

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

BELL CANADA

Plaintiff

)
)
) *Peter J. Lukasiewicz, James Camp and*
) *Deborah Templer*
) for the Plaintiff

- and -

ROGERS COMMUNICATIONS INC. and
ROGERS CABLE COMMUNICATIONS
INC.

Defendants

)
)
)
) *Edward Babin*
) for the Defendants

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)
) **HEARD:** July 15 & 16, 2009

REASONS FOR DECISION

M.A. CODE J.

A. OVERVIEW

[1] The two parties to this action are large sophisticated competitors in the provision of telephone, internet and television services. On June 8, 2009 the Defendant Rogers launched a direct mail and website campaign styled "Check Your Speed" (the campaign). The gist of both the mailing and the dedicated campaign website was to assert 3 things: first, that the internet services "you are paying for may not be what you're getting"; second, to invite internet service customers "to test your connection speed now with an impartial third party"; and, finally, to urge customers to "sign up" or "switch" to Rogers where you will

“get reliable speed every time you connect.” The basic message was that Rogers will provide “speeds you can count on” in contrast to their competitors.

[2] The Plaintiff Bell is referred to in the direct mailing, although it is not named on the website. No other competitors are named. Bell considered the implications of the campaign and performed various tests for a little more than a week. It concluded that the campaign was materially false and misleading and that it was harming Bell in various ways. On June 17, 2009, Bell served and filed a Statement of Claim and the present motion seeking an injunction.

[3] The Statement of Claim alleges 3 causes of action: a violation of ss. 52 and 36 of the *Competition Act*; a violation of ss. 7(a), 22(1) and 53(2) of the *Trade-mark Act*; and the tort of injurious falsehood or trade libel. Although these 3 causes of action have their own distinct elements, they all revolve around the central requirement of materially false or misleading statements about a competitor’s business. The relief sought is \$50 million in general damages, \$1 million in punitive damages, injunctions restraining any further publication of the alleged false representations either by mail or on the website, and ancillary remedies that attempt to undo the alleged harm already caused by the letter and the website.

[4] The Notice of Motion sets out grounds that generally track the pleadings found in the Statement of Claim. Bell seeks an interlocutory injunction restraining Rogers, pending trial, from further publishing the alleged falsehoods either by way of further mailings or on its ongoing campaign website.

[5] On June 19, 2009, within two days of receiving Bell's Statement of Claim and Notice of Motion, Rogers took remedial steps to correct what was arguably the most troubling aspect of its campaign. This feature, related to the allegedly "impartial third party test site" where customers could independently check their speed, has not reappeared and, not surprisingly, Rogers has undertaken that it will not reappear. It will be described in greater detail below.

[6] The parties exchanged affidavits, conducted cross-examinations and gave various undertakings. The motion for an interlocutory injunction then came on for argument on July 15 and 16, 2009, approximately a month after the beginning of the campaign.

[7] The only issue at this interlocutory stage is whether Bell has met its burden of establishing the three part test for an interlocutory injunction set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311:

- (i) is there a serious question to be tried?
- (ii) will the moving party suffer irreparable harm if the injunction is not granted?
- (iii) is the balance of convenience such that the moving party will suffer greater harm if the injunction is not granted than the responding party will suffer if the injunction is granted?

B. FACTS

[8] There are two distinct ways in which Rogers has sought to communicate the message of its campaign. The direct mailing was sent to 227,000 non-Rogers customers in

Ontario and 14,000 non-Rogers internet customers (i.e. those who receive some other Rogers service such as cable television or wireless telephone). The campaign's dedicated website has recorded over 1000 visits and the dedicated phone line has received over 450 calls in the first month of operation.

[9] There is direct evidence from some Bell customers that they received Rogers mailing. Given the dominance of Bell and Rogers in the Ontario internet services market it can be inferred that a substantial number of Bell customers received Rogers mailing. The mailing directed customers to the dedicated website and to the dedicated phone line. During the course of argument, counsel for Rogers undertook on behalf of his client that there would be no further mailings during the campaign. Absent any such mailings, it is likely that access to the website will diminish in the coming months.

[10] The three central representations in the campaign are as follows: first, a representation that the internet speed that non-Rogers customers currently receive may be "less than the speed you signed up for" or the "speed you're paying for"; second, a representation that customers should check their speed with "an impartial third party test site", that Rogers will connect you to this test on the dedicated website, that this test will tell you "your true speed" and that you will then "find out for yourself"; and, finally, a third representation that if you "switch" to Rogers or "sign up" with Rogers you will "get reliable speed every time you connect," you will "never [be] held back by an inconsistent connection" and you will get "the speeds you can count on."

[11] There are some variations between the language used in the letter and the language used on the website. In particular, it is only in the letter that the term “your true speed” is used, it is only in the letter that Bell is directly mentioned, together with the suggestion that “you’ve been thinking of switching anyway,” and it is only in the letter that there is reference made to being “held back by an inconsistent connection.” The representations made in the letter are somewhat stronger, and more troubling, than the representations made on the website. In this regard, I note that counsel for Rogers undertook on behalf of his client, in the course of argument, that the term “your true speed” would not be repeated.

[12] Regardless of the differences noted above, the broad message conveyed to the consumer is the same across both mediums utilized in the campaign: first, that your current internet service may not be delivering the speed that was contractually promised to you; second, that you should check your speed with a neutral third party and learn what it actually is; and third, that you should then contract with Rogers which will deliver the speed it promises reliably and consistently in contrast to its competitors.

[13] There are a number of problems with these representations that, taken together, could lead a trier to conclude that they are materially false or misleading. The first representation is potentially misleading because Rogers never makes clear that what you contract for when you purchase internet services (i.e. “what you paying for” or what “you signed up for”) is not an actual measured speed, whether you are contracting with Bell or

with Rogers. Rather, what is sold is simply a setting on your modem that allows you to achieve up to the set speed.

[14] As Rogers own witness, Robert Goodman, conceded in cross-examination:

“... when we tell our customers what download speed each service tier gets, the number for “Express” is 10 magabits per second... I don’t measure it ... I offer a product. At no point do I measure it ... It’s a setting. So we would set the modem to the speed that relates to the speed that the customer is paying for. At no time in the sales process do we test the speed as you [counsel] refer to it. We set it.”

Given this concession that what is being sold is not an actual measured speed but, rather, a setting on a modem, counsel for Bell asked the following important question of Mr. Goodman:

- Q. And if he [the customer] runs the test, and it tells him that his internet connection speed is less than 10 megabits per second, is he still getting the internet speed that he’s paying for?
- A. The internet speed he’s paying for is “up to,” as is industry practice, so I believe the answer is yes ... We sell an “up to” service, as is industry practice

[15] None of this is made clear in the campaign as the implication throughout is that the independent test will reveal your “true” or accurate speed, on any given occasion when you happen to do the test. More importantly, the implication is that this measured test speed should not be slower than the speed “you signed up for.” If the test speed is slower than the contractually promised speed then, the campaign asserts, you are not getting “what you are paying for.”

[16] Rogers acknowledges in a footnote, in very small print at the bottom of the campaign website and on a separate page of its campaign letter, that “Download speeds may vary with internet traffic, server or other factors.” This concession helps to explain why the “industry practice” is only to sell a modem “setting” that provides an “up to” speed, rather than selling a consistent, actual or measured speed. Unfortunately, this is not the broad message conveyed by the campaign.

[17] The second representation, concerning the “impartial third party test site”, is the one that has now been substantially corrected by Rogers. No one disputes that testing your computer’s internet speed, like testing any product you purchase, is a useful consumer education practice. Both Rogers and Bell invite their own customers to check their internet speeds and both provide a testing service on their own websites. More importantly, evidence was adduced concerning a very popular independent third party speed test website known as “Ookla” which is said to have conducted over 888 million speed tests for customers at a rate of over “20 million tests each month.” This evidence shows that there is significant demand from consumers, and concern by consumers, to have some means of independently checking the speed of their internet service. Rogers’ campaign clearly plays on this consumer desire for impartial third party verification of download and upload speeds.

[18] Unfortunately, the way in which the campaign website set up its own “impartial third party test” was quite misleading. Instead of directing the customer to an independent testing service, like the “Ookla” website, the dedicated campaign website provided its own test which was in fact connected to a server located in Seattle, Washington, on the west coast

of United States. Although the evidence is not entirely consistent, there is no real dispute that for some customers the significant distance between Ontario and Seattle would result in a slower internet connection. Nowhere in its representations, did the campaign state that the “impartial third party test site” was a server located in Seattle nor point out the impact that this geographical distance may have on internet speed.

[19] Worse still, once the customer had completed this first allegedly independent check of his/her internet speed, the dedicated campaign website prompted a further test using other “official servers.” This time, the screen message expressly stated that some of these other servers are “close to you” and specified the 3 Ontario cities of “Toronto, Hamilton, Kitchener.” When the customer clicked on one of these apparently local icons, the server they were connected to was not located in any one of the 3 Ontario cities. Instead, the customer was routed back to the same original Seattle server. In other words, the Seattle server speed test was simply repeated twice. Undoubtedly, it yielded consistent results.

[20] This very misleading process could hardly be described as “an impartial third party test site.” Bell had to conduct a number of quite sophisticated tests in order to get to the bottom of how the campaign test site actually worked. Rogers immediately removed this feature from its campaign, after receiving Bell’s pleadings on June 17, 2009. The present campaign website no longer sets up its own test service. Rather, it simply directs the customer to a reputable independent testing website. There could be no complaint about this and none is made by Bell.

[21] Counsel for Bell submitted that the efforts involved in setting up the original misleading test, with its repeated routing to a Seattle server, must have involved real planning and deliberation. He submits that an inference ought to be drawn that Rogers is determined to gain an unfair advantage in the market place. Counsel for Rogers submits that the website test was set up by a third party contractor, that it was a mistake and that Rogers lead witness, Mr. Goodman, had no knowledge of it. Given that this feature has now been removed from the campaign website, and Rogers has undertaken not to repeat it, it has become an issue that is better left for trial and for remedies other than an interlocutory injunction. The evidentiary record before me is not complete in relation to this issue and it would be unwise to make any further findings about it at this interlocutory stage.

[22] The third representation is the invitation to customers to “switch” or “sign up” with Rogers in order to receive consistently reliable internet speed “every time you connect,” at the promised level. It would be difficult to criticize this representation as being materially misleading if it stood alone. For example, Rogers represents throughout the campaign that “Rogers is the fastest, most reliable internet. Period.” There may be some degree of non-actionable puffery involved in these assertions but it is noteworthy that the representation is supported by a footnote which states, “Fastest and most reliable speeds claim supported by independent third party research conducted by ComScore Inc., comparing average download speed to the equivalent speed of the incumbent DSL provider.” DSL is the technology used by Bell. Nevertheless, Bell makes no complaint as to these positive assertions by Rogers concerning its own capabilities.

[23] What makes the third representation potentially misleading is that the campaign situates it together with the first and second representations. Taken together, the three representations imply that Rogers lives up to its contractual promises and Bell does not, given that Rogers actually provides the speed that it promises while Bell does not. The proof offered to support this assertion is the difference between the speed “you signed up for” and the “true speed” which will be revealed by the independent third party testing.

[24] In fact, Rogers’ internet service is susceptible to the same differential that can occur between the contracted for “setting” speed, which is merely an “up to” speed, and the actual measured speed of a particular test on a particular occasion. Once again, Mr. Goodman’s evidence on cross-examination is illuminating. He was asked what it meant when the campaign asserted that “With Rogers, you’re never held back by an inconsistent connection” [emphasis added]. He replied:

It’s intended to convey that with Rogers, we attempt to allow ... all of our customers to have the ability to reach the speed that they’re paying for.

[Emphasis added]

Similarly, he testified that Rogers’ assertion of reliability is “intended to convey the ability to get the connection that people are paying for ... It means the ability to get the speed you paid for.” Mr. Goodman’s repeated use of the somewhat ambiguous term “ability” was eventually clarified in the following exchange with counsel:

Q. ... So is this intended to mean that if you subscribe to the 10 megabits “Express” service, then you will get that speed every time you connect?

A. I think it’s trying to refer to the fact that you have the ability to get it every time you connect.

....

Q. Is it an issue with the Rogers service if you connect at a peak time?

...

A. I think peak time can impact; I don’t think it does all the time. I think it would be very specific to subscribers.

...

Q. And why would it be subscriber-specific?

A. The nature of the internet.

Q. What does that mean?

A. There are parts of the internet that are shared, and when those parts get busy, it is not inconceivable that speed would be affected.

...

Q. So to sum up, some Rogers subscribers might be affected in terms of internet speed if they connect at a peak time?

A. ... yes, I think as with all carriers, peak time can impact speed.

Q. So peak time can impact speed for a Rogers subscriber?

A. It could, yes.

[Emphasis added]

[25] Mr. Goodman testified that Rogers will “over-provision” the modem by setting the speed at a rate that is higher than the speed contracted for. In this way, Rogers tries to

counteract the reality that factors such as the amount of traffic and the particular location of a site on the internet inevitably have an impact on speed.

[26] Mr. Goodman's evidence, read as a whole, is that Rogers does not guarantee a consistent measured speed but simply the "ability" or potential to reach that speed. This is why it is careful to sell only an "up to" speed or a "setting" on the modem. Unfortunately, this is not clear when the third representation is read in the context of the other two representations in the campaign.

[27] There was a great deal of additional evidence, some of it important, relating to the various *RJR-MacDonald* factors or tests for an interlocutory injunction. I will address this further evidence below when discussing and applying each of the three tests.

C. THE LAW

(i) A serious question to be tried

[28] In *RJR-MacDonald, supra*, the Supreme Court of Canada described the first factor as follows: (at paras. 49 and 50):

"What then are the indicators of "a serious question to be tried"? 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...

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 prolonged examination of the merits is generally neither necessary nor desirable."

[29] Both parties agree that the preliminary issue of “serious question to be tried” is not a high threshold but they stress that strength or weakness on this factor can become important at the subsequent steps in the *RJR-MacDonald* test. In this regard, both parties agree that the three steps are to be considered as a whole and they commend Justice Nordheimer’s approach in *Boehringer Ingelheim (Canada) Ltd. v. Pharmacia Canada Inc.* (2001), 12 C.P.R. (4th) 317 at paras. 37 and 69 (S.C.J.) where he, in turn, adopts the approach set out in Justice Sharpe’s leading text, *Injunctions and Specific Performance*, (Looseleaf Edition; Canada Law Book, 2008):

If one accepts that the relative strength of the plaintiff’s case is a matter that ought to be considered then the question becomes, at what point of the analysis should this consideration be undertaken? It could be considered either in conjunction with the serious issue factor, which I consider more appropriate, or it could be considered in conjunction with the balance of convenience or it could even be considered as a fourth factor. However, if one accepts that all of the factors present in the *Cyanamid* test ought to be considered before reaching the ultimate conclusion on the motion for injunctive relief, then it does not seem to me to matter which approach is taken. The real issue is how much weight should be given to the relative strength factor. In this regard, I respectfully adopt the following observation from Sharpe, *Injunctions and Specific Performance* (looseleaf edition) at para. 2.370:

The weight to be placed upon the preliminary assessment of the relative strength of the plaintiff’s case is a delicate matter which will vary depending upon the context and circumstances. As the likely result at trial is clearly a relevant factor, the judge’s preliminary assessment of the merits should, as a general rule, play an important part in the process. However, the weight to be attached to the preliminary assessment should depend upon the degree of predictability which the factual and legal issues allow. If the judge is of the view that the plaintiff is unlikely to succeed, but cannot say that the claim is frivolous or vexatious, he or she should still go on to consider the other factors, rather than dismiss the application at the threshold. This is a positive and helpful aspect of the *Cyanamid* case which should not be

forgotten. However, the judge's negative impression of the plaintiff's chances of ultimate success should be taken into account, along with all other considerations.

...

Notwithstanding my analysis of the first factor, I now proceed to review the other two factors. I do so for two reasons. I consider it prudent to provide my analysis in case my decision should be the subject of review elsewhere. More importantly, as I have already alluded to, there is authority for the proposition, with which I have already expressed my agreement, that the *Cyanamid* test should not be considered as a step-by-step formula where each factor is to be considered an obstacle which must be overcome before one can tackle the next obstacle. Rather, the preferable approach is for all three factors to be considered and then the collective impact of those factors determines the ultimate result. I refer to the following observation from Sharpe, *Injunctions and Specific Performance* (looseleaf edition) at para. 2.600:

The terms "irreparable harm", "*status quo*" and "balance of convenience" do not have a precise meaning. They are more properly seen as guides which take colour and definition in the circumstances of each case. More importantly, they ought not to be seen as separate, water-tight categories. These factors relate to each other, and strength on one part of the test ought to be permitted to compensate for weakness on another.

[Emphasis added]

[30] Applying these principles to the facts set out above, I am satisfied that there is a serious question to be tried. Indeed, in relation to the second representation summarized above, the campaign was seriously misleading and Bell's case is strong. However, this representation is the one that has now been completely corrected by Rogers and that they have undertaken not to repeat. Accordingly, the strength of the case on this one point will have less weight when considering "irreparable harm" and "balance of convenience." Although Bell's case in relation to the other two representations gets over the "serious question to be tried" threshold, it is not as strong. There are differences between Bell's

technology and Rogers' technology which arguably can have an impact on speed. There is also independent research supporting Rogers' assertions as to its speed and reliability. Depending on how this evidence unfolds at trial, concerning the relative speed and reliability of the two competing systems, a trier could find that the first and third representations were misleading but not materially misleading. Again, these differing strengths and weaknesses of different parts of the case will be borne in mind at the next two stages of the *RJR-MacDonald* test.

(ii) Irreparable harm

[31] The second requirement for an interlocutory injunction, "irreparable harm", was explained in the following terms in *RJR-MacDonald, supra* at para. 59:

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 be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid, supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

[32] Bell relies on the Court's reference to "permanent market loss or irrevocable damage to its business reputation", the implication being that this species of harm is not generally compensable in damages. Two cases that illustrate the point, both decided fifteen years ago by Jarvis J., are *Church & Dwight Ltd. v. Sifto Canada Ltd.* (1994), 20 O.R. (3d) 483 (S.C.J.) and *Maple Leaf Foods Inc. v. Robin Hood Multifoods Inc.* (1994), 58 C.P.R. (3d) 54 (S.C.J.). Both cases involved claims, like the one in the case at bar, where two large competitors were embroiled in a dispute over allegedly false advertising. In the former case, Jarvis J. stated (at paras. 22 and 23):

As to irreparable harm, the defendant asserts that the plaintiff can be adequately compensated for whatever market share it might lose in the time between the granting of the injunction and trial. This fails to account for the great difficulties a trial judge will have in determining what loss flows from the offending words. There will be an advertising campaign and competition in a variety of forms and it will be said at trial, predictably, that any difficulties experienced in marketing by the plaintiff are for reasons totally unconnected with the offending words. Loss of actual and potential customers is recognized as irreparable harm not compensable in damages: see *Source Perrier (Société Anonyme) v. Canada Dry Ltd.* (1982), 36 O.R. (2d) 695 at p. 701, 64 C.P.R. (2d) 116 at p. 123 (H.C.J.); *Creditel of Canada Ltd. v. Faultless* (1977), 18 O.R. (2d) 95 (H.C.J.) at p. 102, 36 C.P.R. (2d) 88 at pp. 95-96.

It is also clear that actual and potential loss of goodwill and diminution of a plaintiff's reputation also constitute irreparable harm: see *Foodcorp Ltd. v. Original Chalet Canada Inc.* (1981), 61 C.P.R. (2d) 89 (Ont H.C.J.) at p. 91; *Time/System International A/S v. Custom Planner Inc.* (1986), 12 C.P.R. (3d) 441 (Ont. H.C.J.) at p. 444. I find that the plaintiff has established that it will suffer irreparable harm if an injunction is not granted.

[33] In the latter case, Jarvis J. reached similar conclusions concerning “irreparable harm” (at paras. 14 and 15):

I am further satisfied that the plaintiff has established that there will be irreparable harm for which the plaintiff cannot be compensated for in damages. The plaintiff’s products will be discredited and a loss of sales will result, which will be difficult to calculate at trial. The plaintiff will predictably take the position at trial that any decrease in sales volume is the result of the advertisements. The defendant will predictably say that many other factors have contributed to the decrease in sales. The effect on the plaintiff’s business will be difficult to gauge and in particular the long-term effect may be impossible to calculate.

The evidence establishes that there will be a loss of actual customers, bearing in mind the plaintiff’s current dominance of the market. These advertisements will have the effect of diminishing the plaintiff’s reputation and lead to a loss of goodwill as well. It is my conclusion that the plaintiff has satisfied the second part of the test and that irreparable harm has been established.

[34] In a more recent decision of this Court, *Canpages Inc. v. Quebecor Media Inc.* (2008), 66 C.P.R. (4th) 385 (S.C.J.), M.F. Brown J. (now R.S.J.) appeared to acknowledge an emerging conflict in the jurisprudence as to whether loss of market share amounts to “irreparable harm” or whether damages is an adequate remedy (at paras. 11, 12 and 14):

In Ontario, there are numerous cases that have concluded that lost sales or lost market share can be measured with the availability of sales history, sales projections and sophisticated accounting. See *V.L. Canada Inc. v. Proctor & Gamble Inc.*, (1996), 65 C.P.R. (3d) 534 (Ont. Gen. Div.).

On the other hand, loss of actual and potential customers is recognized as irreparable harm not compensable in damages. It is also clear that actual and potential loss of goodwill and diminution of a plaintiff’s reputation also constitutes irreparable harm. See *Church & Dwight Ltd. v. Sifto Canada Inc.* [1994] O.J. No. 2139 (Ont. Ct. Gen. Div.).

...

The loss of goodwill is something that damages cannot reverse. There is evidence that the plaintiff would suffer not only loss of profits and goodwill but also loss of reputation. The loss of actual or potential customers, goodwill and diminution of a plaintiff's reputation have been recognized as irreparable harm not compensable in damages because it is difficult, if not impossible for a plaintiff to establish the extent to which customers were lost by it or gained by the defendant as a result of the impugned conduct. In a competitive business market, there is no way for the plaintiff to adequately track the current customers who do not renew contracts, or the prospective customers who do not sign on, due to the interference of the alleged wrongful new competition. I am satisfied that the plaintiff will suffer irreparable harm if an interlocutory injunction is not granted.

I note that *Canpages* was a case involving breach of a negative covenant where it has often been held that proof of "irreparable harm" is not necessary if the plaintiff's case is strong. See: Sharpe, *supra* at p. 2-33.

[35] In *Telus Communications Co. v. Rogers Wireless Inc.*, [2006] O.J. No. 1865 at para. 9 (S.C.J.), Ground J. took the view that loss of market share and harm to business reputation could both be calculated and compensated for in damages:

With respect to irreparable harm, it appears to me that the harm which Telus will incur if the advertisement is allowed to continue will be a loss of customers switching to Rogers and fewer new customers signing on to the Telus network. Any alleged loss of goodwill or diminution of reputation would similarly be manifested by loss of customers. I am not persuaded by the evidence before this court that it would not be possible to calculate the amount of such loss. The parties are large sophisticated corporations which engage in extensive marketing and advertising campaigns and would presumably have historic records of numbers of customers "churning" and their reasons for doing so as well as historic records of new customers gained over various periods of time.

[36] The question of false representations between business competitors, and whether they give rise to “irreparable harm,” was addressed again in this Court in *Boehringer, supra*. The case did not deal with identifiable advertising copy, as in the case at bar, but rather with oral statements by sales representatives. Nordheimer J. took what appears to be a much more demanding approach to “irreparable harm” than Jarvis J. had taken in the earlier cases. He reasoned as follows (at paras. 73-75):

The items from the above quotation that are particularly germane to the issues that are before me are the considerations of permanent market loss and of irrevocable damage to business reputation. As a general proposition, I accept that severe difficulties in proving damages, particularly difficulties with proving the actual number of customers that the plaintiff might lose from the refusal of physicians to prescribe the plaintiff’s drug for their patients, can constitute irreparable harm. For example, I can see that it would be difficult, if not impossible, for the plaintiff to prove how many patients, if they had not been lost to the defendants’ activities, would have been prescribed MOBICOX and, from that, equally difficult to prove how many times or for what duration each patient would have taken the drug. However, as I have already recited in relation to the first factor in the test, I am not satisfied that there is any solid evidence before me that there is a wholesale refusal to prescribe the plaintiff’s drug that has occurred or is likely to occur.

I also accept that there is a reasonable prospect that the business reputation of the plaintiff may be damaged by such misstatements. Nonetheless, I am not satisfied that the plaintiff has shown, at this stage, that any such damage will be irrevocable. It has not been established that the plaintiff cannot, through its sales representatives, counter the effects which it says are arising from the conduct of the defendants. It is not clear to me that, for each physician that the defendants visit and to whom they suggest that MOBICOX is not a true COX-2 inhibitor, the plaintiff cannot also visit that physician and show him or her the letter from Health Canada or other material such as articles and studies which conclude that MOBICOX is a true COX-2 inhibitor. Any of the evidence which the plaintiff points to for the proposition that the defendants’ conduct has caused physicians to feel that they have been misled by the plaintiff or that they have been “snake oiled” by the plaintiff is, when read objectively, entirely speculative. The physicians have essentially said that *if* what the plaintiff

has said about MOBICOX turns out to be untrue, *then* they would have that reaction. But it is evident that none of these physicians have yet reached that conclusion and it is also evident that these physicians are not relying on information from the defendants' representatives alone to eventually reach any such conclusion.

I have determined, therefore, that the plaintiff has not at present established that it will suffer irreparable harm from the defendants' activities. [Emphasis added]

Nordheimer J. went on (at para. 87) to distinguish *Maple Leaf Foods* as a case “where the offending material can be easily identified and removed,” unlike the oral sales representatives in *Boehringer*, a factor he found to be relevant to “balance of convenience.”

[37] On a superficial reading, the above 5 decisions of this Court appear to be inconsistent. At one extreme, Jarvis J. was willing to infer “irreparable harm” from the simple fact of false representations between competitors in the market place. At the other extreme, Nordheimer J. conceded there was some difficulty in proving lost market damages and was willing to infer some damage to reputation but still insisted on proof of actual harm by way of “solid evidence” of “permanent market loss or irrevocable damage to ... business reputation,” which is the standard set out in *RJR-MacDonald* [emphasis added]. The two decisions of Brown J. and Ground J. add the further complicating factor that this Court has often held that “lost sales or lost market share can be measured” by various species of modern expert opinion evidence and, therefore, this kind of lost business can be adequately compensated in damages.

[38] As is so often the case in this area of law, the means of reconciling these seemingly inconsistent decisions is found in Justice Sharpe's text, *Injunctions and Specific Performance, supra*. He begins by noting (at p. 2-32) that the "Federal Court of Appeal has said that proof of irreparable harm cannot be inferred and the 'evidence of irreparable harm must be clear and not speculative'", pointedly omitting any comparison to the position in the Ontario Courts which seems to be more flexible. He then turns to the apparent inconsistency in some of the case law (at p. 2-38 to 2-40):

It is exceptionally difficult to define irreparable harm precisely. Courts regularly and routinely assess monetary awards for non-pecuniary injuries where this is necessary. On the other hand, the courts have sometimes been prepared to view what otherwise seem readily calculable losses as "irreparable" for the purposes of interlocutory relief.

In the context of preliminary relief, the test is a relative and flexible one which, it is submitted, necessarily involves an evaluation of the other factors. Indeed, it has been held that an interlocutory injunction may be granted even where "irreparable" harm has not been demonstrated. Similarly, attempts to make irreparable harm a condition precedent, and hence a threshold test, have been rejected. These cases suggest that the "irreparable harm" requirement can only be defined in the context of the risk-balancing exercise. If the plaintiff's case looks very strong, harm may appear to be more "irreparable" than where the plaintiff has only an even chance of success. While judges seldom explicitly acknowledge that there is an "overflow" effect produced by strength or weakness of other factors, it cannot be doubted that, as a practical matter, it exists. 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. However it is defined, failure to establish irreparable harm is commonly cited as the primary reason for refusing injunctive relief.

... If damages are an adequate remedy, running the risk of restraining the defendant unjustifiably pending the trial is simply not warranted.

[Emphasis added]

[39] There is broad agreement in the case law that the 3 part test in *RJR-MacDonald* is, in fact, a wholistic set of factors and not 3 separate and distinct requirements. To repeat the earlier 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."

[40] 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" (*Church & Dwight*, *supra* at para. 20) and that "the defendant's advertisements are false and misleading" (*Maple Leaf Foods*, *supra* at para. 13). Conversely, in *Boehringer*, *supra* at para. 68, 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 defendants leaves me with very grave doubts as to the strength of the plaintiff's case." Similarly, in *Telus*, *supra* at para. 8, Ground J. had 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.

[41] Applying these principles to the case at bar, the key evidence adduced by Rogers is found in the affidavit of its lead witness, Robert Goodman. He swore that “Rogers will have the ability to calculate the impact of its marketing campaign during the relevant time periods. Bell Canada should therefore be in a position to calculate its damages, if any. Rogers can do so by determining whether a new Rogers high-speed internet service customer from within a ‘Check Your Speed Campaign’ target area received a ‘Check Your Speed Campaign’ letter (i.e. was a non-Rogers customer) and, using a control group and internal market research data, estimate the increase in internet access service sign-ups from among the non-Rogers customers.”

[42] During the course of argument, counsel for Rogers clarified and strengthened this evidence somewhat by advising that his client had records of the addressees of the campaign mailing and had records of its new “sign-ups” and, further, that it undertook to preserve these records pending trial and to produce them on discoveries.

[43] Rogers’ counsel’s earlier-referenced undertakings not to engage in any further direct mailing as part of the campaign, not to repeat the Seattle service test site debacle and not to use the phrase “true speed” during the campaign are also relevant to the issue of “irreparable harm.” As Justice Sharpe put it in his text (*supra* at p. 2-36):

In appropriate cases, the defendant can avoid an injunction by undertaking to account, or to desist from the conduct complained of. For example, in an Ontario case, the plaintiff sought an injunction preventing the distribution of a film. The injunction was refused on the basis that the defendant keep full records of all revenue gained from the distribution of the film.

[44] The critical point in relation to “irreparable harm” is that the strongest part of Bell’s case relates to the second representation and it is no longer being made. Had an emergency injunction been sought on June 17, 2009, while the supposedly “impartial third party test site” connected to the Seattle server was in operation, and had Rogers insisted on continuing with the campaign in this form, I am satisfied that “irreparable harm” could have been inferred and that an injunction likely would have been granted. As in *Church & Dwight, supra*, there would have been a “strong *prima facie* case” and a strong inference from that *prima facie* case of ongoing irreparable harm to Bell’s market share and business reputation.

[45] However, that is no longer the case that is presently before the Court. The Seattle server test site has been taken down and replaced with a truly impartial third party test site that is unobjectionable. In addition, the direct mailing is an event in the past that no longer needs to be enjoined and there is an undertaking from Rogers not to repeat it or, indeed, to carry out any further mailings as part of the campaign. The campaign website remains in place but its representations are somewhat milder than those found in the mailing and, as discussed above in relation to the first factor, it is less clear that these ongoing representations are materially false or misleading. Furthermore, there have only been about 1,000 visits to the campaign’s dedicated website and 450 phone calls to the dedicated phone line. This is a relatively small take-up from a mailing that was sent to almost a quarter of a million customers. The website visits and phone calls will likely decline in the next few months, as the original mailing recedes further into the past and is not followed up

with any further mailings. Finally, Rogers has undertaken to preserve the necessary records that will allow for expert opinion evidence as to any increase in market share derived from the campaign.

[46] In all these circumstances, I am satisfied that the inference of any ongoing “irreparable harm” from the present version of the campaign is weak.

(iii) Balance of convenience

[47] The third factor, “balance of convenience,” was described in the following terms in *RJR-MacDonald, supra* at paras. 62 and 63:

The third test to be applied in an application for interlocutory relief was described by Beetz J. in *Metropolitan Stores* at p. 129 as: “a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits”. In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in *Charter* cases, many interlocutory proceedings will be determined at this stage.

The factors which must be considered in assessing the “balance of inconvenience” are numerous and will vary in each individual case. In *American Cyanamid*, Lord Diplock cautioned, at p. 408, that:

[i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

He added, at p. 409, that “there may be many other special factors to be taken into consideration in the particular circumstances of individual cases.”

Justice Sharpe’s text describes the “balance of risks” that an interlocutory injunction seeks to address, as follows:

“... in the absence of immediate and final resolution, the task of the court is to balance the risk of harm to the defendant, inherent in granting remedial relief before the merits of the dispute can be fully explored, against the risk that the plaintiff’s rights will be significantly impaired in the time awaiting trial.”

[48] It can be seen from the above formulations of this factor that the apparent strengths and weaknesses of the case again play a role at this stage: if the case is weak, the risk of harm to the defendant is likely to be great in granting an interlocutory injunction; if the case is strong, and damages provide an uncertain remedy, the risk of harm to the plaintiff is likely to be great in refusing an interlocutory injunction.

[49] The close inter-relationship between this third factor and the previous two factors was succinctly summarized by Nordheimer J. in *Boehringer, supra* at para. 82:

“In my view, courts should generally be averse to entering into the competitive fray unless it is clear that a false statement is being made which has the prospect of causing irreparable harm or which may impact on the health and welfare of members of the public.” [Emphasis added]

Nordheimer J. also gave weight to public interest or public policy considerations at this final stage of the test (*supra*, at para 82):

“I am also concerned that the injunction being sought has a very real impact on freedom of speech and, as a consequence, carries the genuine prospect of creating a chilling effect on persons who have a legitimate interest in engaging in the debate. Even commercial speech is worthy of protection.”

[50] Applying the above principles, 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 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.

[51] 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. If Rogers was restrained now by an injunction, but ultimately succeeded at trial, it would be very difficult to quantify its damages in terms of lost market share and lost opportunities caused by the injunction.

(iv) Conclusion

[52] The three factors in *RJR-MacDonald*, taken together, lead to the conclusion that this is no longer an appropriate case for an interlocutory injunction. It was an appropriate case, when the Notice of Motion was first served and filed on June 17, 2009, but much has changed since then. In the changed circumstances that presently exist, the second and third factors particularly point towards dismissing the motion.

[53] In the result, Bell's request for an interlocutory injunction is denied. Rogers, of course, is bound by its various undertakings pending trial and these should be noted in the formal order.

[54] I should note that there was considerable argument as to whether Bell had properly pleaded the alleged misrepresentations on which it now relies. Rogers submitted that the only misrepresentation pleaded in the June 17, 2009 Statement of Claim and Notice of Motion concerns the misleading Seattle server test site and that Bell fundamentally changed its argument after Rogers remedied this aspect of its campaign on June 19, 2009. I am satisfied that the pleadings are not limited to the misleading test site and that they clearly cover all of the misrepresentations on which Bell relies.

D. COSTS

[55] This is as a case of mixed results. The motion was ultimately denied and so Rogers was successful in this sense. However, it is apparent that Bell achieved much of what it was seeking in the form of undertakings by Rogers not to repeat the misleading test site,

not to repeat the use of the term “true speed”, not to conduct any further direct mailings during the campaign and to preserve the various records needed to permit expert opinion evidence as to the impact of the campaign on the market. These undertakings, made to the Court during oral argument, are really substitutes for partial injunctions.

[56] In these circumstances, it is appropriate for the parties to bear their own costs and I so order.

M.A. CODE J.

Released: July 24, 2009.

COURT FILE NO.: CV-09-381186
DATE: 20090724

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

BELL CANADA

Plaintiff

- and -

ROGERS COMMUNICATIONS INC. and
ROGERS CABLE COMMUNICATIONS INC.

Defendant

REASONS FOR DECISION

M.A. CODE J.

Released: July 24, 2009.