Federal Court  Cour fédérale

Date: 20160324

Docket: T-300-16

Citation: 2016 FC 350

Ottawa, Ontario, March 24, 2016

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA AND TEARLAB CORPORATION

Plaintiffs

and

I-MED PHARMA INC.

Defendant

ORDER AND REASONS

I. THE MOTION

[1] This is a motion by the Plaintiff, TearLab Corporation [TearLab], for:

1. An order for:

(a) An interim injunction preventing the Defendant, its officers, directors, employees, agents, servants, successors, licensees, affiliates, subsidiaries, related companies and all those over whom it exercises control from infringing claims 1, 2, 5, 6, 8,

13, 14, 16, 25 and 26 of Canadian Patent No. 2,494,540 pending the final disposition of the motion for an interlocutory injunction in this matter;

(b) an interim injunction preventing the Defendant, its officers, directors, employees, agents, servants, successors, licensees, affiliates, subsidiaries, related companies and all those over whom it exercises control from making, using, importing, marketing, offering for sale or selling the i-Pen System, including the i-Pen Single Use Sensors, pending the final disposition of the motion for an interlocutory injunction in this matter;

(c) costs to the Plaintiff TearLab Corporation for this motion payable forthwith; and

(d) such further and other relief as this Honourable Court may deem just.

II. BACKGROUND

[2] The facts giving rise to this motion are not in dispute.

[3] The Plaintiff, the Regents of the University of California [University], owns Canadian Patent No. 2,494,540 [‘540 Patent]. The ‘540 Patent is entitled “Tear Film Osmometry”. The University consents to the relief sought by TearLab but is not a moving party on the motion.

[4] The Canadian patent application that resulted in the ‘540 Patent was filed 25 March 2003 and issued on 3 June 2014. By reason of the issuance of the ‘540 Patent, the University has the exclusive right, privilege and liberty of making, constructing, using, importing, and vending to others to be used, in Canada, the invention claimed in the ‘540 Patent until the expiry of ‘540 Patent on 25 March 2023.

[5] The ‘540 Patent generally relates to, and claims, fluid sample receiving chips, systems for measuring osmolarity of sample fluids, and methods for measuring osmolarity of sample fluids, including tear fluid. The measurement of the osmolarity of tear fluid is useful in the diagnosis and treatment of dry eye disease [DED], an affliction that will affect up to 30% of the Canadian population at some point in their lives.

[6] The Plaintiff, TearLab Corporation, which is the moving party on this motion, is a public company having its shares listed on the Toronto Stock Exchange. TearLab is the exclusive licensee under the ‘540 Patent. TearLab markets the TearLab Osmolarity System [TearLab System] to Canadian eye-care clinicians, such as optometrists and ophthalmologists, as well as certain Canadian eye-care research organizations.

[7] The TearLab System includes a “pen” which is configured for receiving a “test card” (a disposable microchip). In order to operate the TearLab System, a clinician inserts a test card microchip into the pen device and places the end of the chip adjacent to the lower conjunctiva of a patient’s eye and the chip collects a sample of the patient’s tear film. The pen and chip are then placed into a reader unit which determines the osmolarity of the tear sample using electrical impedance (as electric current is passed through the tear sample), and the reader unit displays an osmolarity reading to the clinician.

[8] Almost all users of the TearLab System have rented or taken on loan the TearLab System from TearLab, with their only commitment to TearLab being the purchase of a minimum number of test card chips from TearLab per quarter or per year. Further, almost all users have a contract

with TearLab that can be cancelled at the end of the first year or at year anniversaries. As such, current users can return the TearLab System to TearLab fairly promptly if, for example, a competing and lower-price device comes onto the market.

[9] The ability of the TearLab System to accurately and reliably determine the osmolarity of a patient's tear film at the point-of-care provides useful information allowing optometrists and ophthalmologists to improve their ability to diagnose and treat DED.

[10] Before the TearLab System was approved by regulatory bodies for use by clinicians, it underwent a number of clinical trials to establish that it was safe and efficacious.

[11] TearLab spent years and millions of dollars testing the TearLab System in a series of clinical trials to establish the reliability, accuracy, efficacy and safety of the TearLab System. The results of these clinical trials were submitted to the appropriate regulatory bodies to seek approval of the TearLab System.

[12] After meeting the regulatory obstacles, the United States Food and Drug Agency approved the TearLab System for sale in the United States. In December 2009, the TearLab System was approved by Health Canada for sale in Canada as a class III medical device.

[13] Initially, one of TearLab's largest obstacles was the need to inform and educate eye-care clinicians that hyperosmolarity was a reliable and quantitative biomarker indicator of DED. In or about 2009, this concept was not well known or understood amongst the population of clinicians

in Canada. Among many clinicians TearLab experienced some degree of reluctance to accept that osmolarity may be an indicator of DED.

[14] In order to persuade Canadian eye-care clinicians of the usefulness of the TearLab System, TearLab first had to convincingly demonstrate to those eye-care clinicians that patient symptoms and the pathology of DED were linked to hyperosmolarity.

[15] To overcome the reticence and reluctance of eye-care clinicians, and to encourage eye-care clinicians, both in Canada and around the world, that measuring osmolarity was a useful diagnostic method for DED, TearLab conducted numerous clinical trials and published the results in peer reviewed journals.

[16] TearLab has been trying to convince an increasing number of Canadian eye-care clinicians that tear osmolarity is an effective technique for diagnosing DED. There remains however a significant proportion of the Canadian population of eye-care clinicians who have not yet decided to adopt the technology. TearLab sees this as a future market opportunity.

[17] In mid-January 2016, TearLab discovered that the Defendant was offering for sale a tear osmolarity measuring device called the "i-Pen System," which the Defendant has told Canadian eye-care clinicians will be available in March 2016.

[18] The i-Pen System is a tear-fluid collection and testing device for the quantitative measurement of osmolarity of tears in patients using impedance measurements of a tear film

sample. As depicted and described in the User Manual, the i-Pen System consists of a "Single Use Sensor" and a hand-held reader unit into which the Single Use Sensor is inserted. The hand-held unit displays the osmolarity test result.

[19] TearLab says that i-Pen System and its Single Use Sensor, and the indicated methods of use thereof, each fall within the scope of at least one of claims 1, 2, 5, 6, 8, 13, 14, 16, 25 and 26 of the '540 Patent.

[20] The i-Pen System's Single Use Sensors are offered for sale by the Defendant at a price that is substantially lower than that of the corresponding chips for use as part of the TearLab System. Customers of the Defendant are not obligated to purchase a minimum number of the Defendant's Single Use Sensors.

[21] The Defendant has been advising the Canadian public that it intends to launch the i-Pen System in Canada in March 2016. TearLab commenced the herein patent infringement proceeding by filing a Statement of Claim on February 18, 2016, and served and filed its motion for interlocutory relief on March l, 2016. The hearing of the motion for the interlocutory injunction is being scheduled for a date in late April or early May 2016.

[22] The interim injunction being sought will prevent the Defendant from launching the i-Pen System in Canada before the hearing of the interlocutory injunction.

[23] Despite requests to disclose to TearLab the launch date of the i-Pen System, the Defendant has refused to disclose the launch date. The Defendant has also refused to provide a minimum number of days of advanced notice pre-launch.

III. STATUTORY PROVISIONS

[24] The following provision of the *Federal Courts Act*, RSC, 1985, c F-7 is relevant to this motion:

***Mandamus*, injunction, specific performance or appointment of receiver**	***Mandamus*, injonction, exécution intégrale ou nomination d'un séquestre**
44 In addition to any other relief that the Federal Court of Appeal or the Federal Court may grant or award, a *mandamus*, an injunction or an order for specific performance may be granted or a receiver appointed by that court in all cases in which it appears to the court to be just or convenient to do so. The order may be made either unconditionally or on any terms and conditions that the court considers just.	44 Indépendamment de toute autre forme de réparation qu'elle peut accorder, la Cour d'appel fédérale ou la Cour fédérale peut, dans tous les cas où il lui paraît juste ou opportun de le faire, décerner un *mandamus*, une injonction ou une ordonnance d'exécution intégrale, ou nommer un séquestre, soit sans condition, soit selon les modalités qu'elle juge équitables.

[25] The following provisions of the *Federal Courts Rules*, SOR/98-106 are also relevant to this motion:

Interim and Interlocutory Injunctions	**Injonctions interlocutoires et provisoires**
Availability	**Injonction interlocutoire**
373 (1) On motion, a judge may grant an interlocutory	373 (1) Un juge peut accorder une injonction interlocutoire

injunction.

Undertaking to abide by order

(2) Unless a judge orders otherwise, a party bringing a motion for an interlocutory injunction shall undertake to abide by any order concerning damages caused by the granting or extension of the injunction.

Expedited hearing

(3) Where it appears to a judge that the issues in a motion for an interlocutory injunction should be decided by an expedited hearing of the proceeding, the judge may make an order under rule 385.

Evidence at hearing

(4) A judge may order that any evidence submitted at the hearing of a motion for an interlocutory injunction shall be considered as evidence submitted at the hearing of the proceeding.

Interim injunction

374 (1) A judge may grant an interim injunction on an ex parte motion for a period of not more than 14 days where the judge is satisfied

(a) in a case of urgency, that no notice is possible; or

sur requête.

Engagement

(2) Sauf ordonnance contraire du juge, la partie qui présente une requête pour l'obtention d'une injonction interlocutoire s'engage à se conformer à toute ordonnance concernant les dommages-intérêts découlant de la délivrance ou de la prolongation de l'injonction.

Instruction accélérée

(3) Si le juge est d'avis que les questions en litige dans la requête devraient être tranchées par une instruction accélérée de l'instance, il peut rendre une ordonnance aux termes de la règle 385.

Preuve à l'audition

(4) Le juge peut ordonner que la preuve présentée à l'audition de la requête soit considérée comme une preuve présentée à l'instruction de l'instance.

Injonction provisoire

374 (1) Une injonction provisoire d'une durée d'au plus 14 jours peut être accordée sur requête ex parte lorsque le juge estime :

a) soit, en cas d'urgence, qu'aucun avis n'a pu être donné;

(b) that to give notice would defeat the purpose of the motion.	b) soit que le fait de donner un avis porterait irrémédiablement préjudice au but poursuivi.
Extension	**Prolongation**
(2) A motion to extend an interim injunction that was granted on an ex parte motion may be brought only on notice to every party affected by the injunction, unless the moving party can demonstrate that a party has been evading service or that there are other sufficient reasons to extend the interim injunction without notice to the party.	(2) Lorsque l'injonction provisoire a été accordée sur requête ex parte, tout avis de requête visant à en prolonger la durée est signifié aux parties touchées par l'injonction, sauf si le requérant peut démontrer qu'une partie s'est soustraite à la signification ou qu'il existe d'autres motifs suffisants pour prolonger la durée de l'injonction sans en aviser la partie.
Limitation	**Période limite**
(3) Where a motion to extend an interim injunction under subsection (2) is brought ex parte, the extension may be granted for a further period of not more than 14 days.	(3) La prolongation visée au paragraphe (2) qui est accordée sur requête ex parte ne peut dépasser 14 jours.

IV. ARGUMENTS

A. *TearLab*

[26] TearLab says that an interim injunction is urgent and necessary in this case for the following reasons:

a) The Defendant has told the public that it will launch the i-Pen System in March 2016. The interlocutory injunction is scheduled for late April or early May 2016. Without an interim injunction, the Defendant will launch its i-Pen System prior to the hearing of the interlocutory injunction motion;

b) There is a serious issue to be tried in that the Defendant's i-Pen System, and the indicated methods of use, each fall within the scope of at least one of the claims 1, 2, 5, 6, 8, 13, 14, 16, 25 and 26 of the '540 Patent.

c) TearLab will suffer irreparable harm without an injunction as a result of

   i. An unquantifiable loss of market opportunity;

   ii. A loss of an industry opportunity and potential customer opportunity;

   iii. The impossibility for TearLab to calculate its lost sales because there is no methodology;

   iv. Harm to the goodwill and reputation of TearLab that is impossible to determine;

d) The balance of convenience favours granting the injunction because:

   i. Damages would not provide TearLab with an adequate remedy but would provide the Defendant with an adequate remedy recoverable under TearLab's undertaking to pay damages;

   ii. The Defendant is proceeding with full knowledge of TearLab's patent rights and with "eyes wide open";

   iii. It is prudent to preserve the status quo in this case;

   iv. The '540 Patent is presumed to be valid and the Defendant has proceeded with full knowledge of TearLab's rights, while refusing to disclose its launch date or to provide TearLab with advance notice prior to the launch of the i-Pen System in Canada;

   v. Since the Defendant has not yet marketed its i-Pen System, it would suffer relatively little inconvenience compared to the harm that would be sustained by TearLab if the interim injunction is refused;

   vi. The Defendant sells a variety of other products and is not reliant exclusively upon the i-Pen System, while TearLab's revenue is derived solely from the sale and rental of the TearLab system and the TearLab Test Cards;

   vii. The TearLab System had been sold in Canada since late 2009/early 2010, while the Defendant has not yet launched its product in Canada;

   viii. TearLab will suffer more harm as a result of the refusal to grant an interim injunction than the Defendant will suffer as a result of granting the interim injunction.

B. *The Defendant*

[27] The Defendant says that TearLab has not established grounds for the interim injunction requested for the following reasons:

a) TearLab has not satisfied the "urgency" requirement, and any urgency was created by TearLab's delay in seeking relief;

b) TearLab has not satisfied the conjunctive test established in *RJR - MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR MacDonald*], in that:

   i) There is no serious issue to be tried. Mr. Sullivan's evidence in this issue is inadmissible and TearLab has offered no other evidence on the issue;

   ii) TearLab has not established irreparable harm because it has put forward no evidence by a qualified expert to support its allegation that damages could not be quantified. The Defendant, on the other hand, has provided evidence from a qualified expert – Mr. Rosenblatt – that any damages are quantifiable;

   iii) In addition, TearLab's evidence on irreparable harm does not refer to harm that will be suffered during the period for which an interim injunction is sought;

   iv) TearLab relies on three witnesses to support its claim that it will suffer irreparable harm if an interlocutory injunction is refused. Mr. Tierney and Dr. Jackson are put forward as expert witnesses. Neither of them has expertise relating to any of the grounds upon which TearLab alleges it will suffer irreparable harm. Mr. Smith is a TearLab employee whose evidence is speculative. None of TearLab's evidence establishes that it will suffer irreparable harm;

   v) Irreparable harm does not exist where an applicant claims to suffer harm because of a purely speculative adverse effect on its reputation or on market share. Patent rights confer the right to earn all the profits derived from the sale or use of an invention. "Lost profits" are always calculable and compensable. This Court has consistently ruled that the type of harm that TearLab had alleged it will suffer is not irreparable;

   vi) Because damages are a suitable remedy, it is not necessary to consider the balance of convenience. However, on the facts of the present case, the balance of convenience clearly favours the Defendant. If the interim injunction is granted, the Defendant will be excluded from the market while TearLab will simply be exposed to completion if it is refused. TearLab is attempting to use this Court to protect itself from legitimate completion in a market where it has failed to establish its product.

C. *The Undertakings*

[28] TearLab has provided an undertaking to pay any damages suffered by the Defendant in respect of the i-Pen System if it should turn out that the interim injunction sought by this motion is found to have been wrongly issued. TearLab will abide by an Order concerning damages caused by the granting of the injunction sought.

[29] The Defendant has undertaken to maintain records of sales of all i-Pens and single user sensors through to the final resolution of this litigation in order to facilitate the determination of TearLab's damages should it ultimately prevail.

V. ANALYSIS

[30] It is trite law that in *RJR - MacDonald*, above, the Supreme Court of Canada approved the test for an interim or interlocutory injunction as articulated by the House of Lords in *American Cyanamid Co v Ethicon Ltd*, [1975] RPC 513 [*American Cyanamid*]. This means that TearLab must establish:

a) A serious issue to be tried;
b) That they will suffer irreparable harm if the injunction is not granted; and
c) That the balance of convenience favours the granting of an injunction.

[31] It is also well established that these factors are interrelated and should not be assessed in isolation from one another. See *Movel Restaurants Ltd v E.A.T. at Le Marché Inc*, [1994] FCJ No 1950 (TD) at para 9.

[32] In the case of an interim injunction, the moving party must also establish that sufficient urgency exists to require the injunction. See *Laboratoires Servier v Apotex Inc*, 2006 FC 1443 at para 17.

[33] As far as urgency and serious issue are concerned, TearLab's position is at least debatable but, in my view, TearLab has not established irreparable harm and balance of convenience under the *RJR MacDonald* test and the governing jurisprudence of this Court.

[34] TearLab must satisfy the Court that it will suffer irreparable harm during the interim period for which this injunction is sought. As the Defendant points out, the affidavit evidence submitted by TearLab does not directly speak to this period of time and is not provided by individuals who are qualified to convince the Court that the harm TearLab's fear cannot be compensated in damages.

[35] It is entirely understandable that, given the context of this dispute, TearLab fears it will suffer an unquantifiable loss of market opportunity, loss of an industry opportunity and potential customer opportunity, lost sales, and loss of goodwill. However, these fears need objective support from someone with the expertise to say that they cannot be quantified in the event that the injunction is not granted. Without such evidence, the alleged harm remains speculative.

[36] The individuals who speak to irreparable harm on behalf of TearLab are corporate witnesses and/or witnesses who provide unsupported opinions outside of their expertise. TearLab has said that it primarily relies upon Mr. Tierney for this issue.

[37] Mr. Tierney is a retired Business Director of Allergen Eye Care with considerable experience in the Canadian Eye Care market. Based upon his experience, he provides the Court with his opinion on what will happen if the i-Pen system is launched in Canada by the Defendant and is then removed from the market following an injunction after a patent infringement trial. That is not the issue before me in this motion.

[38] Mr. Tierney tells the Court that the "impact of i-Pen being on the market prior to trial cannot be quantified." He also says "there is no model to determine what impact I-Med's presence in the Canadian Market will have on TearLab" and that "overall losses will be unquantifiable." He asserts as follows:

> 23. The impact of i-Pen being on the market prior to trial cannot be quantified. TearLab is within a growing market and it has not yet had the time or opportunity to try and convince all eye-care professionals to switch to using osmolarity testing in the clinic to diagnose DED. There are many eye-care professionals who will take further convincing to start using the TearLab™ Osmolarity System.
>
> 24. I have had decades of experience in the pharmaceutical industry and I know that when pharmaceutical products face generic competition in the pharmaceutical markets after patent expiry, there is a wealth of modelling to determine changes in price on market share and what happens when competitors enter the market. With respect to the situation with the i-Pen and the TearLab™ Osmolarity System, this is the first time such a situation has ever happened in Canada and, as such, there is no model to determine what impact I-Med's presence on the Canadian market will have on TearLab. Without being able to determine how many opportunities it has lost, or might have lost, but for the sales of the i-Pen, TearLab's overall losses will be unquantifiable.
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> 25. Moreover, if an injunction issues that prevents eye-care professionals from using an i-Pen that they had purchased (and prevents them from getting more single-use microchip sensors) the same doctors will likely blame TearLab and this will harm the reputation of TearLab. As such, the presence of I-Med on the market prior to trial will inevitably cause in irreparable damage to

> the goodwill and reputation to TearLab that will crystalize when an injunction issue after trial.

[39] Mr. Tierney does not establish in his affidavit that, notwithstanding his broad experience in the Canadian eye-care market, he has the experience and the expertise to render this type of opinion on what is quantifiable in damages and what is not. He has no expertise to offer in market forecasting or damages assessment. He also makes assertions for which he provides no real factual basis. For example, how does Mr. Tierney know that doctors will blame TearLab? Experts are required to provide a factual basis for their assertions. Mr. Tierney simply asks the Court to accept that his "decades of experience" will suffice, but this is not decades of experience in market forecasting and damage assessment. We are not told what he has done to ensure that there is no model, and he gives no evidence that he knows anything about market forecasting and damage assessment. He provides no curriculum vitae.

[40] Dr. Jackson is a practising ophthalmologist who was also asked:

> …to provide my opinion on what will happen in the Canadian Market if I-Med is allowed to market their I-Pen and associated disposable sample chips pending a trial in this patent infringement proceeding and then after trial an injunction issues preventing I-Med from selling its I-Pen and preventing optometrists with further supplies of disposable sample chips.

Once again, this is not the issue before me in this interim motion.

[41] Also, Dr. Jackson's opinions are speculative and he nowhere speaks to quantification issues, in which he obviously has no experience. Dr. Jackson's evidence is of no real assistance

to the Court on the issue of irreparable harm, which is why, I presume, TearLab asked the Court to rely upon the evidence of Mr. Tierney for this issue.

[42] The evidence of Mr. Berg (TearLab's Vice President of Regulatory) provides nothing that is relevant to the irreparable harm issue before me, and the evidence of Mr. Smith (Vice President of International Markets for TearLab) tells the Court the i-Pen system of the Defendant is already having an impact on the TearLab system in Canada, but he says nothing (even if he was qualified to do so) about quantification issues relevant to this interim motion.

[43] I summarized the test for irreparable harm in *Aventis Pharma S.A. v Novopharm Ltd*, 2005 FC 815 at paras 59-61 and 113 [*Aventis*]:

> [59] As Mr. Justice Kelen pointed out in *Pfizer Ireland Pharmaceuticals*, at para. 25, it is well established in the jurisprudence that an interlocutory or interim injunction should only be granted in cases where there is clear evidence of irreparable harm. The Plaintiffs must adduce "clear and not speculative" evidence that irreparable harm *will* follow the entry of Novopharm's Novo-enoxaparin into the market.
>
> [60] It is also well understood that irreparable harm refers to the nature of the harm suffered rather than its magnitude. As the Supreme Court of Canada pointed out in *RJR-MacDonald*, it is "harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other." (p. 341)
>
> [61] Furthermore, difficulty in precisely calculating damages does not constitute irreparable harm, provided there is some reasonably accurate way of measuring those damages. See *Merck & Co. v. Nu-Pharm Inc* (2000), 4 C.P.R. (4th) 464 at 476 para. 32 (F.C.T.D.).
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> …
>
> [113] A review of the allegations and evidence put forward by the Plaintiffs for irreparable harm suggests that there is insufficient

> clear evidence that irreparable harm will occur if the injunction is not issued. For the most, the suggestions as to how irreparable harm could occur lack elucidation and remain unsubstantiated, speculative and theoretical. In face of the information that the Plaintiffs have chosen not to provide, and their general approach to problematizing the damages issue rather than providing clear evidence of unquantifiable harm and loss, Ms. Loomer asserts that none of the categories of loss claimed by the Plaintiffs are beyond the realm of quantification "or are other than ordinary components of the standard exercise undertaken by the Courts." Consequently, there is no adequate basis to warrant an injunction.

[44] The same problems arise in the present motion. The Court cannot infer irreparable harm for the interim period from the unsupported allegations of corporate and/or unqualified witnesses who are not in a position to address the quantification issue.

[45] On the other hand, the Defendant has provided direct evidence on this issue from Dr. Rosenblatt who seems to me well qualified to express an opinion on whether TearLab will suffer irreparable harm if I refuse the injunction and, in particular, on the quantification problems raised by TearLab. Dr. Rosenblatt explains how and why the damages feared by TearLab are quantifiable. Dr. Rosenblatt's evidence is the best evidence before me on this issue.

[46] TearLab raises several objections to that evidence. First of all, TearLab says that Dr. Rosenblatt's experience and expertise reside in the pharmaceutical industry and he does not have the wherewithal to provide expertise in this context where we are dealing with a medical device that is marketed in the particular way that TearLab markets its system. But although Dr. Rosenblatt does have experience with pharmaceuticals, he clearly establishes that he is "an expert in marketing, in general, and marketing and forecasting in the pharmaceutical and health industry…." None of TearLab's affiants have this kind of expertise.

[47] TearLab also says that Dr. Rosenblatt makes speculative assertions and provides no basis for his opinions and conclusions. For reasons that are not before me, Dr. Rosenblatt was not cross-examined on his affidavit. It may well be that Dr. Rosenblatt's evidence could be challenged, but any problems that arise from his evidence do not cure the problems with TearLab's evidence. Problems with Dr. Rosenblatt's evidence do not make Mr. Tierney into an expert on marketing and forecasting who can provide the Court with the clear and convincing evidence it needs that any losses TearLab might suffer cannot be quantified and recoverable as damages. See *Aventis,* above, at paras 59-61.

[48] Consequently, I have to conclude that TearLab has not established irreparable harm if an interim injunction is refused. This means that, under the conjunctive, tri-partite test established in *RJR MacDonald*, above, the Court cannot intervene at this stage.

[49] Both parties have requested that the Court not deal with costs until after the interlocutory decision is decided.

ORDER

THIS COURT ORDERS that

1. The motion is dismissed.
2. The parties may address the Court on the issue of costs after the interlocutory decision is made and should do so, initially at least, in writing.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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