COURT OF APPEAL

ON APPEAL FROM the order of Justice MacNaughton of the Supreme Court of British Columbia pronounced on the 15th day of May, 2024.

BETWEEN:

Cascade Aerospace Inc.

APPELLANT
(Defendant)

AND:

Viking Air Limited

RESPONDENT
(Plaintiff)

APPELLANT'S FACTUM

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CHRONOLOGY

Date	Event	Reference
April 26, 2019	Cascade and Viking enter into the Integration Agreement	Reasons of MacNaughton, para. 16
June 30, 2022	Viking delivers the CL-215T to Cascade to begin its integration work.	Reasons of MacNaughton, para. 28(a)
February 2022 to February 2023	Nine meetings held between Viking and Cascade executives to attempt to resolve project delays and out of scope work requests.	Affidavit #1 of Clark Bain, para. 6.
February 24, 2023	Viking advises Cascade that their disputes will not be resolved until Viking resolves its disputes with a third party, Collins.	Affidavit #1 of Clark Bain, para. 6.
May 2023	Viking asks Cascade to stop its work under the Integration Agreement so the parties could discuss termination.	Reasons of MacNaughton, para. 42
September 1, 2023	Viking advises Cascade that it was preparing to repossess the CL-215T.	Reasons of MacNaughton, para. 43
September 13, 2023	Cascade advised Viking that it was not prepared to return the CL-215T to Viking while the parties' dispute was ongoing.	Reasons of MacNaughton, para. 47

September 29, 2023	Viking commences a detinue action and a Rule 10-1(4) application against Cascade.	Reasons of MacNaughton, para. 48
January 10-11, 2024	Viking's Rule 10-1(4) application is heard by The Honourable Justice MacNaughton.	Reasons of MacNaughton
May 15, 2024	Justice MacNaughton grants Viking's application and orders Cascade to return the CL-215T in exchange for Viking posting security in the amount of US$1,845,000.	Reasons of MacNaughton, paras. 236-237
June 10, 2024	Cascade files Notice of Appeal.	Notice of Appeal
June 14, 2024	Cascade files Notice of Application for Leave to Appeal and a Stay.	Notice of Application
July 3, 2024	The Honourable Justice Skolrood hears Cascade's Application, grants leave to appeal, and denies the request for a stay.	Reasons of Skolrood, para. 43

OPENING STATEMENT

The issue on this appeal is whether to set aside an interlocutory replevin order for the return of a waterbomber aircraft before trial in circumstances where there was no risk of the respondent dissipating or damaging the aircraft, but where the applicant confirmed its intention to transfer the property to Morocco before trial. The Application Judge did not apply precedent cases requiring the applicant to adduce evidence of a risk of dissipation or transfer of the disputed property as a condition of granting replevin. Instead, the Application Judge applied outdated and inconsistent cases, and proposed a new, unworkable test, which creates logical inconsistencies within the Rule 10-1 framework. If the Application Judge had properly applied the precedent jurisprudence and considered the required factors, she would not have granted the order from which Cascade appeals.

The Application Judge also failed to apply binding cases from this Court concerning the legal standard for demonstrating irreparable harm on an application for interlocutory relief. By granting the application on the basis of speculative affidavit assertions, unsupported by any direct evidence, the Application applied an untenable lower legal standard for irreparable harm that will result in interlocutory relief being granted in virtually every commercial dispute.

Finally, the Application also erred by misapprehending the evidence in finding other instances of irreparable harm and, most notably, held that irreparable harm resulted from the magnitude of the applicant's potential monetary damages—a proposition that has been consistently and directly rejected by the Supreme Court of Canada.

As a result of these errors, Cascade appeals the May 15, 2024 Order of the Honourable Justice MacNaughton. Cascade seeks this Honourable Court's intervention to correct these errors, set aside Justice MacNaughton's Order, and award Cascade its legal costs throughout.

PART 1 - STATEMENT OF FACTS

A. The Parties

1. The Appellant, Cascade Aerospace Inc. ("**Cascade**"), is a leading Canadian specialty aerospace and defence company that provides aviation engineering and aircraft maintenance services to aircraft operators in military, government, manufacturer, and commercial environments.[1]

2. The Respondent, Viking Air Limited ("**Viking**"), carries on business as a manufacturer and seller of aircraft. Viking is a subsidiary of Longview Aviation Capital Corp. ("**Longview**"). Viking and Longview operate within a corporate group controlled by Westerkirk Capital Inc., a private investment company.[2]

B. The Integration Agreement

3. Viking is implementing an Avionics Upgrade Program (the "**Program**"), which involves updating the system used on aircraft for navigation, display, communications, and system management on its amphibious waterbomber aircraft. On April 26, 2019, Cascade and Viking entered into a fixed-price, multi-year agreement whereby Cascade agreed to install and integrate an updated avionics system in Viking's aircraft (the "**Integration Agreement**").

4. Under the Integration Agreement, Viking is responsible for purchasing an avionics system (the "**B-Kit**") from a third-party supplier, Rockwell Collins (**"Collins**"), and supplying it to Cascade. Cascade is then responsible for installing the B-Kit and for developing the hardware and harness equipment for the installation (the "**A-Kit**").

5. Pursuant to the Integration Agreement, Viking assumed responsibility for ensuring that the B-Kits could be certified by Transport Canada for their intended use. During contract negotiations, Cascade had offered to assume this certification risk, but

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[1] Affidavit #1 of Kevin Lemke, sworn October 18, 2023, at para. 3, Joint Appeal Book, Tab A, pgs. 5-6.

[2] Affidavit #1 of Kevin Lemke, at para. 4, Joint Appeal Book, Tab A, pg. 6.

Viking opted to assume the risk itself to save money. Cascade played no role in the selection of Collins as the B-Kit supplier or in ensuring that the Collins B-Kit was suitable for Viking's avionics upgrade.

6. The Integration Agreement provides that Viking committed to paying Cascade for a minimum of 12 installations, 42 A-Kits, and Cascade's Non-Recurring Engineering costs. If Viking terminates the agreement before these minimum purchases are complete, it would be responsible for a termination fee to make up the difference.[3]

7. The termination fee was specifically negotiated by the parties to for a minimum level of revenue payable to Cascade, given that it agreed to incur significant up-front costs that exceeded Viking's early payment obligations, which Viking sought to maintain favourable cash flow.[4]

C. The Dispute

8. Cascade began performing the integration services work shortly after taking possession of the first aircraft from Viking in October 2019. It quickly became clear that the integration work required several out-of-scope elements arising from unanticipated testing and certification requirements due to problems with the Collins B-Kit supplied by Viking. Cascade repeatedly alerted Viking that this work fell outside the scope of its responsibility under the Integration Agreement.[5]

9. By August 2021, Cascade's integration work and certification efforts faced significant delays and cost-overruns due to Viking's failure to provide necessary B-Kit compliance data. By November 2021, Cascade incurred almost double the originally projected engineering hours.[6]

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[3] Affidavit #1 of Clark Bain, sworn October 18, 2023, at paras. 14-15, Joint Appeal Book, Tab B, pgs. 437-438.

[4] Affidavit #1 of Kevin Lemke, paras. 12(i), Joint Appeal Book, Tab A, pg. 10.

[5] Affidavit #1 of Kevin Lemke, paras. 14 and 17, Joint Appeal Book, Tab A, pgs. 11-12.

[6] Affidavit #1 of Kevin Lemke, para. 26, Joint Appeal Book, Tab A, pg. 14.

10. On June 30, 2022, long after the discovery of B-Kit certification issues and project delays, Viking delivered the second aircraft to Cascade—the CL-215T—to begin the integration services work. This is the aircraft at issue in this proceeding.[7]

11. When it became clear that the B-Kit compliance issue would result in higher costs, Viking took the position that the delays and cost overruns were Cascade's fault. Between February 2022 (before Viking delivered the CL-215T Aircraft) and February 2023, IMP Aerospace & Defence ("**IMP**"), Cascade's parent company, participated in at least nine meetings with Viking in an effort to resolve ongoing disputes.[8]

12. At the February 24, 2023, meeting, Viking told IMP that it could not resolve its issues with Cascade until it first resolved a dispute between Viking and Collins concerning the B-Kits.[9]

13. At a May 17, 2023, meeting, Viking advised Cascade that it had found another supplier to replace Collins. Viking further advised that it intended to negotiate a termination agreement with Cascade, rather than invoke the termination clause under the Integration Agreement, which would have triggered an immediate obligation for Viking to pay Cascade for the guaranteed purchase orders set out in Article 9.1.[10]

14. On May 26, 2023, Viking asked Cascade to stop all further work under the Integration Agreement.[11]

15. On September 1, 2023, Viking asked Cascade return to the CL-215T to Viking. The parties had not yet resolved the issue of termination of the Integration Agreement,

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[7] Affidavit #1 of Kevin Lemke, at para. 13, Joint Appeal Book, Tab A, pg. 11.

[8] Affidavit #1 of Clark Bain, at para. 6, Joint Appeal Book, Tab B, pg. 435.

[9] Affidavit #1 of Clark Bain, at para. 6, Joint Appeal Book, Tab B, pg. 435.

[10] Affidavit #1 of Clark Bain, at para. 8, Joint Appeal Book, Tab B, pg. 435.

[11] Affidavit #1 of Clark Bain, Ex. 1, Joint Appeal Book, Tab B1, pg. 445.

and on September 13, 2023, Cascade informed Viking that it would not release the CL-215T until the parties settled the termination issue.[12]

D. The Underlying Actions

16. On September 29, 2023, about a week after the parties' last meeting, and while Cascade believed negotiations were still ongoing, Viking commenced an action against Cascade for the tort of detinue and brought an application under Rule 10-1(4) for the interim return of the aircraft before trial. A few weeks later, Viking announced it was purchasing B-Kits from a different supplier and that it had acquired two companies, which perform the type of A-Kit integration work that Cascade performed for Viking.[13]

17. Cascade counterclaimed against Viking, seeking specific performance of the Integration Agreement or, alternatively, payment of US$26,000,000 pursuant to the termination fee under Article 9.1.[14]

18. By commencing litigation against Cascade and making arrangements for an alternative supplier to complete Cascade's avionics integration work,[15] Viking effectively terminated the Integration Agreement. However, Viking refuses to formally terminate the contract in an attempt to avoid triggering the termination fee obligation to Cascade.

E. Viking's Replevin Application

19. Viking brought its replevin application under Rule 10-1(4) and section 57(1) of the *Law and Equity Act*, RSBC 1996, c 253 (the "**Act**"), seeking an interlocutory order directing the return of the CL-215T and associated records and components from Cascade (the "**CL-215T Property**").

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[12] Affidavit #1 of Clark Bain, para. 27, Joint Appeal Book, Tab B, pg. 441.

[13] Affidavit #2 of Kevin Lemke, sworn October 24, 2023, at paras. 3-5, Joint Appeal Book, Tab C, pgs. 476-477.

[14] Appeal Record, Tab C, pg. 22.

[15] Reasons for Decision of The Honourable Justice MacNaughton ("Application Judge's Reasons"), dated May15, 2024, at para. 56, Appeal Record, Tab G, pg. 67.

20. Viking filed affidavits from its representative, Mr. Côté, which stated that Viking's affiliate, Longview, had sold the CL-215T to the Kingdom of Morocco, with delivery of the aircraft due sometime in 2024. Viking did not produce a copy of the sales contract, did not state *when* in 2024 delivery was required, and did not provide any further details of the transaction, including whether it was possible for Longview to extend the delivery date. Mr. Côté deposed that *Viking* may suffer irreparable reputational harm if *Longview* was unable to deliver the CL-215T to Morocco in 2024.

21. The Honourable Justice MacNaughton (the "**Application Judge**") heard Viking's application on January 10 and 11, 2024, and issued an Order on May 15, 2024, granting the application, and directing that Cascade return the CL-215T Property, upon Viking posting USD $1.845 million as security (the "**Replevin Order**").

22. In her reasons for decision, the Application Judge deliberately decided to not follow precedent cases for Rule 10-1(4) applications. Rather, the Application Judge—for the first time by any level of court in British Columbia—proposed that Rule 10-1(1) and 10-1(4) applications should apply different tests, and that Rule 10-1(4) should not require evidence of a risk dissipation or transfer of the property by the respondent, notwithstanding the relief sought is a greater interference to the *status quo*.

23. After proposing a new, unprecedented, framework for Rule 10-1(4) applications, the Application Judge applied her new test and found, among other things, that Viking had demonstrated evidence of irreparable harm in the form of:

(a) "Potential reputational damage" to Viking resulting from a potential lost sale of the aircraft to Morocco by Longview;

(b) Unquantifiable damages from future lost sales from other potential customers who may decline to do business with Longview if it were unable to meet its sales commitment to Morocco;

(c) Cascade conducting facility tours to the public within the proximity of the CL-215T, which "was not contemplated by the Integration Agreement";

(d) The value of Viking's CL-215T Aircraft exceeding Cascade's counterclaim by $10 million.[16]

F. Cascade's Application for Leave to Appeal and Stay of Proceedings

24. Cascade filed its Notice of Appeal on June 10, 2024. Pursuant to an agreement between the parties, Viking consented to an interim stay of the Replevin Order pending an expedited hearing of Cascade's application for leave to appeal and stay.

25. Cascade's application was heard and decided by The Honourable Justice Skolrood on July 3, 2024. Justice Skolrood granted the application for leave to appeal but denied the stay request. In finding that Cascade has established merit to its proposed appeal, Justice Skolrood noted that the parties have illustrated a "tension between the two different lines of authority and raise a question of law regarding the correct test under Rule 10-1(4)". He further found that Cascade's proposed appeal concerning irreparable harm identified "a good arguable case of sufficient merit to warrant appellate scrutiny."[17]

26. Justice Skolrood denied Cascade's application to stay the Replevin Order pending this appeal, in part, because Viking gave a new undertaking to not immediately transfer the aircraft out of British Columbia pending the appeal.[18]

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[16] Application Judge's Reasons, at paras. 203-217, Appeal Record, Tab G, pgs. 101-104.

[17] Reasons for Decision of the Honourable Justice Skolrood, July 3, 2024, at paras. 28-30, Joint Appeal Book, Tab D, pgs. 497-498.

[18] Reasons for Decision of the Honourable Justice Skolrood, at para. 39, Joint Appeal Book, Tab D, pg. 500.

PART 2 - ERRORS IN JUDGMENT

27. The Application Judge erred by:

a. Committing an error of law by applying the wrong line of case law under Rule 10-1(4);

b. Committing an error of law by applying an incorrect legal standard to her consideration of irreparable harm; and

c. Committing a palpable and overriding error by misapprehending the evidence in finding that the respondent had established irreparable harm.

28. These errors resulted in an order that was fundamentally incorrect for the reasons described below.

PART 3 - ARGUMENT

29. Although discretionary decisions granting interlocutory relief are entitled to deference, a decision is reversible where the lower court misdirected itself, came to a decision that is so clearly wrong that it amounts to an injustice, or gave no or insufficient weight to relevant considerations.[19]

30. Where an appeal of an interlocutory decision concerns errors of law, the standard of review is correctness. Where an appeal alleges a misapprehension of evidence, the standard of review is palpable and overriding error.[20]

A. Application Judge Applied the Incorrect Test for Rule 10-1(4)

31. Since 2018, the Supreme Court has repeatedly applied *Terastream* to Rule 10-1(4) applications.[21] *Terastream* confirmed a four-part test applied to all Rule 10-1 applications:

a. Does the applicant have a claim on the evidence and not just on the pleadings to a proprietary interest in the property?

b. Is there some evidence to render it reasonable to believe that the property is threatened with disposition or transfer outside the jurisdiction?

c. Is there a substantial question to be decided as to the plaintiff's entitlement to the property?

d. Does the balance of convenience favour granting the order?[22]

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[19] *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 at para. 27.

[20] *Yu v. 16 Pet Food & Supplies Inc.*, 2023 BCCA 397 at para. 25; *Healey v. Chung*, 2015 BCCA 38 at para. 33.

[21] See, for example: *Schneider v. L & R Holdings Ltd.*, 2019 BCSC 1531 at paras. 20-21; *Kriland v. BLB Development Group Ltd.*, 2021 BCSC 1650, at para. 16; *Brown-Forman Corp v. Charton-Hobbs Inc.*, 2021 BCSC 2610, at paras. 58-59.

[22] This Court has not directly considered the test under Rule 10-1(4) since *Terastream* was decided. However, this Court has observed that "the requirements of Rule 10-1

32. In *Terastream*, the Court explained why this four-part test, which always applied to other Rule 10-1 applications, should also apply to replevin applications:

> Replevin is an exceptional discretionary remedy, granted only in the limited circumstances that would justify granting interlocutory relief.
>
> ...
>
> [T]he success of this application turns on the second consideration, whether there is some evidence to render it reasonable to believe that the property is threatened with disposition or transfer outside the jurisdiction. In my view, this consideration goes to the heart of why the extraordinary interim remedy of returning disputed property to a party is sometimes appropriate. That occurs when it is reasonable to believe that keeping the property where it is until conclusion of the trial will leave the winning party with a pyrrhic victory because the property and its value to them has been lost.[23]

33. *Terastream* has been followed in all applications expressly brought under Rule 10-1(4) after 2018 and in no case prior to the application below has the Court declined to follow it. Instead of applying this jurisprudence, the Application Judge referenced an older line of cases that consider varying iterations of the *RJR-MacDonald* injunction test. No other court has applied these older cases when *Terastream* is referenced on the application. These cases are also inconsistent with the Application Judge's reasoning. The legal errors in the Application Judge's reasoning manifest in three distinct ways.

34. First, the Application Judge erred by characterizing the older (non-*Terastream*) cases as consistent with her proposed framework for analyzing the application below. Specifically, the Application Judge stated that a reasonable belief as to risk of dissipation or transfer by the respondent is not required under 10-1(4) in the non-*Terastream* line of cases because a strong *prima facie* case under the *RJR-MacDonald* factors has always been required under 10-1(4). This is an incorrect summary of the earlier cases—none of those cases applied a "strong prima facie case" standard:

(formerly Rule 46)" apply the four-part test set out in *Terastream*. See: *Kepis & Pobe Financial Group Inc. v. Timis Corporation*, 2018 BCCA 420 at para. 21.

[23] *Terastream Networks Inc. v. Grossholz*, 2018 BCSC 837 at paras. 10, 14.

a. In *Midland*, the court required only that the applicant show a "*prima facie* case", not a strong *prima facie* case;[24]

b. In *SR Télécom*, the court described the 10-1(4) test as requiring the applicant to "establish a *prima facie* case, or serious question to be tried....";[25]

c. In *Pakage Apparel*, the court described the test as: "First, is there a serious question to be tried?"[26]

35. In summary, none of the three cases the Application Judge relied on to support her new 10-1(4) framework required the applicant to demonstrate a strong *prima facie* case. The Application Judge's conclusion that the older line of cases required an applicant to demonstrate a strong *prima facie* case in a 10-1(4) application is not supported by those cases, or by any other previous case.

36. Rather, the Application Judge created a new test not supported by precedent and which conflicts with previous cases. Moreover, the Application Judge declined to follow the principled reasoning in the *Terastream* line of cases. Notably, in the non-*Terastream* line of cases, the question of whether risk of disposition or transfer by the respondent is required in a 10-1(4) application was not specifically raised by the parties or considered by the court, either as a standalone factor or as part of the irreparable harm/balance of convenience factor.

37. Second, the Application Judge incorrectly stated that the key question in considering whether an applicant is required to demonstrate risk of disposition or transfer of the property is whether the *applicant* intends to preserve the property prior to trial.[27] In other words, the Application Judge reasoned that if the applicant (*i.e.*, the party seeking the return of property pending trial) intends to dispose of the property before

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[24] *Midland Walwyn Capital Inc. v. Global Securities Corp*, 1997 CanLII 1736 (BC SC) at para. 12.

[25] *SR Télécom v. Micro Manufacturing Corp*, 2008 BCSC 1768 at para. 30.

[26] *Pakage Apparel Inc. v. Ellis*, at para. 41.

[27] Application Judge's Reasons at paras. 75-76, Appeal Record, Tab G, pg. 72.

trial, they need not demonstrate a risk of dissipation or transfer by the respondent (*i.e.*, the party currently in possession of the property) pending trial.

38. This reasoning makes little sense and flips the logic underlying the replevin remedy on its head. It creates circumstances in which an applicant will be incentivized to bring a replevin application instead of a preservation application, when the latter is a less intrusive disturbance of the *status quo*. If an applicant can avoid the need to show risk of dissipation or transfer by the respondent by adducing evidence of its own intention to dissipate the property, replevin risks becoming a final remedy when it is only meant to be an interlocutory remedy pending trial. The Application Judge's Rule 10-1(4) framework created a test that is inconsistent with the purpose and logic of interlocutory orders, which are designed to protect both parties' legal rights until the full adjudication of an issue and only interfere with the *status quo* where the alternative is a risk that the applicant would obtain an empty verdict if it is successful at trial.

39. The lack of internal logic in the Application Judge's reasoning on this point is illustrated by the circumstances of this proceeding. On Viking's 10-1(4) application, the Application Judge concluded that because Viking intends to transfer the aircraft to Longview, who in turn intends to transfer the CL-215T to Morocco, and the court should not concern itself with whether there is evidence to support a reasonable belief about disposition or transfer out of the jurisdiction by Cascade, the party in possession of the aircraft. Viking's intention to dissipate the aircraft was the Application Judge's justification for ignoring the fact that Cascade intended to preserve the aircraft until trial.

40. The problem with this approach is that there remains a live dispute between Viking and Cascade as to which party has the stronger right to possess the CL-215T. This dispute will only be decided by the Supreme Court at trial on a full evidentiary record. While Longview's sale of the CL-215T Property to Morocco may be relevant to the balance of convenience analysis, it is absurd to hold that the party seeking to recover personal property on an interim basis pending trial can improve their ability to do so by arranging to transfer the disputed property out of the jurisdiction prior to trial.

41. Viking's intention to dispose of the CL-215T Property before trial should weigh *against* its interlocutory application, given that the effect of the Application Judge's

interim order granted total judgment to Viking, with no ability for Cascade to recover the property should it prove successful at trial. This injustice is compounded by the fact that Cascade undertook to protect and preserve the aircraft until trial, thereby leaving it available for recovery by Viking should its detinue claim succeed.

42. The third manifestation of the Application's judge's erroneous reasoning is her suggestion that 10-1(4) applications should simply adopt the *RJR MacDonald* mandatory injunction test. Mandatory injunction applications are brought under a distinct sub-rule, one that Viking did not rely on at its application below. It would make little sense to apply the same test to two distinct types of applications for which there are two different sub-rules, while at the same time adopting different considerations for applications brought under Rule 10-1.

43. Contrary to the framework proposed by the Application Judge, there are sound legal reasons for applying a consistent test on Rule 10-1(1) and 10-1(4) applications and requiring an applicant under both sub-rules to prove a risk of dissipation or transfer of the property before trial by the respondent. A replevin application is an extraordinary interlocutory remedy which, in effect, grants judgment in a detinue claim before that claim proceeds to trial. It awards the applicant a greater interference with the status quo than a preservation order brought under sub-rule 10-1(1). Where the applicant's claim is only brought in detinue, as here, and where the applicant confirms an intention to transfer the asset out of British Columbia before trial, the application essentially decides the entire claim on an interim basis without the benefit of live evidence.

44. If there is no risk of dissipation or transfer of the property in question before trial by the respondent, there should be no need to grant either a preservation or a replevin order. *Terastream* and subsequent cases adopting *Terastream* recognize the importance of this factor to a Rule 10-1(4) application.

45. Ultimately, the Application Judge erred in law by rejecting the *Terastream* decision—and subsequent decisions which adopt and approve the *Terastream* framework—as being applicable Rule 10-1(4) applications. The Application Judge further erred by suggesting, in the absence of any authority, that different tests should apply to Rule 10-1(1) applications and 10-1(4) applications. Her reasoning eviscerates

the principle of minimal interference to the status quo pending trial by making it easier for an applicant to seek the return of personal property instead of merely seeking to preserve it. To require different tests under the same Rule—dealing with the interim restrictions on personal property in the respondent's possession pending trial—would create an unworkable legal framework and inconsistent jurisprudence. The Application Judge committed an error of law in her analysis that must be corrected.

B. Application Judge Erred in her Application of the Irreparable Harm Standard

46. The Application Judge correctly observed the binding authority of this Court that an interlocutory relief will seldom be ordered where no irreparable harm is likely.[28] However, the Application Judge subsequently erred in law in her application of that standard by lowering it and finding irreparable harm on the basis of speculative assertions.

47. The Application Judge found four instances of irreparable harm:

a. Possible reputational damage to Viking if Longview cannot complete its sale of the property to Morocco;

b. The proximity of the aircraft to school group tours of Cascade's facility;

c. "Potential confusion in the industry" arising from Cascade social media posts which show the aircraft in the background; and

d. The value of Viking's aircraft exceeding Cascade's counterclaim for damages by $10 million.[29]

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[28] *Edward Jones v. Voldeng*, 2012 BCCA 295, at para. 24.

[29] Application Judge's Reasons at paras. 209-217, Appeal Record, Tab G, pgs. 102-104. The sole instance of irreparable harm alleged by Viking but rejected by the Application Judge was the assertion that Viking will suffer from the loss of business by other customers in queue for Avionics Upgrade Program work. She rejected this allegation on the basis that such alleged damages flow from the failure of the AUP, which is not at issue in Viking's detinue claim.

48. On each of these irreparable harm findings, the Application Judge erred by either applying a lower standard allowing for the mere spectre of irreparable harm or, in the fourth instance, plainly erring at law by concluding monetary damages constitute irreparable harm in circumstances where the applicant did not question in its materials the respondent's ability to pay this quantum of damages.

49. In the first instance, the Application Judge relied on the speculative assertion by Viking's affiant, Mr. Côté, that the *possible* loss of a sales contract by Viking's affiliate, Longview, could result in *possible* reputational harm to Viking:

> Viking, or the Viking Group, **may** suffer reputational damage, and perhaps face contractual claims, if unable to comply with the contractual terms of the sale [of the CL-215T] to Morocco. In other words, I am satisfied that there is a potential for Viking to suffer irreparable harm that is more than speculative.[30]

50. In her reasons, the Application Judge notes that Mr. Côté failed to explain or provide any evidence as to how Viking's reputation is impacted by the business dealings of its affiliate, but excuses this failure without explanation as to why:

> While Mr. Côté's affidavit does not explain why the inability of Longview Services to deliver on the contract with Morocco would cause irreparable harm to Viking, I accept that there is a potential that damage to the reputation of one company in the Viking Group could affect the reputation of other companies in the group.[31]

51. Despite flagging the very problem with Mr. Côté's bare assertion, the Application Judge nevertheless finds that irreparable harm based on the mere possibility of reputational damages – "may suffer" and "perhaps face". This legal standard is not supported by case law. To adopt the Application Judge's lower standard to satisfy the need to prove irreparable harm would render injunctive relief available to any applicant who asserted in an affidavit that they *may* lose a sale as a result of the respondent's actions. This is an untenable standard given the nature of injunctive relief, and was

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[30] Application Judge's Reasons, para 211 [emphasis added], Appeal Record, Tab G, p. 103.

[31] Application Judge's Reasons, at para. 209, Appeal Record, Tab G, p. 102-103.

specifically rejected by this Court recently in *British Columbia (Attorney General) v. Reece*, where Justice Harris noted:

> To support a finding of irreparable harm, the evidence must be more than a series of possibilities, speculations or general assertions. The evidence needs to be **sufficiently precise to demonstrate a real probability** that unavoidable irreparable harm will occur without an injunction.[32]

52. The errors in the lower standard applied by the Application Judge are further demonstrated by her failure to follow decisions from this Court confirming that damages due to lost sales are usually quantifiable,[33] and that future sales and loss of reputational goodwill can also be readily quantified:

> Difficulties posed in the assessment of damages for breach of contract do not render the harm giving rise to such damages irreparable. The court regularly conducts complicated assessments of business losses in commercial cases, including losses that are based on uncertain future events, and unknown and fluctuating market conditions.[34]

53. In *Clark v. Laser Clean Ltd. (Don's Power Vac)*, the Alberta Court of Appeal noted that an applicant's evidence of irreparable harm must demonstrate that the harm cannot be quantified.[35] Viking failed to do so, and the Application Judge, at no time, gave consideration to the fact that the harm alleged by Viking—reputational harm due to a lost sale—is readily quantifiable through expert evidence.

54. In her second finding of irreparable harm, the Application Judge concluded that school group tours within the proximity of the CL-215T suggest it is being used by Cascade for public purposes, which "was not contemplated by the Integration Agreement". This is a puzzling finding in the context of an irreparable harm analysis. The very brief reasons set out on this point cannot support a finding of irreparable harm. An alleged use "not contemplated by the Integration Agreement" does not, by itself,

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[32] *British Columbia v. Reece*, 2023 BCCA 257 at para. 93 [emphasis added].

[33] *Mark Anthony Group Inc. v. Vincor International Inc.*, 1998 CarswellBC 706 (BCSC) at paras 25., 35-36, aff'd 1998 CarswellBC 2289 (BCCA).

[34] *Belron Inc. v. TCG*, 2009 BCSC 596 at para. 102, aff'd 2009 BCCA 577.

[35] *Clark v. Laser Clean Ltd. (Don's Power Vac)*, 2016 ABCA 4 at para. 13.

constitute irreparable harm, and the Application judge offered no further analysis or explanation supporting her ultimate finding of irreparable harm in this instance, despite Cascade's undisputed evidence that tour groups came nowhere near the aircraft. This is a plain legal error.

55. Similarly, the third instance of irreparable harm found by the Application Judge is that Cascade's social media posts showing the CL-215T at its facility could create "potential for confusion in the industry". Mr. Côté deposes that the social media posts "convey to the market that we continue to pursue a failed program with Cascade" and could "cause confusion in the marketplace as to the status of our upgrade." In her reasons, the Application Judge initially points out what appears to be the fatal error in Mr. Côté's assertions—the social media posts do not identify Viking as the owner of the aircraft depicted, and there are no visible markings indicating it is a Viking aircraft. The evidence also ignores the fact that Viking publicly announced its intention to undertake Cascade's integration work through a new company acquired after Viking commenced its claim.

56. Notwithstanding this evidence that directly contradicts Mr. Côté's speculative evidence, the Application Judge, nevertheless held that a social media post could somehow lead to irreparable harm. The Application Judge's analysis simply ends there, without explanation as to how the "potential for confusion" in the industry results in irreparable harm, or whether such harm could be compensated for by way of monetary damages. The lack of analysis on this point demonstrates again that the Application Judge accepted an impermissibly lower standard for irreparable harm.

57. In the fourth finding of irreparable harm, the Application Judge found that Cascade's ongoing withholding of property worth $10 million more than its counterclaim for damages "has the potential to cause irreparable harm". This finding was not grounded in the evidentiary record and *was not even raised by Viking*. It was a speculative concern raised for the first time by the Application Judge in her reasons, without Cascade having an opportunity to respond. Notably, the Court did not find that Cascade is unable to pay a damages award equal to the value of the aircraft, nor did Viking take that position in its evidence or submissions. The Application Judge's

unsolicited and plainly incorrect conclusion[36] that the value of the property itself amounts to irreparable harm ultimately underscores the extent of the conceptual errors emanating throughout her irreparable harm analysis as a result of applying the incorrect, lower legal standard.

C. Application Judge Erred in Finding Irreparable Harm in the Absence of Evidence

58. The Application Judge also committed a palpable and overriding error by misapprehending Viking's evidence. Specifically, she found irreparable harm in the **absence** of evidence. Viking's core irreparable harm argument is that it will suffer lost business and lost goodwill. These assertions arise solely from a statements by Mr. Côté, that Viking's affiliate, Longview, is "at risk of the Purchaser claiming damages or cancelling/terminating the contract" if it doesn't complete its sale of the CL-215T in 2024. Springboarding from this initial bare and speculative statement, Mr. Côté then asserts that if the contract is lost, "this will harm Viking and Longview Services' reputations with this customer as well as their broader reputations in the industry."

59. Despite these assertions, Mr. Côté does not provide a copy of the sales contract or any other documentation to support his assertion. There was no documentary evidence to support the speculation that the sale to Morocco would be "lost". Nor does he attempt to explain how one company in a corporate group can suffer reputational harm as a consequence of a potential lost sale by another company in the group.[37]

60. Similarly, Mr. Côté's statements of irreparable harm relating school tours in the proximity of the CL-215T or social media posts showing the CL-215T in the background do not, themselves, make out a factual basis for irreparable harm, nor is any evidence provided to support a finding of irreparable harm in connection with these allegations.

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[36] *Onkea Interactive Ltd. v. Smith*, 2006 BCCA 521 at para. 25; *Edward Jones v. Voldeng*, 2012 BCCA 295 at para. 41.

[37] The Application Judge held that reputational loss to one member of a corporate group could affect the reputations of other members: see Application Judge's Reasons at para. 209, Appeal Record, Tab G, p. 102-103.

61. The bare assertions in Mr. Côté's affidavit described above are not sufficient to establish an evidentiary basis of irreparable harm.[38] As such, for the Application Judge to find irreparable harm relying solely on those statements amounts to finding irreparable harm in the absence of evidence, which is a palpable and overriding error.

62. In *Vancouver Aquarium Marine Science Centre v Charbonneau*, the application judge granted an injunction on the basis of an affidavit by the applicant which, similar to Mr. Côté, deposed simply that the alleged harm is "impossible to calculate or repair". On appeal, this Court observed:

> This was the only material speaking to irreparable harm before the chambers judge. She accepted this statement without any further analysis, concluded that damages would not place the Aquarium in its former position, and found irreparable harm on that basis. There was not a shred of evidence in support of that conclusion.[39]

63. The Application Judge committed the same error in this case. Mr. Côté's statements themselves labelling potential harms as irreparable could not establish irreparable harm. The Application Judge conducted no further analysis nor identified any additional evidence that could support her finding of irreparable harm. As detailed above, even more problematic than in the *Vancouver Aquarium* case, the Application Judge in this case at no time considered whether monetary damages could address the type of harm alleged by Viking.

64. Bare assertions in affidavits do not constitute evidence of irreparable harm. In relying exclusively on such statements by Mr. Côté, the Application Judge misapprehended the evidence and committed a palpable and overriding error, which requires correction by this Honourable Court.

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[38] *Salcon Bio-Technologies v. International Bio-Recovery*, 2002 BCSC 7 at para. 19.

[39] *Vancouver Aquarium Marine Science v. Charbonneau*, 2017 BCCA 395 at para. 62.

PART 4 - NATURE OF ORDER SOUGHT

65. The Appellant seeks an Order:

    a. Allowing the appeal and dismissing the respondents' 10-1(4) application, with costs to the Appellant throughout.

66. All of which is respectfully submitted.

Dated at the City of Toronto, Province of Ontario, this 2nd day of August, 2024.

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APPENDICES: ENACTMENTS

Supreme Court Civil Rules

BC Reg 168/2009

Part 10 — Property and Injunctions

Rule 10-1 — Detention, Preservation and Recovery of Property

Property that is the subject matter of a proceeding

(1) The court may make an order for the detention, custody or preservation of any property that is the subject matter of a proceeding or as to which a question may arise and, for the purpose of enabling an order under this rule to be carried out, the court may authorize a person to enter on any land or building.

Fund that is the subject matter of a proceeding

(2) If the right of a party to a specific fund is in dispute in a proceeding, the court may order the fund to be paid into court or otherwise secured.

Allowance of income from property

(3) If property is the subject matter of a proceeding and the court is satisfied that the property will be more than sufficient to answer all claims on it, the court at any time

> (a) may allow the whole or part of the income of the property to be paid, during such period as the court may direct, to a party who has an interest in it, or
>
> (b) in the case of personal property, may order that part of the personal property be delivered or transferred to a party.

Recovery of specific property

(4) If a party claims the recovery of specific property other than land, the court may order that the property claimed be given up to the party, pending the outcome of the proceeding, either unconditionally or on terms and conditions, if any, relating to giving security, time, mode of trial or otherwise.