Bell v. Cogeco: Unfair competition – the “best Internet experience” results in an unfavorable judicial experience

October 28, 2016

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In the field of telecommunications, it is not uncommon to see competing Internet service providers engage in advertising war campaigns in order to attract new customers, particularly in this highly competitive market due to the small number of competitors. Competitors are prepared to do anything to attract consumers, perhaps even making their offered products and services appear more attractive than they are.

It is in this context that the Superior Court of Ontario issued, in *Bell Canada v. Cogeco Cable Canada*, 2016 ONSC 6044 [1], September 20, 2016, an interlocutory injunction against Cogeco Cable Canada, in order to cease any use of the advertising phrase “the best Internet experience in your neighborhood ” in its advertisements, on the grounds of false and misleading representations.

Facts and background of the case

Bell Canada (hereinafter “Bell”) and Cogeco Cable Canada (hereinafter “Cogeco”) are two competing Internet providers in Ontario. However, Bell and Cogeco do not use the same technology to provide their services to consumers. Specifically, Cogeco uses “Hybrid fiber coaxial cable” technology (Cable / HFC), while Bell uses “Digital subscriber lines” (DSL) technology. In addition to DSL, Bell also uses “Fiber to the home” (FTTH) through the entire province of Ontario while Cogeco offers this technology only in new residential neighborhoods.

In August 2016, Cogeco announced its new brand identity as part of its advertising campaign for the back to school period. To reflect this new brand image, Cogeco changed the name of its Internet packages for “UltraFibre” and added two new advertising phrases on the homepage of its website: “There’s no limit to the things you can explore” and “Enjoy unlimited entertainment with the best Internet experience in your neighborhood.” After becoming aware of this new advertising campaign, Bell filed an action against Cogeco for false and misleading representations under section 52 of the *Competition Act* and section 7 of the *Trade-marks Act*. Specifically, Bell contests the addition of

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the term “Ultra” in the brand name of the Internet packages, and more particularly, Cogeco’s use of the expression “the best Internet experience in your neighborhood” in its advertisements appearing on the homepage of its website.

Analysis and decision

Justice Matheson analyzed the facts of the case at issue based on the three-part test for granting an interlocutory injunction, as set out in *RJR-MacDonald Inc* [2]., as follows: 1) Is there a serious issue to be tried? 2) Will the Applicant suffer irreparable harm without an injunction? and 3) What is the relative impact on the parties if granted or not? (the “balance of convenience” factor). It is worth mentioning that Justice Matheson dismissed Bell’s claims regarding the rebranded Internet packages “UltraFibre” by Cogeco. While the prefix “Ultra” was added by Cogeco, the actual download speed appears on the package description; thus, this cannot be false or misleading.

1. Serious issue to be tried

a) Overall impression of the advertisement

Under section 52(4) of the *Competition Act*, the overall impression conveyed by the advertisement must be considered from the perspective of an average consumer to determine whether or not the public can be deceived or misled. The advertisement will be considered false or misleading in a material respect if the consumer would likely be influenced by that impression when making a choice that seems advantageous to him/her based on the content or message of the advertisement.

In this regard, Justice Matheson analyzed whether the advertisement “the best Internet experience in your neighborhood”, as a whole, appearing on Cogeco’s homepage, created a false or misleading representation in a material respect, from the point of view of an average consumer, credulous and technologically inexperienced.

Cogeco submitted that the overall impression should be conveyed by taking into consideration the fact that the consumer has consulted all the content of the homepage, including all texts, graphics and hyperlinks. Cogeco also relies on a disclaimer placed on its website, stating that Cogeco uses a combination of optical fiber and coaxial cable technologies. However, this disclaimer appears in very small print and is not immediately apparent since the consumer must click on several links and read the entire page before reaching the warning.

Contrary to the argument raised by Cogeco, the Court considered that the overall impression of the Internet advertisement in the present case should be analyzed taking into account what a consumer would see on a single screen rather than considering all pages and the links connected. The disclaimer of Cogeco to the effect that it uses a combination of technologies is not sufficient to overcome the general impression created by the advertisement because the disclaimer does not appear on the main screen of Cogeco’s homepage.

b) Definition of “Internet experience”

Considering the general impression of the advertisement, the Court attempted to define the “Internet experience” including the criteria consumers are looking for when seeking Internet access services.

Cogeco submits that the “Internet experience” consists of a multitude of factors including not only the speed and performance, but also the customer service and the network security. By this argument, Cogeco attempts to justify the fact that the advertisement signified that Cogeco was delivering an exceptional customer experience. On the other hand, Bell submits that the most

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important factors to consider in the consumer Internet experience are speed and performance.

Justice Matheson, on the basis of a report issued by the Canadian Radio-Television and Telecommunications Commission (CRTC) [3] regarding the performance of Internet services to Canadians, refused Cogeco's argument, as speed is an important factor for consumers regarding their choice of Internet services. In its report, the CRTC indicated that the optical fiber technology surpasses Cable / HFC technology in, among others things, download speed, upload throughput speed, and reliability. The CRTC report also raises the matter that higher speeds are generally what consumers are looking for. Moreover, Cogeco itself acknowledged that this report is a reliable comparison of the various Internet access technologies on the market. Further, since Cogeco is currently not offering FTTH in all areas in Ontario, it cannot claim to offer "the best Internet experience in your neighborhood." The Court is satisfied that there is a serious issue to be tried regarding false or misleading representations.

2) Irreparable harm

The other test criteria for granting an injunction were also satisfied following the analysis of Justice Matheson. Bell has demonstrated that it will suffer irreparable harm since it is not possible to determine the exact number of existing or potential clients who have made a choice based on Cogeco's representations to the effect that it offers the best Internet access services.

3) balance of convenience

It was also concluded that the balance of convenience favored the granting of an interlocutory injunction. Indeed, although Cogeco invokes the costs associated with its advertising campaign, it is possible for Cogeco to modify the homepage of its website by removing or replacing the word "best" at little cost since the phrase only appears on the homepage of Cogeco's website.

The Court concluded that Cogeco has altered the competitiveness of the market by claiming to be "the best", despite the fact that it does not provide the fastest and the best performance in at least one geographical area in which both companies compete in Ontario. An ordinary consumer is likely to be deceived or misled by the representation of Cogeco to the effect that it offers "the best Internet experience in your neighborhood."

The decision teaches a valuable lesson in the considerations and care to be taken when developing advertising campaigns and slogans in such highly competitive fields. For any information on this or other intellectual property matters, please do not hesitate to contact a member of our team.

1. *Bell Canada v. Cogeco Cable Canada*, 2016 ONSC 6044.
2. *RJR-MacDonald Inc. v. Canada (Attorney-General),* [1994] 1 S.C.R. 311.
3. http://crtc.gc.ca/eng/publications/reports/rp160317/rp160317.htm

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