Federal Court Cour fédérale

Date: 20170120

Docket: T-2105-16

Citation: 2017 FC 76

Ottawa, Ontario, January 20, 2017

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

UNILIN BEHEER B.V. AND FLOORING INDUSTRIES LIMITED, SARL

Plaintiffs

and

TRIFOREST INC., JUNWU ZHANG ZAIRONG FENG, CONGYU ZHANG AND MOLSON INTERNATIONAL TRADING INC.

Defendants

PUBLIC ORDER AND REASONS

I. Overview

[1] By an amended notice of motion dated December 28, 2016, the Plaintiffs Unilin Beheer B.V. [Unilin] and Flooring Industries Limited, Sarl [FIL] request three remedies from this Court. First, they apply for a review of the execution of the *ex parte* Mareva injunction order [the

Mareva Injunction Order] issued by Mr. Justice LeBlanc on December 19, 2016 against the Defendants Triforest Inc. [Triforest], Mr. Junwu Zhang, Ms. Zairong Feng and Ms. Congyu Zhang [collectively, the Triforest Defendants], and a declaration that this Mareva Injunction Order was lawfully executed. Second, they seek to convert this Mareva Injunction Order into an interlocutory Mareva injunction pursuant to Rule 373 of the *Federal Courts Rules*, SOR/98-106. Third, they want to obtain an interlocutory injunction order against the Triforest Defendants as well as the Defendant Molson International Trading Inc. [Molson] pursuant to Rule 373 or, in the alternative and as the Defendants may elect, an order to deposit into Court. The three aspects of the Plaintiffs' motion are collectively referred to as the Review Motion in this judgment.

[2] The Plaintiffs claim that the Defendants are infringing certain patents they hold with respect to laminate flooring products. Laminate flooring is a multi-layer wood-based flooring product and generally consists of multiple panels that are coupled together to cover a floor surface.

[3] The Plaintiffs contend that an interlocutory Mareva injunction order should be issued by this Court against the Triforest Defendants as there is genuine risk that the Triforest Defendants would remove their liquid assets from Canada or dissipate them to render ineffective any judgment of this Court. The Plaintiffs further submit that the Court should also issue an interlocutory injunction order against all Defendants to prevent them from continuing to manufacture, use, sell or import into Canada their laminate flooring products until the questions of patent infringement and validity are finally determined by this Court on the main action.

[4] The Defendants respond that the Court should dismiss the Plaintiffs' request on the execution of the Mareva Injunction Order as the Order was improperly obtained and is impossible to properly enforce. The Defendants further submit that the Plaintiffs have failed to establish the existence of a real risk that the Triforest Defendants have or will expatriate or dissipate financial resources, let alone outside the normal course of business and for the purpose of avoiding the possibility of a judgment. Finally, the Defendants argue that the Court should not issue an interlocutory injunction to restrain them from manufacturing, using, selling or importing into Canada laminate flooring products that purportedly infringe the Plaintiffs' patents as the Plaintiffs have failed to establish irreparable harm that cannot be compensated financially.

[5] There are three issues to be decided on this Review Motion:

A. Was the Mareva Injunction Order lawfully executed?

B. Should the Mareva Injunction Order be converted into an interlocutory Mareva injunction order?

C. Should the interlocutory injunction order sought by the Plaintiffs be granted?

[6] For the reasons that follow, the Plaintiffs' Review Motion is granted in part. I conclude that the Mareva Injunction Order was lawfully executed in accordance with its terms and followed the applicable procedural rules. However, I am not persuaded that the elements required to issue an interlocutory Mareva injunction order are satisfied. This is because the evidence obtained and provided by the Plaintiffs is not sufficient to demonstrate, on a balance of probabilities, that there is a real risk of removal or dissipation of assets in order to frustrate judgment. I am also not satisfied that the tripartite test set forth in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald*] for the issuance of interlocutory

injunctions is met, as the Plaintiffs have notably failed to provide the required clear and non-speculative evidence to demonstrate, on a balance of probabilities, that they will suffer irreparable harm if the injunction is not granted.

II. Background

A. *The parties*

[7] The Plaintiffs Unilin and FIL are sister companies that are part of the Unilin Group. Unilin is a Netherlands-based company and FIL is a Luxembourg company. The Unilin Group regroups companies that are leading manufacturers of a variety of products in the building materials industry, including laminate flooring products.

[8] Traditionally, laminate flooring was installed by coupling panels with each other using a simple tongue and groove joint secured by an adhesive such as glue. The Unilin Group then developed a revolutionary technology for joining panels of laminate floor products without the use of an adhesive [the Glueless Locking Technology], and launched it in the market in 1997. The Glueless Locking Technology involves shaping the profiles of the tongue and groove of the flooring panels such that they are "locked" when coupled together. The tongue and groove of the flooring panels can be coupled together by rotation or lateral displacement. The Glueless Locking Technology is protected throughout the world by a vast portfolio of patents held by the Unilin Group.

[9] Unilin owns the patent rights relating to the Glueless Locking Technology and FIL is responsible for the licensing and enforcement of the Unilin Group's patent rights. The Plaintiffs do not manufacture or sell directly laminate flooring products in Canada but they are present in the Canadian market through importers of their licensed products.

[10] The Defendant Triforest is a Canadian importer, distributor and retailer of laminate flooring products. Triforest operates three stores in Canada, one in Markham, Ontario and two in the Vancouver area in British Columbia. It has a total of 20 employees. Triforest sells its laminate flooring products to retailers in association with at least the trademarks TOUCAN and TOUCAN FOREST PRODUCTS, and the retailers in turn resell them to Canadian customers. The laminate flooring products currently sold by Triforest are not licensed by the Plaintiffs [the Unlicensed Products].

[11] The three individual Defendants are all directors of Triforest. They are members of the same family, Mr. Zhang and Ms. Feng being husband and wife and Ms. Zhang being their daughter.

[12] The Unlicensed Products imported by Triforest are manufactured by at least two companies located in China, namely Chuzhou Runlin Wood Industry Co Ltd [Runlin] and Shenglang Wood Co, Ltd [Shenglang]. Triforest, Runlin, Shenglang and the three individual Defendants are also associated with a third Chinese company, Chuzhou Jiude Wood Co, Ltd [Jiude]. Shenglang was a licensee of the Unilin Group from January 2014 until March 2016, when its license was terminated due to Shenglang's inaccurate reporting of products

manufactured and sold under license, and thus of the royalties due to Unilin. Runlin and Jiude are not and have never been licensees of Unilin. Mr. Zhang, Ms. Feng and Ms. Zhang, are also the shareholders and legal representatives of the three Chinese manufacturers Runlin, Shenglang and Jiude.

[13] In other words, the three individual Defendants are involved in both Triforest's business activities in Canada and in the Chinese companies that manufacture and export the Unlicensed Products imported and distributed in Canada by Triforest.

[14] The Defendant Molson sells laminate flooring products imported into Canada by Triforest from two retail locations located in Markham, Ontario and Mississauga, Ontario. According to the Plaintiffs' investigation of publicly available information data, Molson is estimated to be the largest Canadian importer of unlicensed laminate flooring products manufactured by Runlin, after Triforest.

B. *The Plaintiffs' patents*

[15] Unilin owns a vast portfolio of patents and patent applications around the world pertaining to the Glueless Locking Technology, including Canadian Patent Nos. 2,475,076 [the 076 Patent] and 2,522,321 [the 321 Patent], directed at certain aspects of the Glueless Locking Technology [collectively, the Canadian Patents]. FIL is a licensee of the Canadian Patents, and has the right to grant sublicenses.

[16] Over the years, the Unilin Group has developed an extensive licensing program for the Glueless Locking Technology, whereby Unilin grants licenses to manufacturers around the world to manufacture and sell flooring products incorporating this technology. At present, the Unilin Group has approximately 150 active licensees for the Glueless Locking Technology and, on the basis of data available to the Plaintiffs, some 49 Canadian importers of laminate flooring products have exclusively imported Unilin's licensed products in 2016.

[17] In 2012, the Plaintiffs developed a program pursuant to which licensed manufacturers in certain countries (including China) must affix a holographic authentication label [the L2C Label] to each box of flooring products they manufacture under license from the Plaintiffs [the L2C Program]. The purpose of the L2C Program was to more easily identify Unilin's licensed products in the marketplace and more accurately trace the complete volume of products incorporating the Glueless Locking Technology manufactured by its licensees.

[18] The Unilin Group has distributed over 143 million L2C Labels to its licensees since the start of the L2C Program in April 2012. Since that time, these licensees have reported the manufacture and sale of approximately 280 million square meters of laminate flooring products. In addition, the Plaintiffs have spent time and resources enforcing their patents related to the Glueless Locking Technology throughout the world, including in Canada.

C. *History of the proceedings*

[19] Around August 2014, the Plaintiffs became aware of Triforest's alleged infringing activities. An investigation by the Plaintiffs uncovered that Triforest imported, distributed and

sold in Canada laminate flooring products manufactured by Runlin that were not licensed by the Plaintiffs, that allegedly infringe several claims of the Canadian Patents and that did not bear the L2C Label.

[20] Between September 2014 and September 2015, the Plaintiffs and their counsel wrote several letters to Triforest requesting that it cease importing and selling unlicensed laminate flooring. In October 2015, representatives of Triforest (including Ms. Feng) met with counsel for the Plaintiffs. The evidence submitted by the Plaintiffs shows that, during that meeting, it was confirmed that Triforest imported Unlicensed Products manufactured by Runlin. Ms. Feng also represented that Triforest would not be in a position to compensate the Plaintiffs for the unpaid royalties associated with the past importation and sale of the Unlicensed Products and that if Triforest were forced to do so, it would go bankrupt. Triforest also confirmed at the meeting that it would cease selling unlicensed laminate flooring products in Canada.

[21] In early 2016, the Plaintiffs learned that, despite the October 2015 meeting, Triforest had continued to import into Canada significant amounts of unlicensed laminate flooring products from Runlin. According to the Plaintiffs' investigation, as of August 2016, Triforest had imported close to one million square meters of unlicensed laminate flooring products from Runlin to Canada.

[22] Between October 2013 and April 2015, the Plaintiffs also sent letters to Molson. At first, it was to inform Molson about the L2C Program, the L2C Label and the patents held by the Unilin Group on laminate flooring products incorporating the Glueless Locking Technology.

When they learned that Molson was selling laminate flooring products manufactured by Runlin and supplied by Triforest, the Plaintiffs requested that Molson cease its importation and sale of unlicensed laminate flooring products.

[23] In May and June 2016, investigators were retained by the Plaintiffs to purchase sample flooring products sold by Triforest and Molson in Toronto and Vancouver. The vast majority of the boxes of Unlicensed Products obtained by the investigators did not bear L2C Labels. In June and July 2016, the Plaintiffs' technical expert, Dr. Joseph Loferski, proceeded to test and analyse some of the sample flooring products purchased by the investigators, in order to assess whether they infringe any of certain specific claims of the Canadian Patents. Dr. Loferski issued his opinion in October 2016 and concluded that each and every element of claims 13 to 17, 19, 20 and 21 of the 076 Patent and of claims 10, 11 and 12 of the 321 Patent were found in each of the samples of the products he had analysed.

[24] In October 2016, Mr. Olivier Soucisse, an analyst investigator, was engaged by the Plaintiffs to investigate the financial situation of the Triforest Defendants. Mr. Soucisse conducted background checks, ascertained ownership of real estate and other assets, and gathered wealth and financial information on these Defendants. Mr. Soucisse issued his report in November 2016, indicating that the Canadian assets of the Triforest Defendants included heavily leveraged real estate, as well as bank accounts for which the details and contents were unknown.

[25] On December 6, 2016, the Plaintiffs commenced an action for infringement against the Defendants and brought an *ex parte* motion for a Mareva injunction against the Triforest

Defendants. On the basis of the evidence then provided by the Plaintiffs, including affidavits from the investigators, from Dr. Loferski, from Mr. Soucisse and from a representative of FIL, Ms. Christine Walmsley-Scott, the *ex parte* motion was heard and granted by this Court on December 19, 2016. The Mareva Injunction Order was directed at Triforest, at the three individual Defendants and at various banks and financial institutions.

D. *Settlement privilege issue*

[26] The Triforest Defendants claim that the Plaintiffs improperly rely on certain documents which are the subject of settlement privilege. These documents relate to the October 2015 meeting between representatives of Triforest and counsel for the Plaintiffs, where the importation of Unlicensed Products and the alleged infringement of the Plaintiffs' Canadian Patents were discussed.

[27] I do not agree with the Triforest Defendants. It is well established that the settlement privilege requires the presence of three conditions: a litigious dispute in existence or within contemplation; a communication made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and a communication made with the purpose to attempt to effect a settlement (*Kirkbi AG v Ritvik Holdings Inc*, [2002] FCJ No 793 at para 175). However, there is an exception to the rule of settlement privilege where the communication subject to privilege is not used as evidence of liability for the conduct which is the subject of negotiations or of weak cause of action, but is used for other purposes. In those circumstances, the privilege does not bar production in Court (Sopinka, Lederman & Bryant, *The*

Law of Evidence in Canada, 4th ed, Markham: LexisNexis Canada Inc, at para 14.343; *Sabre Inc v International Air Transport Assn*, [2009] OJ No 903 at paras 20-21).

[28] This is the case here, as the Plaintiffs do not rely on the impugned documents to establish the liability of the Triforest Defendants for the alleged infringement of its Canadian Patents, but instead as evidence that Triforest were aware of the Plaintiffs' licenses and that its representatives had then indicated that they would not have the financial resources to pay the license fees on all the Unlicensed Products if they had to.

[29] These documents and the arguments relying on their content can therefore be properly considered by this Court in the context of the Plaintiffs' Review Motion.

III. Analysis

A. *Execution of the Mareva Injunction Order*

[30] The first question to be determined is whether the Mareva Injunction Order issued on December 19, 2016 was lawfully executed.

[31] The issue on this first portion of the motion brought by the Plaintiffs is to review the execution of the Mareva Injunction Order to determine if the execution was lawful and proper. This is not an appeal on the merits of the Mareva Injunction Order granted or a motion for a stay of the Order. Nor is it a motion to vary or set aside the Mareva Injunction Order pursuant to Rule 399.

[32] On the record before me, I am satisfied that, in the circumstances of this case, the Mareva Injunction Order was lawfully executed by the Plaintiffs.

(1) Mareva injunctions

[33] A Mareva injunction is a type of interlocutory injunction whereby the assets of a party are frozen so that they cannot be removed from the jurisdiction or dissipated in order to frustrate judgment. This is an exceptional form of injunction, granted on the basis that there is a genuine risk that the defendants will dissipate their assets or remove them outside of the jurisdiction prior to judgment, which would render judgment against that party useless, as there would be nothing against which to enforce it.

[34] A Mareva injunction is a most extraordinary remedy. The general rule established in *Lister & Co v Stubbs*, [1886-90] All ER 797 (CA) is that execution cannot be obtained prior to judgment and judgment cannot be obtained prior to trial (*Aetna Financial Services v Feigelman*, [1985] 1 SCR 2 [*Aetna*] at 10; *Eli Lilly Canada Inc v Novopharm Limited*, 2010 FC 241 [*Eli Lilly*] at para 15). The fundamental principle is that a litigant is not entitled to a remedy or execution against a defendant's assets before having established liability on the part of that defendant. Moreover, the Mareva injunction is typically an *ex parte* order, which puts an even higher threshold on the moving party. The granting of a Mareva injunction is therefore only available where the strict conditions for its issuance are met, and the courts should be prudent and cautious before issuing one.

[35] The test for the granting of a Mareva injunction is well-established and was first developed by Lord Denning in *Third Chandris Shipping Corporation v Unimarine SA*, [1979] 1 QB 645 (CA) [*Third Chandris*]. The requirements outlined by Lord Denning in *Third Chandris* have been cited with approval in Canada, and the Canadian courts have developed and re-articulated them in various cases (*Chitel et al v Rothbart et al* (1982), 141 DLR (3d) 268 (Ont CA) [*Chitel*] at paras 43-57; *Aetna* at 19-21; *Marine Atlantic Inc v Blyth et al* (1993), 113 DLR (4^{th}) 501 (FCA) [*Marine Atlantic*] at paras 5-10; *Eli Lilly* at paras 17-20; *Cho v Twin Cities Power-Canada*, 2012 ABCA 47 at para 5).

[36] Further to those precedents, the moving party must therefore satisfy the following test to obtain a Mareva injunction:

A. establish a *strong prima* facie case;

B. meet the five following guidelines developed in *Third Chandris* as modified and rephrased in *Chitel*:

i. make full and frank disclosure of all matters in its knowledge which are material for the judge to know;

ii. give particulars of its claim against the defendant, stating the ground of its claim and the amount thereof, and fairly stating the points made against it by the defendant;

iii. give some grounds for believing that the defendant has assets in the jurisdiction;

iv. give some grounds for believing that there is a risk of the assets being removed from jurisdiction or dissipated in order to frustrate judgment; and

v. give an undertaking in damages in case it fails in its claim or the injunction turns out to be unjustified; and

C. satisfy the regular tripartite test for an interlocutory injunction described in *RJR-MacDonald*, namely the presence of a serious issue to be tried, irreparable harm if the injunction is not granted and the balance of convenience favouring the moving party.

[37] If the moving party fails on any of these conditions, the courts should refuse the Mareva injunction.

(2) Execution of the Mareva Injunction Order

[38] The terms regarding the execution of the Mareva Injunction Order were set out in the Order.

[39] The Mareva Injunction Order required that the Plaintiffs deposit with the Court the amount of $50,000 as security for damages prior to service upon the Defendants, banks or financial institutions. The Plaintiffs did file the $50,000 deposit with the Court on December 20, 2016.

[40] The Mareva Injunction Order was then sent by facsimile and formally served on December 21 and 22, 2016 on eight banks and financial institutions (namely Bank of Montreal, CIBC, HSBC, Royal Bank of Canada, Scotiabank, TD Canada Trust [TD], Bank of China and Industrial and Commercial Bank of China [ICBC]). The Mareva Injunction Order was accompanied by a letter from counsel for the Plaintiffs, indicating what the Mareva Injunction

Order required these banks and financial institutions to accomplish. The letter notably mentioned to the banks and financial institutions that the Order was to prevent the Triforest Defendants from transferring assets (including by the payment of monies) outside of Canada.

[41] The Mareva Injunction Order was then properly served upon Triforest, Ms. Feng and Ms. Zhang on December 21, 2016, and the following day upon Mr. Zhang and Molson. The affidavits filed by the Plaintiffs in support of the Review Motion attest to that.

[42] As required, the Plaintiffs brought their motion to review the execution of the Mareva Injunction Order before the Court within 14 days of service upon all Defendants, namely on January 4, 2016, one day before the scheduled expiry of the Order. Plaintiffs' counsel also filed with the Court the written reports received from the banks and financial institutions further to the execution of the Order. There is no indication that the Plaintiffs did not compensate the banks and financial institutions for reasonable expenses they incurred in carrying the searches and freezing of assets ordered.

[43] Based on my review of the evidence, I find that the procedure followed was in accordance with the terms of the Mareva Injunction Order, that no improper execution of the Order arose and that the behaviour of the Plaintiffs and their counsel involved with the execution of the Order was irreproachable. I also do not find that the Order was obtained for an improper purpose and I observe that, at the time the Order was issued, the conditions for the issuance of the *ex parte* Mareva injunction were met to the satisfaction of the presiding judge.

[44] The Triforest Defendants claim that the Mareva Injunction Order cannot be considered as having been lawfully executed on two grounds: they contend that the Plaintiffs have failed to make a full and frank disclosure, and they complain about the fact that the banks and the financial institutions ended up freezing all banking accounts of the Triforest Defendants, thereby widely exceeding the scope of the Order.

[45] I am not convinced that these arguments raised by the Triforest Defendants reflect an unlawful execution of the Mareva Injunction Order.

[46] I agree that a party seeking an *ex parte* Mareva injunction is required to make full and frank disclosure of all material facts as the Court is asked to grant such order solely on the basis of the evidence presented by the moving party. It is indeed a well-established principle of our law that a party seeking the extraordinary relief of an *ex parte* injunction must provide a balanced and complete presentation of the facts. A fact may be material even if it is not determinative. However, I do not find that there was a lack of full and frank disclosure in the Plaintiffs' application for the Mareva Injunction Order or that they omitted or misrepresented material facts. On the contrary, I conclude that the Plaintiffs lived up to their obligations and duties imposed by the law.

[47] The Triforest Defendants essentially take exception with the Plaintiffs' reliance on the fact that they had been recently unable to pursue a similar claim for infringement against a third party, MGA Commodities Inc. [MGA], who became insolvent before the Plaintiffs could execute a judgment against it. In their submissions, the Plaintiffs expressed strong concerns that the

Triforest Defendants would imitate MGA and seek bankruptcy protection to avoid paying any amount for which they would be liable to the Plaintiffs for patent infringement. The Triforest Defendants claim that the Plaintiffs failed to disclose to the Court that there was no relationship between MGA and Triforest; that by November 2016, the financial investigations into the Triforest Defendants showed significant assets in Canada and no risk of insolvency; and that the MGA case dealt with counterfeiting of the Plaintiffs' laminate flooring products as well as allegations of copyright and trademark infringement, unlike the present proceeding limited to an alleged patent infringement.

[48] I am satisfied that the Plaintiffs made a full and frank disclosure of the MGA situation in their attempt to draw a parallel between that case and the current case. At no point did the Plaintiffs claim or suggest that there was a relationship between MGA and the Triforest Defendants. In addition, the results of the Plaintiffs' financial investigations, the existence of the real estate assets owned by the three individual Defendants and the financial situation of all Triforest Defendants were fully disclosed through the affidavit of Mr. Soucisse. Finally, the failure to specifically mention the counterfeiting aspect of the MGA case was not, in my opinion, a material element. In fact, Ms. Walmsley-Scott testified that, in her view, infringement and counterfeiting were serious problems of a similar nature for the Unilin Group. Moreover, the parallel drawn with the MGA situation was made with respect to the inability to collect payment following an infringer's insolvency rather than in relation to the features and extent of the infringement by MGA.

[49] The Triforest Defendants also complain about the fact that the Plaintiffs have been unable to properly enforce the Mareva Injunction Order, which only permitted the prohibition of money transfers by the Triforest Defendants to recipients outside of Canada. Instead, the banks and financial institutions have completely frozen the bank accounts and credit cards of the Triforest Defendants, preventing them from depositing or withdrawing any funds in the normal course of their livelihoods or business.

[50] The Plaintiffs acknowledge that the financial assets of the Triforest Defendants have been completely frozen, that this was not the remedy contemplated by the Mareva Injunction Order, and that this went beyond the scope of the terms of the Mareva Injunction Order. The banks and financial institutions that were served with the Mareva Injunction Order indicated to Plaintiffs' counsel that it was not possible for them to limit their application of the Mareva Injunction Order to its scope as issued. The evidence before me and the representations made by counsel at the hearing, however, indicate that, as soon as this became known to the Plaintiffs, their counsel had discussions with the banks and the financial institutions to find a solution, which proved difficult to do during the Christmas holiday period.

[51] While this might have raised an issue with respect to the enforceability of the Mareva Injunction Order and might have provided grounds to the Triforest Defendants to vary the Order or to set it aside, I am not ready to find that this constitutes an unlawful or improper execution of the Order by the Plaintiffs or its representatives. I note that, in the interim order issued with the consent of the Triforest Defendants on January 5, 2017, to remain valid until the issuance of this judgment, the terms that the banks and financial institutions had found impossible to implement

have been modified and that the banking accounts of the Triforest Defendants are no longer frozen.

(3) Conclusion on the review of the Order

[52] For the above reasons, I am thus of the view that the execution of the Mareva Injunction Order was carried out lawfully by the Plaintiffs. The Plaintiffs are therefore authorized to withdraw the deposit of $50,000 they had filed with the Court on December 20, 2016.

B. *Interlocutory Mareva injunction*

[53] The second issue to be determined is whether the Mareva Injunction Order should be converted into an interlocutory Mareva injunction order. To succeed, the Plaintiffs have to demonstrate that all the components of the test for the issuance of Mareva injunctions remain satisfied further to the evidence obtained from the execution of the Mareva Injunction Order and the receipt of the response materials filed by the Triforest Defendants.

[54] I have reviewed the voluminous evidence obtained by the Plaintiffs from the four banks and financial institutions that provided banking accounts information on the Triforest Defendants, as well as the evidence tendered by the Triforest Defendants through the affidavits of Mr. Steve Wang, accountant for Triforest, and Ms. Zhang. The Plaintiffs' evidence is contained in the various affidavits of Ms. Julie Morin and of Ms. Van Khai Luong containing the letters and reports from the banks and financial institutions, and in the extracts of the Triforest Defendants' bank statements and passports prepared by Plaintiffs' counsel for the hearing before

this Court. On the evidentiary record before me, I am not satisfied that there is clear and convincing evidence allowing me to conclude that a remedy as exceptional and extraordinary as an interlocutory Mareva injunction should be issued in this case. More specifically, I do not find that there is evidence supporting, on a balance of probabilities, a real risk that the Triforest Defendants would remove their assets from Canada or dissipate them outside of normal and lawful course of business, for the purpose of avoiding or rendering ineffective a judgment that the Plaintiffs may obtain on their claim of infringement. The evidence uncovered through the execution of the Mareva Injunction Order simply does not confirm the risk anticipated and feared by the Plaintiffs when the *ex parte* Order was issued.

[55] This "genuine risk" factor contained in the five *Third Chandris / Chitel* guidelines is the "overriding consideration" for the issuance of a Mareva injunction (*Aetna* at 24), and I conclude that the Plaintiffs do not satisfy it. As this is sufficient to refuse the interlocutory Mareva injunction, there is no need to consider the other factors and conditions prescribed by the jurisprudence on Mareva injunctions.

(1) Strong *prima facie* case

[56] That said, since the parties and their respective counsel spent a fair portion of their written and oral submissions on the issue of the "strong *prima facie* case" of infringement, and in anticipation of the discussion below on the *RJR-MacDonald* test, I will make the following remarks on this point.

[57] The Triforest Defendants dispute the assertion that the Plaintiffs have a strong *prima facie* case against them. They raise four arguments in support of their position. The Triforest Defendants first assert that the infringement analysis of Dr. Loferski is flawed because he did not measure the density of the core in the Unlicensed Products, whereas claims in each of the 076 Patent and the 321 Patent require that the product be made with HDF or MDF. The Triforest Defendants also contend that claim 10 of the 321 Patent requires "elastic deformation of the groove" and that Dr. Loferski admitted that the lower lip of the Triforest products deformed, not the groove. They further submit that the 076 Patent and the 321 Patent are invalid on the basis of various grounds including overbreadth, claim ambiguity, indefiniteness, anticipation by other patents and lack of utility. Finally, the Triforest Defendants have provided decisions issued in other countries where Unilin Group's patents apparently corresponding to the Canadian Patents have been found invalid, and where the corresponding European patents had their claims narrowed.

[58] For the following reasons, I am not satisfied that the Triforest Defendants have provided clear and convincing evidence disputing the validity of the 076 Patent and the 321 Patent, to the point where the statutory presumption of validity has been displaced and where the Plaintiffs' case no longer falls within the range of a strong *prima facie* case of infringement. The Triforest Defendants may have laid the ground for some arguable points on the merits of the Plaintiffs' case of patent infringement, a matter to be decided at trial. However, at this stage, I find that the evidence adduced by the Plaintiffs provides answers to the various arguments raised by the Triforest Defendants against the validity of the Canadian Patents, sufficient to satisfy me that the Plaintiffs have demonstrated a strong *prima facie* case.

[59] I pause to note that counsel for the Triforest Defendants opposes the production of the second supplemental affidavit of Ms. Luong filed on behalf of the Plaintiffs, which contains responding evidence on the issue of prior art documents submitted to the Canadian Patent Office in 2006, during the prosecution of the Canadian Patents. I do not agree. I am instead satisfied that this affidavit can be admitted as it is relevant and is assisting the Court on an issue raised by the Triforest Defendants in their response and discussed at length in the cross-examination of Ms. Walmsley-Scott. I am also of the view that it causes no undue prejudice to the Triforest Defendants and that it serves the interests of justice to have it on the record (*Atlantic Engraving Ltd v Lapointe Rosenstein* (2002), 23 CPR (4th) 5 (FCA) at paras 8-9).

[60] Turning to the Triforest Defendants' arguments, I am not persuaded that the cross-examination of Dr. Loferski allows to conclude that, since the density of the core in Triforest's Unlicensed Products was not measured, it was not possible for Dr. Loferski to conclude that these products infringed the identified claims of the Canadian Patents. Dr. Loferski stated in his evidence that he was able to confirm that the Triforest Unlicensed Products were made of HDF and MDF, and there is evidence showing that Triforest explicitly advertises that its products are made of HDF. Similarly, on the elastic deformation of the groove, I agree with the Plaintiffs that there is evidence showing that Dr. Loferski equates the groove with the lower lip.

[61] As to the decisions arising from the other jurisdictions, I am not persuaded that they erode the strong *prima facie* case of the Plaintiffs. Despite certain challenges in Europe, the Plaintiffs' patents have remained valid and have been slightly modified further to those decisions, prior to the Canadian Patents being issued. These decisions, in my view, are not

sufficient to question the validity of the Canadian Patents. Patent law varies between jurisdictions and the scope of the claims and of the monopolies granted to the Plaintiffs' various patents related to the Glueless Locking Technology will therefore differ from one country to the other. Absent any expert evidence challenging the validity of the Canadian Patents, I do not find that the decisions issued in the UK, France and the Netherlands pertaining to patents owned by the Unilin Group in these jurisdictions, as well as the two pieces of prior art cited by the Triforest Defendants, are sufficient to dispute, cast doubt or challenge the deemed validity of the Plaintiffs' Canadian Patents.

[62] More specifically, the evidence shows that the relevant UK patent was declared valid following an amendment, and a corresponding European patent was also found valid following opposition proceedings. Similarly, in France, there was consent to the reversal of the French decision invalidating certain claims of a European patent, following a parallel opposition to the same patent decided in the Plaintiffs' favour after the issuance of the French decision. As to the decision in the Netherlands, I agree with the Plaintiffs that it is of no relevance, as it pertains to a patent directed at an invention different from the inventions covered by the Canadian Patents. Finally, the Plaintiffs point out that the pieces of prior art raised by the Triforest Defendants were submitted and considered by the Canadian patent authorities prior to the issuance of the Canadian Patents.

[63] I am therefore of the view that the Plaintiffs have demonstrated a strong *prima facie* case of infringement against the Triforest Defendants. A strong *prima facie* case requires more than an arguable case; it implies that the moving party has a high chance of success on the merits. In

this case, the Plaintiffs own the rights in the 076 and 321 Patents, including the exclusive right, privilege and liberty of making, constructing, using and selling to others to be used, the inventions as claimed therein. This was confirmed in the affidavits of Ms. Walmsley-Scott and Dr. Loferski. There is an initial presumption of validity. The Canadian Patents are in force since 1997, and their validity has never been challenged in Canada. Furthermore, the expert evidence of Dr. Loferski demonstrates that the Unlicensed Products imported and sold by the Triforest Defendants incorporate all of the elements of many claims of the 076 Patent and 321 Patent and infringe upon the Plaintiffs' exclusive patent rights. The evidentiary record also satisfies me that the Triforest Defendants sell and distribute Unlicensed Products that may infringe upon the 076 and 321 Patents and do not bear any L2C Label. The Plaintiffs' investigations further show that the Defendants hold a significant inventory of Unlicensed Products. All of this evidence points to a high chance of success for the Plaintiffs in their action for infringement.

[64] The Triforest Defendants claim that statutory presumption alone is not sufficient to establish a *prima facie* case required to support an interlocutory injunction when affidavit evidence is offered disputing the validity of the patent, relying on *Teledyne Industries Inc et al v Lido Industrial Products Ltd* (1977), 33 CPR (2d) 270 at 276 [*Teledyne*]. However, *Teledyne* was a case where expert affidavit evidence from a patent agent had been offered to dispute the validity and infringement of the patent. In addition, this was a case where the patent was of recent origin and its validity had never been established. This is not the situation here. On the contrary, the Triforest Defendants did not submit any expert affidavit evidence challenging the validity of the Plaintiffs' Canadian Patents.

[65] Accordingly, I am satisfied that the Plaintiffs have made out a strong *prima facie* case of patent infringement against all Defendants.

(2) Real risks of removal or dissipation of assets

[66] The problem with the Plaintiffs' motion for an interlocutory Mareva injunction is the requirement of a real risk of removal or dissipation of assets by the Triforest Defendants.

[67] The Plaintiffs claim that the banking information received further to the execution of the Mareva Injunction Order confirms that the Triforest Defendants have liquid assets in Canada, and that they frequently and easily transfer large sums of money in and out of their Canadian bank accounts, to and from unknown destinations. On the basis of these banking patterns and of the Triforest Defendants' commercial activities in China, the Plaintiffs submit that there is no question that the conversion of the Mareva Injunction Order into an interlocutory Mareva injunction order is necessary to ensure that any final judgment of this Court will be effective and enforceable.

[68] I disagree. Despite the able representations made by counsel for the Plaintiffs, I am not persuaded that, with the evidence uncovered by the Plaintiffs and the evidence filed by the Triforest Defendants on this Review Motion, the demanding test for the issuance of an interlocutory Mareva injunction is now met.

(a) *The Chitel test*

[69] True, the real risk of assets being removed from the jurisdiction or dissipated by the defendant to avoid the possibility of judgment is only one of the five *Third Chandris / Chitel* factors and it may be that the Plaintiffs satisfy many of the other conditions. However, this "genuine risk" factor is the overriding consideration for granting a Mareva injunction (*Aetna* at 24). Evidence of a threat to arrange assets to as to defeat judgment and "for the purpose of avoiding judgment" is key (*Marine Atlantic* at para 9).

[70] On this point, it is worth citing the exact test I must apply, as set out in *Chitel* at para 57. It reads as follows:

> The applicant must persuade the Court by his material that the defendant is removing or there is a real risk that he is about to remove his assets from the jurisdiction to avoid the possibility of a judgment, or that the defendant is otherwise dissipating or disposing of his assets, in a manner clearly distinct from his usual or ordinary course of business or living, so as to render the possibility of future tracing of assets remote, if not impossible in fact or in law.

[71] The Plaintiffs therefore had to provide clear and convincing evidence that, on a balance of probabilities, 1) the Triforest Defendants are removing or there is a real risk that they are about to remove their assets from Canada or are otherwise dissipating or disposing of their assets, 2) they do this in a manner clearly distinct from their usual or ordinary course of business or living, 3) so as to render the possibility of future tracing of the assets remote, if not impossible, or for the purpose of avoiding the possibility of judgment.

[72] The burden is on the moving party to prove each of those three elements. Only where all those criteria are met can a Mareva injunction prevent the impugned behaviour. It would

therefore not be enough to provide evidence that the defendant is having financial difficulties or that the defendant will probably remove its assets from the jurisdiction, if there is no evidence to suggest that the defendant also has a purpose to defeat or frustrate a potential judgment. If the assets are not dissipated for the purpose to avoid judgment, or if transfers are carried out in the normal course of a defendant's affairs, then the moving party, like all others with claims against the defendant, must run the risk that the defendant may dissipate its assets or consume them in discharging other liabilities and so leave nothing with which to satisfy a judgment.

[73] I pause to underline that, as the Supreme Court stated in *FH v McDougall*, 2008 SCC 53 [*McDougall*], there is only one standard of proof in civil cases in Canada, and that is proof on a balance of probabilities (*McDougall* at para 46). In that decision, Mr. Justice Rothstein, for a unanimous court, said that "it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case" and that the only legal rule in all cases is that "evidence must be scrutinized with care by the trial judge" to determine whether it is more likely than not that an alleged event occurred or is likely to occur (*McDougall* at para 45). Evidence "must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (*McDougall* at para 46). This, evidently, applies to the type of evidence needed for a Mareva injunction.

[74] I agree with the Plaintiffs that, in determining whether there is a genuine risk that a defendant removes its assets from Canada or dissipates them, the courts must consider all of the relevant circumstances, including the nature of the conduct alleged and the type of assets involved (*Caisse populaire Laurier d'Ottawa Ltee v Guertin*, [1983] OJ No 2221 (Ont HC)

[*Laurier*] at para 17; *Insurance Corp. of British Columbia v Patko*, 2008 BCCA 65 at para 29). But in the end, what needs to be assessed is "whether in all of those circumstances the assets will be dealt with in a manner that will serve to hamper or defeat the plaintiff's attempts to realize on any judgment they might obtain" (*Laurier* at para 17).

[75] A motion like this one ultimately turns on its facts. And, when all of the circumstances are considered, the evidence adduced in this case fails to convince me that, on a balance of probabilities, the three components of the test set out in *Chitel* are met. What the Plaintiffs more specifically overlooked here are two fundamental elements of the test: acting out of the ordinary course of business, and a purpose or intent to evade legitimate execution and enforcement of a potential adverse decision.

(b) *The evidence*

[76] I find that the evidence on the record before me shows that:

A. Neither Triforest nor the three individual Defendants are currently insolvent or face financial difficulties;

B. The Triforest Defendants own [REDACTED] real estate assets in Canada, [REDACTED];

C. Before the expiration of the Mareva Injunction Order on January 5, 2016, four financial institutions confirmed that they did not locate any account in the name of the Triforest Defendants. Counsel for the Plaintiffs however received information and transaction history pertaining to certain banking accounts that the Triforest Defendants hold [REDACTED];

D. The deposit and withdrawal patterns in the various banking accounts of the Triforest Defendants date back to 2013 and 2104 (and sometimes to 2011 and 2012) for the majority of their banking accounts;

E. The majority of the evidence singled out by the Plaintiffs in their extracts provided to the Court relate to 2012, 2013, 2014 and 2015. More limited evidence has been provided for 2016;

F. The travel evidence regarding the three individual Defendants, adduced to reflect the correlation between banking withdrawals and travel abroad to China, essentially date back to 2012 and 2014, with only one single instance in 2016;

G. The banking accounts of the Triforest Defendants generally contain vague and general entries [REDACTED], not allowing to know the source or the destination of the money transfers;

H. The [REDACTED] banking accounts report regular transfers to [REDACTED] institutions offering various cross-border financial services including global payments solutions, foreign exchange and international transfers;

I. The evidence does not allow to confirm or corroborate whether the transfers of money [REDACTED], are transfers out of the jurisdiction;

J. The payments made to the supplier Runlin were well identified in one [REDACTED] banking account, but these explicit entries were only for one supplier and were limited to a few payments made in the first quarter of 2016;

K. Several banking accounts of Triforest and of the three individual Defendants [REDACTED] showed substantial balances in December 2016, at the time the accounts were frozen further to the Mareva Injunction Order. [REDACTED];

L. Ms. Feng has a banking account [REDACTED] showing no movement since January 2015;

M. The various [REDACTED] banking accounts of Triforest show lots of deposits and withdrawal activities, with significant balances regularly remaining in the accounts throughout the period for which the accounts have been provided.

[77] As was the case in *Eli Lilly*, I am of the view that, when considered in its totality, this evidence does not establish, on a balance of probabilities, that the Triforest Defendants are about to remove assets from Canada or that in making their various money transfers, they are acting in anything other than the ordinary and usual course of their business and livelihood. Further, there is insufficient evidence on the record to prove, on a balance of probabilities, that the Triforest Defendants are transferring these amounts for the purpose of avoiding judgment or that they would wind up their Canadian operations rather than pay a judgment awarded to the Plaintiffs.

(c) *No expatriation or dissipation of assets*

[78] On the removal of assets out of the jurisdiction or the dissipation of assets, I find no clear and convincing evidence able to support the affirmations made by the Plaintiffs. At best, the evidence is inconclusive and speculative. To use the words of Ms. Walmsley-Scott in her cross-examination, there is a belief "that because of the defendants' close ties to China that there's a significant risk that they could transfer all their assets out of Canada" (my emphasis). This is too speculative and insufficient to constitute evidence of expatriation of assets on which to base the grant of a Mareva injunction, as the removal of assets must be more than a mere possibility.

[79] I am also not persuaded, based on the record before me, that I can reasonably infer from the evidence on the transfers [REDACTED], that this is to be read as necessarily meaning transfers outside of Canada, in the absence of other corroborating evidence. I am also not ready to infer that regular [REDACTED] from a banking account, without any more detail and without any other evidence, is sufficient to demonstrate, on a balance of probabilities, the existence of a transfer outside the jurisdiction or a dissipation of assets. Stated otherwise, I cannot conclude that

it is more likely than not that the required expatriation or dissipation of assets occurred or is likely to occur.

[80] True, the transaction history of the Triforest Defendants' [REDACTED] banking accounts shows that the accounts are sometimes kept at a relatively low ongoing balance, that the Triforest Defendants frequently deposit large sums of money in their accounts, and subsequently transfer equally large sums of money out of the accounts a few days or weeks after the deposits, normally by way of withdrawal or Internet transfer. But the evidence also shows that substantial balances regularly remain in the Triforest accounts. Further, as acknowledged by the Plaintiffs in two paragraphs in their written submissions, the large deposits, withdrawals and transfers are more often than not "to and from unknown destinations".

[81] I accept that the evidence on the banking accounts of the Triforest Defendants reflects the transfer of significant withdrawals and deposits representing a large amount of money in the past few years. I understand that this may be a source of concern for the Plaintiffs. However, I do not agree that this amounts to evidence of a genuine risk of removal of assets out of Canada or of dissipation of assets.

(d) ***Transfers in the usual course of business or living***

[82] Turning to the second element of the *Chitel* test, which is the disposition of assets in a manner clearly distinct from the defendant's usual or ordinary course of business or living, the reports of the Triforest Defendants' banking accounts provided [REDACTED] show large deposits, withdrawals and transfers that have been going on for years, that clearly started prior to

the events leading to the Plaintiffs' motion, and that do not exhibit a change in behavior as a result of the Plaintiffs' correspondences, meeting with the Plaintiffs' counsel in October 2015, or the commencement of their action for infringement. The [REDACTED] bank records, in particular, show a pattern of large transfers in and out of the Triforest Defendants' banking accounts that pre-date the events in question. This evidence does not support a conclusion that these are or were transfers occurring outside of the normal course of the livelihoods and business of the Triforest Defendants, and actually supports the opposite conclusion. There is also no evidence suggesting that this course of action is fraudulent or illegal.

[83] Of course, given the vertical integration of the Triforest Defendants' operations, it is reasonable to infer that some of those transfers and withdrawals made in the normal course of business must have included money transfers to China, to the related manufacturers and suppliers of laminate flooring products, or to the three individual Defendants. Since only a few transactions with suppliers were clearly identified as such in the [REDACTED] account, it is also reasonable to infer that [REDACTED] included payments to suppliers. However, there is no evidence allowing me to conclude that these money transfers are clearly distinct from the normal course of business or living of the Triforest Defendants.

[84] The banking accounts evidence obtained by the Plaintiffs is voluminous. The problem for the Plaintiffs is that this evidence goes back to 2012, 2013 and 2014 (and sometimes to 2011), and shows a recurring pattern of deposits, withdrawals and transfers that have been occurring for years in the banking accounts of the Triforest Defendants. There is no evidence reflecting a change in the circumstances of the Triforest Defendants' livelihood, business or operations, or

any risk of the Triforest Defendants removing assets out of the usual or ordinary course of their livelihood or business in order to defeat or frustrate an eventual judgment.

[85] In her affidavit, Ms. Zhang also indicated that, for the three individual Defendants, the source of the large deposits were from accounts in China, line of credit accounts with the [REDACTED], Internet transfers from other banks accounts held by them, or loan repayments by Triforest. She stated that the large withdrawals were used for the purchase of real estate, home renovations and transfers to other bank accounts held by the individual Defendants, loans to Triforest, mortgage payments, tuition and living expenses. Turning to Mr. Wang, he has affirmed in his affidavit that Triforest regularly transfers funds from its [REDACTED] banking accounts to entities or persons located in or outside of Canada for the purpose of fulfilling its payment obligations for the normal operation of the business, including several reoccurring monthly expenses such as payroll, payments to suppliers, rental expenses and GST remittances. He testified that transfers made by Triforest from its [REDACTED] banking accounts to entities or persons located in China have been only for business-related purposes. This evidence of Ms. Zhang and of Mr. Wang was not challenged nor contradicted.

[86] On the evidentiary record before me, I therefore find that the Triforest Defendants have not changed, and do not intend to change, their usual methods of transferring their monetary assets and of running their business. I note that their laminate flooring business is active and continuing, both as manufacturers in China and importers in Canada, and that Triforest has become one of the five largest importers of laminate flooring products in Canada.

(e) *No purpose of avoiding judgment*

[87] Finally, turning to the third and last part of the *Chitel* test, I can only consider granting a Mareva injunction if I can conclude that the purpose and intention of the Triforest Defendants is to defeat any judgment that the Plaintiffs may obtain against them. Again, there is no clear and convincing evidence demonstrating, on a balance of probabilities, that the purpose of the Triforest Defendants withdrawing the funds from their accounts is not a legitimate one. The fact that these transfers might affect the Plaintiffs' ability to recover on any judgment it may obtain does not, in and of itself, justify the granting of a Mareva injunction.

[88] As was the case in *Aetna*, there is no evidence allowing me to find an improper motive behind the transfers of money by the Triforest Defendants. The evidence instead shows that the transfers reflect the history of conduct of the business and personal affairs carried out by the Triforest Defendants, and there is no sufficient basis to find a purpose on the part of the Triforest Defendants to default on their obligations, either generally or to the Plaintiffs, if such an obligation is found to exist on the merits (*Aetna* at 36).

[89] In light of the evidence before me, I do not find that, on a balance of probabilities, there is an improper purpose on the part of the Triforest Defendants in the various transfers of funds observed in their banking accounts. Nor am I persuaded that, on a balance of probabilities, the evidence unearthed with the benefit of the Mareva Injunction Order support a conclusion that there is a real risk that the Triforest Defendants will deal with their banking accounts in a manner that will interfere with or defeat the Plaintiffs' attempt to realize on any judgment they might obtain on the merits. I further observe that the Plaintiffs' investigation into the current status of the Triforest Defendants' finances showed no evidence of an intention by the Triforest

Defendants to defeat or frustrate an eventual judgment. It instead showed that the bank accounts, loans, mortgages, credit cards and leases of the Triforest Defendants were in good standing, and there was no evidence of dissipation of assets, bankruptcy, collections or judgment against them. Their respective financial situation is sound.

[90] In any event, I note that evidence that a defendant is insolvent or having financial difficulties, or the possibility that potential judgment debtors may be declared bankrupt, is not sufficient to justify a Mareva injunction (*Marine Atlantic* at para 9). There must be evidence that the disposal of assets is "for the purpose of avoiding judgment": "[t]he removal of assets from the jurisdiction by a resident defendant in the normal course of its business, without there being any suggestion of an intent to defeat or frustrate any eventual judgment recovery by the plaintiff, is not enough to support a Mareva injunction" (*Marine Atlantic* at para 9).

[91] I accept that representatives of Triforest have at least been evasive if not untruthful with Plaintiffs' counsel in October 2015, that they have tried to hide the fact that they knew the source of Triforest's Unlicensed Products, and that they then indicated they would go bankrupt if they had to pay royalties to the Plaintiffs for all their past importations of Unlicensed Products. For the Plaintiffs, the October 2015 report from their counsel on the meeting with Triforest is a key document. I acknowledge that, on the basis of this document, there may have been some dishonesty on the part of the Triforest Defendants at the time. However, considering all the circumstances and all the evidence before me, I do not find that this October 2015 statement is enough to tip the balance in favour of the Plaintiffs on the interlocutory Mareva injunction, and

to conclude that the transfers of money the Triforest Defendants have been doing for years are for the purpose of avoiding judgment.

[92] Looking at the matter with the added benefit of the results from the execution of the Mareva Injunction Order, it is my view that the significance of the October 2015 statement has atrophied with the passage of time and with the dissonance observed between its contents and the more recent evidence on the sound financial situation of the Triforest Defendants.

[93] One other point is worth mentioning. The evidence shows that the Triforest Defendants have ties to Canada. The three individual Defendants became permanent Canadian residents in March 2012, have lived in Canada since then, and own real estate assets in the country, [REDACTED]. Triforest operates three stores in Canada with 20 employees. Triforest has an on-going business as one the five largest imports of laminate flooring products in Canada, perhaps, I acknowledge, due to the benefit of Unlicensed Products that could be infringing on the Canadian Patents of the Plaintiffs. This is not reflective of a situation where defendants are about to flee the jurisdiction or dissipate assets in order to avoid a judgment against them.

[94] In other words, when all the evidence on the record is considered, I am not persuaded that it is now sufficient to meet the third dimension of the *Chitel* test and to support the issuance of the interlocutory Mareva injunction now sought by the Plaintiffs. The evidence uncovered through the execution of the Mareva Injunction Order does not confirm the significance of the risk identified to obtain the initial Order.

(3) Conclusion on the interlocutory Mareva injunction

[95] For the above reasons, I am unable to conclude, based on all the circumstances of this case and on a balance of probabilities, that there is real risk of removal of assets from the jurisdiction before a judgment could be obtained by the Plaintiffs, or that assets would be dissipated by the Triforest Defendants so as to frustrate a judgment, outside of their normal course of business and operations. The evidence does not show that, and it does not allow me to draw such inference. Evidence that the Triforest Defendants regularly transfer large sums of money in and out of their Canadian bank accounts, to and from unknown destinations, is not enough to satisfy the stringent test established for Mareva injunctions, and to convince me that the conversion of the Mareva Injunction Order into an interlocutory Mareva injunction order is necessary to ensure that any final judgment of this Court will be effective and enforceable.

[96] I observe that, in its submissions to the Court, Triforest is prepared to undertake to produce to the Plaintiffs an accounting of past sales of its laminate flooring products in Canada for the period starting on June 1, 2014, ending on the day before the date of signing such undertaking, and to keep an accounting of current and future sales of its laminate flooring products in Canada until the disposition of this matter or until the term of the Canadian Patents, whichever comes first. I am of the view that it would be in the interests of justice to keep that undertaking in place and that an order to that effect seems just and appropriate in the circumstances.

C. *Interlocutory injunction*

[97] The third issue to be determined on this Review Motion is whether an interlocutory injunction order should be issued against all Defendants to prevent them from continuing to

manufacture, use, sell or import into Canada their unlicensed laminate flooring products until the matters raised by the action for patent infringement are finally determined by the Court. To succeed, the Plaintiffs have to demonstrate that each element of the *RJR-MacDonald* test for the issuance of interlocutory injunctions is met.

[98] For the reasons that follow, I am not persuaded that, on the record before me, the Plaintiffs have provided the required clear and non-speculative evidence to demonstrate, on a balance of probabilities, that they will suffer irreparable harm if the interlocutory injunction sought is not granted.

(1) The *RJR-MacDonald* test

[99] It is trite law that for an interlocutory injunction to be granted, the moving party must satisfy the three conditions set out in *RJR-MacDonald*. In that decision, the Supreme Court held that, to issue an order for injunctive relief, a court must first be satisfied that there is a serious issue to be tried. Second, it must determine that the applicant would suffer irreparable harm if the injunction were refused. Third, it must find that the "balance of convenience", which contemplates an assessment of which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits, favours the moving party (*RJR-MacDonald* at 334). The tripartite test is conjunctive, so all three elements have to be met in order for an injunction to be granted.

[100] In recent decisions issued in the context of stays, as opposed to interlocutory injunctions, the Federal Court of Appeal has indeed frequently reminded that all three elements of the

tripartite test have to be satisfied. Finding the existence of a serious issue does not automatically bring with it that the other two prongs of the tripartite test are satisfied. As the Federal Court of Appeal stated in *Janssen Inc v Abbvie Corporation*, 2014 FCA 112 [*Janssen*], each branch of the test adds something important and "none of the branches can be seen as an optional extra" (*Janssen* at para 19).

[101] I add that the Federal Court of Appeal has repeatedly considered that the applicable test for interlocutory injunctions is the same as the test governing the granting of stays of proceedings or of appeals (*Toronto Real Estate Board v Commissioner of Competition*, 2016 FCA 204 at para 11; *Janssen* at paras 12-17; *Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 [*Glooscap*] at para 4; *International Charity Association Network v Canada (National Revenue)*, 2008 FCA 114 at para 5). As the Federal Court of Appeal makes no distinction between the principles developed for interlocutory stays or for interlocutory injunctions, its observations on the cumulative requirement of the three elements of the *RJR-MacDonald* test are equally applicable in the context of injunctions, even though these were made in the context of stays.

[102] That said, I agree that three prongs of the interlocutory injunction test are interrelated and that the three factors should not be assessed in total isolation from one another (*University of California v I-Med Pharma Inc*, 2016 FC 350 [*I-Med Pharma I*] at para 31; *University of California v I-Med Pharma Inc*, 2016 FC 606 [*I-Med Pharma II*] at para 27, aff'd 2017 FCA 8; *Geophysical Service Incorporated v Canada-Nova-Scotia Offshore Petroleum Board*, 2014 FC

450 [*Geophysical Service*] at para 35; *Merck & Co Inc v Nu-Pharm Inc*, (2000) 4 CPR (4^{th}) 464 [*Nu-Pharm*] at para 13).

[103] In their written and oral submissions, the Plaintiffs relied on case law developing the "blatant infringement" approach to suggest that this may result in a lower irreparable harm threshold or even in an exemption from the requirement to establish irreparable harm, depending on the facts at stake. They argue that, in the circumstances of this case, the behaviour of the Triforest Defendants amounts to a blatant patent infringement, and they invite the Court to consider a more lenient approach on the issue of irreparable harm.

[104] This line of jurisprudence on "blatant infringement" must, however, be put in its proper context.

[105] First, I note that the "blatant infringement" argument has arisen in copyright cases, as opposed to patent cases. While it is well accepted that copyright infringement does not take place inadvertently, this is not necessarily the case for patent infringement given the highly technical nature of most patent claims. In fact, in one of the early cases where the notion of "blatant infringement" was introduced, Madam Justice Reed made an explicit distinction with patent cases before accepting that there was a lesser need to prove irreparable harm in "blatant" cases of copyright infringement (*International Business Corporation v Ordinateurs Spirales Inc/Spirales Computers Inc* (1984), 80 CPR (2d) 187 (FCTD) [*Spirales Computers*] at 201). She explicitly indicated that for patent cases, the threshold must be higher, and would require the usual proof of irreparable harm for interlocutory injunctions:

> In any event, I am not convinced that the degree of harm required to be proved in a case such as this, where there had been blatant copying, is as high as that required in other cases of interlocutory injunction. Counsel for the plaintiff argued that the irreparable harm test was appropriate to patents because it was easy to inadvertently infringe a patent right. Thus, the courts are slow to grant interlocutory injunctions in patent cases. He argued, however, that copying could not take place inadvertently and therefore the courts were more willing to grant interlocutory injunctions in copyright infringement actions when the copying was very clear, without requiring irreparable harm or a finding that damages would not be adequate. I accept this reasoning. It accords with my interpretation of the jurisprudence.

[106] I am not aware of cases, and counsel for the Plaintiffs did not cite any, where this notion of "blatant infringement" was used in the context of an injunctive relief sought for patent infringement. It is a concept which remains foreign to patent cases.

[107] Second, the "blatant infringement" cases can be traced back to the reasoning of Mr. Justice Nadon in *Diamant Toys Ltd v Jouets Bo-Jeux Toys Inc*, 2002 FCT 384 [*Diamant Toys*], where he adopted the Court's view in *Spirales Computers* and found that when copyright infringement is blatant, there must be a less stringent test of damages (*Diamant Toys* at para 56). However, as recently stated by Madam Justice Tremblay-Lamer in *Bell Canada v 1326030 Ontario Inc (iTVBox.net)*, 2016 FC 612 [*Bell Canada*], Mr. Justice Nadon's reasoning has subsequently been read by this Court as being restricted to those situations where there is a finding of blatant copyright infringement (*Bell Canada* at para 29; *Geophysical Service* at para 36; *Western Steel and Tube Ltd v Erickson Manufacturing Ltd*, 2009 FC 791 [*Western Steel*] at paras 11-12).

[108] Third, these "blatant infringement" cases did not go as far as suggesting or implying that no proof of irreparable harm is required in order to obtain an interlocutory injunction when there is evidence of blatant copyright infringement. In my view, they rather only hold for the proposition that a strong finding on the first prong of the tripartite injunction test in copyright cases may lower the threshold on the other two prongs, and that it may then be appropriate to consider a less severe test of potential damage than would otherwise be the case (*Western Steel* at para 12). I am not aware of injunction cases where an applicant's case was sufficiently strong, even in the copyright context, that the threshold for meeting the other two factors was set so low that no proof of irreparable harm was required. A robust case on the serious issue dimension of the *RJR-MacDonald* test does not relieve the moving party from the burden of establishing that it would suffer some irreparable harm that could not be compensated with damages (*Bell Canada* at para 29). In short, "there is no automatic conclusion that irreparable harm exists merely because the foundation of an action is an infringement of copyright or trademark or the alleged tort of passing off" (*Western Steel* at para 11).

[109] I further observe that, in cases where this issue of blatant copyright infringement was raised, the Court was nonetheless persuaded that there was some form of irreparable harm (*Bell Canada* at para 31). I mention one last point: the early cases such as *Diamant Toys* where the "blatant infringement" approach emerged were not interlocutory injunction cases but rather cases involving preservation orders, where the legal requirements are different (*Western Steel* at paras 11-12).

[110] For all those reasons, I am not convinced that the "blatant infringement" case law should guide my approach to the assessment of irreparable harm in this patent case, or that I should depart from the well-accepted principles governing the evidentiary requirements for this second element of the *RJR-MacDonald* test.

[111] In any event, even if I were to assume that there is precedent to support the proposition that irreparable harm can be satisfied by a demonstration that a defendant's allegedly infringing patented product is substantially the same as that of the plaintiff, and that the "blatant infringement" approach developed in the copyright space could be imported into the patent space, I consider that the evidence before me is inadequate and insufficient to make a determination that there is a "blatant" patent infringement in this case. A strong *prima facie* case of patent infringement does not necessarily equate to a blatant infringement. To be qualified as blatant, the infringement needs to be undeniable and unmistakable. I accept that such obviousness can arise in copyright and trademark cases, but it is much more difficult to establish in patent cases. Especially in a situation where, as is the case here, the Triforest Defendants have raised some arguments questioning the validity of the Plaintiffs' Canadian Patents, where the patents cover dozens of pages and each identify numerous claims, and where there is no explicit admission of infringement. The issue will be debated in detail at trial. While I agree that the Plaintiffs have a strong *prima facie* case of patent infringement, I am not persuaded that the evidence before me suffices, at this early stage, to qualify this case as one of "blatant infringement" by the Triforest Defendants.

(2) Serious issue

[112] The first part of the tripartite test is whether the evidence before the Court is sufficient to satisfy it that there is a serious issue to be tried. The threshold is a low one. While a preliminary assessment of the merits of the case is required, "a prolonged examination of the merits is generally neither necessary nor desirable" (*RJR-MacDonald* at 337-338). As a general rule, the question of whether a serious issue exists should be answered on the basis of no more than an "extremely limited review of the case" (*RJR-MacDonald* at 348). Once the Court determines that the underlying proceeding is "neither vexatious nor frivolous", it should proceed to the second part of the test (*RJR-MacDonald* at 337). In an interlocutory injunction, "the underlying dispute remains to be decided, and judges sitting on such matters should generally avoid wading any further into that underlying dispute than is strictly necessary to deal with the matter before them" (*Jamieson Laboratories Ltd v Reckitt Benckiser LLC*, 2015 FCA 104 at para 25).

[113] In light of my earlier finding that the Plaintiffs have demonstrated a strong *prima facie* case of patent infringement on the motion for an interlocutory Mareva injunction, I am satisfied that there is a serious issue to be tried. There is an initial presumption that the Canadian Patents of the Plaintiffs are valid and based on the facts before me, there is definitely at least an arguable case and a serious issue that the Defendants' Unlicensed Products would fall within the scope of one or more claims of the Canadian Patents. The fact that the Defendants may have an arguable case of their own to question the validity of the Canadian Patents does not mean that there is no serious issue to be tried.

[114] The first element of the *RJR-MacDonald* test is accordingly met.

(3) Irreparable harm

[115] I now turn to the second part of the tripartite test, irreparable harm.

(a) *Legal requirements*

[116] "Irreparable" refers to the nature of the harm suffered rather than its magnitude; it is harm which "either cannot be quantified in monetary terms or which cannot be cured" (*RJR-MacDonald* at 341). The threshold for establishing irreparable harm is very high. Harm does not become irreparable solely because precisely calculating damages would be difficult, as is regularly the case in patent cases (*I-Med Pharma II* at para 32; *Merck Frosst Canada Inc v Canada (Minister of Health)* (1997), 74 CPR (3d) 460 (FCTD) [*Merck Frosst Canada*] at 464; *Merck & Co v Apotex Inc*, [1993] FCJ No 1095 at para 42). Difficulty in precisely calculating damages does not constitute irreparable harm, provided there is some reasonably accurate way of quantifying and measuring those damages (*Nu-Pharm* at para 32).

[117] It is also well established that irreparable harm in the context of injunctive relief must flow from clear and non-speculative evidence which demonstrates how such harm will occur if the relief is not granted (*AstraZeneca Canada Inc v Apotex Inc*, 2011 FC 505 at para 56, aff'd 2011 FCA 211; *Aventis Pharma SA v Novopharm Ltd*, 2005 FC 815 [*Aventis Pharma*] at paras 59-61, aff'd 2005 FCA 390; *Syntex Inc v Novopharm Ltd* (1991), 36 CPR (3d) 129 (FCA) at 135). Simply finding that irreparable harm is likely is not enough; there must be evidence that the moving party will or would suffer irreparable harm if the injunction if not granted (*Centre Ice Ltd v National Hockey League at al* (1994), 53 CPR (3d) 34 (FCA) [*Centre Ice*] at 52).

[118] In *Janssen*, the Federal Court of Appeal stated that a party seeking a suspension relief must demonstrate in a detailed and concrete way that it will suffer "real, definite, unavoidable harm – not hypothetical and speculative harm – that cannot be repaired later" (*Janssen* at para 24). In that decision, Mr. Justice Stratas added that "it would be strange if vague assumptions and bald assertions, rather than detailed and specific evidence, could support the granting of such serious relief" (*Janssen* at para 24). The Federal Court of Appeal has indeed frequently insisted on the quality of evidence needed to establish irreparable harm. General assertions cannot establish irreparable harm as "[t]hey essentially prove nothing" (*Gateway City Church v Canada (National Revenue)*, 2013 FCA 126 [*Gateway Church*] at para 15). Similarly, "[a]ssumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence, carry no weight" (*Glooscap* at para 31).

[119] I cannot do better than repeat the often-cited passage from Mr. Justice Stratas in *Stoney First Nation v Shotclose*, 2011 FCA 232 [*Stoney First Nation*] at para 48:

> It is all too easy for those seeking a stay in a case like this to enumerate problems, call them serious, and then, when describing the harm that might result, to use broad, expressive terms that essentially just assert – not demonstrate to the Court's satisfaction – that the harm is irreparable.

[120] In injunctive matters, the burden is on the moving party to satisfy the court that there is "evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result" unless the injunction is granted (*Gateway Church* at para 16; *Glooscap,* at para 31; *Stoney First Nation* at para 48). Again, the requirement of having evidence "sufficiently clear, convincing and cogent to satisfy the balance of probabilities test",

set out in *McDougall*, of course also applies to the clear and non-speculative evidence needed for irreparable harm.

(b) *Plaintiffs' claims of irreparable harm*

[121] The Plaintiffs argue that, if an interlocutory injunctive relief preventing the Defendants from continuing to import and sell the Unlicensed Products is not granted, they will suffer serious and irreparable harm under a number of headings. These allegations of harm are premised on the fact that Triforest is now amongst the top five importers of laminate flooring products in Canada and that, to the Plaintiffs' knowledge, it is the largest importer of infringing laminate flooring products.

[122] The Plaintiffs' claims of irreparable harm are all contained in the affidavit of Ms. Walmsley-Scott. No other evidence has been provided by the Plaintiffs. In essence, Ms. Walmsley-Scott states that the Plaintiffs will suffer harm through 1) the loss of goodwill and reputation; 2) the loss of market share and of existing and potential customers; 3) the risk of the Defendants "springboarding" into the post-patent market; and 4) the financial inability of the Defendants to pay an eventual judgment against them.

[123] I observe that Ms. Walmsley-Scott does not cite nor provide a single document in support of her allegations of harm.

[124] Having reviewed the totality of the evidence provided by the Plaintiffs, I am not satisfied that, on a balance of probabilities, there is the required clear and non-speculative evidence to

support any of the allegations of irreparable harm. In fact, even if I were to assume that the current case could amount to a "blatant infringement" and that the lower threshold approach discussed above could be imported in the patent space, I do not find that the Plaintiffs' assertions of irreparable harm would meet these more flexible requirements.

[125] First, the various allegations of harm are not supported by detailed and specific evidence, and they thus remain in the universe of speculations. Second, the harm alleged by the Plaintiffs is all quantifiable, and no expert evidence has been provided to demonstrate that such harm is not measurable in monetary terms or that no methodology is available to calculate the Plaintiffs' alleged damages.

(c) *Speculative nature of irreparable harm*

[126] The alleged harm singled out in the affidavit of Ms. Walmsley-Scott can be regrouped under four different headings.

(i) **Loss of goodwill and reputation**

[127] The Plaintiffs first claim that if the infringement of their intellectual property rights is allowed to continue, their goodwill and reputation will be hurt. This will result from the impossibility of monitoring the Defendants' infringement, the destruction of the goodwill built between the Unilin Group and its licensees and importers of licensed products, and the incitement of other importers to trade in unlicensed products.

[128] The Plaintiffs contend that the Unilin Group will be perceived in the flooring industry as being unwilling and unable to enforce its Canadian intellectual property rights and the L2C Program, despite the significant time and resources it has spent on developing its program. Ms. Walmsley-Scott says it will become impossible to monitor and prevent the infringing activities if Triforest is not prevented from selling the Unlicensed Products, and that it is already impossible for Unilin to properly monitor the situation. The Plaintiffs also submit that the failure by the Triforest Defendants to pay royalties has impaired the ability of other licensees to fairly compete in the Canadian marketplace, thus undermining Unilin's licensing program. The Plaintiffs further allege that, if not restrained by this Court, the Defendants' ongoing infringement will incite other importers of laminate flooring products to purchase their products from unlicensed manufacturers, and new manufacturers not to seek a license from Unilin, the whole in order to avoid paying the royalties owed to Unilin for the licensing of the products incorporating the Glueless Locking Technology.

[129] Ms. Walmsley-Scott affirms that this harm cannot be measured in monetary terms.

[130] The problem is that, apart from Ms. Walmsley-Scott own self-serving assertions, there is no evidence on the various components of this chain of events. The risk of such harm is entirely speculative as these assertions are unsupported by any evidence and any degree of particularity. The record indicates that Triforest and Molson have been present in the Canadian market for over two years and that Triforest has managed to become one of the five leading importers of laminate flooring products in Canada. Yet, no particular evidence has been provided by Ms.

Walmsley-Scott or the Plaintiffs with respect to the impact of the Defendants' presence on the business of their licensees in Canada, or of the Canadian importers of their licensed products.

[131] There is no evidence on the potential negative perceptions or impossibility of monitoring. Also, no evidence from importers or from licensees has been adduced to the effect that they might have a negative view on the Plaintiffs' monitoring and enforcement of its Canadian Patents. There is no evidence of licensees having discontinued or threatening to discontinue paying royalties to Unilin if the Triforest Defendants continue to operate their business without having to pay theirs. There is also no evidence of potential or prospective licensees refraining from doing business with Unilin while awaiting the outcome of the Plaintiffs' recourses against the Triforest Defendants.

[132] This situation is quite different from the cases cited by the Plaintiffs, such as *Universal City Studios Inc v Zellers Inc* (1983), 73 CPR (2d) 1 (FCTD) at 11 or *Anne of Green Gables Licensing Authority Inc v Avonlea Traditions Inc* (2000), 6 CPR (4^{th}) 57 (Ont CA) at para 16, where some supporting evidence from license users had been provided on the issue of loss of goodwill and reputation.

[133] Similarly, there is no evidence to substantiate the so-called floodgates argument advanced by the Plaintiffs, as no particulars or examples (expect for the statements made by Ms. Walmsley-Scott) have been provided showing that other manufacturers or importers have been or could be encouraged to engage in the infringing activities, resulting in a "death by 1000 cuts" to the Unlin Group's licensing and L2C Program (*Spirales Computers* at 199-200).

[134] The Plaintiffs bear the onus of providing the clear and convincing evidence of irreparable harm to their goodwill and reputation, but their evidence on this issue boils down to hypotheticals and speculations. No witness and no document lend any support for the assertions made on this claim of reputational damage. I must therefore conclude that the Plaintiffs have not established a basis for this heading of irreparable harm.

[135] In addition, I am also not persuaded that the evidence supports the allegation that it has been or will become impossible for the Plaintiffs to monitor and prevent infringing activities if the injunction is not granted. I instead note that the Plaintiffs' own evidence shows that they have been somewhat actively protecting and enforcing their patents relating to the Glueless Locking Technology, including the Canadian Patents. The Plaintiffs have sent over 200 letters to potential importers operating in Canada to notify them regarding the LC2 Program and to flag the issue of potential infringement of their intellectual property rights on laminate flooring products. The evidence also indicates that the Plaintiffs keep track of sales of unlicensed products in Canada. Finally, they have taken action and initiated a few lawsuits against various alleged infringers, including recently against MGA. This behaviour is not reflective of a patent owner unable to monitor and enforce its intellectual property rights, or shackled in its efforts to do so.

(ii) Loss of market share and of existing and potential customers

[136] The Plaintiffs also claim that the infringing activities of the Defendants will allow them to gain market share at the expense of Unilin's licensees, because unlicensed flooring products are sold by manufacturers at lower prices than licensed products since no royalties are paid. This will also result in manufacturers and importers being encouraged to sell unlicensed products at a

lower cost, and in a loss of actual or potential customers for the Plaintiffs. The Plaintiffs further contend that, if the Defendants are permitted to maintain their infringing activities, they will be able to continue to unfairly compete with competitors selling licensed laminate flooring products in Canada, including Unilin and customers of Unilin's licensees, by either charging lower prices for their products and/or using the larger profits to invest in other activities to increase sales.

[137] This, repeats Ms. Walmsley-Scott, cannot be estimated or measured in monetary terms either.

[138] Again, the evidence provided only shows general and speculative assertions about loss of market share, without any particularity. This, as the Federal Court of Appeal frequently reminded, is insufficient to meet the high threshold of irreparable harm.

[139] There is no evidence of new manufacturers refraining from seeking a license from Unilin in order to avoid paying royalties, or threatening to do so. Let alone evidence of such behaviour being triggered by the infringing activities of the Defendants. There is no evidence of Unilin licensees having terminated or threatening to terminate their licensing arrangements, of licensees or importers having lowered or threatening to lower prices for their licensed products. There is no evidence of lost sales or threat by importers to purchase cheaper, unlicensed imported products. There is no evidence of other manufacturers being tempted or encouraged to sell unlicensed products at a lower cost, or of Unilin's licensees losing actual or potential customers to unlicensed manufacturers. There is not even evidence of Triforest' Unlicensed Products being sold at prices lower or with larger profits than the Unilin licensed products because of the alleged

monetary benefit gained from the failure to pay royalties. Not a single sales report, example of lost business, testimony of licensee or of importer has been offered to support the allegations made by Ms. Walmsley-Scott.

[140] In that context, to suggest that there could be irreparable harm in the form of lost sales or lost customers in the period leading to the hearing on the merits is entirely speculative. The unsubstantiated affirmations of Ms. Walmsley-Scott cannot base a finding of irreparable harm. In fact, at one point, Ms. Walmsley-Scott even says that, since it is difficult to get back a customer's business once it is lost, this <u>may</u> result in some of Unilin's licensees going out of business due to an inability to compete. This falls short of the requirements established by the case law on irreparable harm.

[141] Again, despite the fact that the Plaintiffs have known about the allegedly infringing activities of the Defendants since at least August 2014 and monitored Triforest's importation activity using publicly accessible data from Datamyne, they offer no concrete evidence to support any loss of business during this period, or that other importers of laminate flooring products have purchased their products from unlicensed manufacturers.

[142] This is a case where the party seeking to enforce its patents was in the market at the same time as the alleged infringer and, as the Federal Court of Appeal reminded in *Centre Ice*, a notable absence of supporting evidence of lost business in those circumstances is fatal to a claim of irreparable harm (*Centre Ice* at 54). I would add that this Court has frequently held that this type of harm alleged to be suffered by the Plaintiffs in terms of lost market share, lost

opportunities to expand and price reductions is typically not irreparable in patent cases (*I-Med Pharma II* at paras 43-46; *Aventis Pharma* at paras 33-45; *Merck Frosst Canada* at 462).

[143] In any event, if that was to translate into an ability for the Defendants to obtain a greater market share than they would otherwise have been able to have, to the detriment of competitors who respect intellectual property rights and acquire products from licensed manufacturers, this damage would be quantifiable as it would take the form of increased sales of unlicensed products for which royalties need to be paid to Unilin.

(iii) Springboarding

[144] The Plaintiffs further raise the prospect of irreparable harm resulting from "springboarding". The "springboard" argument refers to situations where the alleged infringer has not yet entered the market but plans to do so near the end of the patent life, or where the alleged infringer actually enters the market, in order to gain an early start or position to better compete in the after-patent market. The party holding the patent thus loses a part of the market share due to a breach of its patent in anticipation of the patent's expiry (*China Ceramic Proppant Ltd v Carbo Ceramics Inc*, 2004 FCA 283 at paras 3 and 10). Springboarding thus typically refers to losses intervening after the expiry of the patent, caused by a behaviour that, however, occurred prior to the expiry (*Bayer Healthcare AG v Sandoz Canada Incorporated*, 2007 FC 352 [*Bayer*] at para 52).

[145] Given that the 076 Patent and the 321 Patent will expire in June 2017, the Plaintiffs claim that the Defendants' ongoing infringement of Unilin's patent rights until their term will provide

them with the ability to obtain a greater market share than they would otherwise have been able to secure through selling licensed products, and provide the Defendants with a "springboard" into the post-patent market (*Baker Hughes Inc v Galvanic Analytical Systems Ltd* (1991), 37 CPR (3d) 512 (FCTD) at 515; *Spirales Computers* at 199-200). That is, the advantage gained by the Triforest Defendants as a result of their premature entry into the market will continue to result in losses for Unilin in the months immediately following the expiry of the Canadian Patents, which damages, the Plaintiffs say, are not recoverable.

[146] I do not find that, in light of the evidence before me, this "springboarding" amounts to demonstrated irreparable harm to the Plaintiffs. First, it is true that Unilin's Canadian Patents are approaching the end of their term of protection but, since the Defendants are already on the market and are not new players planning a "springboard" entry, I am not convinced that there is clear and non-speculative evidence of harm in that respect in the existing market context. As indicated above, the Plaintiffs have failed to provide the required convincing and non-speculative evidence of loss of market share despite the Plaintiffs' awareness of the Triforest Defendants' activities since more than two years.

[147] Second, since the Plaintiffs are not directly present in the Canadian market except through the sales of their licensed products made by importers and the receipt of royalties, how can there be harm to the Plaintiffs in terms of lost market opportunities following the expiry of the Canadian Patents? That would be harm to the business of Unilin's licensed manufacturers or of importers of its licensed products, which would allegedly lose ground to the Triforest Defendants in the after-patent market. Only harm suffered by the moving party qualifies under

this branch of the *RJR-MacDonald* test, not that of third parties (*Glooscap* at para 33). The Plaintiffs thus cannot claim these potential losses of their importers or licensees in the post-patent market as irreparable harm of their own. In addition, this claim of potential loss remains hypothetical and suffers from the same shortcomings identified above on the lack of particularity.

[148] Third, I am also not persuaded that this type of harm cannot be measured in monetary terms for the Plaintiffs, as it will essentially translate into loss of royalty revenues until the expiry of the patent protection (*Aventis Pharma* at para 61; *Bristol Myers Squibb Co v Apotex Inc*, 2001 FCT 1086 at paras 20-21). Damages in patent cases are intended to put a successful plaintiff in the position that it would have been in, but for the infringement. It is entirely speculative to say that a party will not be able to recover damages for any losses that it may suffer in the post-patent period, as such damages can indeed be recoverable and calculable (*Bayer* at paras 56-57).

(iv) Inability to pay

[149] The Plaintiffs finally claim that, based on Unilin's prior experience in being denied proper compensation by MGA following MGA's infringement of its patent rights in Canada, there is a genuine risk that Unilin would not be able to recover the complete damages owed by the Defendants as a result of their similar infringing activities. Ms. Walmsley-Scott states that she believes "that Triforest will attempt to thwart any order of this Court through a similar scheme" (as MGA). In relation to that concern over the Defendants' inability to pay, the Plaintiffs also rely on the October 2015 events detailed above. They argue that the Triforest

Defendants have explicitly stated and shown that they had no intention to pay Unilin the royalties owed for the unlicensed laminate flooring products they had imported at the time and continue to import, and that, if Triforest were to be forced to do so, their only option would be to go bankrupt. In light of the fact that Triforest explicitly stated that it would be financially unable to pay the license fees for the unlicensed products they have imported, the Plaintiffs submit that it is absolutely reasonable to conclude that Triforest will not pay the damages they would be ordered to pay by the Court.

[150] I do not agree that this amounts to clear and non-speculative evidence of irreparable harm in the circumstances of this case.

[151] I first note that this inability to pay has not been recognized as irreparable harm in *Eli Lilly*, since a failure to be able to collect a judgment is speculative. It is speculative with respect to the monetary amount at stake as the moving party does not know what will not be available from the defendant in the event it is successful in its action for infringement. This is precisely the case here. The Plaintiffs have only established that they are concerned to be unable to collect on a future judgment against the Triforest Defendants. This does not satisfy the irreparable harm requirements (*Eli Lilly* at para 32). The Plaintiffs must establish the harm with clear and convincing evidence and demonstrate on a balance of probabilities that the alleged harm is likely to occur. The Plaintiffs' potential failure to be able to collect a judgment meets none of these requirements as the Plaintiffs can only speculate as to the amount of damages they say that they may fail to recover (*Eli Lilly* at para 32; *RBC Dexia Investor Services Trust v Goran Capital Inc*, 2016 ONSC 1138 at para 11).

[152] That said, I acknowledge that some cases suggest that a real, non-speculative risk of a defendant's financial inability to satisfy a judgment or an award could, in certain circumstances, be a relevant consideration in the assessment of the question of irreparable harm (*RJR-MacDonald* at 341; *Turbo-Resources Ltd v Petro-Canada Inc* (1989), 24 CPR (3d) 1 (FCA) at 18-19). Even if I was to follow this line of cases, for a defendant's inability to pay to constitute irreparable harm, there would still need to be, as always, clear and non-speculative evidence demonstrating such inability on a balance of probabilities. I am not persuaded that the evidentiary record before me supports such a conclusion in this case.

[153] The Plaintiffs have the evidentiary burden of establishing that the Defendants' current financial situation is such that the Plaintiffs would not be able to collect on damages which may be awarded to them if successful. I can appreciate that Ms. Walmsley-Scott and the Plaintiffs feel some frustration following the recent experience they went through in the aborted enforcement of their rights against another infringer, MGA, due to MGA's filing for bankruptcy. However, to draw from this separate and unrelated event a claim of irreparable harm based on a suspected parallel behaviour by the Defendants is entirely speculative.

[154] I further note that the statement attributed to Triforest to the effect that they would be financially unable to pay the Unilin license fees was made in October 2015, and that the information available on the financial situation of the Triforest Defendants since then does not reflect that they are in financial difficulty. On the contrary, there is no evidence of dissipation of assets, bankruptcy, collections or judgment against the Defendants in the results of the financial investigations conducted by the Plaintiffs and filed in support of their Review Motion. As

previously discussed, the Plaintiffs' investigation shows that the bank accounts, loans, mortgages, credit cards and leases of the Triforest Defendants are in good standing, and that the three individual Defendants recently acquired Canadian real estate assets. Furthermore, the banking accounts evidence obtained further to the execution of the Mareva Injunction Order shows that the Triforest Defendants hold many banking accounts containing substantial balances in December 2016.

[155] I therefore do not find, after weighing the various elements of the evidentiary record before me and on a balance of probabilities, that the Plaintiffs' sour collection experience with MGA or the October 2015 statement of Triforest's representatives suffice to conclude that there is clear and non-speculative evidence of an inability to pay on the part of the Defendants, cogent enough to qualify as irreparable harm. The suggestion that the Defendants would not be in a financial position to pay whatever amount of damages might be awarded to the Plaintiffs at trial does not find support in the evidence in the circumstances. In other words, doubts or concerns that a plaintiff may have about a defendant's eventual incapacity to pay are not enough to grant an interlocutory injunction pending trial.

[156] To demonstrate that harm will actually be suffered and that it will not be able to be repaired later, the moving party must provide evidence concrete and particular enough to allow the Court to be persuaded on the matter (*Stoney First Nation* at para 49). Injunctive relief is not granted on the basis of assertions, it is granted on the basis of evidence. And this is what is lacking here.

(v) Conclusion on speculative nature of harm

[157] In light of the foregoing, I am not convinced that the Plaintiffs have adduced the required real, clear and non-speculative evidence showing that they will suffer irreparable harm. There is no persuasive, detailed and concrete evidence demonstrating the existence of the various headings of potential harm asserted by Ms. Walmsley-Scott. I thus find that the various allegations cannot support a finding of irreparable harm meeting the requirements established by *RJR-MacDonald* and its progeny. As was the case in *Janssen*, the harm that the Plaintiffs say they might potentially suffer is too speculative and hypothetical to form a basis for a finding of irreparable harm.

[158] It is entirely understandable that, given the context of this dispute, the Plaintiffs are concerned and fear that, absent an injunctive restraint on the Defendants, they will continue to suffer lost revenues from unpaid royalties by the Defendants, what they feel is a loss of goodwill and other adverse impacts. However, these fears need an objective basis in order to qualify as irreparable harm and to open the door to an exceptional interlocutory injunctive relief. The central problem with the Plaintiffs' claims of irreparable harm is that they are unsupported by evidence beyond the assertions of Unilin's main corporate witness. "Irreparable harm must be demonstrated, not just asserted. Demonstration is achieved by supplying particular information that empowers the Court to find the existence of harm that cannot be repaired later" (*Gateway Church* at para 18). On the record before me, there is only assertion, not demonstration.

(d) ***Quantifiable nature of harm***

[159] There is also a second major problem with the Plaintiffs' allegations of irreparable harm, and it is the fact that the evidence on the record does not allow to conclude that the alleged harm is not quantifiable, and thus irreparable.

[160] Ms. Walmsley-Scott states on a few occasions that the damages apprehended by the Plaintiffs cannot be measured in monetary terms. These bald statements fall short of the exigencies of irreparable harm in two main respects. First, no credible and convincing evidence has been provided to support the assertions that the Plaintiffs' harm would be impossible to quantify in monetary terms. Second, there is every indication on the record that damages in respect of any royalty revenues lost or likely to be lost by Unilin are indeed capable of calculation.

[161] As rightly pointed out by counsel for Molson at the hearing, an affirmation from Ms. Walmsley-Scott to the effect that the Plaintiffs' alleged harm is not quantifiable in monetary terms is not good enough. Ms. Walmsley-Scott is a corporate witness who does not have the experience nor the expertise to render an "opinion on what is quantifiable in damages and what is not" (*I-Med Pharma I* at para 39). Furthermore, Ms. Walmsley-Scott offers no factual basis for her assertions on the incapacity to measure the alleged damages. I agree with the Defendants that such evidence is not sufficient and falls well short of having the attributes able to convince me that, on a balance of probabilities, the claimed harm is not quantifiable in monetary terms (*I-Med Pharma I* at paras 36-44).

[162] No proper expert evidence on the record speaks to quantification issues, neither on why the alleged damages of the Plaintiffs cannot be quantified and measured in monetary terms, nor on why no methodology exists to calculate them. This is quite different from the situation in *Reckitt Benckiser LLC v Jamieson Laboratories Ltd*, 2015 FC 215 [*Jamieson*] at paras 53-54, aff'd 2015 FCA 104 at para 31, where losses were considered irreparable because there was extensive expert evidence demonstrating that no possibility of quantifying the losses and of calculating the damages existed.

[163] Contrary to the situation in *Jamieson*, no attempt was even made by the Plaintiffs to try to quantify the alleged harm. And no expert evidence was provided to support the assertion that the Plaintiffs' damages are not capable of quantification or to demonstrate that no methodology for quantifying the losses exists. I just cannot infer that damages cannot be quantified in monetary terms from the unsupported allegations of a corporate witness who is not in a position to address the quantification issue.

[164] I add that damages are not unquantifiable simply because there could be some difficulty in calculating them (*Nu-Pharm* at para 32). "Patent rights are economic in nature and there is usually no reason why damages ensuing from infringement are unable to be measured or calculated in a reasonably accurate way" (*I-Med Pharma II* at para 79; *Pfizer Ireland Pharmaceuticals v Lilly Icos LLC*, 2003 FC 1278 at para 27 citing *Cutter Ltd v Baxter Travenol Laboratories of Canada Ltd* (1980), 47 CPR (2d) 53 (FCA) at 55-56). It is the burden of the moving party to demonstrate that damages cannot be quantified when it alleges that this is the case. The Plaintiffs have failed to do so here.

[165] Superimposed on this is the fact that there is every indication that the damages claimed by the Plaintiffs to be irreparable are in fact quantifiable. The harm to be suffered by the Plaintiffs further to the alleged patent infringement by the Defendants results from lost licensing revenues and lost royalties. The Plaintiffs do not themselves sell the laminate flooring products at issue in the Canadian market; only importers selling Unilin's licensed products do. The Plaintiffs rather collect royalties under non-exclusive licensing agreements with approximately 49 importers operating in the Canadian market. The Plaintiffs' royalties and license fees are based on a simple formula using the volume of laminated flooring products sold.

[166] Based on the evidence, this looks to be easily capable of quantification. Indeed, the Plaintiffs have been able to estimate lost licensing revenues in their written submissions. For example, using publicly accessible data of Triforest's import activity, the Plaintiffs have quantified a reasonable royalty of $228,000 on inventory currently in Triforest's possession, using the square meterage (m2) of these products multiplied by the royalty rate of $US 0.92 per m2 adjusted by the exchange rate of $1.33/$US. For past sales, a reasonable royalty can thus easily be calculated. Using the same simple arithmetic, the Plaintiffs were also able to quickly make a damage assessment and to estimate the lost royalties for past importation by the Defendants in the conclusions contained in the revised proposed order they submitted to the Court at the hearing of their Review Motion. Again, this figure was computed based on square meterage of sales multiplied by the royalty rate.

[167] I should mention that there is nothing extraordinary about the type of harm alleged – loss of goodwill, loss of market share, incitement of others to infringe – that would differentiate this

case from most patent infringement proceedings. The loss of licensing fees which may be owed are quantifiable damages which can reasonably be determined after a decision on the merits of the case.

[168] For all those reasons, I am therefore not satisfied that the Plaintiffs have offered sufficient evidence demonstrating, on a balance of probabilities, that they would suffer harm that is irreparable, if the interlocutory injunction is not granted. The allegations and evidence before me do not amount to clear and non-speculative evidence establishing harm and allowing the Court to make inferences that the claimed harm is not quantifiable and thus irreparable. The second element of the *RJR-MacDonald* test is accordingly not met.

(4) Balance of convenience

[169] I now turn to the last part of the *RJR-MacDonald* test, the balance of convenience (or inconvenience, as some prefer to state it). Under this third part of the test, the Court must determine which of the parties will suffer the greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits (*RJR-MacDonald* at 342). Given that the Plaintiffs have not led the evidence needed to allow me to make a finding of irreparable harm and having concluded that they have failed to satisfy that branch of the *RJR-MacDonald* test, it is not necessary for me to consider where the balance of convenience lies. The Plaintiffs' motion succeeds only if all three requirements are proved, and one of the elements has clearly not been established.

[170] Since the three components of the test are interrelated, I would however add that, in my view, the balance of convenience favours the Defendants as refusing the issuance of an interlocutory injunction implies that the *status quo* will be maintained until a decision on the merits of the Plaintiffs' action for patent infringement, and that the Defendants will continue to carry on their business in the interim period. Moreover, if an interlocutory injunction is refused, the Plaintiffs have not established that they will suffer irreparable harm, and damages will remain a remedy available and adequate for the unpaid royalties that could be owed by the Defendants.

(5) Conclusion on the interlocutory injunction

[171] The Plaintiffs have the obligation to satisfy me that they meet all elements of the tripartite conjunctive test set forth in *RJR-MacDonald* in order to be successful on their motion for interlocutory injunction. On the basis of the evidence before me, I find that they have not provided clear and non-speculative evidence of irreparable harm, and that the balance of convenience does not favour them. I must therefore deny their motion.

D. *Other remedies*

[172] Both the Plaintiffs and the Defendants seek a confidentiality order with respect to certain affidavits containing banking information and financial information on the Triforest Defendants. The evidence uncovered through the execution of the Mareva Injunction Order and filed with the Court as exhibits to the affidavits of Ms. Morin and Ms. Luong, as well as the affidavits of Ms.

Zhang and Mr. Wang, contain financial information pertaining to the Triforest Defendants, including account numbers, transaction history and current balances.

[173] In the circumstances, I am satisfied that this evidence should be filed under seal and be subject to a confidentiality order in accordance with Rule 151. I consider this to be appropriate on the basis of the principles in *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at paras 53-55 and the submissions of the parties.

IV. Conclusion

[174] For the reasons detailed above, I conclude that the Mareva Injunction Order was lawfully executed in accordance with its terms and followed the applicable procedural rules. However, I am not persuaded that the grounds required for the issuance of an interlocutory Mareva injunction order are met, as the evidence obtained and provided by the Plaintiffs is not sufficient to demonstrate, on a balance of probabilities, that there is a real risk of removal or dissipation of assets by the Triforest Defendants in order to frustrate judgment, outside the normal scope of their business. I am also not satisfied that the tripartite test set forth in *RJR-MacDonald* for the issuance of interlocutory injunctions is met, as the Plaintiffs have failed to provide the required clear and non-speculative evidence to demonstrate, on a balance of probabilities, that they will suffer irreparable harm if the injunction is not granted.

[175] Costs are awarded to the Plaintiffs on their motion for the *ex parte* Mareva Injunction Order and on the first dimension of their Review Motion dealing with the review of the execution of the Order. Costs are awarded to the Defendants on the two other aspects of the

Plaintiffs' Review Motion, namely the motion for an interlocutory Mareva injunction and the motion for an interlocutory injunction.

ORDER

THIS COURT'S ORDERS that:

1. The execution of the Mareva Injunction Order issued on December 19, 2016 was lawfully conducted;

2. The Plaintiffs are authorized to withdraw from the Court the deposit they have filed on December 20, 2016, as security for damages in connection with the execution of the Mareva Injunction Order, and the Administrator is ordered to pay out the said deposit together with all interest accrued thereon, by cheque payable to Smart & Biggar In Trust;

3. The motion to convert the Mareva Injunction Order into an interlocutory Mareva injunction order is dismissed;

4. The motion for the issuance of an interlocutory injunction order is dismissed;

5. The affidavits of Julie Morin dated December 28 and 30, 2016 and the second supplementary affidavit of Van Khai Luong dated January 3, 2017 filed by the Plaintiffs and the affidavits of Steve Wang dated December 28, 2016 and Congyu Zhang dated December 30, 2016 filed by the Defendants shall be treated as confidential;

6. The Defendant Triforest shall maintain its undertaking dated January 3, 2017 with respect to its accounting of sales;

7. Costs are awarded to the Plaintiffs on their *ex parte* motion for a Mareva injunction and on their review motion dealing with the review of the execution of the Order. Costs are awarded to the Defendants on the Plaintiffs' review motion relating to the motion for an interlocutory Mareva injunction and the motion for an interlocutory injunction. If the parties are unable to agree on costs, they should file written submissions within 14 days of this Order, not to exceed five pages in length.

"Denis Gascon"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2105-16
STYLE OF CAUSE:	UNILIN BEHEER B.V. AND, FLOORING INDUSTRIES LIMITED, SARL v TRIFOREST INC., JUNWU ZHANG, ZAIRONG FENG, CONGYU ZHANG, AND MOLSON INTERNATIONAL TRADING INC.
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JANUARY 4, 2017
ORDER AND REASONS:	GASCON J.
DATED:	JANUARY 20, 2017

APPEARANCES:

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Christopher Tan	FOR THE DEFENDANT MOLSON INTERNATIONAL TRADING INC.

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