

CANADA / JUDGMENT

TELUS Communications Inc. v. Shaw Communications Inc.

2020 BCSC 1354

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2020 BCSC 1354 TELUS Communications Inc. v. Shaw Communications Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

TELUS Communications Inc.

v. Shaw Communications Inc.,

2020 BCSC 1354

Date: 20200911

Docket: S205658

Registry: Vancouver

Between:

TELUS Communications Inc.

Plaintiff

And:

Shaw Communications Inc.

Defendant

Before: The Honourable Mr. Justice D.M. Masuhara

Reasons for Judgment

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Place and Dates of Trial/Hearing:

Vancouver, B.C.

July 2-3, 2020

Written Submission from Shaw:

July 10, 2020

Place and Date of Judgment:

Vancouver, B.C.

September 11, 2020

I. Introduction

- [1] TELUS seeks an interlocutory injunction against its direct competitor, Shaw, in the marketing of its internet services. This action was prompted by Shaw's use of the term "Fibre+" in the naming of its internet products on May 27, 2020. TELUS pleads that Shaw's use of the term "fibre" in its marketing materials materially misleads customers as Shaw does not offer Internet services through a "fibre to the home" ("FTTH") infrastructure. Instead, Shaw fibre system a Hybrid Fibre Coax ("HFC") only extends to a node near the customer and not to the home. The Shaw network uses a technology called "Data Over Cable Service Interface Specification" ("DOCSIS") to enable high bandwidth data transfer over its network which is known as a "fibre to the node" network ("FTNN"). TELUS pleads DOCSIS is inferior to the FTTH infrastructure TELUS offers. It is the position of TELUS that the usage of the term "fibre" in respect to Internet services means service through an FTTH network. These reasons deal with TELUS' application for this extraordinary remedy.
- [2] On June 10, 2020, TELUS filed its Notice of Civil Claim against Shaw. TELUS asserts that Shaw has engaged in false and misleading representations; injurious falsehood; and breaches of the Competition Act, R.S.C. 1985, C-34 [Act] and the Trademarks Act, R.S.C., 1985, c. T-13. However, the focus of this application has been violations specifically under s. s. 52 of the Act.
- [3] TELUS describes Shaw's wrongful actions as follows:

11. On or about May 27, 2020, Shaw began broadcasting, publishing and distributing a new marketing campaign, in which Shaw promotes its existing "DOCSIS" residential Internet service under the new product name, "Fibre+" (including the "Fibre+ 300", "Fibre+ 750" or "Fibre+ Gig" Internet plans), which Shaw describes as a "new internet product" (the "Claims")
12. Shaw's clear representation to customers is that it is now offering a new FTTH Internet service. Shaw even suggests in the Claims that it has already installed the necessarily infrastructure to offer customers a FTTH Internet service: "We've already laid the Fibre+ network cables in the communities we serve. There's no need to dig up your driveway, lawn or neighbourhood, because you can already access the power of Fibre+."
- [4] The impugned marketing campaign and statements, as pleaded, are said to be contained in a press release issued by Shaw on May 27, 2020, as well as in website material launched by Shaw that same day.
- [5] Section 52(1) the Act prohibits false or misleading representations in advertising. It provides as follows:

False or misleading representations

52(1) No 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.

[6] TELUS' civil action for damages is permitted under s. 36 of the Act:

Recovery of damages

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, or
- (b) the failure of any person to comply with an order of the Tribunal or another court under this Act,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

- [7] Section 52 is one of the indictable criminal offences identified under the Act. While TELUS is pursuing a civil claim for damages caused by Shaw's alleged contravention of s. 52, and thus the standard to establish the breach is the civil balance of probabilities, it should not be ignored that the wrongs asserted are associated with criminality.

[8] TELUS avers that as a result of Shaw's Representations, TELUS has and continues to suffer irreparable harm, including but not limited to:

20.

- (a) depreciation of its goodwill;
- (b) loss of business opportunity including loss of customers and potential customers;
- (c) harm resulting from Shaw's alteration of the marketplace in causing customer confusion about the respective Internet services offered by the parties;
- (d) harm resulting from consumers being misled as to the relative merits of the competing TELUS and Shaw networks and services; and
- (e) damage to its reputation.

21. Unless and until Shaw removes the advertisements and promotional materials containing the Claims, TELUS will continue to suffer irreparable harm.

[9] On or about June 3, 2020--prior to commencing this action--TELUS sent a letter to Shaw, demanding that Shaw remove the Representations and cease from making any similar claims.

[10] On June 5, 2020, Shaw sent a letter in response denying that its Representations were misleading, maintained that its Fibre+ brand accurately reflects its network and its benefits, and communicated its position that "no one has a monopoly on the word 'fibre'".

[11] Following Shaw's June 5, 2020 response, TELUS brought this application seeking the following specific relief:

- (a) an interim and interlocutory injunction restraining, enjoining and prohibiting Shaw, including anyone acting on behalf of Shaw or on Shaw's instructions, from directly or indirectly broadcasting, publishing or otherwise distributing false or misleading claims in its advertising, namely:

I. use of "Fibre+" as the product name for Shaw's DOCSIS Internet services; and

II. any other statements or claims, whether express or implied, that create the impression that Shaw offers fibre to the home ("FTTH") Internet services, including but not limited to statements or claims describing or referring to Shaw's DOCSIS Internet services as a "fibre" or "fibre optic" internet service.

[12] TELUS has given the required undertaking as to damages in pursuing this injunction.

[13] On the same day the within action was filed, TELUS announced the launch of a new residential and business Internet speed in Western Canada of 1.5 Gigabit ("Gig"); thirteen days after Shaw's launch of its new 1 Gig Internet service.

- [14] In its reply submissions, TELUS clarified that it was not seeking to prohibit Shaw's "fibre" branding as it relates to Shaw's overall Hybrid-fibre co-axial cable ("HFC") network, only Shaw's representations relating to Shaw's more recent Fibre+ Gig and Fibre+ 750 Internet products:
4. For clarity, TELUS does not take issue with the historical use of the term "FibrePlus" to describe its overall HFC network and is not seeking a prohibitive order in that regard. Instead, TELUS disputes Shaw's recent inclusion of the term "Fibre+" to describe two of its direct-to-consumer Internet products (i.e., Fibre+ Gig and Fibre+ 750).
 5. The recent May 2020 press release referred to by Shaw is misleading because two of the three plans are newly labelled as "Fibre+", which gives the impression that it is different than Shaw's Basic Internet. The "Basic" network is the exact same as the "Fibre+" network" which has not changed as of May 2020. While Shaw revised its drop down description of the network, it refused to change the names of these two internet plans.

II. Background and POSITIONS OF THE PARTIES

- [15] Internet service providers (ISPs) participate in a highly competitive market. The parties here are direct competitors. Shaw is TELUS' largest competitor in the provision of home internet services in western Canada. Both TELUS and Shaw supply high-speed broadband internet services to customers, however, their respective networks differ. Shaw utilizes a hybrid-fibre coaxial cable system and offers DOCSIS based services. Whereas, TELUS relies on fibre optic technology and offers FTTH based services. Fibre optic technology consists of flexible strands of transparent glass that are used to transmit information as pulses of light.
- [16] TELUS more recently has invested in extending fibre optic wire directly to (not into) a customer's home; whereas Shaw's network extends fibre optic cable to a node in the local vicinity of the customer and uses coaxial cables to extend the internet connection for the final segment between the local node and the customer's home hence its "hybrid" designation, which is also referred to as Fibre-to-the- Node ("FTTN"). Prior to TELUS' push to extend fibre, its system would have been characterized as FTTN. The final segment of fibre optic wire extended from the node to the customer's home is referred to by TELUS as the "last mile". It is this segment which TELUS states it has invested \$6 Billion to extend and provides superior performance to customers, an assertion contested by Shaw. I note in this regard the evidence of Dr. Knittle and Mr. Poltz. It is apparent that there are several factors that affect performance beyond the type of wires used in providing signals to the customer.

A. TELUS' position

- [17] As a result of these differences between the infrastructure of the parties, TELUS submits that Shaw's use of the term 'Fibre+' in its advertising, and its Representations, are materially misleading contrary to s. 52 of the Act.

[18] More specifically, TELUS points to Shaw's recent use of "Fibre+" in the marketing of its internet services to the public:

In late May of 2020, Shaw rebranded its existing cable Internet services under a new product name ("Fibre+"), in a highly-publicized and widely-distributed marketing campaign.

[19] The specific publications which TELUS directs its complaints at as part of Shaw's Fibre+ marketing campaign include Shaw's Press Release of May 27, 2020 and Shaw's Fibre+ website materials. The Press Release and website materials are attached as Appendix A and B, respectively to these Reasons.

[20] Mr. Balser of TELUS, deposes:

46. On or about May 27, 2020, Shaw began broadcasting, publishing and distributing a new marketing campaign, in which Shaw has rebranded its existing DOCSIS-based Internet service under the new product name, "Fibre+" (including the "Fibre+ 300", "Fibre+ 750" or "Fibre+ Gig" Internet plans) (the "Claims"). In the Claims, Shaw describes Fibre+ as a "new Internet product". Attached as Exhibit "K" is a true copy of a press release from Shaw dated May 27, 2020, regarding the launch of its "Fibre+" product line.
47. In addition to mischaracterizing its DOCSIS-based access technology as "Fibre+", in the Claims Shaw even misleadingly suggests that it has already installed the necessary infrastructure to offer customers a FTTH Internet service:

We've already laid the Fibre+ network cables in the communities we serve. There's no need to dig up your driveway, lawn or neighbourhood, because you can already access the power of Fibre+.

[21] TELUS submits that Shaw's new Fibre+ product branding is misleading consumers about the very nature of the technology that Shaw uses to deliver its Internet services. In particular, TELUS says Shaw is leading consumers to believe that it now uses modern fibre-optic technology to deliver Internet services directly to customers' homes (i.e. offering a new FTTH service) when in reality, Shaw continues to use the exact same Internet technology, including the use of lower-performance coaxial cable (not fibre-optic cable) to connect customers to the Internet. This is the same infrastructure used by Shaw prior to the rebranding of its Internet products as Fibre+.

[22] In support of its claim that Shaw's Representations have "alter[ed] the marketplace [by] causing customer confusion about the respective Internet services offered by the parties", TELUS introduced evidence of social media commentary, made in response to Shaw's Representations, as well as reactions and impressions of the term "Fibre+" from "independent public polling" .

- [23] First, TELUS submits that the social media comments demonstrate that there is "significant public misunderstanding and consternation about Shaw's 'new Internet product' called 'Fibre+'. The social media comments include questions raised by numerous consumers asking TELUS whether Shaw's Fibre+ offerings indicated that Shaw was now installing new fibre optic cables to customers' residences, and other consumers objecting to Shaw's misleading terminology in calling DOCSIS-based Internet services "Fibre+."
- [24] Second, TELUS submits that the independent public polling it commissioned "confirms that a significant majority of consumers are being misled" by Shaw's Representations. TELUS submits that the "polling's critical finding is that an overwhelming majority of respondents (78%) agreed that use of the term 'Fibre+' in an Internet plan would lead them to believe that the 'Internet service is delivered via fibre optic cable connected to your home.'"
- [25] TELUS also submitted public statements in support of its claim that there has been a "highly critical" reaction from industry to Shaw's use of the term "Fibre+" as a new label for its existing DOCSIS service, as well as from other internet competitors expressing concern and alarm at Shaw's misleading use of "Fibre+."

B. Shaw's position

- [26] Shaw submits that TELUS is using its application and the court process to strategically obtain a competitive advantage. Shaw submits that TELUS' complaints are best dealt with in the level playing field of the open market place and that it is inappropriate to bring the marketplace into the courtroom. Shaw argues that what TELUS is de facto seeking through its application, is to suppress Shaw's brand and remove Shaw's current advertising campaign from the market (highlighting its fastest speed home internet tier (1Gig)), while TELUS announces its own new speed tier offering (1.5 Gig). Shaw submits that this is antithetical to the purposes of the Act under which TELUS is pursuing its claim. Shaw argues that this application is part of TELUS' own media strategy to try and convince the public that Shaw's network is not "fibre", and that Shaw is not a reliable ISP.
- [27] Shaw's argument that its Representations do not contravene s. 52 of the Act focus on three main points. First, Shaw submits that TELUS' position that the Representations are materially misleading consumers only reflects what TELUS wishes the average consumer would focus on when deciding between different ISPs--namely, specific internet access technologies (i.e. FTTH versus HFC or FTTN), as opposed to the entire bundle of value propositions that ISP's provide and the ultimate experience a consumer receives. Shaw submits that TELUS procured no evidence that customers would know or care about the type of wires connecting their home to the network, much less that it would make a material difference to Internet customers' purchasing decisions -- despite having the opportunity to do so as part of its survey evidence. Thus, TELUS has failed to show that any claimed misrepresentation is in fact material--as is required to make out a contravention of s. 52 of the Act.

- [28] Second, Shaw argues that TELUS has failed to show that the general impression created by Shaw's Fibre+ branding and the rest of its Representations is neither inaccurate, nor misleading. Shaw submits that there is nothing factually incorrect in its branding of its HFC infrastructure as "Fibre+".
- [29] In support of this argument Shaw points out that nowhere on Shaw's website--for any type of Internet product offering--does Shaw:
- (a) say that its network is a FTTH network;
 - (b) say that its network is 100% fibre;
 - (c) refer to TELUS, TELUS' PureFibre network, or TELUS' PureFibre trademark; or
 - (d) compare Shaw's network architecture to that of TELUS or any other FTTH ISP.
- [30] Shaw points to the fact that 99% of its system is in fact "fibre" and since 2012 it has invested over \$20 billion in its wireline network and its technologies and services, including pushing fibre deep into each neighbourhood it serves so that its fibre cabling only ends on average within a few hundred metres of every customer's home.
- [31] Additionally, Shaw's evidence is that while its "Fibre+" branding is new, it has been using the brand "FibrePlus" to market its network since mid-2016, and that the only reasonable interpretation of its Representations is that it is offering certain new service tiers delivered over its Fibre+ (formerly FibrePlus) network, which is a hybrid-fibre coax network.
- [32] Shaw submits that ever since its 2016 launch of "FibrePlus", Shaw has "been informing the public that its FibrePlus network is fibre plus more, namely fibre plus coaxial cable plus the advantages that the combination of the two provide, together with the enhanced performance and additional benefits enabled by Shaw's substantial and ongoing investments in its network." Specifically, Shaw's evidence is that its network provided an advantage: the combination of the speed of fibre with the durability, availability, and simplicity of coax, plus the advantage that their network investments would continue to produce faster speeds and better performance.
- [33] While Shaw maintains for the above reasons that the use of the term "fibre" and "Fibre+", and its Representations, are not inaccurate or misleading, Shaw directs this Courts attention to the fact that after being made aware of TELUS' lawsuit and allegations, out of an "abundance of caution" Shaw has pre-emptively made the following changes to its website:
- (a) changed the word "cable" to "coax" in case someone associates "cable" with something other than "coax" (which was how Shaw, as a cableco, interpreted that word) and added the word "hybrid". The answer to "What is Fibre+" now reads: "Fibre+ is the name of our hybrid fibre coax network that delivers the fastest speeds in Western Canada "
 - (b) added the words "fibre coax" in the following sentence: "Our powerful fibre coax network ." in lieu of: "Our powerful network....";

- (c) for consistency, even though Shaw's retail focus is on its higher speed Internet tiers (300, 750, and 1 Gig), added a reference to the Fibre+ network to the description to the lower speed offerings (150, 75, 25, and 10) as well; and
 - (d) added a standalone push button on the first page a user is taken to when accessing Shaw's main website. That button says: "Fibre+". It takes the user directly to the dedicated Shaw Fibre+ page for residential Internet. The button sits below Shaw's current 1 Gig service advertisement.
- [34] Third, Shaw submits that TELUS has failed to show that it has suffered any harm directly as a result of Shaw's use of the term "Fibre+" to describe its Internet products and its other Representations, as required by its claim under the Act. Shaw notes that it is significant that TELUS does not allege any harm from the use of the term "FibrePlus" or "fibre" in the description of Shaw's network and notes further TELUS' previous inconsistent conduct in the use of the term "fibre", when it was not FTTN.
- [35] Shaw argues that there can be no difference in the general impression on consumers created as between the use of "Fibre+" and "FibrePlus" to describe its internet offerings-- neither of which are materially misleading or have caused TELUS harm. Shaw notes that despite the lack of meaningful difference between Shaw's 2016 FibrePlus branding and its 2020 Fibre+ branding introduced in 2016, TELUS did not pursue its s. 52 claim against Shaw alleging that it has suffered harm, until Shaw's 2020 Fibre+ campaign.
- [36] Shaw also notes that the term "fibre" is not exclusive to FTTH networks and services, and that it is unclear why TELUS would suffer harm specifically from Shaw's use of this term to describe its non-FTTH based Internet services when other major cables engage in the same conduct. In this regard, Shaw points out that all of Canada's major cable companies (Rogers, Cogeco, Videotron, and Eastlink), along with Canada's largest telecommunications company ("telco") (Bell), publicly use the word "fibre" when describing their non-FTTH wireline networks (or portions thereof) and the Internet services they deliver through them.
- [37] In respect to the average consumer, Shaw points to the findings in *R. (City Fibre Ltd.) v. Advertising Standards Authority* [2019] EWHC 950[City Fibre], a Queen's Bench Division, Administrative Court judicial review case from the United Kingdom which upheld the findings of the Advertising Standards Authority which tribunal concluded, among other things, that the average consumer would not likely be misled by advertisements for part-fibre broadband services that used the term "fibre" without qualifications. The court rejected arguments that an average consumer must be reasonably well-informed about the feature "fibre" including the distinction between part-fibre and full-fibre, in order to be considered reasonably well-informed when considering advertising of broadband services.
- [38] Shaw argues this is applicable to consumers in this case. Shaw further says TELUS' assertion of consumers being misled is undercut by TELUS' own public statement before the Trade-marks Opposition Board in 2012:

24. Pricing, reliability and the experience the customer has interacting with the products and services TELUS supplies are the key drivers of product selection by our customers. The details of the technology, for example the hardware or software that is selected to deliver the products or services, do not drive the consumer's selection of products or services.
25. Regardless of what hardware or software is used to deliver the internet, our household customers are mainly concerned with affordability, ease of use, speed and reliability....
27. One reason for the marketing focus on the end service rather than the underlying technology is that our Canadian household consumers see only the end product. Our consumers would be focused on their television viewing experiences rather than the make-up of the hidden cable that delivers signals to their homes.
28. From a technical perspective, the wire connected to the customers' home is often twisted pair copper wire rather than fibre optic cable. In our experience, customers rarely know or are concerned about the difference.
- [39] Moreover, Shaw points out that TELUS itself has also advertised non-FTTH networks as "fibre" in the past in that TELUS publicly announced its "new fibre network" at a time when TELUS' network remained predominantly fibre to the node ("FTTN"), with twisted-pair copper (not fibre) "last mile" connections. Thus, Shaw says this past conduct belies TELUS' current position of claiming harm and erodes any equitable high ground that TELUS thinks it holds. Specifically, Shaw highlights that TELUS has failed to explain in its evidence why its own use of "fibre" to describe a FTTN network with legacy twisted-pair copper wires was legitimate, while it nonetheless asks this Court to find Shaw's description of its HFC network using the word "fibre" to be materially misleading and to have caused TELUS harm.
- [40] Instead, as mentioned, Shaw contends that the real reason TELUS has initiated its action is Shaw's launch on May 27, 2020, into the 1 Gig home Internet market in Western Canada-- a segment of the market that TELUS had enjoyed to itself for almost 18 months. Further, Shaw states that additional investments it has made to its network have positioned it to offer even greater speeds in the future, including download speeds up to 10 Gigs per second.
- [41] In response to TELUS' clarification in its reply submissions that it is not seeking to prevent Shaw from using "Fibre+" or "fibre" in association with its network, and that TELUS only takes issue with Shaw's use of the terms "Fibre+" or "fibre" when used as a description for its specific Internet products, Shaw argues that the clarification is not genuine in that the wording of the application remains broad; and in any event, the clarification is an illogical distinction without substance. Shaw says that it has simply chosen to associate its network brand name "Fibre+" with the specific Internet services delivered on that network which are commonly named by the speed of data download and upload (i.e. "Fibre+ 750", etc.).
- [42] As discussed, Shaw submits that it has marketed its internet products, offered on its network, under its FibrePlus (now Fibre+) brand for almost four years. Shaw points out it does not sell pieces of its network, and instead markets Internet products (also referred to as

"Internet "services"); an injunction restraining Shaw from using any "Fibre+" branding from the marketing of any of its products would force Shaw to abandon the public recognition and goodwill surrounding the brand it has built up to specifically sell its internet products. The point of Shaw's advertising is to sell its Internet products. Thus, Shaw submits that while TELUS represents that it is only seeking narrow relief, this creates a false sense of what TELUS is actually asking of this Court and has a broad impact encompassing all of the Internet products that Shaw actually sells.

- [43] I find it important to reiterate here that in response to TELUS' action complaining of TELUS' use of Fibre+ to describe its higher speed internet tier products (300, 750, and 1 Gig), Shaw has already added a reference to the Fibre+ network to the description of its lower speed offerings (150, 75, 25, and 10) as well. This removes the distinction between the lower and higher tier offerings which was part of TELUS' complaint and ultimately goes to TELUS' concerns that customers might interpret these different tiers to be offered on a different network from each other (i.e. on FTTN as opposed to HFC).
- [44] Further, Shaw argues that TELUS cannot logically maintain that the use of "Fibre+ Gig" in the Press Release or on the website constitutes false or misleading advertising, and is the cause of irreparable harm when, in the very same publication, a consumer also reads about the Fibre+ network--without that consumer being misled or TELUS being harmed in any way. Shaw rhetorically asks in its submissions: how can the former constitute a criminal offence and the other be innocuous?
- [45] Lastly, in addition to Shaw's own arguments that its marketing has not been misleading or in any way inaccurate, Shaw takes issue with the nature and reliability of the information and documents that TELUS has relied upon in this application as evidence. Shaw submits that the evidence relied upon by TELUS does not meet the standard required for obtaining the extraordinary remedy sought here. Shaw objects to the admissibility of large sections of the main deponent of TELUS, Mr. Balser, as being: hearsay, double hearsay, and triple hearsay; opinion evidence without qualification, documents to which the deponent had no role in preparing nor stating his belief in their contents; or irrelevant.
- [46] In respect to the social media evidence and the independent polling evidence (by Angus Reid Forum) relied upon by TELUS, Shaw submits that such evidence is inadmissible, unreliable and unhelpful. Shaw submits that TELUS has not adhered to the standard for public opinion polls as set out in *Mattel, Inc. v. 3894207 Canada Inc.*, 2006 SCC 22 at para. 43. For example, Shaw argues that the opinion poll that TELUS relies upon was not put before the court, and that neither the identity of the individual who conducted the polling nor the methodology used were provided. Shaw relies in part the report of Dr. Corbin, who is an expert in social science research. I note that her previous career positions includes being the Chief Operating Officer of the Angus Reid Group. She evaluated the TELUS opinion poll and the social media information referred to in the affidavit of Mr. Balser. She set out several concerns with the reliability and validity of the social media evidence and significantly the fact that the excerpts referred to in the TELUS evidence were selectively "chosen to

complement certain conclusions in [Mr. Balser's] affidavit, and omitting any posts favourable to Shaw" and had been removed from the context provided by "the back and forth of the online conversations from which they were drawn."

- [47] Shaw submits that after excluding the inadmissible evidence put forward by TELUS, that the foundations for the critical elements of its case are eliminated: it offers no evidence that the general impression of the Representations are inaccurate or misleading, i.e.: that Shaw has started offering a "new" Internet product that "provides FTTH"; that it has suffered any harm; that "Fibre+" properly denotes only FTTH networks; that it is inaccurate or misleading for Shaw to use "Fibre+" or to use the word "fibre" in describing its hybrid fibre coax network and Internet services; that FTTH networks are superior to HFC networks, and that the Representations are harming TELUS' goodwill in its FTTH network in any way.

III. The LEGAL test to be applied ON THIS APPLICATION

- [48] As there is no statutory basis in the Act for the issuance of an interlocutory injunction in civil proceedings initiated pursuant to s. 36 of the Act, any interlocutory injunction granted would be made pursuant to this Court's inherent jurisdiction, as set out under s. 39(1) of the Law and Equity Act, R.S.B.C. 1996, c. 253 and in Rule 45 of the Supreme Court Rules: TELUS v. Rogers at paras. 39-44. Thus, a three-stage test is applied.
- [49] As a preliminary step, I must first determine the exact nature of the interlocutory injunction sought by TELUS as this affects the first stage of the applicable test; namely, is TELUS seeking a prohibitive or a mandatory interlocutory injunction? TELUS submits that it is seeking an interlocutory prohibitive injunction to restrain Shaw from making certain misleading advertising claims regarding its Internet services. In contrast, Shaw submits that TELUS is in effect seeking a mandatory injunction. A prohibitive interlocutory injunction is the usual type of pre-trial interlocutory relief which takes the form of an order restraining the defendant from engaging in conduct for a limited period of time. In contrast, a mandatory injunction takes the form of an order requiring the defendant to carry out some positive obligation. The distinction between the two types of injunctions is important as there is a different legal threshold at the first stage of the approach to an interlocutory injunction.
- [50] While prohibitive injunctions are subject to the often cited test articulated in RJR-Macdonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311[RJR], the test for granting a mandatory injunction is subject to a modified RJR test, which, as laid out in R v. Canadian Broadcasting Corp., 2018 SCC 5[CBC], imposes a higher threshold at the first stage.
- [51] Under the RJR test the application judge assesses whether: (1) there is a serious issue to be tried, (2) the applicant has established it will suffer irreparable harm if an injunction is refused; and (3) the balance of convenience favours granting the injunction, in so far as the applicant would suffer greater harm from the refusal of the interlocutory injunction than the respondent would if the injunction is granted: RJR at pp. 334-35.

- [52] However, where the applicant seeks a mandatory interlocutory injunction, the first stage question is whether "a strong prima facie case that it will succeed at trial" as been established: CBC at para. 15. As discussed in CBC, "[t]his entails showing a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice": para. 15.
- [53] In CBC, the Supreme Court of Canada justified the higher threshold applied to applications for mandatory injunctions as follows:
- [15] A mandatory injunction directs the defendant to undertake a positive course of action, such as taking steps to restore the status quo, or to otherwise "put the situation back to what it should be", which is often costly or burdensome for the defendant and which equity has long been reluctant to compel. Such an order is also (generally speaking) difficult to justify at the interlocutory stage, since restorative relief can usually be obtained at trial. Or, as Justice Sharpe (writing extrajudicially) puts it, "the risk of harm to the defendant will [rarely] be less significant than the risk to the plaintiff resulting from the court staying its hand until trial". The potentially severe consequences for a defendant which can result from a mandatory interlocutory injunction, including the effective final determination of the action in favour of the plaintiff, further demand what the Court described in RJR -- MacDonald as "extensive review of the merits" at the interlocutory stage.
- [footnotes omitted]
- [54] Identifying the nature of an interlocutory injunction is not always a straightforward task. As stated in CBC :
- [16] distinguishing between mandatory and prohibitive injunctions can be difficult, since an interlocutory injunction which is framed in prohibitive language may "have the effect of forcing the enjoined party to take . . . positive actions". For example, in this case, ceasing to transmit the victim's identifying information would require an employee of CBC to take the necessary action to remove that information from its website. Ultimately, the application judge, in characterizing the interlocutory injunction as mandatory or prohibitive, will have to look past the form and the language in which the order sought is framed, in order to identify the substance of what is being sought and, in light of the particular circumstances of the matter, "what the practical consequences of the . . . injunction are likely to be". In short, the application judge should examine whether, in substance, the overall effect of the injunction would be to require the defendant to do something, or to refrain from doing something.
- [55] Shaw asks this Court to rely upon the CBC decision and the direction it provides to "look past the form and the language in which the order sought is framed" in order to conclude that what TELUS is truly seeking is a mandatory injunction. Shaw submits that "the practical consequences" of granting the injunction sought by TELUS would ultimately be to require Shaw to take positive steps to remove all of its marketing materials containing the Representations, as is currently published and transmitted on Shaw's website (as well as

other forums), and to design and launch replacement branding that meets the criteria mandated in TELUS' application: CBC at para. 16.

- [56] While Shaw's submissions are persuasive and I have found the characterization one way or the other challenging, I cannot find that CBC leads me to find that TELUS is de facto seeking a mandatory injunction. Not only may CBC be distinguished from the present facts before me, but a more analogous case determining the nature of an interlocutory injunction sought in a civil context, decided post-CBC, supports TELUS' argument that it is seeking a prohibitive interlocutory injunction.
- [57] In CBC, the Crown sought to have CBC remove from its website a victim's identifying information--the transmission of which the Crown alleged was in contravention of a court ordered publication ban. While, after the ban, CBC refrained from publishing any further stories that contained the victim's identifying information, CBC refused to remove from its website the victim's identifying information contained in articles published prior to the issuance of the ban. Thus, the precise interlocutory relief sought by the Crown in CBC, and the core issue in its application, was a positive direction that CBC be required to remove specific publication material. CBC was already agreeing to refrain from publishing further non-compliant materials. At first instance the mandatory injunction was refused. Though reversed on appeal, the Supreme Court of Canada upheld the original decision.
- [58] Unlike in the application before me, it was not contested in CBC whether the nature of the interlocutory relief was mandatory. It was assumed that the Crown was making a mandatory application. Instead, the analysis in CBC regarding the distinction between prohibitive and mandatory injunctions was relevant to the Court's determination of whether a different legal threshold test should be applied on a mandatory injunction. Moreover, the application was made in the context of criminal proceedings in which the Crown alleged that CBC was in criminal contempt.
- [59] Directly analogous to the circumstances before me, in *Corus Radio Inc. and Corus Entertainment Inc. v. Harvard Broadcasting Inc.*, 2019 ABQB 880 [Corus] Justice Dilts considered the guidance of the Supreme Court of Canada in CBC in the context of an injunction application relating to misleading advertising claims under the Act. In this case, the claimant radio station Corus was seeking an injunction to restrain radio station Harvard from using particular branding in its radio broadcasting business. Harvard argued that such an injunction would require it to rebrand its station and replace its digital and non-digital signage, logo, promotions, marketing and on-air messaging--and thus amounted to a mandatory injunction.
- [60] In explicitly recognizing the impact of the Supreme Court of Canada's decision in CBC, Dilts J. determined that the core nature of the injunction sought by Corus was prohibitive and not mandatory:

- [24] The Supreme Court in *Canadian Broadcasting Corp.* discusses not just the challenge of distinguishing between a prohibitive injunction and a mandatory injunction, but also the fact that prohibitive injunctions often carry with them burdensome costs to compliance. It cites with approval the decision in *Mosaic Potash* where the Saskatchewan Court of Appeal observed that the substantive differences between the impact of mandatory and prohibitory injunctions can be easily overstated. Ultimately, the Supreme Court in *Canadian Broadcasting Corp.* at para 16 and says that my responsibility is to examine the overall effect of the injunction.
- [25] Notwithstanding that Harvard may have to take significant and tangible steps to comply with an interlocutory injunction, if granted, I am satisfied that the overall effect of the injunction sought by Corus is to restrain Harvard from doing something. In these circumstances, Harvard's burden to comply does not alter my view that Corus is seeking a prohibitive injunction. The burden on Harvard of complying with an interlocutory injunction is properly a factor to be considered in assessing the balance of convenience.
- [61] In line with Corus, I find that Shaw's submissions that, as a consequence of granting the injunction, it would be required to take steps to remove certain advertising content and be forced to design and launch replacement branding, goes to the burden of compliance and does not transform the prohibitive nature of the injunction sought by TELUS. The overall effect of the injunction sought by TELUS is to restrain Shaw from advertising its Internet products using the phrases "Fibre+" or "fibre", along with the other impugned Representations. Having concluded that the nature of the interlocutory injunction sought by TELUS is prohibitive, I will now turn now to the application of the three-part test for such an interlocutory injunction.
- [62] I note here that the court in exercising its discretion is determining what is just and equitable in the circumstances. The three-stage test is to be considered holistically. The strengths or weaknesses in one stage may offset the weaknesses or strengths in another.

A. Has TELUS demonstrated a serious question to be tried?

- [63] The first stage requires that I undertake a preliminary assessment of whether there is a serious issue to be tried. A claim that demonstrates a serious issue to be tried, is one that is not "frivolous or vexatious:" *CBC* at para. 12. This is a low threshold and is often met: *Visionwerx Investment Properties, Inc. v. Strong Industries Inc. et. al.*, 2020 FC 378 at para. 113. For the following reasons, I find that while TELUS, on a preliminary assessment, has weaknesses, it is neither "frivolous" nor "vexatious".
- [64] TELUS' action against Shaw avers that its Representations are in violation of s. 52(1) of the Act. The test to apply in determining whether there has been a breach of s. 52(1) of the Act was set out in *Bell Mobility v. TELUS Communications Company*, 2006 BCCA 578:

- (i) the court must determine the general impression conveyed to consumers, based only on the representations actually made in the advertisements. This is the impression formed by consumers upon seeing the advertising in its intended form and includes an examination of the literal meaning of the impugned representations; and
- (ii) the court must, having regard to extraneous facts if necessary (but not for the purpose of altering the general impression already arrived at), gauge whether the impression conveyed to consumers by the representation is false or, alternatively, misleading in a material respect.

[65] As stated in *Bell v. Cogeco Cable Canada*, 2016 ONSC 6044 [Cogeco] at para. 25:

the advertisement must be looked at as a whole, from the perspective of an average consumer. The consumer perspective is that of a credulous and technologically inexperienced consumer of Internet services.

[66] Ultimately, to determine if Shaw has breached s. 52, a court must first assess the general impression Shaw's publications convey to consumers, and then assess whether that general impression is false and misleading in a material respect. Finally, as a civil suit brought by way of s. 36(1) of the Act, TELUS must also establish that it has "suffered loss or damage as a result".

[67] As discussed, TELUS' complaints regarding Shaw's Representations focus on three themes:

- (a) Shaw calling its Internet service "Fibre+", and offering products such as "Fibre+ Gig";
- (b) Describing Fibre+ as a "new Internet product", and
- (c) Stating: "We've already laid the Fibre+ network cables in the communities we serve. There's no need to dig up your driveway, lawn or neighbourhood, because you can already access the power of Fibre+".

[68] While TELUS argues that Shaw's use of "Fibre+" materially misleads the average consumer into believing that Shaw offer a FTTH Internet services (i.e. since the last mile connection in Shaw's DOCSIS Internet services consists of coaxial cable), I take Shaw's point that there is no direct indication in the use of the term "fibre" alone that this fibre extends all the way to the home. In line with the case law, when assessing what the average consumer would understand from Shaw's Fibre+ branding, I must look at the phrase's literal meaning and general impression. I am more persuaded by Shaw's submissions that the use of the addition symbol (+) conveys that there are additional features, beyond the use of fibre, offered by the Internet products (i.e. faster speeds). Shaw's current description of its Fibre+ service on its website reads: "Fibre+ is the name of our hybrid fibre coax network that delivers the fastest speeds in Western Canada."

[69] While TELUS' submissions included a focus on the Canadian Radio-Television and Telecommunications Commission's ("CRTC") characterization of Shaw's particular service as offering HFC access technologies as opposed to FTTH, and the use of the term "fibre" in the industry to signify the latter category, industry professionals, and the CRTC as a highly

technical regulatory agency, are not representative of the "credulous and technologically inexperienced consumer of Internet services:" *Bell Canada v. Rogers Communications Inc.* et al., 2010 ONSC 2788 [Bell Canada] at para. 25.

- [70] Further, I question TELUS' submissions that the difference between fibre and coax, and calling a network "fibre" and an Internet product "Fibre+", is clearly material.
- [71] At this point, I find more compelling Shaw's position that the people who know and care about the differences and distinctions between HFC and FTTH are not the segment of consumers that s. 52 seeks to protect, since they are the very consumers that would not be confused militates against the TELUS position. As Shaw points out, for the average consumer to be misled by the term "Fibre+" in the way alleged by TELUS--i.e. that Shaw is now offering FTTH infrastructure over HFC--the average consumer would need to be aware of the features or technical characteristics of FTTH networks and HFC networks that deliver their home Internet services such that they would be misled when considering an advertisement for Internet services. I find that TELUS' argument weak in demonstrating that the average consumer (1) understands the difference between HFC and FTTH infrastructure; (2) correlates the use of the term "fibre" exclusively with FTTH infrastructure and not HFC and thus would be misled by the word "fibre", and (3) would chose an internet service provider using FTTH over HFC--i.e. that this would be material to their decision.
- [72] At this preliminary stage, I also find the at the evidence and submissions of Shaw dilute TELUS' reliance upon the social media and survey evidence, in addition to the reply evidence of Mr. Balser on the Shaw evidence on the topic.
- [73] Further, as discussed, Shaw has been describing its network "FibrePlus" for almost four years without any party suggesting it was misleading. I find the fact that TELUS does not take exception to Shaw using the phrase "fibre" in connection with its overall HFC, but does so only in respect to Shaw's recent inclusion of the term "Fibre+" to describe its higher tier direct-to-consumer Internet products (i.e., Fibre+ Gig and Fibre+ 750), to undermine the strength and coherence of its submissions. If the crux of TELUS' argument is that the average consumer is misled by the term "fibre", because of its associations with FTTH, I find it hard to appreciate why that same consumer would not be also misled by the description of Shaw's entire network as "FibrePlus" for the very same reason. I say this recognizing that TELUS points out in reply that Shaw's FibrePlus brand was only in relation to its network and not with respect to a particular internet service.
- [74] In regards to TELUS' specific complaint that the use of Fibre+ to describe some of Shaw's internet products and not others creates the impression that there is a difference in network infrastructure between these services--i.e. that now Shaw is offering some higher tiered services on a FTTH network as opposed to higher speeds on its existing FTTN infrastructure--I note that since the initiation of TELUS' action Shaw has also included the term Fibre+ to the description of its lower speed offerings (150, 75, 25, and 10), thus removing any such distinction. I also find the reference of "no need to dig up" driveways,

lawns or neighbourhoods as advancing TELUS' claim that Shaw is characterizing its system as FTTH is not persuasive given that Shaw explains in its publication that "Fibre+" is a hybrid fibre coax network.

- [75] Finally, to be successful at trial this Court must be satisfied that TELUS has shown that it has, in fact, sustained: (a) actual loss or damage--providing speculative assertions is not sufficient, and (b) that the loss or damage was caused by Shaw's allegedly false or misleading material representation. Such real and resultant damage is one of the very elements of the cause of action itself. The plain language of s. 36 of the Act is that TELUS "must show both a breach of s. 52 and loss or damage suffered by him or her as a result of that breach": *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 [Singer] at para. 107. As discussed in *Singer*, "[t]hat can only be done if there is a causal connection between the breach (the materially false or misleading representation to the public) and the damages suffered by the plaintiff": para. 107. At this stage the evidence is thin but not determinative. See for example: *Cogeco* at para. 34.
- [76] Ultimately, while on a preliminary assessment my view is that TELUS case is not particularly strong, on the low threshold required at this stage there is enough that demonstrates that there is a serious question to be tried and that TELUS' claim is neither frivolous or vexatious. On this basis, I will proceed to the other stages of the RJR test.
- [77] If I am wrong about the nature of the injunction sought by TELUS and is subject to the higher threshold of establishing a "strong prima facie case" I would find that TELUS fails at this stage of the analysis.

B. Has TELUS demonstrated that it will suffer irreparable harm if the relief sought is not granted?

- [78] Under the second stage TELUS must establish that it will suffer irreparable harm if the injunction is not granted.
- [79] In *Onkea Interactive Ltd. v. Smith*, 2006 BCCA 521 at para. 18, Mr. Justice K. Smith discussed what type of harm constitutes "irreparable harm" as follows:
- Irreparable harm is of two types. First, there is harm that cannot be quantified in monetary terms, such as permanent market loss or irrevocable damage to business reputation. Second, there is harm that cannot be compensated: for example, because an award of damages will not be collectible: see *RJR-MacDonald Inc. v. Canada (Attorney General)*, *supra*, at 341.
- [80] TELUS argues that it will suffer irreparable harm for which it cannot adequately or accurately be compensated for in damages, because of the extreme difficulty in determining which customers were misled by the Representations, thus resulting in market loss for TELUS, as opposed to those who made choices for reasons unrelated to the Representations: *Bell Canada* at para. 37.

- [81] TELUS points to the decision in *Bell Canada*, in which, analogous to this case, the Ontario Supreme Court was hearing an application for an interlocutory injunction as part of an action arising from breaches of s. 52 of the Act, and in that case found that the applicant ISP had established irreparable harm:
- [37] I am also satisfied that the plaintiff has established that there will be irreparable harm for which it cannot be compensated for in damages. It would be difficult, if not impossible, to determine with any certainty which potential or existing customers were misled by the claim that Cogeco is the best, and which customers or potential customers made their choices for reasons unrelated to this advertising claim: *BC Tel Mobility Cellular Inc. v. Rogers Cantel Inc.*, 1995 CanLII 1679 (BC SC), [1995] 63 C.P.R. (3d) 464 (B.C.S.C.), at para. 31; *Maple Leaf Foods Inc. v. Robin Hood Multifoods Inc.*, 1994 CanLII 7429 (ON SC), [1994] O.J. No. 2165 (Gen. Div.), at para 12; *Church & Dwight Ltd. v. Sifto Canada Inc.*, 1994 CanLII 7314 (ON SC), [1994] O.J. No. 2139 (Gen. Div.), at para 18; *Bell Aliant Regional Communications Ltd. v. Rogers Communications Inc.*
- [82] TELUS also directs me to this Court's findings in *BC Tel Mobility Cellular Inc. v. Rogers Cantel Inc.*, [1995] B.C.J. No. 1999 (S.C.) [BC Tel], and *Telus Communications Co. v. Rogers Communications Inc.*, 2009 BCSC 1610 [Telus Communications BCSC].
- [83] In *BC Tel*, Justice Allan held that applicant wireless telecommunication company would suffer irreparable harm if the defendant's allegedly misleading advertisements were permitted to continue:
- [31] I am satisfied that if BC Tel were successful, a monetary remedy would be difficult to quantify and might be inadequate compensation. The mobile phone market appears to be a lively one. It would be difficult, if not impossible, subsequently to determine which potential customers were misled by the Cantel advertisements and chose that company's network instead of BC Tel's and which potential customers made that choice for reasons unrelated to the advertising.
- [84] In *Telus Communications BCSC*, Justice Grauer held:
- [45] Looking at it from the perspective of Telus enjoying ultimate success, it seems evident to me that the losses which Telus might suffer as a result of consumers being misled as to the relative merits of the competing networks would be extremely difficult to quantify and would qualify as irreparable harm. Similar conclusions were reached in *Church & Dwight Ltd. v. Sifto Canada Inc.* (1994), 1994 CanLII 7314 (ON SC), 20 O.R. (3d) 483 (Gen. Div.), *Purolator Courier Ltd. v. Mayne Nickless Transport Inc.* (1990), 33 C.P.R. (3d) 391 (F.C.T.D.), *Eveready Canada, a Division of Ralston Purina Canada Inc. v. Duracell Canada Inc.* (1995), 1995 CanLII 7328 (ON SC), 64 C.P.R. (3d) 348 (Ont. Gen. Div.) and *BC Tel Mobility Cellular Inc. v. Rogers Cantel Inc.* (1995), 1995 CanLII 1679 (BC SC), 63 C.P.R. (3d) 464 (B.C.S.C.).

- [85] I note that Justice Grauer's characterization that irreparable harm exists where damages would be "extremely difficult to quantify" was recently cited in *Uber Canada Inc. v. Surrey (City)*, 2020 BCSC 173 at para. 37.
- [86] In response, Shaw argues that TELUS has not provided any evidence, demonstrating that it has suffered any harm at all, and instead relies on mere speculation as to harm through only the bald assertions contained in Mr. Balser's affidavit that TELUS has suffered and continues to suffer: financial loss and unquantifiable harm; depreciation of good will of TELUS in the marketplace; loss of prospective customers; and diminishment in TELUS' investment in infrastructure. Further, Shaw submits that even if TELUS did provide evidence of actual damage or loss, which Shaw says has not occurred, TELUS has not established a causal link as required under s. 36 the Act, between any false and misleading material representations and the damage TELUS has allegedly suffered.
- [87] While there is some merit to Shaw's submissions, we are still at the preliminary stage and the limited evidence goes to the strength of TELUS' case and is not in line with the precedent before me on the question of irreparable harm.
- [88] While Shaw relies upon the decision in *Bell Canada* at paras. 27-28 in support of its position that TELUS should have introduced stronger evidence of the harm caused by the Representations to date if it wished to establish irreparable harm, I note that this decision has been overtaken by more recent precedent--the possibility of which is even explicitly recognized in the reasons in *Bell Canada*:
- [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.
- [89] The decision rendered by the Court of Queens Bench of New Brunswick in *Bell Aliant Regional Communications, Limited Partnership v. Rogers Communications Inc. et al.* 2010 NBQB 166 [Bell Aliant] addresses the issue of irreparable harm as follows:
- [23] If this injunction is not granted will the Plaintiff, Bell Aliant, suffer irreparable harm? It is conceded by the parties that the loss of business is difficult to assess. It is also conceded that the loss of customers and the potential loss of new customers is also difficult to assess. The evidence of the parties is that they both offer "bundles of service" to their customers for cheaper rates if the customer has, for example, internet, cell phone and regular phone service with the provider. It would be difficult to track which component of the bundle is lost. Mr. Hartling, with Rogers, conceded in cross-examination that it would be difficult to

calculate harm caused by misleading advertising. Justice Grauer in *Telus Communication Co. v. Rogers Communication Inc.*, said at para 45 "if the harm is difficult to quantify that would qualify as irreparable harm." Rogers contends that Bell Aliant has not provided any evidence that the damages would be difficult to quantify except for Ms. Duplisea's "bald assertion"

- [90] I note that the application for leave to appeal of *Bell Aliant* was dismissed: *Rogers Communications Inc. v. Bell Aliant Regional Communications*, [2010] N.B.J. No. 212 (C.A.).
- [91] In line with the cases mentioned above, I find that the difficulties in evaluating and thus adequately compensating for market loss as a result of misrepresentations is sufficient for present circumstances on the question of form of irreparable harm if the Representations are found to misled consumers at trial. I think it fair to say however, referring to difficulty is not an incantation for meeting the irreparable harm threshold.

C. Has TELUS shown that the balance of convenience favours granting the injunction?

- [92] The final stage of the RJR test requires an assessment of the balance of convenience to identify which party that would suffer greater harm from the granting or refusal of the interlocutory injunction pending a decision on its merits. The factors that must be considered in the balance of convenience will vary in each individual case: RJR at 324. In coming to its determination, the court is given the discretion to consider a wide range of factors: *Bar C Ranch and Cattle Company Ltd. v. Red Rock Sawmills Ltd.*, 2004 ABCA 113 at para. 17.
- [93] While I have found that TELUS has met the first two threshold questions--I have determined that the balance of convenience does not favour the sought after injunction.
- [94] At this stage of the action, my view is that the applicant's case is not as compelling as it asserts. I do note the competing views and statements of the affiants put forth by each party and the fullness of their evidence will be tested at trial; however, I am left to question TELUS' position that FTTH networks in essence holds exclusivity over the term "fibre" in the branding of Internet services. The reports and documents relied upon by TELUS have limitations as pointed out by Shaw in terms of admissibility and relevance. Further, the evidence of Shaw showing the use by cable companies (Rogers, Cogeco, Videotron, and Eastlink), along with Bell, publicly use the word "fibre" when describing their non-FTTH wirelines networks (or portions thereof) and the Internet systems they deliver them through. TELUS was not aware that Cogeco uses the name "Ultra Fibre" to describe its 1 Gig Unlimited and other Internet speed tier offerings over an HFC network. Interestingly, Cogeco is a competitor of TELUS in Quebec, the second largest cable operator in Ontario and Quebec. And this lack of knowledge brings into question the TELUS assertion that "no ISP in North America, other than Shaw, uses the term 'fibre' in the product name, unless it is a FTTH service" and "ISPs in North America are very careful to only use the term 'fibre' in promoting Internet service with a FTTH Infrastructure, with fibre optic cable installed directly to the consumer's residence" and the other assertions made.

[95] Also diluting TELUS' case is the past conduct of TELUS in describing its ISP network as "fibre" well before it had any meaningful scale or geographical reach as an FTTH network and remained predominantly a FTTN network with twisted-pair copper wire in its "last mile." TELUS' failure to adequately to explain why its own use of "fibre" to describe its own FTTN network with legacy copper wire as legitimate but that Shaw should be prohibited from describing its HFC network using the word "fibre". TELUS' clarification that it was only objecting to the inclusion of "fibre" in the branding of Shaw's plan tiers in my view does not assist it. As Shaw responded, the inescapable result of the clarification that it takes no issue with Shaw continuing to call its network Fibre+ but would be misled in a material respect by: "Fibre+Gig" makes no sense particularly when viewed within the context of the publications in issue has some purchase. Shaw's rhetorical question accentuates the difficulty with TELUS' position:

How is the use of "Fibre+ Gig" in the Press Release or on the website false or misleading and the cause of irreparable harm when, in the very same publication, a consumer also reads about the Fibre+ network--without that consumer being misled or TELUS being harmed in any way? How is one a criminal offence and the other innocuous?

Notwithstanding the response of TELUS to this submission, my view here at present is that TELUS does not have the equitable high ground.

[96] Further, the evidence relied upon by TELUS that the term "fibre" and the branding "Fibre+" is either misleading or materially misleading, or that the use of such terms and Shaw's Representations have resulted in harm to TELUS, is weakened by the contrary evidence of Shaw. I note as well the description of the applicable consumer does not fit within the level of appreciation of the technical aspects of a FTTH network that TELUS has focussed upon, including the concept of the "last mile".

[97] Further, I have taken into account the stated impact on Shaw if the injunction were granted.

[98] I also have considered the difficulties that I have discussed with respect to causation and the limited evidence of harm. I also recognize the evidence that TELUS has invested "billions of dollars" in updating its network infrastructure to provide FTTH offerings; however, this in itself is not determinative. So long as Shaw is not materially misleading consumers, the amount of money TELUS has invested in its offerings and business is not relevant--such an argument is contrary to the goal of efficiency which the Act seeks to uphold and promote for the benefit of consumers.

[99] I have also taken into consideration the preference espoused in the authorities for reaching a determination on an interlocutory injunction application that maintains the status quo, and that this factor is properly considered at the balance of convenience stage of the RJR test: CBC at p. 10. This Court has found that the status quo in the context of large telecommunications companies consists of companies being permitted to make claims of superiority over its competitors in various respects: TELUS Communications Company v. Bell Mobility Inc., 2007 BCSC 518 at paras. 24 and 26. I accept Shaw's submissions that this

status quo similarly applies in the context of competing ISPs. Ultimately, the status quo is that TELUS and Shaw remain engaged as competitors, with Shaw continuing to provide its highspeed Internet services under the network brand "Fibre+" (which has been in place for many years) and its accumulated goodwill, and that Shaw and other major ISPs in Canada use "fibre" in promoting or describing their services--just as TELUS used to do when its network was predominantly twisted pair copper wire in its "last mile". I also find persuasive at this stage that the consumer for the purposes of s. 52 is not technically knowledgeable of the differences between the various ISP networks and is driven in product selection, the words of TELUS, by pricing, reliability, and customer experience. This is also supported in a more general sense in the CityFibre case referenced earlier. Also, at this stage, superiority of performance of each's respective system to the customer is hotly contested and it is not clear that the consumer is being prejudiced in this respect.

[100] While I take TELUS' point that in the competitive marketplace, making a false or misleading claim alters the status quo, in light of my analysis at this preliminary stage as to the strength of TELUS' claim, the competing inconvenience to Shaw, the public interest in a competitive marketplace, and noting that the seriousness of allegation of wrongdoing contained in a s. 52 claim along with the other matters discussed; I do not find that it is appropriate to grant the injunction sought.

[101] Based on all of the foregoing, I cannot find that that the balance of convenience favours granting the injunction sought by TELUS.

IV. Conclusion

[102] The application of TELUS is denied.

"The Honourable Mr. Justice Masuhara"

Appendix A

Appendix B

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