings the evidence may not have crystallized, the court's findings at the interlocutory stage may not coincide with the findings at the final hearing. Bearing these distinctions in mind let us consider the arguments pro and con "serious question" and "*prima facie* case".

The recognition that the court may err due to the lack of time and lack of crystallization is a two edged sword. Some suggest that the way to avoid error is to require the higher threshold of "*prima facie* case" which will compel the court to more thoroughly investigate the issue of violation of right.[55] This argument appears to miss the mark in that the reason for the possibility of error in the first place was the courts inability to reach the merits. Others suggest that the way to avoid error is to require the lower threshold and in so doing place less emphasis on the issue of violation of right which is riddled with factual and/or legal difficulties.[56]

Another argument rooted in practicality urges the courts to adopt the higher threshold and investigate the issue of violation of right as fully as possible because a valid objective of the interlocutory injunction motion is to provide the parties with a summary and inexpensive adjudication.[57] This type of argument cannot be decisive. Surely considerations of fairness and accuracy are overriding.

A final argument in favor of the higher threshold arises out of the due process consideration. It has been suggested that in order to guard against the serious ramifications of incorrectly granting an interlocutory injunction the

---

54. Discussed *infra*.

55. *See* J. Leubsdorf, *supra* n. 1, at 541, 546-547 for a fuller discussion of the argument. *See also* A. Wilson, *supra* n. 1.

56. *American Cyanamid* v. *Ethicon*, *supra* n. 2; *Smith* v. *Inner London Education Authority*, [1978] 1 All E.R. 411 at 423 (C.A.); and *see* the discussion in R.J. Sharpe, *supra* n. 1, at 188-190 for a fuller discussion of the argument. An analogous argument exists in the treatment of the burden of proof in the field of certainty of damage. Where the defendant's act has rendered it impossible for the plaintiff to meet the usual burden of proof, the court will accept a lesser degree of proof. *See Schrump* v. *Koot*, *supra* n. 52; *Chaplin* v. *Hicks*, [1911] 2 K.B. 786 (C.A.); *but see Turenne* v. *Chung*, *supra* n. 52.

57. *See e.g.*, *Hubbard* v. *Vosper*, *supra* n. 6; *Fellowes* v. *Fisher*, *supra* n. 24; *See also* the discussion in A. Wilson, *supra* n. 1.

court should limit the circumstances in which an interlocutory injunction will be granted. A way of achieving this result is to utilize a higher threshold.[58] The due process consideration no doubt has, and should have, great impact on the court's decision to grant an interlocutory injunction. However, there may be reasons beyond the plaintiff's control, such as time pressures and lack of fact crystallization, which make it impossible for the plaintiff to meet the higher burden at the earlier stage. Moreover a more judicious method of meeting the due process argument may be to give the court a wider discretion by lowering the burden and considering strength of case in the balance of convenience.[59]

An argument in favor of the lower threshold is that not only are the courts unable to reach the merits due to lack of time for the facts to crystallize and lack of time for counsel to prepare, investigate, and present, but the motion courts do not have the hours and days available to hear the case. Although, in many instances this is the unfortunate situation it is a pragmatic but nevertheless poor argument for the lower threshold. Even if we use the lower threshold, the court still has to face and assess the issue of violation of right at both the requirement phase and in the balance of convenience.[60]

A final argument in favor of the lower threshold is essentially a recapitulation of the problems of requiring the higher threshold at the interlocutory stage. The thrust of this argument is that due to the chance of court error in determining the facts and law applicable to a showing of a violation of right, the plaintiff should not be thrown out on the violation of right requirement unless the plaintiff's case, in light of the defendant's evidence, is clearly not sustainable i.e. no serious question is raised. If this approach is taken and the lower threshold is chosen, the court may still be in a position to consider the strength of the plaintiff's case in the balance of convenience. The court will be in a position to attach greater emphasis to the issue of violation of right in cases where it feels more confident in reaching conclusions concerning the plaintiff's case. For example, the court may attach greater weight where there are few fact discrepancies and the legal issues are not complex.[61] The adoption of the lower threshold promotes flexibility by allowing more cases to go to the balance of convenience stage at which point the court may exercise its discretion in weighing the factors.[62]

Before we make our choice with respect to the appropriate burden of proof, there is an additional avenue to pursue and consider. Should there be one burden of proof which applies in all cases, or should the burden vary depending on the nature of the case? At least three situations have been suggested as warranting a variation in the burden of proof. It has been postulated that where there are "important" rights at stake such as speech, assembly and work[63] or where the interlocutory injunction will be tantamount

58. *See e.g., Fellowes* v. *Fisher*, *supra* n. 24 and discussion in A. Wilson, *supra* n. 1.

59. Discussed *infra*.

60. Discussed *infra*.

61. Discussed *infra*.

62. *Yule, Inc.* v. *Atlantic Pizza Delight Franchise (1968) Ltd.*, *supra* n. 25, at 732; *Saunders* v. *Smith*, *supra* n. 6, at 728, 1107; *Hubbard* v. *Vosper*, *supra* n. 6, at 98; *see also* J. Leubsdorf, *supra* n. 1, at 554.

63. As to speech *e.g., Bonnard* v. *Perryman*, [1891] 2 Ch. 269 (C.A.); *Hubbard* v. *Vosper*, *supra* n. 6; *Ollendorff* v. *Black*, *supra* n. 6; R. Sharpe, *supra* n. 1, at 194; C. Gray, *supra* n. 1, at 317; W. Baker, *supra* n. 1, at 67. As to assembly, *e.g., Hubbard* v. *Pitt*, *supra* n. 10. As to work, *e.g., N.W.L. Ltd.* v. *Woods*, [1979] 1 W.L.R. 1294 (H.L.); C. Gray, *supra* n. 1, at 320-326; W. Baker, *supra* n. 1, at 69. Discussed *infra*.

to a final hearing[64] the higher burden should be used, and conversely where there are fact discrepancies and difficult legal issues the lower burden should be employed.[65]

Let us deal with each of these situations in turn. First, should the threshold vary with the nature of the right allegedly violated? This can be described as an interest protected approach.[66] The argument appears to be that if the granting of an injunction precludes the defendant from exercising a right which is considered more important or fundamental than other rights, the plaintiff should be held to a higher burden which will result in fewer interlocutory injunctions or greater protection of the "important" right. Conversely, if the denial of the interlocutory injunction will result in interference with the exercise of an "important" right by the plaintiff, the plaintiff should be held only to the lesser burden.

There are serious difficulties with this approach. The first difficulty is reaching a consensus as to which rights are the important rights. Another difficulty arises when the rights of the plaintiff and the defendant both involve an infringement of an "important" right. For example, the plaintiff, a corporation, alleges that the defendant, an individual, is selling product X in contravention of a restrictive covenant. If the individual defendant's sale of the product is not enjoined, the plaintiff company will become insolvent and the ten employees of the plaintiff corporation will be out of work.

Given these difficulties, is adjusting the burden necessary to meet the objective of protecting "important" rights? It is suggested that the degree of importance of the right lies in the severity and scope of the hardship which will result from its infringement. What will the nature of the impact be? Who will be affected by the violation - the parties? a non-party? the public at large? Equitable jurisprudence has long recognized hardship as a critical consideration in granting relief, be it permanent or interlocutory. Moreover, there is substantial historical and current support for the proposition that hardship to non-parties and the public generally is a valid consideration.[67] The need for protection of the "important" rights is undeniable. However, since there is a place in the existing model to deal with the protection objective, it is unnecessarily troublesome and cumbersome to administer burdens of proof which vary with the nature of the right.

A variation in the burden of proof has also been advocated where the case contains discrepancies of fact or difficult issues of law.[68] It is argued that where the difficulties exist, the court should use the lower burden of "serious question", and where the facts and legal issues are reasonably clear, the court

---

64. Discussed *infra*.

65. Discussed *infra*.

66. *See* generally, *De Mestre* v. *A.D. Hunter* (1952), 77 W.N. (N.S.W.) 143 (S.C.); *Beecham Group Ltd.* v. *Bristol Laboratories Pty. Ltd.*, *supra* n. 50, at 622; and discussion in R.G. Hammond, supra n. 1, at 278-280. *See also* cases referred to in n. 63.

67. *Hartlepool Gas and Water Co.* v. *W. Hartlepool Harbour and Rwy. Co.* (1865), 12 L.T. 366; J.W. Castles, *supra* n. 1, at 1363; J. Leubsdorf, *supra* n. 1, at 549; *but see Abouna* v. *Foothills Provincial General Hosp. Bd.* (1975), 65 D.L.R. (3d) 337 at 343 (Alta. S.C.T.D.), where the court refuses to consider hardship to a non-party.

68. *Eg.*, *Niagara Frontier Caterers Ltd.* v. *Lukey* (1975), 24 C.P.R. (2d) 280 (Ont. H.C.); *Labelle* v. *Ottawa Real Estate Bd.* (1977), 16 O.R. (2d) 502 at 507 (H.C.); *Teledyne Indus. Inc.* v. *Lido Industrial Products Ltd.* (1977), 79 D.L.R. (3d) 446 (Ont. H.C.); *Yule, Inc.* v. *Atlantic Pizza Delight Franchise (1968) Ltd.*, *supra* n. 25, at 731; *Paddington Press Ltd.* v. *Champ* (1979), 43 C.P.R. (2d) 175 at 187 (Ont. H.C.); *Hotel Calif. Holdings Ltd.* v. *Grossman* (1980), 11 R.P.R. 66 (Ont. H.C.); *Fellowes* v. *Fisher*, *supra* n. 24, at 190, 200; *Smith* v. *Inner London Authority*, [1978] 1 All E.R. 411 (C.A.) at 423 ff.

should apply the higher burden of "*prima facie* case". Again there are serious difficulties with this approach. The first difficulty is that it mandates an additional determination by the court as to whether the facts and law are difficult. Secondly, the need for such a determination invites counsel to tangle the facts and cloud the issues.[69]

In view of these difficulties are there any compelling reasons for applying the higher threshold where the fact and legal issues are reasonably clear? One of the main reasons for advocating the lower threshold was that lack of time to prepare, and lack of time for the facts to crystallize created a higher than usual risk of error on the interlocutory application. The argument continues that if the fact or legal issues are particularly controversial, the risk of error increases. If the higher burden is made a requirement, then the plaintiff carries the burden of the potential for error. The higher the burden, the greater the number of plaintiffs who are denied relief. However, if the lesser burden is applied, the error potential is diffused rather than shifted onto the defendant. Lowering the burden does not more readily result in the granting of the interlocutory injunction, rather it allows the case to move to the balance of convenience phase wherein the court may exercise its discretion for or against the interlocutory injunction. In the balance of convenience stage, the court can attribute little weight to the strength of case where it is having difficulty dealing with the fact or legal issues at the interlocutory stage. Conversely, it may place substantial weight on strength of case where the facts and law are reasonably straight forward. Considering the difficulties of requiring the court to make the additional determination of whether there are sufficient fact or legal difficulties to warrant a change in the threshold, the loss of flexibility that attends the higher threshold, and the already existing mechanism in the model for dealing with the situation, the better solution is to retain the lower threshold requirement.

The third situation in which a change in threshold is suggested is where the granting of the interlocutory injunction will have the practical effect of granting a permanent injunction.[70] For example, if picketing is enjoined there may be no point in the strikers proceeding to a final hearing. The momentum will be lost. Another example is where the plaintiff alleges that a trade secret is about to be divulged by the defendant. Where the interlocutory injunction is tantamount to a final injunction there is effectively no distinction between the interlocutory and the final hearing in terms of the nature of the relief sought. Although the injunction is interlocutory and technically for a limited period, its practical effect is unlimited due to the unlikelihood of a further order or trial. The argument for moving to the higher burden in this situation recognizes this similarity in the nature of the relief and concludes that the burden at the interlocutory stage should be the same as at the final hearing.

The argument in favor of the higher threshold, while perceiving the similarity of the two hearings, fails to acknowledge the difference between

69. As R.G. Hammond, *supra* n. 1, says at 269, "But when does a matter become sufficiently contentious to trigger the less onerous *American Cyanamid* model? When counsel makes it so?" *See also Yule, Inc.* v. *Atlantic Pizza Delight Franchise (1968) Ltd.*, *supra* n. 25, at 732; and the discussion in R.J. Sharpe, *supra* n. 1, at 189.

70. *Eg.*, *Bryanston Finance Ltd.* v. *de Vries (No. 2)*, [1976] 1 All E.R. 25 (C.A.); *N.W.L. Ltd.* v. *Woods*, *supra* n. 63; *Paddington Press Ltd.* v. *Champ*, *supra* n. 68; *Hubbard* v. *Pitt*, *supra* n. 10; *Stein* v. *City of Winnipeg*, *supra* n. 39; *and see* discussion in J. Leubsdorf, *supra* n. 1, at 557; W. Baker, *supra* n. 1, at 70; R.G. Hammond, *supra* n. 1, at 256.

granting relief on an interlocutory motion which will have the effect of permanent relief, and granting permanent relief after a full hearing. If we require the higher threshold we are placing the risk of error on the plaintiff's shoulders by allowing fewer cases to advance to the balance of convenience stage. This argument has been outlined in our discussion of varying the burden in situations of fact discrepancies and difficult legal issues.[71] The argument for a higher burden does not recognize that if the circumstances were such that the plaintiff would have proceeded to final hearing, the plaintiff may have been able to meet the higher burden while finding it impossible to do so at the earlier stage due to lack of time for crystallization and preparation.

In suggesting that we do not adopt a higher threshold where the interlocutory injunction is effectively a final order, we are not denying the importance of this factor in the courts decision to grant or not to grant. The likelihood of the interlocutory injunction having the effect of a final hearing must be recognized as a factor greatly increasing the hardship to the losing party. This may be adequately treated in weighing of the respective hardships at the balance of convenience stage. We need not generate additional complications by creating a separate category with a different burden of proof.[72]

(iii) Should inadequacy of alternate remedy be a requirement?

Historically, proof of inadequacy of alternate remedy has been a prerequisite to the granting of any equitable relief, be it permanent or interlocutory.[73] The primary alternate remedy being damages, the phrase "inadequate alternate remedy" has become synonymous with "irreparable harm" or harm that could not be rectified by, or quantified in, dollars.[74] Recurring fact situations where damages are viewed as inadequate include circumstances involving injury to property or person, where the solvency of the defendant is in doubt and situations where the court feels a damage quantification would be so inaccurate, due to difficulties of proof beyond the parties' control, that the court could not warrant fair compensation.

The historical rationale of the inadequacy of alternate remedy requirement was that equitable relief only existed and operated to cure defects and deficiencies in the remedies available at common law. If there was no defect in the common law remedy there was no "jurisdiction" to grant equitable relief.[75] While agreeing that inadequacy of alternate remedy has been a requirement of equitable relief since its inception, Professor Hammond ably argues that,

---

71. Discussed *supra*.

72. There are those who advocate a higher burden where the movant is seeking a *quia timet*, mandatory, *Mareva* or *Anton Piller* type of injunction. *See e.g., Mareva* v. *International Bulk Carriers*, [1975] 2 Lloyd's Rep. 509 (C.A.); *E.M.I. Ltd.* v. *Pandit*, [1975] 1 All E.R. 418 (Ch.); *Anton Piller* v. *Manuf. Processes Ltd.*, [1976] 1 All E.R. 779 (C.A.); *Cyrus Anvil Mining Corp.* v. *White Pass and Yukon Corp.*, [1980] 6 W.W.R. 526 (B.C.S.C.); *see also* discussion in C. Gray, *supra* n. 1, at 320. It is suggested that these situations have been isolated due to the serious hardship to the losing party. This can be adequately dealt with at the balance of convenience stage.

73. *Triebwasser* v. *A.T. and T. Co.* (1976), 535 F. (2d) 1356 (2d Cir.) at 1359; *and see* discussion in Spry, *supra* n. 37, at 356 ff.; J. Leubsdorf, *supra* n. 1, at 530, 533, 548; C. Gray, *supra* n. 1, at 326; R.J. Sharpe, *supra* n. 1, at 190; *Burron* v. Browning, supra n. 18, at 9; *Retail Store Employees Union and Last* v. *Canada Safeway Ltd.*, *supra* n. 10, at 108 (*per* Monnin, J.A. dissenting).

74. *Eg.*, Spry, *supra* n. 37, at 369; *American Cyanamid*, *supra* n. 2, at 323; J. Leubsdorf, *supra* n. 1, at 530, 547. Other alternate modes of relief include an order for an accounting, preservation, receivership or replevin.

75. Spry, *supra* n. 37, at 356. "Jurisdiction" is used in the sense that if a court found an adequate alternate remedy, it was the court's invariable practice to refuse equitable relief. "Jurisdiction" is not used in the sense of invalidity or "*ultra vires*". This is discussed at *supra* n. 38, regarding the "jurisdictional" requirement of violation of a right.

particularly since the *Judicature Acts 1873 and 1875*, there has been a doctrinal fusion of the law and equity.[76] He concludes that, "The historical constraint [inadequacy of alternate remedy] is now grossly overstated and is one of the contemporary shibboleths of the law".[77]

Although a critical analysis of the theory of doctrinal fusion is beyond the scope of this paper, it should be mentioned that major texts in the field do not support Professor Hammond's position.[78] Moreover, Professor Hammond suggests that the only reason for perpetuating the requirement of inadequacy of alternate remedy is consistency with "inherited equitable maxims" which are no longer applicable.[79] It is doubtful whether history is the only reason for maintaining the requirement. Whatever may have been the historical reasons for allowing equitable relief only in situations where the common law remedies were inadequate, we have become attuned to a system of law which acknowledges equitable relief, specific relief, as "extra ordinary"[80] and damages as "ordinary". This is a matter, not only of history, but of policy. Are we ready to grant specific performance for non-delivery of goods readily available in the market place? It is respectfully submitted, that unless and until we have had an extensive and exhaustive review of the ramifications which flow from removal of the requirement of "inadequacy of alternate remedy", it should be retained.[81]

(iv) The burden of proof as to inadequacy of alternate remedy.

Although much has been written about the burden of proof of violation of a right, little has been said concerning the burden of proof relating to inadequacy of alternate remedy.[82] The clearest analysis of this issue is found in the American cases which suggest that the choice is between a showing of "possibility" and "probability".[83] Unfortunately the cases fail to define the terms.[84] As discussed earlier in the context of showing a violation of a right, "possibility" can be defined in the same way as "serious question" to mean less than a fifty per cent chance. This may be contrasted with a showing of "probability" or "*prima facie* case" or greater than a fifty per cent chance.[85] It is urged that we adopt this equation and reduce the potential for confusion by using "possibility" and "probability" to mean the same thing in the context of both violation of a right and inadequacy of alternate remedy.

---

76. R.G. Hammond, *supra* n. 1, at 275-277.

77. *Id.*, at 276.

78. P.H. Pettit, *Equity and the Law of Trusts* (4th ed. 1979) 8-10; Hanbury and Maudsley, *Modern Equity* (11th ed. 1981) 17-20; Spry, *supra* n. 37, at 309-313.

79. R.G. Hammond, *supra* n. 1, at 277.

80. A recent Manitoba decision which acknowledges this point is *Burron* v. *Browning*, *supra* n. 18, at 8.

81. The recognition of any requirement is inconsistent with the multi-factor model. This inconsistency has been discussed in relation to establishing a requirement as to violation of right.

82. In his dissent in *Retail Store Employees' Union and Last* v. *Canada Safeway Ltd.*, *supra* n. 10, at 107-108, Monnin, J.A. said: "To succeed in obtaining an injunction, a plaintiff must show a strong *prima facie* case of pending irreparable injury. He must also show that in addition to a substantial violation of an enforceable right, that the remedy of damages would be inadequate under the circumstances of the pending case." Standing alone, the first sentence sets the burden for inadequacy of alternate remedy as "strong *prima facie* case". However, when the first sentence is considered in conjunction with the second sentence, Monnin, J.A. seems to mean that there are two requirements, one being violation of a right and the second being inadequacy of damages. In any event, the statement is unclear and the words are not defined.

83. J.W. Castles, *supra* n. 1, at 1364-1372.

84. *Ibid.*

85. *Discussed supra.*

The choice of threshold for inadequacy of alternate remedy can be analyzed in much the same way as the choice for violation of right. The arguments in favor of the higher and lower threshold have already been set forth.[86] While the arguments relating to the difficulties of reaching the merits are not applicable, the discussion and conclusions reached on the arguments relating to the lack of crystallization, due process, and flexibility are applicable to this discussion. The solution which achieves the optimum balance between principle, practice and policy, once again appears to be the lower threshold. The application of the lower threshold promotes flexibility by passing more cases through to the balance of convenience stage where the court may exercise its discretion in a manner that promotes due process.

IV. The Balance of Convenience

The suggested treatment of inadequacy of alternate remedy parallels the suggested approach to violation of a right. At the requirement stage the court asks whether the plaintiff has met the two required thresholds. If one or the other is not met, the court need not consider the matter further. If the thresholds are met the court moves to the balance of convenience stage. At this stage the court widens the scope of its consideration. For example, in relation to the issue of violation of right, the court may consider the *extent* of the strength of the plaintiff's case.[87] Likewise, the court may consider the *extent* of the plaintiff's hardship. The scope of the consideration is extended to include entirely new factors as well.

While our proposed model sets up requirements, which if not met, must result in a denial of the interlocutory injunction, it does not establish any requirements, which if met, must result in the granting of an interlocutory injunction. There are two lines of cases[88] which suggest that if certain requirements are met as to violation of right and/or inadequacy of alternate remedy, the court must grant the interlocutory injunction without reference to the balance of convenience. Such an approach is very different from our model which requires certain factors before the court may exercise its discretion in favor of granting an interlocutory injunction. It is one thing to say if no right exists, no remedy may be granted. It is quite another to say, if certain requirements are met the interlocutory injunction must be granted as a matter of course, or in effect, as of right. Although there is no dispute that equitable relief is not as of right, there have been cases where the courts have granted equitable relief upon a showing of a certain fact or set of facts. A widely known example of this position is *Doherty* v. *Allman*[89] where the court suggested that if the plaintiff showed a violation of an express negative covenant the court would grant an injunction without reference to any hardship or fairness considerations. The case law and literature do not support this approach.[90]

Nevertheless, there are two lines of cases which suggest that an interlocutory injunction must be granted without reference to the balance of conveni-

86. Discussed *supra*.

87. As has already been discussed *supra*, there may be discrepancies of fact, or difficulties in the legal issues which make it inappropriate for the court to put further emphasis on violation of right in the balance of convenience.

88. Discussed *infra*.

89. (1878), 3 App. Cas. 709 (H.L.).

90. Spry, *supra* n. 37, at 4-18, 519-521; *Servicemaster Indus. Inc.* v. *Servicemaster of Victoria Ltd.* (1979), 13 B.C.L.R. 15 (S.C.).

ence where certain facts are shown. One line of cases arises out of an interpretation of *American Cyanamid*,[91] while the other line of cases arises out of the description of the principles applicable to the interlocutory injunction set out in *Halsbury's Laws of England*.[92] In *American Cyanamid* Lord Diplock said:

> 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 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.
>
> *As to that*, the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. 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. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.[93] [emphasis added]

Lord Diplock began his very next paragraph with the following sentence:

> 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.[94]

This last sentence has resulted in the interpretation that where the plaintiff shows a serious question, inadequacy of damages to the plaintiff, and no inadequacy to the defendant, the court must grant an interlocutory injunction.[95]

The other line of cases arose from the description of the principles in *Halsbury*[96] which was referred to in *Lido Industrial Products Ltd.* v. *Melnor Manufacturing Ltd.*[97] and adopted by Matas J.A. in *Lambair* v. *Aerotrades*

---

91. *Supra* n. 2.

92. 3rd ed., Vol. 21, at 366 (hereinafter referred to as Halsbury).

93. *Supra* n. 2, at 323.

94. *Ibid.*

95. In *Fellowes* v. *Fisher*, *supra* n. 24, Browne, L.J. said at 842, "In his third principle Lord Diplock seems to be saying that the 'balance of convenience' only arises if the first and second principles fail to provide a solution, but he had said *before* stating the first principle that the court 'should go on to consider ... the balance of convenience ...', which seems to imply that the first and second principles are factors to be taken into account in assessing the balance of convenience rather than self-contained rules." Rubin, J. in *Landi Den Hartog B.V.* v. *Stopps*, [1976] F.S.R. 497 (Ch.) found that the plaintiff had shown a serious question, damages to the plaintiff were inadequate, and damages to the defendant were adequate. He said at 502, "Browne, L.J. in *Fellowes* v. *Fisher* ... would treat that conclusion as sufficient, without regard to the other of Lord Diplock's principles, to grant interlocutory relief. Sir John Pennycuick, on the other hand, would treat that conclusion as showing no reason to refuse the interlocutory injunction, ..." For a discussion of the cases which have viewed certain facts as requiring an interlocutory injunction without reference to the balance of convenience, see C. Gray, *supra* n. 1, at 326-329.

96. *Supra* n. 92.

97. *Supra* n. 27.

(Western) Ltd.[98] and in *Ducharme* v. *City of Winnipeg*[99]. In *Lido Industrial Products Ltd.* v. *Melnor Manufacturing Ltd.* Cartwright C.J.C. said:

> On reading the reasons of the learned President as a whole it appears to me that he proceeded on the basis not only that it was clear that the defendant had copied the plaintiffs' design but that the plaintiffs' right to the exclusive use of the design could not be seriously questioned. The learned President said in part:
>
> 'This being a case of piracy of the defendant's rights without colour of right, it is not a case, in my view, where the granting of an interlocutory injunction depends upon balance of convenience.'
>
> I cannot think that the learned President would have so expressed himself unless he had concluded that there was little, if any, doubt as to the plaintiffs' exclusive right to the use of the design. The applicable rule is conveniently summarized in Halsbury 3rd ed., vol. 21 at p. 366, as follows:
>
> 'Where any doubt exists as to the plaintiff's right, or if his right is not disputed, but its violation is denied, the Court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the defendant, on the one hand, would suffer if the injunction was granted and he should ultimately turn out to be right, and that which the plaintiff, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right. The burden of proof that the inconvenience which the plaintiff will suffer by the refusal of the injunction is greater than that which the defendant will suffer, if it is granted, lies on the plaintiff.'[100]

This has been interpreted as meaning that if no doubt exists as to the plaintiff's right, the court must grant an interlocutory injunction without reference to the balance of convenience. In *Stein* v. *City of Winnipeg*[101] the plaintiff sought an interlocutory injunction restraining the City from spraying with an allegedly toxic insecticide. The plaintiff argued that the City had no authority to do the spraying without an environmental impact study which admittedly had not been done. Mr. Justice Freedman found that the study was clearly essential or in other words the plaintiff's case was beyond doubt. He said:

> Without the requisite environmental impact review the spraying project stands unauthorized in law. A project launched without legal authority, indeed contrary to the express requirements of the law, should not be continued. That factor could and should have been decisive in the determination of the issue whether or not an interim injunction should be granted.[102]

Mr. Justice Freedman concluded that the plaintiff had clearly shown a violation of right and without reference to any other factors, he would have granted the interlocutory injunction. The majority considered the balance of convenience and refused to grant the interlocutory injunction.

The *Halsbury* approach was taken a step further by O'Sullivan J.A. in his dissent in *Ducharme* v. *City of Winnipeg*.[103] The City was about to close Broadway Street for repairs. The plaintiff, a Broadway businessman, argued that his right of access was violated because the City had not passed the

98. *Supra* n. 11.
99. *Supra* n. 12.
100. *Supra* n. 27. at 771.
101. *Supra* n. 39.
102. *Id.*, at 227.
103. *Supra* n. 12.

required authorizing by-law. Mr. Justice O'Sullivan, while finding that the plaintiff would likely succeed in showing a violation of right did not find that the plaintiff's case was clear or beyond doubt.[104] Without reference to any hardship considerations, he concluded:

> Until proper authority is given, I am of the view that the action contemplated by the city at the present time is illegal. It is not the function of the Court to grant a licence to anyone, whether citizen or public authority, to violate the law.[105]

As has been discussed, any approach which mandates the granting of an interlocutory injunction if certain requirements are met, without reference to the balance of convenience, is not consistent with the principles of equitable relief. Nevertheless, should we foster such an approach? It is submitted that we should not. If we require the court to grant an interlocutory injunction if certain facts are present, we are precluding the court from looking at other facts which are crucial to equitable relief, while irrelevant to damages. For example, do we wish to grant an interlocutory injunction where the plaintiff has shown a clear violation of his right, but the plaintiff is also guilty of an abuse of process or laches? Do we wish to grant an interlocutory injunction where the plaintiff has shown a clear violation of right, but damages will be an adequate remedy to the plaintiff and the hardship to the defendant is great?

Having concluded that the balance of convenience must always be considered before a court may grant an interlocutory injunction, the final issue to be discussed is, what factors ought to be weighed in the balance of convenience. The phrase "balance of convenience" is used to describe the stage at which the court weighs all relevant competing factors. In our analysis of the requirements of violation of right and inadequacy of alternate remedy, we have discussed the need to consider at the balance of convenience stage strength of case and extent of hardship to the plaintiff. If the plaintiff establishes a violation of right and inadequacy of alternate remedy over and above the minimum threshold, this will tip the balance in the plaintiff's favor. Other factors which we also discussed include the existence and extent of the hardship to the defendant, non-parties and the public generally.[106]

Another factor which should be considered in the balance of convenience is fairness as to the circumstances giving rise to the violation and as to the proceedings. The fairness consideration, like the hardship factor, is a hallmark of equitable relief and there is no dispute as to its relevance.[107]

The need to preserve the status quo is often suggested as an additional factor to be weighed in the balance of convenience.[108] This factor has been properly dismissed by many writers as unnecessary, unhelpful, and unclear.[109] The term "status quo" is ambiguous. Are we referring to the "status quo" prior to the alleged violation, or "status quo" after the alleged violation? If we

104. *Id.*, at 249-251.

105. *Id.*, at 251.

106. Discussed *supra*.

107. *Eg.*, *Lambair* v. *Aerotrades (Western) Ltd.*, *supra* n. 11, at 408. Most cases on interlocutory injunction do not refer to the fairness factor, but this is undoubtedly because the facts do not warrant any such discussion.

108. *Eg.*, J. Leubsdorf, *supra* n. 1, at 546; R.J. Sharpe, *supra* n. 1, at 193; C. Gray, *supra* n. 1, at 336-338. *See also Burron* v. *Browning*, *supra* n. 18.

109. *See* n. 108.

are referring to the "status quo" prior to the alleged violation, how do we deal with "*quia timet*" interlocutory injunctions which necessarily involve a movement away from the "status quo" existing prior to the alleged violation? If we are referring to the "status quo" after the alleged violation, how do we deal with mandatory interlocutory injunctions which necessarily involve a movement away from the "status quo" existing after the alleged violation? The second major thrust of the criticism is to ask, what are we adding or accomplishing by considering the "status quo" factor? It seems that any reasons for wanting to preserve the "status quo" have already been adequately covered within the court's consideration of the strength of case, hardship and fairness criteria.

V. Conclusion

As a result of our examination and analysis of the case law and literature our conclusions may be summarized as follows:

1. The multi-requisite model must be applied. In failing to establish any requirement the multi-factor model has been shown to be inconsistent with equitable principles and current policy.

2. The plaintiff must establish a violation of a right and inadequacy of alternate remedy, before the court may consider the balance of convenience.

3. The burden of proof, which the plaintiff must satisfy in relation to each of these requirements is "serious question to be tried". This means that based on the evidence of the plaintiff and the defendant, the plaintiff has established more than the mere possibility or speculative possibility of success, although the plaintiff need not establish that he would succeed on a balance of probability.

4. The burden of proof should not change depending on the nature of the right allegedly violated, the factual discrepancies or legal difficulties, or on whether the granting of an interlocutory injunction would have the effect of a permanent injunction.

5. In no circumstances should there be requirements, which if met, mandate the granting of an interlocutory injunction. The interlocutory injunction should never be granted as of right and should never be granted without consideration of the balance of convenience.

6. The factors to be weighed in the balance of convenience are strength of the plaintiff's case, extent of the plaintiff's hardship, existence and extent of the hardship to the defendant, non-parties, and public, along with fairness as to the circumstances giving rise to the alleged violation and fairness in the legal proceedings.

In our analysis of the existing models and their modified versions, it became evident that inconsistent approaches were being offered. This required that choices be made — choice of model and burden of proof being the most controversial and difficult. The difficulties were no surprise considering the tension which exists between rule and principle and between flexibility and framework. Our choice of the multi-requisite model over the multi-factor model should not be seen as a choice of framework over flexibility, but rather

as an affirmation that equitable principles and current policy demand that we establish requirements of violation of right and inadequacy of alternate remedy. Indeed our desire to incorporate the flexibility of the multi-factor model is seen in our decision to adopt the lower threshold of proof as to each requirement. This provides flexibility by allowing more cases to go to the balance of convenience stage. Our approach also promotes flexibility, from the point of view of the defendant, through its refusal to grant an interlocutory injunction without reference to the balance of convenience. It is hoped that the suggested approach offers a workable and reviewable framework which reflects principle and policy, while providing sufficient flexibility to decide each case "on a basis of fairness, justice and common sense in relation to the whole of the issues of fact and law which are relevant to the particular case."[110]

110. *Hubbard* v. *Vosper*, *supra* n. 6, at 1031, *per* Megaw, L.J.