

Comments

INJUNCTIONS IN MISLEADING ADVERTISING CASES

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Les entreprises désirant faire cesser la publicité de leurs concurrents par voie d'injonction interlocutoire en vertu de l'article 52 de la *Loi sur la concurrence* doivent affronter plusieurs difficultés. En particulier, il est difficile de déterminer quelle importance le tribunal accordera à la « valeur probante de la preuve » et au « préjudice irréparable ». Les auteurs ne recommandent de recourir aux demandes d'injonctions pour faire cesser la publicité trompeuse que dans des cas exceptionnels.

Introduction

There are only a few realistic options available for businesses to deal with the (perceived) unfair and misleading advertising of competitors. Prosecutions under the *Competition Act* (“the Act”) take time and put the matter out of the immediate control of the offended party. Although many companies belong to Advertising Standards Canada (“ASC”), which offers a dispute resolution procedure, others do not, and ASC’s decisions are not binding. Finally, the court system is generally so slow that advertising campaigns will almost certainly have run their course by the time a claim can be brought to trial or otherwise dealt with.

Offended parties often feel that they are left with little choice but to bring a motion for an interlocutory injunction, usually under sections 36 and 52 of the Act. Such proceedings are expensive and public, but at least they can be relatively expeditious.

Although on occasion such motions have been successfully used to restrain advertising, there are a number of significant hurdles that must be cleared before an injunction will be issued by a Canadian court. In some cases, the bar is set very high, making it difficult to see how a large, successful commercial entity could obtain an injunction restraining the advertising of one of its competitors.

Ultimately, in our view, businesses should be encouraged to attempt to develop mutually acceptable protocols to deal with advertising disputes, and move for interlocutory relief as a last (and not a first) resort.

Section 52 of the Competition Act

Section 52 of the Act states “[n]o person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or 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 a material respect.”¹

This section is contained in Part VI of the Act, “Offences in Relation to Competition.” It is a criminal provision, contravention of which is punishable by imprisonment for up to 14 years.²

Under section 36 of the Act, any person who has suffered “loss or damage” as a result of “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, as well as costs.³

Therefore, to ultimately succeed in a claim pursuant to sections 36 and 52 of the Act, a claimant must establish:

1. that the impugned advertising is for the purpose of promoting, directly or indirectly, any business interest;
2. that the impugned advertising is false or misleading;
3. that the false and misleading representation is being made knowingly or recklessly;
4. that the impugned advertising is false or misleading in a material respect; and
5. that the impugned advertising has caused, is causing or will cause loss or damage to the claimant.

The burden of proof is on the claimant to establish all of these requirements. There is some authority for the proposition that while the burden of proof is still on the balance of probabilities, it is a heavier burden that requires “substantial proof” of an activity which is a “very serious public crime.”⁴ It is difficult to determine what such an apparently higher standard actually requires, in particular following the Supreme Court of Canada’s 2008 decision in *F.H. v. McDougall*.⁵

It is clear, however, that the standard for liability under section 52 is reasonably high. Aggressive advertising is not circumscribed by the Act unless it is an “untruthful disparagement” of the goods or services of a competitor. Even advertisements which “push the bounds of what is fair” are acceptable; before the courts will interfere in the competitive marketplace, it must be established that the advertisements are “clearly unfair.”⁶

Section 52 is distinct from the various civil “deceptive marketing practices” described in Part VII.1 of the Act, including section 74.01(1)(b), which states that it is “reviewable conduct” to make a representation to the public regarding the performance of a product that is not based on “an adequate and proper test.”⁷ Section 36 does not grant the public a right to pursue a claim for damages for any section of the Act other than Part VI. Therefore, in order to establish liability under sections 36 and 52 of the Act, a claimant must do more than simply claim that its competitor’s testing is not “adequate and proper,” but must instead establish all of the elements of liability for criminal misleading advertising described above.

The Act does not specifically provide for injunctive relief; however, courts have generally found that they have inherent jurisdiction to issue an interlocutory injunction where it appears “just and convenient” to do so.⁸

In a motion for an interlocutory injunction to restrain false advertising, it is very common for the moving party to make additional claims pursuant to the *Trade-marks Act* and the torts of injurious falsehood and interference with economic interests. These causes of action often entail a very similar analysis to section 52 of the Act and will not be discussed in detail in this paper.⁹

Injunction

The well-known test for an injunction in Ontario (and most of the rest of Canada) is:

1. there must be a serious issue to be tried;
2. it must be determined that the applicant would suffer irreparable harm if the application is refused; and
3. the balance of convenience must favour the applicant.¹⁰

In British Columbia, the test is worded in a slightly different way. The first stage of the test is whether the applicant’s claim raises a fair issue to be tried. The second is whether the balance of convenience favours the granting of the injunction. Whether either of the parties will suffer irreparable harm is but one factor to be considered at the second stage.¹¹

The relationship between the different stages of the test is somewhat murky. The consensus seems to be that they should not be seen as “separate, water-tight categories” or “a series of independent hurdles.” Rather, since the factors relate to one another, strength in one area ought to be permitted to compensate weakness in another.¹²

While this undeniably provides courts with much-needed flexibility in order to do justice between the parties in an individual case, the lack of clearly delineated requirements has, as we shall see, led to inconsistent decisions and unpredictable results.

Strength of the Case

The Supreme Court of Canada has held that there are no specific requirements which must be met in order to satisfy the criteria of whether there is “a serious issue to be tried.” Instead:

“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.”¹³

However, the Supreme Court of Canada also held that an exception to this rule arises when the result of the interlocutory motion will in effect amount to a final determination of the action.¹⁴ In one Ontario case, the court concluded that a motion for an interlocutory injunction in a false and misleading advertising case often amounts to a final determination of the action, and noted that courts have routinely inquired into the merits of the complaint to ensure that the reason for restraining the impugned representation is compelling.¹⁵

There appears to be some uncertainty as to whether, at the interlocutory stage, a court should consider all of the elements of a claim under section 52. This was the approach adopted by Justice Nordheimer in *Boehringer Ingelheim (Canada) Ltd. v. Pharmacia Canada Inc.* Even though the plaintiff had established that the defendants may have made false statements, Justice Nordheimer ruled that it had not established there was a serious issue to be tried because the plaintiff had not brought forward sufficient evidence that the statements were made dishonestly or recklessly or that the plaintiff had, or would, suffer economic harm.¹⁶

However, the courts have also held that where it is clear that a false statement would cause harm, there is no need for proof of actual economic loss¹⁷ and that the state of mind of the defendant may be inferred from the evidence including but not limited to its statements of belief in the validity of its claims.¹⁸ In other cases the courts have granted injunctions without explicitly considering whether the impugned representations were made knowingly or recklessly or whether the plaintiff had or would suffer economic harm.¹⁹

In general, courts are reluctant to make factual determinations regarding expert evidence or testing at the interlocutory stage.²⁰ Many are content to simply assume that there is a serious issue to be tried and move on to the other stages of the test.

As discussed above and below, notwithstanding the apparent ease with which this first requirement can be met, the strength of the case (beyond whether there is a serious question to be tried) is an important factor which can affect the other elements of the test.²¹ In practice, a strong case that an advertising claim is false and misleading often goes a long way towards securing an interlocutory injunction. Likewise, courts seem reluctant to issue injunctions in cases where they are not convinced of the strength of the case.

Irreparable Harm

The Supreme Court of Canada defined “irreparable” harm in *RJR-Macdonald Inc.* as harm that cannot be quantified or cured, usually because one party cannot collect damages from the other. Examples include where one party will be put out of business or will suffer permanent market loss or irrevocable damage to its business reputation.²²

There are a number of problems in establishing irreparable harm in a claim under section 52. First, the harm caused by false and misleading advertisements is generally of an economic nature and takes the form of lost profits and revenues. Companies may also claim that false and misleading representations damage their reputation or brand, but this loss of reputation should also manifest itself in a loss of customers.²⁵

Second, in most motions for interlocutory relief pursuant to section 52 the defendant has more than enough resources to compensate the plaintiff for any damages, and the plaintiff is rarely in danger of being put out of business by the impugned representation.

Accordingly, plaintiffs generally take the position that although the claim is for economic harm, the damages suffered are irreparable because they cannot be quantified. Plaintiffs usually argue that there are too

many variables to determine the effect of a specific advertisement and there is no reliable method to calculate the economic value of a company's brand. Usually the evidence for this position consists of affidavits from officers of the plaintiff.²⁴ Evidence of this nature has been criticized by the court on some occasions,²⁵ and has been accepted in other cases.²⁶

The Nova Scotia Supreme Court has in fact quantified damages in a misleading advertising case with the aid of an expert witness who was an accountant and a professional business valuator.²⁷

Unfortunately, the definition of what constitutes "irreparable harm" in cases under section 52 of the Act is inconsistent.

Courts in Ontario have previously held that damages from false and misleading advertising cannot be calculated and therefore that damages are an inadequate remedy.²⁸ However, they have just as frequently held that proof of irreparable harm must be clear and not speculative, and that there should be evidence to support a claim that harm is taking place.²⁹ In particular, one court stated that large sophisticated companies should be able to show some evidence of harm.³⁰

In Ontario, Justice Code recently attempted to reconcile the Ontario decisions by ruling that in a strong case irreparable harm could be inferred, but in a weaker one it had to be independently proven.³¹ It is difficult to predict, at this stage, to what extent the courts will be willing to examine the underlying merits of the plaintiff's claim and exactly how strong a case needs to be for a court to "infer" irreparable harm.

In two subsequent decisions between the same parties, the Ontario courts appeared to take a somewhat stricter approach towards irreparable harm. In both of those cases, the court found there to be a serious issue to be tried (although not necessarily a strong case) but was unimpressed with the moving party's affidavit evidence that it was suffering irreparable harm.³²

The answer may be that Ontario courts are generally reluctant to grant an injunction unless a strong case is established, whether or not this is explicitly stated so in the reasons. Very few, if any, injunctions have been granted to restrain false advertising in cases where the court did not find that the moving party had established a strong case.

Ontario courts have also not taken a consistent approach towards the issue of whether the harm must be permanent and irrevocable. In some cases, the courts have required strict proof that any damage is not only difficult to quantify, but irrevocable;³³ in others, they have not considered the issue.³⁴

In British Columbia, the courts generally tend to take a more relaxed approach to the issue of irreparable harm, either by simply stating that the harm to the plaintiff cannot be quantified³⁵ or by stating that the harm to both the plaintiff and the defendant cannot be quantified.³⁶ In one recent case, Justice Grauer ruled that the moving party did not have to prove that it was unable to counter the effects of the misleading advertising with its own advertising.³⁷

In a recent New Brunswick case, Justice Clendening followed the decision of Justice Grauer, above, apparently adopting a more relaxed approach towards irreparable harm.³⁸

The Federal Court appears to take a stricter approach and has consistently ruled that proof of irreparable harm must be clear and not speculative.³⁹

Delay in bringing the motion for an injunction can be seen as compelling evidence that the matter is not urgent and that the plaintiff is not suffering irreparable harm.⁴⁰ Further, the longer the representation has been made, the more likely the courts are to insist upon evidence of actual harm.⁴¹

Additionally, if the representation is not being made at the time of the hearing and the defendant has undertaken not to make it in the future, any claim for irreparable harm is speculative.⁴² We have not found a Canadian case where an interlocutory injunction was granted under section 52 of the Act in such circumstances.

Balance of Convenience

The third factor the courts will consider when deciding whether to grant an interlocutory injunction is 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. The factors considered in this phase are numerous and vary in each individual case.⁴³

The balance of convenience is rarely determinative in motions for interlocutory injunctive relief pursuant to section 52. Usually, the judge's finding at this stage will mirror his or her findings on the strength of the case and irreparable harm.

Courts have often considered the importance of protecting commercial free speech, and they have repeatedly stated that “[e]ven commercial speech is worthy of protection.”⁴⁴ Courts may be wary of becoming part of a marketing strategy, and have expressed reluctance to interfere in a competitive marketplace, or to “micromanage” advertising disputes between weighty competitors.⁴⁵ On the other hand, courts have also ruled that protecting the public from being misled is an important objective.⁴⁶

It can also be relevant if the plaintiff is or has been engaging in similar conduct to that it seeks to enjoin,⁴⁷ although this is not always a persuasive factor.⁴⁸

As described above, in British Columbia, the courts consider a variety of factors at the stage of considering the balance of convenience, including:

- the risk of irreparable harm to either party;
- the strength of the moving party's case
- which of the parties has acted to alter the balance of the relationship and so affected the status quo;
- factors affecting the public interest; and
- any other factor.⁴⁹

The practical effect of the British Columbia test is to put more emphasis on the strength of the case and less on the requirement of irreparable harm. For example, in *TELUS Communications Co. v. Rogers Communications Inc.*, Justice Grauer considered Telus's motion for an order enjoining Rogers from representing that it had the “most reliable” wireless network. Telus had recently constructed an entirely new end-to-end wireless network and Rogers' advertising was based on a comparison between Rogers' network and Telus' old network. Justice Grauer granted the injunction despite finding that there was an equal risk of irreparable harm to both parties. His decision was upheld on appeal.⁵⁰

During the same period, Bell Canada (which shares its wireless network with Telus) was also representing that its network was the most reliable (as well as the largest, fastest, best and most powerful). Bell Canada's claims were based on testing it had conducted between Rogers' network, and its “new network” before that network had been made available to the public. Once again, the court found that there was an equal risk of irreparable harm to both parties. Justice Cullen granted the injunction regarding the “most reliable” representation but declined to enjoin Bell from making any of the other representations, ruling that since Bell had at least some testing to support its claims, the case concerning these other representations was “not as stark” as it had been before Justice Grauer.⁵¹

The courts in both British Columbia and Ontario have found that the terms of the injunction should be as narrow as possible to remedy the problem.⁵²

Conclusion

The test for an interlocutory injunction is flexible and discretionary, and the courts have not always applied it consistently in advertising cases. That being said, it certainly appears that the strength of a moving parties' case has assumed greater importance in the more recent jurisprudence. This is a change in how lawyers (and most judges) have viewed the test for an interlocutory injunction in this country.

Where a court determines that the moving party has a strong case, it is much more likely to be forgiving on

the other requirements of the test, and more likely to grant the injunction. Where it does not so find, a court is more likely to require convincing evidence that the moving party is suffering harm and that such harm is irreparable before granting an injunction. In such cases, as we have seen, courts will also review more carefully a range of issues under the balance of convenience aspect of the test, such as freedom of speech, the nature of the parties and the marketplace, prior related conduct and the harm that may be suffered by the responding party if an injunction is awarded. When a court heads down this path, it is clear that the chances of success are much lower.

In any event, the injunction remains one of a number of potential remedies available to deal with misleading advertising claims. Each of the options (including the injunction option) has its limitations and complications. However, in the absence of a negotiated alternative dispute mechanism, an injunction may be the best alternative, in particular where a party can present a strong case to the court that the disputed advertising is clearly false and misleading.

Endnotes

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¹ *Competition Act*, R.S.C., 1985, c. C-34, s. 52.

² *Competition Act*, R.S.C., 1985, c. C-34, s. 52(5).

³ *Competition Act*, R.S.C., 1985, c. C-34, s. 36.

⁴ *Maritime Travel Inc. v. Go Travel Direct.Com Inc.*, 2008 NSSC 163 at para.39 (CanLII), aff'd 2009 NSCA 42 (CanLII).

⁵ *F.H. v. McDougall*, 2008 SCC 53 (CanLII).

⁶ See *Maritime Travel Inc. v. Go Travel Direct.Com Inc.*, 2008 NSSC 163 at para.39 (CanLII) and the cases cited therein.

⁷ *Competition Act*, R.S.C., 1985, c. C-34, s. 74.01(1)(b). Note that section 52(1)(b) of the Act previously contained a provision regarding "adequate and proper" testing, but it has been moved to Part VII.1.

⁸ *Mead Johnson Canada v. Ross Pediatrics*, 1996 CanLII 8235 at paras. 29-30 (Ont. S.C.J.), leave to appeal denied 1996 CanLII 8194 (Ont. S.C.J.); *TELUUS Communications Co. v. Rogers Communications Inc.*, 2009 BCCA 581 at para. 44 (CanLII), aff'g 2009 BCSC 1610 (CanLII), *Bell Aliant v. Rogers Communications*, 2010 NBQB 166 (CanLII).

⁹ *Boehringer Ingelheim (Canada) Ltd. v. Pharmacia Canada Inc.*, 2001 CanLII 28351 at para. 65 (Ont. S.C.J.); *Bell Canada v. Rogers Communications Inc.*, 2009 CanLII 39481 at para. 3 (Ont. S.C.J.).

¹⁰ *RJR -- MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (S.C.C.), *Boehringer Ingelheim (Canada) Ltd. v. Pharmacia Canada Inc.*, 2001 CanLII 28351 at para. 26 (Ont. S.C.J.).

¹¹ *TELUUS Communications Co. v. Rogers Communications Inc.*, 2009 BCCA 581 at para. 27 (CanLII), aff'g 2009 BCSC 1610 (CanLII).

¹² Robert J. Sharpe, *Injunctions and Specific Performance*, looseleaf (Aurora, Ont.: Canada Law Book, 2009) at 2.600, *Boehringer Ingelheim (Canada) Ltd. v. Pharmacia Canada Inc.*, 2001 CanLII 28351 at para. 69 (Ont. S.C.J.); *Bell Canada v. Rogers Communications Inc.*, 2009 CanLII 39481 at paras. 38-39 (Ont. S.C.J.).

¹³ *RJR - MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (S.C.C.).

¹⁴ *RJR - MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (S.C.C.).

¹⁵ *UL Canada Inc. v. Procter & Gamble Inc.*, 1996 CanLII 8176 at paras. 39-40 (Ont. S.C.J.).

¹⁶ *Boehringer Ingelheim (Canada) Ltd. v. Pharmacia Canada Inc.*, 2001 CanLII 28351 at paras. 66-67 (Ont. S.C.J.). See also: *Telus Communications Company v. Rogers Wireless Inc.*, 2006 CanLII 15757 at para. 8 (Ont. S.C.J.).

¹⁷ *Church & Dwight Ltd. v. Sifto Canada Inc.*, 1994 CanLII 7314 (Ont. Ct. J. (Gen. Div.)).

¹⁸ *Rogers Wireless Partnership v. Bell Canada and Bell Mobility Inc.* (16 December 2009), Vancouver S098835 at para. 72 (B.C.S.C.).

¹⁹ See, for example, *Bell Canada v. Rogers Communications Inc. et al.*, 2010 ONSC 2788 (CanLII) where Justice Grace wrote at paragraph 23: "I recognize that there are other elements which must be proved 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."

²⁰ *Bell Canada v. Rogers Communications Inc.*, 2010 ONSC 3010 at para. 18 (CanLII); *Rogers Wireless Partnership v. Bell Canada and Bell Mobility Inc.* (16 December 2009), Vancouver S098835 at para. 76 (B.C.S.C.); *Bell Aliant v. Rogers Communications*, 2010 NBQB 166 at para. 18 (CanLII).

²¹ See, for example, *Bell Canada v. Rogers Communications Inc.*, 2009 CanLII 39481 at para. 48 (Ont. S.C.J.) and *TELUUS Communications Co. v. Rogers Communications Inc.*, 2009 BCSC 1610 at para. 47 (CanLII), aff'd 2009 BCCA 581 (CanLII).

²² *RJR -- MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (S.C.C.).

²³ *Telus Communications Company v. Rogers Wireless Inc.*, 2006 CanLII 15757 at para. 9 (Ont. S.C.J.).

²⁴ It is worth noting that these affidavits can come back to haunt a party that finds itself on the other side of a motion for an interlocutory injunction.

²⁵ See *Effem Foods Ltd. v. H.J. Heinz Co. of Canada* (1997), 75 C.P.R. (3d) 331, 1997 CarswellNat 1353 at paras. 2-3, (F.C.T.D.) (W.L.); *Bell Canada v. Rogers Communications Inc. et al.*, 2010 ONSC 2788 at para. 28 (CanLII); *Bell Canada v. Rogers Communications Inc.*, 2010 ONSC 3010 at paras. 19-20 and 28 (CanLII); *Janssen-Ortho Inc. v. Amgen Canada Inc.*, 2003 CanLII 26024 at para. 69 (Ont. S.C.J.).

²⁶ *Rogers Wireless Partnership v. Bell Canada and Bell Mobility Inc.* (16 December 2009), Vancouver S098835 at para. 53 (B.C.S.C.).

²⁷ *Maritime Travel Inc. v. Go Travel Direct.Com Inc.*, 2008 NSSC 163 at para. 110 (CanLII), aff'd 2009 NSCA 42 (CanLII).

²⁸ *Maple Leaf Foods Inc. v. Robin Hood Multifoods Inc.*, 1994 CanLII 7429 at para. 14 (Ont. Ct. J. (Gen. Div.)); *Church & Dwight Ltd. v. Sifto Canada Inc.*, 1994 CanLII 7314 at paras. 22-23 (Ont. Ct. J. (Gen. Div.)); *Eveready Canada v. Duracell Canada Inc.*, 1995 CanLII 7328 at para. 21 (Ont. Ct. J. (Gen. Div.)).

²⁹ *Boehringer Ingelheim (Canada) Ltd. v. Pharmacia Canada Inc.*, 2001 CanLII 28351 at paras. 73-74 (Ont. S.C.J.) (CanLII); *Johnson & Johnson Inc. v. Bristol-Myers Squibb Canada Inc.*, 1995 CanLII 7321 at para. 27 (Ont. Ct. J. (Gen. Div.)), *UL Canada Inc. v. Procter & Gamble Inc.*, 1996 CanLII 8176 at paras. 54 (Ont. S.C.J.), *Telus Communications Company v. Rogers Wireless Inc.*, 2006 CanLII 15757 at para. 9 (Ont. S.C.J.); *Janssen-Ortho Inc. v. Amgen Canada Inc.*, 2003 CanLII 26024 at paras. 71-73 (Ont. S.C.J.).

³⁰ *UL Canada Inc. v. Procter & Gamble Inc.*, 1996 CanLII 8176 at para. 71 (Ont. S.C.J.).

³¹ *Bell Canada v. Rogers Communications Inc.*, 2009 CanLII 39481 at para. 40 (Ont. S.C.J.).

³² *Bell Canada v. Rogers Communications Inc. et al.*, 2010 ONSC 2788 at para. 28 (CanLII); *Bell Canada v. Rogers Communications*

Inc., 2010 ONSC 3010 at paras. 19-20 (CanLII).

³³ *Boehringer Ingelheim (Canada) Ltd. v. Pharmacia Canada Inc.*, 2001 CanLII 28351 at para. 74 (Ont. S.C.J.); *UL Canada Inc. v. Procter & Gamble Inc.*, 1996 CanLII 8176 at para. 53 (Ont. S.C.J.); *Janssen-Ortho Inc. v. Amgen Canada Inc.*, 2003 CanLII 26024 at para. 73 (Ont. S.C.J.).

³⁴ For example, see *Maple Leaf Foods Inc. v. Robin Hood Multifoods Inc.*, 1994 CanLII 7429 (Ont. Ct. J. (Gen. Div.)); *Church & Dwight Ltd. v. Sifto Canada Inc.*, 1994 CanLII 7314 (Ont. Ct. J. (Gen. Div.)).

³⁵ *Tele-Mobile Co., A Partnership v. Bell Mobility Inc.*, 2006 BCSC 161 at para. 70 (CanLII).

³⁶ *Rogers Wireless Partnership v. Bell Canada and Bell Mobility Inc.* (16 December 2009), Vancouver S098835 at para. 82 (B.C.S.C.). But c.f. *Telus Communications Co. v. Bell Mobility Inc.*, 2007 BCSC 518 at para. 17 (CanLII), where Justice Silverman found that the damage to both parties was roughly equal and could be compensated for in a financial sense.

³⁷ *TELU Communications Co. v. Rogers Communications Inc.*, 2009 BCSC 1610 at para. 58 (CanLII), aff'd 2009 BCCA 581 (CanLII).

³⁸ *Bell Aliant v. Rogers Communications*, 2010 NBQB 166 (CanLII).

³⁹ *Effem Foods Ltd. v. H.J. Heinz Co. of Canada* (1997), 75 C.P.R. (3d) 331, 1997 CarswellNat 1353 at paras. 2-3, (F.C.T.D.) (W.L.).

⁴⁰ *Johnson & Johnson Inc. v. Bristol-Myers Squibb Canada Inc.*, 1995 CanLII 7321 at para. 27 (Ont. Ct. J. (Gen. Div.)).

⁴¹ *Effem Foods Ltd. v. H.J. Heinz Co. of Canada* (1997), 75 C.P.R. (3d) 331, 1997 CarswellNat 1353 at para. 4, (F.C.T.D.) (W.L.), *Bell Canada v. Rogers Communications Inc. et al.*, 2010 ONSC 2788 at para. 28 (CanLII); *Bell Canada v. Rogers Communications Inc.*, 2010 ONSC 3010 at para. 28 (CanLII).

⁴² *Tele-Mobile Co., A Partnership v. Bell Mobility Inc.*, 2006 BCSC 161 at para. 25 (CanLII); *Bell Canada v. Rogers Communications Inc. et al.*, 2010 ONSC 2788 at para. 28 (CanLII); *Bell Canada v. Rogers Communications Inc.*, 2009 CanLII 39481 at para. 45 (Ont. S.C.J.).

⁴³ *RJR -- MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (S.C.C.).

⁴⁴ *Boehringer Ingelheim (Canada) Ltd. v. Pharmacia Canada Inc.*, 2001 CanLII 28351 at para. 82 (Ont. S.C.J.); *Bell Canada v. Rogers Communications Inc. et al.*, 2010 ONSC 2788 at para. 33 (CanLII); *Bell Canada v. Rogers Communications Inc.*, 2010 ONSC 3010 at para. 32 (CanLII); *Bell Canada v. Rogers Communications Inc.*, 2009 CanLII 39481 at paras. 49-51 (Ont. S.C.J.).

⁴⁵ *Telus Communications Co. v. Bell Mobility Inc.*, 2007 BCSC 518 at para. 26 (CanLII); *Bell Canada v. Rogers Communications Inc. et al.*, 2010 ONSC 2788 at para. 33 (CanLII).

⁴⁶ *TELU Communications Co. v. Rogers Communications Inc.*, 2009 BCSC 1610 at para. 49 (CanLII), aff'd 2009 BCCA 581 (CanLII).

⁴⁷ *Johnson & Johnson Inc. v. Bristol-Myers Squibb Canada Inc.*, 1995 CanLII 7321 at para. 34 (Ont. Ct. J. (Gen. Div.)); *UL Canada Inc. v. Procter & Gamble Inc.*, 1996 CanLII 8176 at paras. 59 (Ont. Ct. J. (Gen. Div.)).

⁴⁸ *Mead Johnson Canada v. Ross Pediatrics*, 1996 CanLII 8235 at paras. 44-46 (Ont. Ct. (Gen. Div.)), aff'd 1996 CanLII 8194 (Ont. S.C.).

⁴⁹ *Rogers Wireless Partnership v. Bell Canada and Bell Mobility Inc.* (16 December 2009), Vancouver S098835 at para. 4 (B.C.S.C.).

⁵⁰ *TELU Communications Co. v. Rogers Communications Inc.*, 2009 BCSC 1610 (CanLII), aff'd 2009 BCCA 581 (CanLII).

⁵¹ *Rogers Wireless Partnership v. Bell Canada and Bell Mobility Inc.* (16 December 2009), Vancouver S098835 (B.C.S.C.).

⁵² *TELU Communications Co. v. Rogers Communications Inc.*, 2009 BCSC 1610 at para. 60 (CanLII), aff'd 2009 BCCA 581 (CanLII); *Bell Canada v. Rogers Communications Inc. et al.*, 2010 ONSC 2788 at para. 39 (CanLII).

⁵³ *Boehringer Ingelheim (Canada) Ltd. v. Pharmacia Canada Inc.*, 2001 CanLII 28351 (Ont. S.C.J.); *Janssen-Ortho Inc. v. Amgen Canada Inc.*, 2003 CanLII 26024 (Ont. S.C.J.).

⁵⁴ *Maple Leaf Foods Inc. v. Robin Hood Multifoods Inc.*, 1994 CanLII 7429 (Ont. Ct. J. (Gen. Div.)); *Church & Dwight Ltd. v. Sifto Canada Inc.*, 1994 CanLII 7314 (Ont. Ct. J. (Gen. Div.)).