SUPREME COURT OF NOVA SCOTIA

Citation: *Ucore Rare Metal Inc. v IBC Advanced Technologies Inc.*, 2019 NSSC 396

Date: 20191204
Docket: Hfx. No. 483216
Registry: Halifax

Between:

Ucore Rare Metals Inc., a body corporate

Plaintiff

v.

IBC Advanced Technologies, Inc., a body corporate, and Steven R. Izatt

Defendant

Judge: The Honourable Justice Gregory M. Warner

Heard: December 4, 2019, in Halifax, Nova Scotia
Oral Decision: December 4, 2019.

Counsel: Caitlin Regan and Stewart Hayne, for the Plaintiff (applying party)
Michelle Awad Q.C., for the Defendants (responding party)

By the Court:

Reserve the right to reduce to writing

[1] This is an interlocutory injunction hearing scheduled for one day. It is inappropriate that there be a long delay as opposed to a decision now. So, as inarticulate as it might be by reason of the circumstances of this case, this is an oral decision. If I have to reduce it to writing, I reserve the right to correct the grammar without changing any of the analysis or reasons, so as to make it a more organized, logical and readable decision.

The Application

[2] This Application is for an interlocutory injunction to enjoin IBC Advanced Technologies, Inc., pending the hearing of the Action in the Supreme Court of Nova Scotia, from:

a) taking any further steps to issue additional notices to terminate the Option Agreement or taking steps in reliance upon (or furtherance to) the Notice of Termination; and,

b) taking any steps, or conducting any business, or transacting with any third-parties in such a manner as to prevent or preclude (or effectively prevent or preclude) Ucore from fully and effectively exercising its asserted and disputed rights (I emphasize plural) under the Option Agreement.

[3] An Interim Agreement was issued by consent in February.

[4] This injunction request is not consented to. The Court has before it several inches of affidavits that have been filed between March 6^{th} and late November 24^{th}, and I have the benefit of several briefs, and updated briefs, which I referred to at the opening of this hearing.

The Law

[5] I have relied for the summary of the law, not just in the articulate briefs by counsel, but primarily on the seminal text by Robert J. Sharpe, *Injunctions and Specific Performance*, (Toronto: Carswell, Release No. 23, November 2014), and, in particular, the general principles in Chapter 1, and Chapter 2, which specifically deals with Interlocutory Injunctions. The case law that counsel have referred the

Court to, and the principles counsel referred to, are basically those in Justice Sharpe's text.

[6] I am going to *précis* highlighted sections in his text. Each party may cite decisions that say something in their favour. I prefer to rely on people like Justice Sharpe because of his eminence as a judge on the Ontario Court of Appeal, and because his analysis is based on a summary of all of the caselaw available to him.

[7] The traditional rule is that an injunction will be granted only where damages will provide an inadequate remedy. It is not possible to define inadequacy of damages in a precise way. It is a vague principle that takes shape depending upon the context.

[8] As a general principle, a remedy should be fair to the party against whom the order is made and should not impose substantial hardships that are not required to secure the right being protected. The discretion to award injunctions cannot be reduced to a simple balance of burden and benefit.

[9] Supervision of injunctions involves problems of definition more so than most court orders. Justice Sharpe writes:

> … the courts should avoid vague and ambiguous language which fails to give the defendant proper guidance or which in effect postpones determination of what actually constitutes a violation of the plaintiff's rights. …
>
> the terms of the injunction should be no wider than is required to protect the plaintiff's right.

[10] In Chapter 1 under the heading of "interlocutory injunctions", Justice Sharpe writes that the court must deal with the issue of delay, which is not relevant to this case, and then makes a comment with regards to the clean hands maxim by noting that this maxim does not relate to the morality of the parties but must have an immediate and necessary relation to the equities sued for. "Wrongdoing will not deprive the plaintiff of a specific performance or an injunction unless it bears directly upon the appropriateness of the remedy."

[11] Another general consideration in Chapter 1 relates to when the request is for an injunction against a foreign party. He writes:

> Claims for injunctions against foreign parties present jurisdictional constraints which are not encountered in the case of claims for money judgments. …

> The result is a reluctance to grant injunctions against parties not within the jurisdiction …

Where the defendant has no assets within the jurisdiction, or is an individual who remains outside the jurisdiction, the court will be more cautious.

[12] On the issue of enforcement of foreign injunctions, Sharpe notes a 2006 decision of the Supreme Court of Canada where courts, changing the traditional common law rule, imposed injunctive relief of a non-monetary nature in *Pro Swing Inc. v Elta Golf Inc*., 2006 SCC 52. He also cites the Ontario Court of Appeal decision in *Barrick Gold Corp. v Lopehandia* (2004), 71 OR (3d) 416, to the same effect.

[13] From Chapter 2 –' Interlocutory Injunctions', I quote and/or parse some of the statements that I highlighted in preparing for this motion.

[14] "The injunction is a flexible and drastic remedy. Injunctions are not restricted to any area of substantive law..." There are three basic sorts of interlocutory restraining orders: *ex parte*, interim and interlocutory. Interlocutory "… usually refers to an order restraining the defendant until trial …".

[15] The problem of balancing the risks in interlocutory injunctions is described:

> The problem posed by interlocutory injunction applications may be best understood in terms of balancing the relative risks of granting or withholding the remedy before full adjudication of the legal rights at issue.

[16] This risk balancing exercise is described as follows:

> The plaintiff must show a risk that his or her rights will be destroyed by the defendant's actions before the court has rendered its judgment at trial. The risk to the plaintiff is that if an immediate remedy is not granted, his or her rights will be so impaired by the time of trial and judgment that it will simply too late to afford an adequate remedy.
>
> Against the risk to the plaintiff must be balanced the risk of harm to the defendant, should the injunction be granted. This risk is inherent in awarding a remedy before judgment. On an interlocutory application, the court cannot afford the defendant the full procedural rights of a trial and it may well transpire that although the plaintiff now appears to have a reasonable prospect of success, the plaintiff will fail if and when the case is tried. …

[17] The parties will usually not have fully prepared at this stage. But in some cases, as in this case, the court does have the benefit of a significant volume of documents and affidavit evidence, and some in-court cross-examination on these relevant affidavits.

[18] *RJR-MacDonald v Canada (Attorney General)*, 111 DLR (4th) 385, (*"RJR-MacDonald")*, following *American Cyanamid Co. v Ethicon Ltd.*, [1975] AC 396, ("*Cyanamid*") set out a three-part analysis for interlocutory injunctions.

[19] The first part of the analysis involves the court asking: What is the relative strength of the plaintiff's case? If the plaintiff demonstrated a strong *prima facie* case, the likelihood of the ultimate success, although not decisive, weighs heavily in favor of an injunction.

[20] On the other hand, and here I am quoting from *RJR-MacDonald* respecting the strength of the applicant's case:

> There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case.

[21] The second part of the analysis is whether damages provide the plaintiff with an adequate remedy? If so, no injunction should be granted.

[22] And the third question asked is: would the plaintiff's undertaking in damages provide adequate compensation to the defendant, should he or she succeed at trial, for the loss sustain because of the injunction. If yes, there is a strong case for an interlocutory injunction. Where there is doubt as to the adequacy of the respective remedies in damages, the case turns on the balance of convenience.

[23] In this final stage, weight may be placed on the court's prediction of ultimate success, but only where the extent of the non-compensable disadvantage to each party would not differ widely would it be proper to take into account the apparent disproportionate strength of a party's case as revealed by the affidavit evidence.

[24] Justice Sharpe writes that since *Cyanamid* and *RJR-MacDonald* most "… cases have been read in the context of their particular facts …" and "… that the plaintiff's chance of ultimate success is directly relative to the assessment of the relative risks of harm."

[25] Only "[i]f the assessment of the merits is impractical because of the conflicting evidence or questions of credibility, the matter will have to be decided solely on the basis of balance of convenience and irreparable harm factors."

[26] In respect of irreparable harm to the plaintiff, the traditional test was whether "… the ordinary remedy of damages would be inappropriate or inadequate."

[27] In *Cyanamid*, Lord Diplock noted that:

> If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in the financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at the stage.

[28] The problem, as identified by Justice Sharpe, is that the case law with respect to what constitutes irreparable harm is all over the place and it is difficult to define exactly what the phrase means. He quotes *RJR-MacDonald* to the effect that "irreparable" refers to the nature of the harm suffered rather than the magnitude and the court gives several contextual examples of factors that may be described as "irreparable".

[29] Typical among them, according to Justice Sharpe, are those where the act of the plaintiff would "put the party out of business, prevent the gaining of a livelihood or cause irrevocable damage to the reputation or professional standing. Market place confusion … can give rise to irreparable harm..." He adds that "… the courts should avoid taking a narrow view of irreparable harm."

[30] He stated: "The means of the defendant is an important, but not decisive factor." The granting of an interlocutory injunction should not turn on the wealth of either party. However, "in commercial cases, the inability of the defendant to pay damages will be an important factor."

[31] Under the heading in Chapter 2 - Negative Covenants, and I think I mentioned this a short time ago, Justice Sharpe writes that, while not unanimous in the caselaw, it is not necessary to prove irreparable harm to enforce a negative covenant.

[32] I accept that Ms. Regan is not saying that a negative covenant gives rise to a presumption of irreparable harm, she just submits that irreparable harm and balance of convenience are less significant factors when the court is being asked to enjoin the breach of a negative covenant.

[33] Proof of irreparable harm cannot be inferred. The evidence must be clear and not speculative. Both counsels have stated that in their briefs. It is not enough for a party seeking a stay to show an irreparable harm may arguably result; the applicant's burden is to show that irreparable harm will result.

[34] Justice Sharpe states:

> Irreparable harm and the assessment of balance of convenience are very closely linked; in some cases where the balance of convenience strongly favors an injunction, conclusive proof of irreparable harm may not be required.
>
> … the "irreparable harm" requirement can only be defined in the context of the risk-balancing exercise. …
>
> The important point is that irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case.

[35] The case law indicates that "… the plaintiff must give an undertaking to pay to the defendant any damages …" when it seeks an interlocutory injunction, although there are "… no inflexible rules which inevitably requires that the undertaking be given".

[36] Under the heading "Balance of Convenience", the third part of the *RJR-MacDonald* test, Justice Sharpe writes the factors are so varied that it "would be unwise to attempt to even list [them] …".

[37] He noted in *Cyanamid* that Lord Diplock suggested there are two general principles. First, "where all else is equal", it is best to "preserve the *status quo*". I note particularly, "where all else is equal". Second, the assessment of where the balance of convenience lies is significantly affected by the "extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at trial". He repeats that they - the second and third tests, are closely linked.

[38] Sometimes the question asked is: which of the two parties would suffer greater harm?

[39] He discusses preservation of *status quo*, but writes that it adds little or nothing to the analysis:

> the plaintiff must demonstrate that unless the injunction is granted, his or her rights will be nullified or impaired by the time of trial. … s*tatus quo* is an inappropriate, and potentially misleading, description and "of limited value in private law cases".

[40] Finally, he writes that *Cyanamid* and *RJR-MacDonald* should be seen as guidelines and not firm rules. The terms have no precise meaning. They are not "separate, water-tight categories". "… [S]trength in one part of the test ought to be permitted to compensate for weakness in another."

[41] There is some description, that does not add much at the end of the day, dealing with injunctions restraining disposition of assets pending trial, other than: "Interlocutory injunctions are frequently granted to restrain disposition of an asset where the plaintiff asserts a specific or proprietary claim with respect to the asset."

Analysis

[42] I have already described the particulars of the injunctive relief sought.

[43] With respect to the first issue - the relative merits of the case at first glance, the Court has the benefit of the history of the relationship between the Plaintiff/Applicant, Ucore Rare Metals Inc. ("Ucore"), and the Defendant/Respondent, IBC Advance Technologies ("IBC"). Their relationship began about 2013 when Ucore obtained some [mining] rights to a property in Alaska that apparently had potential for the recovery of rare earth elements. It approached firms that, among other things, specialized in the separation and purification of these elements in the mining context. That is one of the business activities of IBC.

[44] On April 29, 2014, the parties entered into a comprehensive agreement, with five schedules, that provided for a series of research projects by IBC on the basis of IBC's "leading-edge technology" described by the initials 'MRT' and several tradenames but not patents; IBC held the intellectual property in their technology.

[45] The research projects were described in Schedule B to the agreement and provided for a schedule of payments by Ucore as the projects progressed. The research projects were intended to culminate in determining whether the IBC technology could be used by Ucore in respect of its Bokan Alaska rare earth mining project. The last of the three research projects was to build a pilot plant to demonstrate, I think it was – although I cannot remember the exact terms used, on

a bench-scale model - a small size plant to test the separation process for rare earth elements.

[46] The comprehensive agreement also provided that, after those first three research projects, which were more in the line of a customer-supplier relationship between Ucore and IBC, and depending on the results of the first three projects, the parties would determine whether the results proved favorable to the use of IBC's technology in Ucore's Alaska project, and whether it was worthwhile to proceed with the other two parts of the April 29, 2014 agreement.

[47] I am not sure at which stage IBC was to do a feasible study with regards to the usefulness of their technology for the purposes of Ucore's Alaska project, in relation to the fourth part of April 29, 2014 agreement: entering into an agreement [which I describe as a proposed joint venture], which was described in Schedule C of the April 29, 2014 comprehensive agreement as a "*Short Form* Operating Agreement" . In respect of the proposed joint venture, the parties agreed that they may incorporate a new company in accord with Schedule C, or negotiate and arbitrate a more comprehensive joint venture 'Operating Agreement'.

[48] Basically, the joint venture outlined in Schedule C involved the incorporation of a company ("Newco") in which each of the parties would hold 40% of the equity; another entity, who may finance the construction of a commercial separation plant to process the rare elements, was foreseen to become a 20% equity holder. The particulars of the organization were not written in stone, but the April 29, 2014 agreement contained a fairly extensive outline of the proposed venture.

[49] Most importantly, the agreement incorporated the possibility of a "Shareholders Agreement" and a "Suppliers Agreement". The Suppliers Agreement included that: IBC would enter into an agreement with Newco, whereby IBC agreed among other things, to:

- provide Newco with the exclusive rights to market defined "Products" to customers within "Target Sectors" and the non-exclusive rights to market "Products" to customers outside the "Target Sectors",

- provide the Products to Newco on a Cost Plus basis in sufficient quantity and quality to satisfy the needs of Newco's customers, and

- provide Newco with the right to sell the Products to Newco's customers at a Retail Price to be determined in Newco's discretion.

[50] It provided for a 'Customer Agreement' whereby Ucore would enter into an agreement with Newco as the initial customer; that is, whereby Ucore agreed to use Newco as its supplier. With respect to the Intellectual Property or "IP", which is defined in Schedule A of the April 29, 2014 agreement, it provides that that IBC would grant to Newco an exclusive perpetual, full and royalty-free license and authorization to enjoy and benefit from the IP as it applies to the 'Target Sectors'.

[51] The Target Sectors were defined in an initialled amendment to the April 29, 2014 agreement -It is not clear if the handwritten amendment was initialled the same day as the April 29, 2014 agreement or shortly thereafter, as 'Rare Metal purification, Tailings Remediation and the Catalytic Converter Recycling Sector'. They are defined in Schedule A.

[52] The Schedule C Operating Agreement provided that Newco could exercise the right for what was called the 'Production Transfer' in which case Newco would pay IBC a transfer fee of two million US dollars for ownership of the IP for the Target Sectors.

[53] The April 29, 2014, Research Agreement also provided separately – as identified in Schedule D to the Agreement, that Ucore had the right to issue to IBC a Plant Construction Authorization, called the "PCA", for IBC to design, construct, deliver and install a separation plant for rare metals, which would be owned by Ucore. Schedule D did not restricted construction of the separation plant to Bokan, Alaska; it could be there or elsewhere, but I infer that it related to the Bokan project.

[54] Attached to that fairly complex April 29, 2014, Research Agreement, as Schedule E, was a "Cooperating Agreement". It starts with a 'whereas' clause that talked about the four separate parts of the Research Agreement being the basis for the Cooperating Agreement. Schedule E contains terms and provisions that both counsels referred to in their submissions. I am going to come back to them in a minute.

[55] Ten to eleven months after entering into this rather complex agreement, the parties signed another agreement - the "Option to Purchase IBC" Agreement ("Option Agreement"), whereby Ucore had an option to purchase IBC, in accordance with the terms of the Option Agreement.

[56] The initial option gave Ucore for an option to purchase IBC for 18 months with a $300,000.00 option payment. The option was later extended for, I think, 30 months for another $350,000.00 payment.

[57] Significant paragraphs that are relevant to this litigation and to this motion include Paragraph 4.5 of the Option Agreement. Execution of the Option Agreement did not cancel the Research Agreement. Paragraph 4.5 – under the heading, 'Supplementary Payments', reads:

> IBC and Ucore acknowledge that the Research Agreement and the Agreement herein are independent agreements, with independent rights and obligations associated thereto. A default by either such party of any of their mutual obligations under the Research Agreement shall not be deemed a default under this Agreement. In the event that the Research Agreement is terminated for any reason, such termination shall not affect the obligation of the parties relative to this Agreement.

[58] The Option Agreement gave Ucore, in its sole discretion, the right to terminate the agreement if IBC's technology or processes were not feasible, or if IBC did not qualify as a reasonable fit for Ucore as a perspective acquisition (Paragraph 5.2).

[59] Paragraph 6.4 – under the heading, 'Exclusivity and Encumbrance', provides in part that

> … IBC and the Selling Shareholders agree not to solicit or engage in negotiations or proceedings for the purpose of selling IBC, in whole or in part, to any party other than Ucore as contemplated by this Agreement. …that it shall not transfer, assign or otherwise encumber any of the material assets or the IP of IBC, except in the reasonable course of IBC's business, that it shall not assign or undertake activities which would reasonably be expected to materially devalue any of the assets or the IP of IBC, and that it shall observe the Non-Compete Provision, as defined herein.

[60] The Non-Compete Provision is not relevant to today's motion. It relates to the selling shareholder setting up a separate company to compete with IBC, if the option was exercised and Ucore purchased IBC.

[61] The next sentence in Paragraph 6.4 reads:

> IBC acknowledges and warrants the continue validity of the representations of IBC as set out in the Cooperating Agreement pertaining to IBC's unencumbered

> ownership of the IP and covenants to inform Ucore of any material event that may impede the value of the IP during the Term and Purchase Process.

[62] Very importantly, Paragraph 6.5, under the heading, ‘Supplemental Representations, Warrants and Covenants’, reads:

> In addition to the representations and warranties made by IBC in the Cooperating Agreement (which are incorporated by reference herein), the parties hereto make the supplemental representation, warranties and covenants that are found in Schedule “D” hereto.

[63] The Court asked at the beginning of the hearing what counsel for Ucore intended to enjoin by the second - or (b) part of its requested injunction: - enjoining IBC from conducting any business so as to prevent Ucore from fully and effectively exercising its asserted and disputed rights under the Option Agreement. Counsel referred the Court to the fact that the Cooperating Agreement, Schedule E to the Research Agreement, Paragraph 3, under the heading, ‘Exclusivity in favour of Ucore’, reads in part:

> … Notwithstanding the foregoing, IBC agrees that during the Term, it shall not, and shall not permit any of its respectively subsidiaries or affiliates (other than Newco), and will cause its respective … officers, directors, … to not, directly or indirectly, engage in activities which involve the deployment of the IP in the Target Sectors, or are competitive with Newco in its offerings in the Target Sectors (collectively, the “Competitive Activities”). The parties agree that Competitive Activities shall include any activities which are likely to inhibit the ability of Newco to market its offerings in the Target Sectors, …

[64] Counsel for Ucore says that part of the injunctive relief that Ucore seeks is to enjoin IBC, as part of IBC’s normal business activities, from deployment or use of IBC’s IP in the Target Sectors - “rare metals purification, tailings remediation and catalytical converter recycling”.

[65] Counsel for IBC notes, in response to my exchange with counsel for Ucore, that paragraph 6.5 in the Option Agreement reads: “In addition to the representations and warranties made by IBC in the Cooperating Agreement …”. She adds that the header for Paragraph 3 in the Cooperating Agreement (Schedule E to the Research Agreement) reads: “Exclusivity in Favour of Ucore”, but the heading for Paragraph 8 reads: “Representations and Warranties of IBC”. Counsel submits that Paragraph 8 of the Cooperating Agreement is what Paragraph 6.5 of the Option Agreement refers to and intends to incorporate in the Option

Agreement. These representations and warranties (Paragraph 8 of the Cooperating Agreement) do not contain a restriction on the type of business IBC can conduct.

[66] In reply, counsel for the Ucore asked the Court to look at Paragraph 9 of the Cooperating Agreement, under the heading: "Covenants of IBC", which paragraph contains a covenant that IBC will effectively not compete with Ucore, or offer any products or services to any business that is in any way substantially similar to or expected to be competitive with the business contemplated by the 'Joint Operating Enterprise' (defined in Schedule C as Newco).

[67] It is not my job to make a final interpretation of Paragraph 6.5 of the Option Agreement, and the extent to which the Cooperating Agreement provided Ucore with exclusive rights to IBC's IP in the Target Sectors.

[68] In the context of the very complicated Research Agreement and relationship that had been entered between Ucore and IBC the year before the Option Agreement was entered into, I think it would be stretching it to the extreme to interpret Paragraph 6.5 of the Option Agreement, and I am making this interpretation for the purposes of this interlocutory injunction only, to imply that, in addition to the representations and warranties made by IBC in Paragraph 8 of the Cooperating Agreement, which agreement was made in respect of the five projects identified in the Research Agreement, Paragraph 6.5 was intended to or incorporated any other parts of the Cooperating Agreement, and in particular, Paragraphs 3 or 9.

[69] Further to that, I see nothing in either of the agreements – the Research Agreement, wherein Ucore hired IBC to research the application of IBC's technology to the requirements of Ucore in its Bokan rare earth project, and the contemplated a joint venture (Newco), to which IBC agreed to provide its technology, its IP, exclusively in relation to the Target Sectors and non-exclusively for any other purposes - that would support an interpretation of the Option Agreement that IBC was going to, or could, conduct its own business with its MRT technology only in non-Target Sector areas.

[70] I do not see how, by hiring IBC to doing research under the first three-parts of the Research Agreement, Ucore acquired an entitlement, or an exclusive entitlement, to the use or benefit of the IBC technology as it applied to rare earth elements.

[71] An interlocutory injunction is an equitable relief. The relief has to balance the damage to the plaintiff with the harm to the defendant.

[72] Absent any entitlement or interest in the IP developed by IBC as a result of the research projects IBC was hired by Ucore to carry out, and absent the entering into the joint venture provided for under Paragraph 3 and Schedule C of the Research Agreement, it would be unfair and inequitable to restrict IBC as part of its normal course of business from using the IP that it developed, and expanded (further developed) when asked by one of its customers, Ucore, to research its application to rare earth elements or oxides (which I think I read goes by the proper term of REEs,) before the determination of the rights of Ucore to IBC's IP in the trial of this proceeding.

[73] Determination of this motion is not based on being unable to measure the value of IBC's technology to Ucore. The Option Agreement gives Ucore the right to buy the shares of IBC. The Option Agreement does not contain a separate option to buy IBC's technology – the latter is an indirect consequence of buying IBC's shares.

[74] The Court's hesitation with Ucore's proposed injunctive relief, is based on Justice Sharpe's comments relating to enjoined parties who are not within the court's jurisdiction, and by the fact that, at the present time, the parties appear to lack any trust in the other, and that the proposed injunction includes a significant restraint on IBC's business activities that is based on, in my view, a weak claim respecting disputed rights under Paragraph 6.5 of the Option Agreement.

[75] Obviously, if IBC were to dispose of its interest in the IP respecting the MRT technology, as it applies to REEs, before a Court determines whether the Option Agreement was valid, and that Ucore is not in default, and if valid and enforceable, before Ucore has the opportunity to acquire the IBC shares and thereby IBC's technology either for Bokan or any other purpose, the balancing of the harm to the respective parties would tip the other way. But absent IBC disposing of its IP and interest in the MRT technology as it applies to REEs, IBC should not be restricted in its business activities.

[76] On its face, the Option Agreement giving Ucore the option to purchase the shares of IBC gives Ucore a strong *prima facie* case to an interlocutory injunction. It is an agreement signed by parties clearly with the benefit of legal counsel.

[77] That fact is a significant factor in my determination that the balance of convenience strongly favors an interlocutory injunction that enjoins IBC from: (a) taking any further steps to issue any additional notices or terminate the Option Agreement, or taking steps in reliance upon or further to the Notice of Termination, and (b) taking any steps or conducting any business or transacting with any third-party in such a manner as to prevent or preclude or to effectively prevent or preclude Ucore from fully and effectively exercising the Option Agreement. The injunction shall remain in place until the issues in this proceeding are determined by the Court.

[78] I am not prepared to include, as part of the enjoined activity, a restriction on IBC using its IP in the Target Sectors.

[79] The agreement in dispute is an Option Agreement. It is not a purchase and sale agreement. Ucore has the sole discretion to withdraw on fairly broad terms.

[80] Any dispute between the parties as to who is at fault with regards to the Research Agreement or the parties' other business transactions may be relevant in the sense of what is sometimes referred to as the "clean hands" doctrine. The affidavits I have read do not establish the kind of "dirty hands" that tips the balance in favour of either party, nor displaces the primary factor in favour of an injunction, which is that in the Option Agreement on its face IBC warrants that IBC is prohibited from acting in a way that would prevent the option from being exercised, if the option is found to be valid and enforceable. The option agreement itself, other than in relation to the interpretation of Paragraph 6.5 and of the Cooperating Agreement, is precise enough to do that.

[81] In my view, the determination of the third factor - the balance of convenience, is stronger than the second factor - irreparable harm.

[82] I have taken into consideration that IBC is a private company and Ucore is a public company. Ucore is a junior mining company without operating assets at the present time, and, as between the two parties, proportionately is a much higher risk not to be able to pay damages in respect of this litigation than IBC appears to be, if it (Ucore) is unsuccessful at trial.

[83] I have considered the issue of irreparable harm, a term which Justice Sharpe's text correctly points out, citing *RJR-MacDonald* and *Cyanamid*, is a very difficult term to define.

[84] Ucore tried to frame the issue of irreparable harm on the basis that IBC's MRT technology was "unique". I am not sure that they are correct.

[85] From almost all of the materials attached to the affidavits before the Court, it is clear that IBC believed they had a superior technology; they described it as leading edge. They described it as disruptive. They believed that it was far superior to the solvent or solution technology that many of their competitors used. I take those descriptions made by IBC as to their technology at their face value.

[86] I am not sure those descriptions of IBC's technology raises my refusal to enjoin IBC's continued use of its technology to the level of irreparable harm to Ucore.

[87] I add that Ucore could not stand still and wait for an unknown number of years for this dispute to be decided. Ucore's action in mitigating its loss by working with an alternative separation solution that IBC suggests is inferior to its own, is not a determination that IBC's technology is only superior, as opposed to being unique.

[88] It will probably be difficult to assess, if Ucore is successful in its action, what it would have lost by not having available to it IBC's MRT technology, as compared to the alternative that they appear to be forced to work with. I conclude that Ucore did not chose to work with an alternative technology from a competitor; rather, it appears to be attempting to mitigate a possible loss, in the event of its success at trial.

[89] Its mitigation does not weaken Ucore's claim for injunctive relief. I do not accept Ms. Awad's submission or representation that we do not presently know if the alternative technology of an IBC competitor would be better than IBC's. IBC clearly believes from the exhibits in this motion that the competitor's technology is a substantially inferior process from that which they very articulately describe in the exhibits.

[90] I accept that Ucore's Plan B is only mitigation as a result of the position taken by IBC with respect to the Option Agreement. It may very well be that Ucore does not at the end of the day, even if it wins the right to, exercise the option, and complete the purchase of IBC. That is not relevant to this interlocutory injunction application.

[91] The Court's role is to balance the harm to Ucore against the harm to IBC, pending this litigation.

[92] My decision is that I am prepared to grant an interlocutory injunction that uses the words requested by Ucore with the exception that there has to be added a provision that the injunction does not enjoin IBC from doing what Paragraph 3 in the amended Cooperating Agreement says they covenanted not to do.

[93] If the parties are unable to agree and either side wishes to make submissions on costs, I will receive a submission from Ucore within one week and a reply from IBC week after that.

Warner, J.