CITATION: Bell Canada v. Rogers Communications Inc. et al., 2010 ONSC 2788
COURT FILE NO.: CV-10-399634
DATE: 20100514

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: BELL CANADA, Plaintiff

AND:

ROGERS COMMUNICATIONS INC. and ROGERS CABLE COMMUNICATIONS INC., Defendants

BEFORE: Justice A.D. Grace

COUNSEL: Peter J. Lukasiewicz, Nicholas Kluge and James Camp, Counsel for the Plaintiff

Edward J. Babin and Clifford Jackman, Counsel for the Defendants

HEARD: April 28, 2010

ENDORSEMENT

[1] In this round, Bell Canada ('Bell') seeks an interlocutory injunction restraining Rogers Communications Inc. and Rogers Cable Communications Inc. (collectively 'Rogers') from continuing any advertising campaign which suggests Roger's television, internet or wireless service are more reliably available than the comparable services provided by Bell or which suggests Bell's services are less reliably available as a result of weather conditions.

BACKGROUND

[2] Bell and Rogers are fierce competitors. Both provide a range of services to customers in Ontario and elsewhere including television, internet and wireless. They are frequent litigants.

[3] While Bell emphasizes its motion is not limited to the thirty second television commercial which was run by Rogers for approximately six weeks from early March until mid-April, 2010, the viewing of the commercial spawned this action and motion.

[4] I have viewed the commercial. The commercial is, for the most part, accurately described in Bell's factum as follows:

> "The Rogers Commercial opens with a shot of a computer screen in a living room that is "frozen" because the computer is unable to connect with the Internet. The camera then pans to show a television screen picture that is scrambled, and then pulls back to reveal a bedraggled Bell customer, standing on his balcony in rainy weather, tugging on his Bell satellite television dish. He mutters, "First my Internet now my satellite TV won't work in this weather." The next shot shows him peering into the window of his neighbour's residence, who, as a Rogers customer, is freely surfing the Internet and watching crystal clear television. The narrator then says "Whether it's Internet, TV or wireless, Rogers is Canada's Reliable Network" while the following caption flashes across the screen:
>
> "INTERNET TV WIRELESS"
>
> followed by:
>
> "ROGERS
>
> CANADA'S RELIABLE NETWORK"

[5] With respect to the commercial in question, I noted the customers are familiar to many as the "two guys" previously used by Rogers in a line of wireless advertisements seen on television. The non-Rogers customer's computer did not appear to me to be "frozen" but it was clearly slow moving and the words quoted above were, indeed, uttered. The Rogers customer appeared to be happily working at his computer although I could tell no more than that. While the word "wireless" was used as outlined above, no wireless device appeared in the commercial.

BELL'S POSITION

[6] Bell submits:

> A. the purpose of the commercial is to compare the television, internet and wireless services of Rogers with those of Bell;
>
> B. the purpose of the comparison is to suggest Bell's internet, television and/or wireless services are unreliable in rainy weather while similar services offered by Rogers are unaffected;
>
> C. the suggestion Bell's internet, television and/or wireless services are unreliable in rainy weather is false and misleading;
>
> D. the suggestion the internet, television and/or wireless services of Rogers are more reliable in rainy weather than Bell's is false and misleading.

[7] Bell alleges Rogers assertions violate sections of the *Competition Act* and the *Trade-Marks Act* and that Rogers has committed the tort of injurious falsehood. It submits the evidence introduced on the motion should satisfy me there are serious issues to be tried, that Bell will suffer irreparable harm if an injunction is not issued and that the balance of convenience favours Bell: *RJR-MacDonald Inc*. v. *Canada* (*Attorney General*), [1994] S.C.J. No. 17.

[8] During argument Bell provided a draft order setting forth the terms requested which would enjoin Rogers not only from airing the commercial again but also from engaging in similar conduct in the future.

ROGERS' POSITION

[9] Rogers submits:

> A. this motion is moot. The commercial has not aired since approximately April 18 and will not air again;
>
> B. in any event, Bell has not established there is a serious issue to be tried since the commercial is not false or misleading. Rogers says the commercial fairly depicts a phenomenon known as "rain fade" which can and does affect satellite television reception, there is no suggestion Internet or wireless services do not work in the rain and Bell cannot prove that Bell is the target of the commercial since neither Bell nor its trade-marks are referred to;
>
> C. Bell cannot establish any, let alone irreparable, harm and the balance of convenience favours Rogers since the commercial is no longer airing. In its factum, Rogers submits Bell is attempting to use "this Court to curb Rogers' ability to compete, and limit its right to free expression, in a case where it is highly unlikely that Bell Canada could ultimately succeed at trial."

STAGE ONE ANALYSIS – IS THERE A SERIOUS ISSUE TO BE TRIED

[10] I will deal with the question of whether the motion is moot later in these reasons. Independent of mootness, is there a serious issue to be tried in light of the allegations of the breach of statute and/or the tort of injurious falsehood?

[11] The relevant provisions of the *Competition Act* are section 36(1)(a) and from Part VI, section 52(1). They read:

> 36(1) Any person who has suffered loss or damage as a result of
>
> (a) conduct that is contrary to any provision of Part VI…may … sue for and recover from the person who engaged in the conduct…an amount equal to the loss or damage proved to have been suffered…

> 52(1) No person shall, for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, *knowingly or recklessly* make a representation to the public that is *false or misleading* in any *material* respect. (Emphasis added)

[12] If contravened, section 53.2 gives the court authority to, inter alia, grant "relief by way of injunction".

[13] Section 7(a) of the Trade-marks Act prohibits one participant in an industry from making "a false or misleading statement tending to discredit the business, wares or services of a competitor."

[14] To succeed in respect of the tort of injurious falsehood, Bell must demonstrate that false statements were made, directly or by implication, about it in the commercial, the statements were made with intent to cause injury without lawful justification and that Bell suffered actual economic loss: *Church & Dwight Ltd.* v. *Sifto Canada Inc*. (1994), 20 O.R. (3d) 483 (Gen. Div.).

[15] Is Bell's premise that Rogers was comparing its television, internet and wireless services with those of Bell a fair one? In saying it is, Bell points to the fact only Rogers and Bell offer internet, television, wireless and wireline telephone services and alleges the satellite dish shown in the commercial was uniquely associated with Bell. On the other hand, Rogers points out that during the commercial Bell is not mentioned, none of its trademarks are displayed and only two (television and Internet) of four services are shown and discussed. Rogers has lead evidence it has numerous other competitors who provide television or internet services.

[16] Two cases are instructive. In *Church & Dwight Ltd*. v. *Sifto Canada Inc*., supra, Jarvis J. said:

> "The case before me is unusual in that virtual domination of the marketplace has been established by the plaintiffs (sic) product. Where a party virtually controls the marketplace it cannot be said that the absence of the name of the target competitor is determinative of the question. Viscount Simon L.C. in *Knupffer* v. *London Express Newspaper Ltd.,* [1944] A.C. 116 at p. 119…said:
>
> Where the plaintiff is not named, the test which decides whether the words used refer to him is the question whether the words are such as would reasonably lead persons acquainted with the plaintiff to believe that he was the person referred to." (para. 13)

[17] In *Mead Johnson Canada* v. *Ross Pediatrics* (1996), 31 O.R. (3d) 237 (Gen. Div.) promotional materials were held to refer to the plaintiff by "implication" where the plaintiff was "the other major competitor in this marketplace" (at para. 32).

[18] In this case, near its conclusion, the commercial's references to television and internet services were extended to include wireless. While later changed, the commercial also provided a

link to the "wireless" page on Rogers' website. The reference to the three services satisfies me Bell's allegation it was the target of the commercial is a serious issue.

[19] Each of the causes of action relied upon by Bell require a finding the commercial contained false or misleading statements. Rogers filed affidavits of its employees D'Arcy Hunt and Giancarlo Urbanis concerning the possible effect of inclement weather on satellite television reception. Both were cross-examined by Bell's counsel with respect to the extent of their knowledge about and the limited effect of "rain fade" or "attenuation". While weaknesses in their testimony were revealed, no technical evidence was offered by Bell. Bell relies on the following statement of Heather Tulk, its Senior Vice-President, Residential Products:

> "The service availability of Bell's Internet, television and wireless services exceeds 99.9%"

[20] While to me "availability" (Bell's word) and "reliability" (Rogers' word) are not synonymous, the scope of Rogers commercial is nonetheless troubling. Rogers led no evidence to suggest internet service of anyone could be affected by heavy rain. At paragraph 22 of his affidavit, Mr. Hunt of Rogers stated:

> "The Commercial neither claims nor implies that Internet or wireless services are adversely affected by poor weather."

[21] I disagree. Both the image on the computer screen and the "First my Internet…" comment made by the non-Rogers customer, create the very impression Mr. Hunt seeks to disclaim. Inclusion of the internet reference in the commercial causes me to conclude there is, indeed, a serious issue to be tried with respect to the factual accuracy of the commercial keeping in mind the following comments of the Supreme Court of Canada in *RJR-MacDonald*, supra:

> "The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case…
>
> Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A lengthy prolonged examination of the merits is generally neither necessary nor desirable." (paras. 49 and 50)

[22] In *Purolator Courier Ltd*. v. *United Parcel Service Canada Ltd*., [1995] O.J. No. 876 (Gen. Div.), Lederman J. wrote:

> "Advertising can be an effective tool in persuading the public to utilize a particular product or service. By its nature, it is one-sided and usually does not convey a full and balanced analysis. To do so, of course, might diminish its persuasive power. There must, however, be a reasonable basis for the representation that is made. So long as that is so, competitors may complain that the ad does not depict the whole picture, but they are just as equipped to tell their side of the story in the commercial marketplace…Courts should be reluctant to

> intervene in the competitive marketplace unless the advertisements are clearly unfair." (para. 63)

[23] Rogers relies on *Maritime Travel Inc*. v. *Go Travel Direct Com Inc*., 2008 CarswellNS 280 (S.C.) affirmed 2009 CarswellNS 219 (C.A.) for the proposition a breach of section 52 of the *Competition Act* requires "substantial proof". That was a trial decision and the standard is, of course, different than at this stage of the analysis. I recognize there are other elements which must be proven at trial for Bell to succeed. I go no further than to say I am satisfied analysis of stages two and three of the *RJR-MacDonald* test is required.

STAGE TWO – WILL BELL SUFFER IRREPARABLE HARM

[24] At the time this motion was argued, Clendening J. of the Court of Queens Bench of New Brunswick had not released her decision in *Bell Aliant Regional Communications, Limited Partnership* v. *Rogers Communications Inc. et al.* 2010 NBQB 166

[25] Decision was rendered on May 4, 2010. While the advertising campaign in issue there is different, Clendening J. concluded there was "a risk of irreparable harm to" Bell Aliant because the loss of customers and the potential loss of new customers would be difficult to assess. (para. 23) An interlocutory injunction was granted. I understand Rogers is seeking leave to appeal.

[26] In *Bell Canada* v. *Rogers Communications Inc. et* al., [2009] O.J. No. 3161 (S.C.J.), Code J. reviewed apparently inconsistent cases. Some, on their face, seemed to say that proof of "irreparable harm" would be inferred "from the simple fact of false representations between competitors in the market place." Others held that "lost sales or lost market share can be measured" and therefore did not constitute harm which was "irreparable". (para. 37) In rationalizing the state of the law, Code J. wrote:

> "There is broad agreement…that the 3 part test in *RJR-MacDonald* is, in fact, a wholistic set of factors and not 3 separate and distinct requirements. To… quote from Justice Sharpe's text, the three 'factors relate to each other, and strength on one part of the test ought to be permitted to compensate for weakness on another.'
>
> Applying this analysis to the Ontario cases that deal with 'irreparable' harm in the context of alleged loss of market share and damage to business reputation, their seeming inconsistency disappears. The two decisions of Justice Jarvis take a relatively liberal approach to inferring these forms of harm because he had already found at the first stage that 'a strong *prima facie* case has been established"…and that "the defendant's advertisements are false and misleading"… Conversely, in *Boehringer*, supra… Nordheimer J. had concluded at the first stage that "the current state of the evidence regarding the instances of improper conduct alleged by the plaintiff against the defendant leaves me with

very grave doubts as to the strength of the plaintiff's case." Similarly in *Telus*, supra…Ground J. held at the first stage that he was "not satisfied…that *Telus* has a very strong cause of action for injurious falsehood." Given this context, when proceeding to the second stage, both Nordheimer J. and Ground J., insisted on strict proof of actual harm. In other words, in a strong case harm can be inferred from the facts of the case but in a weak case it needs to be proved independently. Especially when the cause of action alleges a form of trade libel, it is simply common sense that a strong case on the merits will infer significant harm to business reputation which will be difficult to quantify in damages." (paras. 39 and 40)

[27] *RJR-Macdonald* is, once again, instructive when the Court held "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, usually because one party cannot collect damages from the other. Examples of the former include instances …where one party will suffer permanent market loss or irrevocable damage to its business reputation…" (para. 59)

[28] I do not believe "irreparable harm" should be inferred here for these reasons:

A. I do not believe Bell's case to be sufficiently strong that any harm, let alone harm which is irreparable in nature, should be assumed. The positions of both parties have been advanced in a bona fide manner and involve a number of important issues which cannot be resolved summarily. Who will prevail in the end with respect to the issue of whether the commercial is false or misleading remains to be seen. At this early stage, both parties have, in my view, an equal chance of success. In those circumstances, some proof of actual harm is, in my view, required;

B. On March 26, 2010, Ms Tulk deposed "Bell *is suffering* and will continue to suffer irreparable harm" because the commercial "will cause some potential customers to choose Rogers…over Bell" (Emphasis added). The motion was not argued until April 28. Yet no proof that a single customer had been lost was provided to the Court. One would have thought some evidence of the impact of the campaign could have been introduced. None was. I do not know whether revenue is up or down. I do not know whether other indicators of pending business loss or gain have been affected. Some evidence to support the unqualified statement of Ms Tulk should have been available: *Effem Foods Ltd*. v. *H.J. Heinz Co. of Canada*, 1997 CarswellNat 1353 (F.C.T.D.) at para. 7;

C. The commercial is no longer being shown and Rogers has promised it will not be aired again. Bell is concerned about Rogers' future conduct because Rogers has not undertaken to refrain from showing similar commercials in the future. I have no doubt the Court will respond quickly and in a meaningful manner in the event

> it appears any advertiser is playing a tactical game of broadcasting false and misleading commercials and then withdrawing them in the face of a pending motion. However, I do not believe that stage has been reached.

[29] There is a growing list of cases involving participants in the telecommunications industry. Injunctions were granted in several including *Telus Communications Co. v. Rogers Communications Inc.* [2009] B.C.J. No. 2329 (S.C.); *Rogers Wireless Partnership* v. *Bell Canada et al.* (December, 16, 2009, Docket S098835)(B.C.S.C.); *Bell Aliant*, supra and, in part, in *Tele-Mobile Co*. v. *Bell Mobility Inc*., [2006] B.C.J. No. 392 (S.C.). Injunctions were not granted in *Bell Canada* v. *Rogers Communications Inc.*, supra (though one would have been had Rogers not changed some of its practices); *Bell Mobility v. Telus Communications Co.*, [2006] B.C.J. No. 3333 (C.A.); *Telus Communications Co. v. Bell Mobility Inc.* 2007 CarswellBC 786 (S.C.) and *Telus Communications Co. v. Rogers Wireless Inc.* 2006 CarswellOnt 3015 (S.C.J.). A review of those cases evidences the fact driven nature of motions of this kind. The identity of the parties, the scope of their businesses, the nature of the conduct, its frequency and duration, the nature of the complaint, the defendant's response, the ability to measure the effect of the conduct on the plaintiff's business and the procedural history are a non-exhaustive listing of factors which may be relevant in attempting to determine whether harm is irreparable.

[30] To suggest irreparable harm will flow from the commercial seems to me an over-reaction. The parties are large corporations. The substantive issues are strongly contested. The commercial was thirty seconds long and it was shown for a limited period. No one from Bell appears to have noticed the commercial until its second week. The complaint is the commercial implied things negatively and unfairly. They were not stated expressly. The advertisement has ceased running. Some weeks have passed. I would have thought that would have given Bell some time to assess, at least in a preliminary and imperfect way, the effect of the commercial particularly since Bell suggested through its employee Ms Tulk that if "the broadcast of the Rogers Commercial is not halted immediately, the effect on Bell may be devastating because of the number of consumer decisions made each day with respect to the initial acquisition or continuing purchase of telecommunications services from a particular service provider." There is no evidence to suggest the concern was well-founded. I agree with the comments of Ground J. in *Telus* v. *Rogers*, supra:

> "The parties are large sophisticated corporations which engage in extensive marketing and advertising campaigns and would presumably have historic records of customers "churning" and their reasons for doing so as well as historic records of new customers gained over various periods of time." (para. 9)

[31] I am not satisfied Bell has suffered or will suffer irreparable harm.

STAGE THREE – BALANCE OF CONVENIENCE

[32] Who will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits? I can do no better than return to the comments of Code J. in *Bell* v. *Rogers*, supra, where he said:

> "I am satisfied that the balance of convenience favours denying interlocutory relief. The greatest harm to Bell has already occurred, when the mailing was sent out referring Bell customers to the campaign website with its misleading test site. The worst aspect of the website has now been taken down, it will not be repeated and there will be no further mailings. What remains on the website is unlikely to cause irreparable harm and, more importantly, it is uncertain whether what remains on the website will be found to be materially false or misleading at trial.
>
> Weighed against these uncertain risks of ongoing harm to Bell is the fact that Rogers has a legitimate interest in making commercial representations about the relative merits of the two competing internet services. There is also a public interest in this debate as it contributes to consumer education." (paras. 50 and 51)

[33] In this case, the commercial is off the air. Ultimate success is very much in doubt. The parties are aggressive advertisers. Complaints flow frequently in both directions. Undoubtedly, lines are tested and periodically, as evidenced by cases decided to date, they are crossed. However, none of those observations are cause for concern. The exercise of freedom of speech should be constrained only where there is good reason to believe it has been abused. As stated by Nordheimer J. in *Boehringer Ingeleheim* (*Canada*) *Ltd*. v. *Pharmacia Canada Inc*., 2001 CarswellOnt 1770 (S.C.J.), "Even commercial speech is worthy of protection." (para. 82) In the fullness of time, the accuracy of the Bell's outstanding allegation Rogers contravened the statutory and common law standard will be determined. In the meantime, I agree with the statement of Silverman J. in *Telus* v. *Bell*, supra, when he said:

> "The Court has no interest in micro-managing an advertising battle between two weighty competitors…" (para. 26)

[34] I have little doubt Bell can, through its own advertising, counter the effects which it says Rogers has caused.

IS THIS MOTION MOOT

[35] Rogers submitted Bell's motion for injunctive relief was moot because the commercial was no longer being aired. Rogers relied on the following passage of Sopinka J. in *Borowski v. Canada* (*Attorney General*), 1989 CarswellSask 241 (S.C.C.):

> "The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question…If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision." (para. 15)

[36] In my view, the motion was not moot. The decision of Rogers to remove the commercial from the air was said to have been made independent of this proceeding. D'Arcy Hunt's affidavit described the position of Rogers as follows:

> "The Commercial is only scheduled to air until April 16, 2010. Rogers currently has no plans to run the Commercial after that."

[37] There was some suggestion before me the commercial aired as late as April 18, 2010. Furthermore, while I believe Rogers has now undertaken not to run the commercial at all, that undertaking was not a concession it had done anything wrong but only reflective of Rogers' intention the commercial be time limited. Rogers undertaking relates to the commercial, not the conduct which Bell alleges is false or misleading. While I do not, therefore, regard the motion as moot, I have taken Rogers undertaking with respect to the commercial into account in considering the issue of irreparable harm as occurred in *Tele-Mobile v. Bell*, supra, para. 25.

[38] During argument Bell's counsel provided me with a draft of the order he sought as well as copies of orders recently granted in two other British Columbia cases. Both prohibit the defendant from "publishing or distributing to the public any advertising or other materials containing a representation or statement" that suggested one network was "the *most* reliable network in Canada". (Emphasis added)

[39] In this case, Bell sought a variation of those orders including an order restraining Rogers from representing that its internet, television, and/or wireless services are "more reliably available" than those of Bell. Even if I was of the view an injunction should issue I would not have granted an order in that form. Putting Bell's case at its highest level, the most that could be said is Rogers suggested its internet and television services were more reliable than the comparable services provided by its competitors (of which Bell is one) in heavy rain. If an analysis of the various stages set forth in *RJR-MacDonald* justifies the granting of an injunction, it should do no more than is absolutely necessary to restrain the offending conduct. As MacPherson J. said in *Daishowa Inc. v. Friends of the Lubicon*, (1998), 39 O.R. (3d) 620 (Gen. Div.):

> "the attempt to persuade people to purchase your product, and a concomitant attempt, either explicit (e.g. negative advertising) or implicit, to dissuade people from purchasing a competitor's product, is entirely an economic message and entirely a lawful form of expression." (p. 648)

[40] There are, of course, limits. If a business resorts to "untruthful disparagement of a competitor's goods and services" (per Lederman J. in *Purolator Courier v. United Parcel Service*, supra, para. 61), intervention may be warranted but the restriction imposed by the court should be designed to push the conduct to the inside edge of the line of appropriateness and no further.

CONCLUSION

[41] In the result, Bell's motion for an interlocutory injunction is denied. As indicated, Rogers has undertaken not to broadcast the commercial in issue any longer.

[42] If the parties cannot agree on costs they are asked to provide brief written submissions to me, with supporting time dockets, through Judge's Administration by June 16, 2010. My thanks are extended to counsel for their able submissions.

GRACE J.

Date: May 14, 2010