See paras. 70, 77

*Case Name:*

# Rogers Communications Inc. v. Shaw Communications Inc.

**RE: Rogers Communications Inc., and Shaw Communications Inc.**

[2009] O.J. No. 3842

63 B.L.R. (4th) 102

2009 CarswellOnt 5489

180 A.C.W.S. (3d) 493

Court File No. 09-8326-00CL

Ontario Superior Court of Justice

**F.J.C. Newbould J.**

Heard: September 9, 2009.
Judgment: September 16, 2009.

(83 paras.)

*Civil litigation -- Civil procedure -- Injunctions -- Circumstances when not granted -- Interlocutory or interim injunctions -- Motion by Rogers Communication Inc. seeking an interlocutory injunction restraining Shaw Communications Inc. from acquiring a broadband wireline cable business in Hamilton, Ont., on the grounds that Shaw was bound by a restrictive covenant prohibiting it from building/acquiring any such business in Ontario, Quebec or Atlantic Canada, dismissed -- Rogers had established a serious issue to be tried, however it failed to show irreparable harm or that the balance of convenience lay in its favour -- Rogers had no proprietary right to acquire the company's shares, and placing a value on its damages was not insurmountable.*

*Contracts -- Validity -- Public policy -- Restrictive covenants -- Motion by Rogers Communication Inc. seeking an interlocutory injunction restraining Shaw Communications Inc. from acquiring a broadband wireline cable business in Hamilton, Ont., on the grounds that Shaw was bound by a restrictive covenant prohibiting it from building/acquiring any such business in Ontario, Quebec or Atlantic Canada, dismissed -- Rogers failed to show irreparable harm or that the balance of*

*convenience lay in its favour -- Shaw had a good case that the covenants were contrary to public interest in relation to their effect on a cable television business owner who wanted to sell it in a competitive marketplace.*

Motion by Rogers Communication Inc. for an interlocutory injunction restraining Shaw Communications Inc. from acquiring Mountain Cablevision Ltd., a broadband wireline cable business in Hamilton, on the grounds that Shaw was bound by a restrictive covenant prohibiting it from building or acquiring any broadband wireline cable business in Ontario, Quebec or Atlantic Canada. The covenant was contained in an agreement entitled "Swap of Cable Customers" in which assets were swapped between Rogers and Shaw. Shaw argued the restrictive covenant was unenforceable as it was an unlawful restraint of trade and ambiguous, and that Rogers had failed to establish the grounds for an injunction until trial.

HELD: Motion dismissed. While Rogers had not established a strong prima facie case, it had established there was a serious issue to be tried regarding the validity of the restrictive covenants. It had not, however, established that it would suffer irreparable harm if an injunction was not granted or that the balance of convenience favoured an injunction. There was no doubt that the acquisition of Mountain was contrary to the non-competition covenant in the agreement. It would be very difficult for Shaw to establish sufficient ambiguity to render the covenant unenforceable. As for whether the covenants would be held to be reasonable between the parties, Rogers had a good case. The parties were knowledgeable businessmen of equal bargaining strength, and were taken to know what was reasonable in their own interests. There was a serious issue to be tried as to whether the agreement would be in contravention of the new provisions of the Competition Act, in force in March 2010. Shaw had a good case that the covenants were contrary to the public interest in relation to their effect on an owner of a cable television business who wanted to sell it in a competitive marketplace and that they were contrary to the existing s. 45(1)(d) of the Act. However, Rogers had met the threshold of a serious issue to be tried. It could not be said that Rogers' case was so strong that there was little doubt on the merits. As for irreparable harm, Rogers had no proprietary right to acquire the shares of Mountain and it failed to come to terms with Mountain's shareholders while it had exclusive rights to do so. Furthermore, placing a value on the damages would not seem insurmountable. It had no proprietary interest in some future cable operation that might come on the market. As for the balance of convenience, if an injunction was granted, there was evidence that Mountain's business might be harmed, harming Shaw's interest in it in the event it ultimately succeeded in acquiring it. Mountain faced a risk of loss of key employees during the period of uncertainty an injunction would bring. The balance of convenience favoured Shaw. Costs were to be in the cause.

**Statutes, Regulations and Rules Cited:**

Competition Act, s. 45(1), s. 114

**Counsel:**

Timothy J. Pinos, Casey M. Chisick and Eunice Machado, for the applicant Rogers Communications Inc.

Charles F. Scott and Amy Salyzyn, for the respondent Shaw Communications Inc.

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## ENDORSEMENT

**1** **F.J.C. NEWBOULD J.**:-- Rogers Communications Inc. ("Rogers") moves for an interlocutory injunction to restrain Shaw Communications Inc. ("Shaw") from acquiring Mountain Cablevision Ltd. ("Mountain") on the basis that Shaw is bound by a restrictive covenant which prohibits Shaw from building or acquiring any broadband wireline cable business in Ontario, Quebec or Atlantic Canada. Mountain is a broadband wireline cable business in Hamilton, Ontario that in part operates a cable television business. The covenant is contained in an agreement entitled Swap of Cable Customers in which assets were swapped between Rogers and Shaw.

**2** The principal defence of Shaw is that the restrictive covenant is unenforceable as it is an unlawful restraint of trade and ambiguous and that Rogers has failed to establish the basis for an injunction until trial.

**3** For the reasons that follow, the motion is dismissed. While Rogers has not established a strong *prima facie* case, it has established that there is a serious question to be tried regarding the validity of the restrictive covenants. It has not, however, established that it will suffer irreparable harm if an injunction is not granted or that the balance of convenience favours an injunction.

**The parties and the cable television business**

**4** Rogers is a diversified communications and media company. Through Rogers Cable, it is Canada's largest provider of broadband cable television services as well as high-speed internet access and home phone services all delivered over its cable lines.

**5** Shaw is a diversified communications company which provides broadband cable television, high-speed internet, digital phone, telecommunications services and satellite direct-to-home services.

**6** Mountain is a family-owned company based in Hamilton, Ontario. It is full service high speed internet, telephone and television provider with approximately 41,000 cable customers. Approximately one-third of its revenue derives from television. Rogers offers cable television services to subscribers in Brantford, Ontario, immediately west of Hamilton, and in an area contiguous to the area served by Mountain.

**7** Cable television systems grew from the practice of entrepreneurs erecting large antennas for the purpose of collecting over-the-air broadcast signals and then redistributing these signals to local subscribers. In the early days of the industry, cable television was commonly referred to as Community Antenna Television ("CATV"), which described its early technical basis. Although the technology has evolved quite considerably since then, that acronym continues to be used to describe cable television services, as well as other services such as digital television signals and internet services.

**8** The Canadian cable television industry has always been regulated by the Canadian government. In 1968, a new Broadcasting Act established the Canadian Radio-Television Commission, now known as the Canadian Radio-Television and Telecommunications Commission (the "CRTC"), to regulate both broadcasting and cable TV. The CRTC became, and remains, the licensing authority for CATV.

**9** Over the years, the cable television industry has become increasingly concentrated in terms of ownership. In 1976, the four largest multisystem cable companies accounted for 48% of the 1.4 million cable subscribers in Canada at that time. Today, Rogers and Shaw together account for nearly two-thirds of cable subscribers in Canada. The other major Canadian cable companies are Videotron (a wholly-owned subsidiary of Quebecor Media Inc.), which offers service primarily in Quebec and the francophone communities of New Brunswick and some parts of Eastern Ontario; Cogeco Inc. ("Cogeco"), the second-largest cable system operator in both Ontario and Quebec, and Bragg Communications Inc., doing business as EastLink.

**10** The Canadian model of cable television regulation was based, in part, around the grant of exclusive rights to provide cable television service to specific geographical areas. This structure provided incentives and requirements for cable providers to build out an infrastructure of wires, amplifiers and related equipment in order to deliver signals to potential subscribers in the licensed area. In return for the grant of this local "monopoly" for the provision of cable television services, the CRTC regulated most of the commercial terms upon which cable providers were permitted to offer service to subscribers, including channel availability and rates.

**11** As a practical matter, a cable television operator does not compete in the area in which it is licensed with any other cable television operator. The CRTC typically licenses only one cable television operator in a geographical area. The competition now faced by cable operators is from other service providers, particularly satellite television services. Currently, Bell TV (controlled by BCE Inc.) and Star Choice (controlled by Shaw) are licensed as national satellite television services in Canada and offer a line-up of television and other services that is directly competitive to that of Rogers and other cable companies.

**12** The CRTC does not regulate the service fees of other types of television distribution undertakings, such as satellite television. Since 1997, a cable television operator has had the right to apply to the CRTC for deregulation of its basic cable fees. If it is shown that competitive television

services are available to at least 30% of the households in a licensed service area, and the cable television system had lost 5% of its subscribers following the introduction of competitive services, the Commission will order that basic cable fees for that system be deregulated. Each of Rogers, Shaw and Mountain Cablevision have applied to have their basic service fees deregulated for their various service areas, and the CRTC has granted those applications.

**13** The emergence of national satellite television services promoted by large, well-funded entities such as Bell and Shaw, as well as the CRTC's policy of encouraging the growth of satellite and other services competitive with the cable companies, has placed additional competitive pressure on cable companies and provided further incentives for them to look to ways in which they can increase their size and efficiency. Clustering of service areas to increase the cable company's "footprint" in an area is one way to achieve this.

**14** In 1994 Rogers purchased Maclean Hunter to further its consolidation and growth plans, as nearly all of Rogers' cable television territories were adjacent to those of Maclean Hunter, and improve its competitive position relative to Bell Canada.

**15** As part of its takeover of Maclean Hunter, Rogers proposed an asset swap with Shaw so that Shaw could acquire and consolidate certain Rogers' assets in the west and Rogers would acquire and consolidate Shaw assets in Ontario. Rogers traded its cable systems in Victoria, Calgary and Thunder Bay for Shaw's systems in parts of Toronto, Woodstock, St. Thomas, Strathroy and Tillsonburg.

**The Swap of Cable Customers Agreement ("Swap Agreement")**

**16** On March 22, 2000, Shaw and Rogers entered into the Swap Agreement, whereby Rogers agreed to swap the assets of its existing cable television business in British Columbia in exchange for the assets of Shaw's existing cable television business in Southern Ontario and New Brunswick. Rogers transferred to Shaw ownership of its cable assets in the Vancouver area and Shaw transferred to Rogers ownership of its cable assets in Richmond Hill, Scarborough, Barrie, Orangeville, Orillia and other nearby Southern Ontario communities and in parts of New Brunswick.

**17** Ted Rogers and Jim Shaw negotiated the business terms of the Swap Agreement at a private dinner meeting between them on the evening of March 21, 2000, and the Swap Agreement was drafted and signed the next day at the Rogers corporate offices. While there is some debate as to the intent and purposes of the Swap Agreement, the evidence of these two men is not before the court as Ted Rogers is deceased and Jim Shaw chose not to provide an affidavit and Rogers took no steps to examine him for the purposes of the motion.

**18** The non-competition covenants in issue are contained in the signed Swap Agreement. Although a lengthy Asset Exchange Agreement made as of March 22, 2000 and signed on March 8, 2001 was entered into to supersede the Swap Agreement, it provided that sections 2 and 3 of the

Swap Agreement would continue in full force and effect. These sections provide:

2.

(a) For a period commencing on the date hereof and ending 5 years from the date of closing, and

(b) For a further period of 5 years after the end of the period referred to in paragraph 2(a),

Shaw shall not start a new, or acquire a, broadband wireline cable business (CATV) in Eastern Canada (Ontario, Quebec, and the Maritimes). For the foregoing purposes, neither the acquisition of any shares (including a controlling interest), in certain cable television operations (or their successors) operating solely in Nova Scotia in which Shaw currently, directly or indirectly, holds shares, nor the acquisition of cable television systems in Nova Scotia by such operators while they are not controlled by Shaw, shall violate the foregoing obligation.

Any court determination that the foregoing obligations are not enforceable for the period set out in paragraph 2(b) shall not affect the obligations of the parties in this Clause 2 during the period set out in paragraph 2(a).

3.

(a) For a period commencing on the date hereof and ending 5 years from the date of closing, and

(b) For a further period of 5 years after the end of the period referred to in paragraph 3(a),

Rogers shall not start a new, or acquire a, broadband wireline cable television business (CATV) in Western Canada (Manitoba, Saskatchewan, Alberta and British Columbia).

Any court determination that the foregoing obligations are not enforceable for the period set out in paragraphs 3(b) shall not affect the obligations of the parties in this Clause 3 during the period set out in paragraph 3(a).

**19** The date of the closing is contested. Rogers says that the closing took place on March 8, 2001, which if correct, means that the non-competition provisions run to March 8, 2011. Shaw says that the Asset Exchange Agreement terms provide for the closing date to be ten business days in the month following approval by the CRTC, which occurred on October 27, 2000, making the closing date November 14, 2000, which the parties agreed for administrative and operational purposes to be November 1, 2000. Therefore Shaw says the non-competition provisions, if valid, would run to November 1, 2010.

**20** On April 17, 2000, Rogers and Shaw jointly applied to the CRTC to obtain approval for the asset swap contemplated by the Asset Exchange Agreement and the Swap Agreement. In response to requests from the CRTC for further information, both Rogers and Shaw provided letters setting out the rationale for the swap. They emphasized the economic benefits to each of them of clustering their cable operations in a given geographic region and the beneficial effects on their customers. They also emphasized the need to cluster in order to compete with other service providers, such as incumbent telephone companies, including Bell and BCTel/Telus, Canada's two largest communication companies. Their submissions did not discuss the non-competition provisions in the Swap Agreement.

**21** On October 27, 2000 the CRTC approved the transaction. In so doing, it echoed and adopted much of the rationale set out by Rogers and Shaw. The CRTC found that the asset exchange would result in greater efficiencies, cost savings and service improvements. It would also allow the two companies to rationalize their cable holdings in Canada which would strengthen the systems being exchanged and would, therefore, benefit subscribers. No reference in the decision was made to the non-competition provisions contained in the Swap Agreement.

**22** On May 12, 2000, Rogers and Shaw filed with the Competition Bureau a short form pre-notification filing required by s. 114 of the *Competition Act*. Enclosed was a draft of the Asset Exchange Agreement as well as a copy of the Swap Agreement that contained the non-competition provisions. The Competitive Impact Analysis provided with the filing did not deal with the non-competition provisions and generally dealt only with the swap of cable operations. It discussed the clustering rationale for the swap of cable operations in the same terms as had been submitted to the CRTC and stressed the competition benefits of the transaction in enabling cable operators to compete with incumbent telephone companies and other service providers. The Competition Bureau sent a "no action" letter to the parties. To what extent the Competition Bureau considered the non-competition provisions is not known.

**Sale of Mountain Cablevision**

**23** In early 2009, the owners of Mountain decided to sell Mountain. Initially, as a result of a prior understanding between the principals, between January 22, 2009 and March 6, 2009, Mountain's shareholders extended to Rogers an exclusive opportunity to acquire Mountain. However, Rogers' initial valuation estimate for Mountain was significantly less than that of Mountain's shareholders

and their advisors. Rogers ultimately chose to conclude these discussions and advised that it would not be able to offer the price that the Mountain shareholders were seeking.

**24** As a result, the Mountain shareholders retained RBC Capital Markets to supervise an auction for Mountain. On April 15, 2009, RBC Capital Markets sent out packages to five potential purchasers, including Shaw and Rogers. Rogers, Shaw and two other bidders participated in the auction. In various combinations of shares and cash, there were initially two offers from Shaw and another bidder at the same amount and a third bid from Rogers that was 3% lower and a fourth bid that was lower still. Only two bidders advanced to the final round, Shaw and Rogers. On July 6, 2009, final bids were received from Shaw and Rogers. The shareholders of Mountain preferred the Shaw bid and accepted it. The sale has not yet closed or been approved by the CRTC.

**Applicable Law**

**25** The general rule is that a party will be entitled to an interlocutory injunction upon satisfying the tests established in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 as follows:

(a) Is there a serious issue to be tried?
(b) Will the applicant suffer irreparable harm if the injunction is not granted?
(c) Which party will suffer the greatest harm from granting or refusing the injunction, i.e. where does the balance of convenience lie?

**26** *RJR-Macdonald* instructs that the threshold for a "serious question to be tried" is a low one and that a prolonged examination of the merits is generally neither necessary nor desirable. If satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to the second and third tests even if of the opinion that the plaintiff is unlikely to succeed at trial. I do not accept the position of Shaw that Rogers is required in order to meet this threshold of a serious question to be tried to establish on a balance of probabilities that the presumption against restrictive covenants has been overcome.

**27** Rogers, however, relies on the principle that it is not necessary to consider the second and third tests set out in *RJR-MacDonald* if a moving party demonstrates a clear breach of a negative covenant. This principle has been applied in a number of cases in which a negative covenant was given by a vendor of a business not to compete with the business sold. See for example *Button v. Jones*, [2001] O.J. No. 1976, *Singh v. 3829537 Canada Inc*., [2005] O.J. No. 2402 and *Hargraft Schofield LP v. Schofield*, [2007] O.J. No. 4400, 2007 CarswellOnt 7326. These cases involved breaches of negative covenants that on their face appeared reasonable.

**28** In Sharpe, *Injunctions and Specific Performance*, Looseleaf ed. (Aurora: Canada Law Book, 2008) it is stated at p. 2-33:

> It has been held that, where the plaintiff sues to enforce a negative covenant, it is

> not necessary to prove irreparable harm. It is submitted that this proposition is applicable only in cases where the plaintiff's case is strong and where there is little doubt on the merits.

**29** In my view, to apply the principle contended for by Rogers requires that there must be a strong *prima facie* case that the covenant is reasonable. It is necessary to consider more than just the *American Cyanamid* test of a serious issue to be tried adopted in *RJR-MacDonald*. I agree with the approach of Pattillo J. in *Van Wagner Communications Co., Canada v. Penex Metropolis Ltd.,* [2008] O.J. No. 190 that it is necessary to undertake a preliminary and tentative analysis of the strength of the plaintiff's case to consider whether there is a strong *prima facie* case. In *Van Wagner*, Pattillo J. relied on the following statements from *Canada (Attorney General) v. Saskatchewan Water Corp.*, [1991] S.J. No. 403, a case involving an injunction to restrain a negative covenant, and adopted in *CBJ International Inc. v. Lubinsky*, [2002] O.J. No. 3065 (Div. Ct.):

> To satisfy the first step he [the judge] must undertake a preliminary and tentative analysis of the strength of the case put forward by the plaintiff ... Similarly he must make a tentative and preliminary assessment of the possible defences which may be offered ...
>
> ...
>
> If the plaintiff is left with a strong prima facie case approaching a plain and uncontested breach of a clear covenant, then an injunction ought to be granted without much regard to the balance of convenience and irreparable harm. If the plaintiff is left only with a *prima facie* case then more regard needs to be had to the balance of convenience and irreparable harm.

**30** I take it that the reference to a *prima facie* case in *Saskatchewan* in the last sentence quoted is meant to refer to the test of a serious issue to be tried. In order to consider Rogers' claim that I need not have regard to the second and third tests for an interlocutory injunction, it is necessary therefore to consider whether Rogers has established a strong *prima facie* case, or as put in Sharpe, *supra*, whether Roger's case is strong and there is little doubt on the merits.

**Strength of Rogers' case and the defences offered**

**31** There is no doubt that the acquisition of Mountain by Shaw is contrary to the non-competition covenant of Shaw in the Swap Agreement. Mr. Bissonette, the president of Shaw, admitted on cross-examination that the acquisition clearly conflicted with the covenant. He asserted however that the covenant is not legally binding. Mr. Scott fairly conceded in argument that the acquisition of Shaw is an acquisition of "a broadband wireline cable business (CATV)", within the language of the covenant, but contends that the covenant is not legally valid and is unenforceable.

**32** Shaw's main contention is that the covenant is void as an unlawful restraint of trade and contrary to public policy. It also contends that the covenant is unenforceable due to its vagueness and ambiguity. I will first deal with the latter contention.

### (i) Vagueness and ambiguity

**33** Shaw relies on the lack of the word "television" in its covenant not to acquire a "broadband wireline cable business (CATV)" in distinction to the covenant of Rogers not to acquire a "broadband wireline cable television business (CATV)" and contends that its covenant is vague and ambiguous. It points to the change in meaning of CATV to now include services other than cable television. When the Asset Exchange Agreement was being negotiated, the parties could not agree on a number of issues surrounding the non-competition covenant to be inserted in that agreement, with the result that the covenants in the Swap Agreement continued in force and no change was made adding the word "television" to the Shaw covenant.

**34** In my view, there is little in this argument of Shaw. It is likely that the failure to include the word "television" was an oversight. The clauses are completely reciprocal but for this one matter and there would appear to have been no business purpose in having them differ. Indeed Shaw in its statement of defence pleaded that the Swap Agreement contained covenants "by both Rogers and Shaw ... not to build or acquire a broadband wireline cable television business". Shaw pleaded "Specifically ... Shaw was not to build or acquire a broadband wireline cable television business east of the Ontario-Manitoba border, and ... Rogers was not to build or acquire such a business west of that border." Mr. Bissonnette, the president of Shaw, said on cross-examination that the restrictive covenants were to be reciprocal as to what they covered and any variation in wording would have been unintentional.

**35** Moreover, Mr. Bissonnette had no difficulty in understanding that the acquisition of Mountain by Shaw was contrary to the non-competition covenant, and that an earlier acquisition by Shaw of Norcom Telecommunications Limited, a small cable television operator in Northwestern Ontario, was also contrary to the covenant. It would be very difficult for Shaw to establish sufficient ambiguity in these circumstances to render the covenant unenforceable on that ground.

### (ii) Restraint of Trade

**36** A contract in restraint of trade is one in which a party to a contract agrees to restrict his or her liberty in the future to freely carry on trade with other persons not parties to the contract: *Stephens v. Gulf Oil Canada Ltd*. (1975), 11 O.R. (2d) 129 (Ont. C.A.) at p. 138-9; *Esso Petroleum Co. v. Harper's Garage (Stouport) Ltd.* (1967), [1968] A.C. 269 U.K. H.L.) at p. 317. All restraints of trade are contrary to public policy and are *prima facie* void unless they can be justified as being reasonable with respect to the interests of the parties and the public: *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535 at p. 565; *J.G. Collins Insurance Agencies v. Elsley*, [1978] 2 S.C.R. 916.

**37** In *Shafron v. KRG Insurance Brokers (Western) Inc*. 2009 SCC 6, Rothstein J. explained the tension between freedom to contract and public policy considerations against restraint of trade. He stated:

> 16 Restrictive covenants give rise to a tension in the common law between the concept of freedom to contract and public policy considerations against restraint of trade. In the seminal decision of the House of Lords in *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535, this tension was explained. At common law, restraints of trade are contrary to public policy because they interfere with individual liberty of action and because the exercise of trade should be encouraged and should be free. Lord Macnaghten stated, at p. 565:
>
> > The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule.
>
> 17 However, recognition of the freedom of the parties to contract requires that there be exceptions to the general rule against restraints of trade. The exception is where the restraint of trade is found to be reasonable. At p. 565, Lord Macnaghten continued:
>
> > But there are exceptions: <u>restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable</u> -- reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities. [Emphasis added.]
>
> Therefore, despite the presumption that restrictive covenants are *prima facie* unenforceable, a reasonable restrictive covenant will be upheld.

**38** At trial, the onus is on a party seeking to enforce a covenant in restraint of trade to establish that it is reasonable in the interests of the parties. The onus for establishing that it is not reasonable in the public interest is on the party opposing enforcement. See *J.G. Collins Insurance Agencies v.*

*Elsley, supra,* at p. 928 and *Tank Lining Corp. v. Dunlop Industries Ltd*. (1982), 40 O.R. (2d) 219 at 225 (C.A.). I do not think that Rothstein J. intended to, or did, change the onus for establishing unreasonableness in the public interest by stating that the onus is on the party seeking to enforce a restrictive covenant to show the reasonableness of its terms. He was not dealing with a case involving an allegation that the covenant was against public policy but rather with a case dealing with the reasonableness of the covenant as between the parties. In considering the strength of each party's case in a motion for an interlocutory injunction, these trial onuses need be kept in mind.

**(iii) Reasonableness as between Rogers and Shaw**

**39** Parties of equal bargaining strength such as Rogers and Shaw acting with legal advice, which was the case here, are in my view the best judges of what is reasonable as between them. In *Tank Lining Corp. v. Dunlop Industries Ltd., supra,* Blair J.A. stated at 225:

> The test of reasonableness in the interest of the party upholding a restrictive covenant is that it is not more than adequate to protect that party's interest: *Herbert Morris, Ltd. v. Saxelby*, [1916] 1 A.C. 688. <u>When two competently advised parties with equal bargaining power enter into a business agreement, it is only in exceptional cases that the courts are justified in over-ruling their own judgment of what is reasonable in their respective interests</u> as Lord Haldane stated in North Western Salt Co. Ltd. v. Electrolytic Alkali Co. Ltd., [1914] A.C. 461 at 471:
>
>> ... when the question is one of the validity of a commercial agreement for regulating their trade relations, entered into between two firms or companies, the law ... looks carefully to the interest of the public, but it regards the parties as the best judges of what is reasonable as between themselves. (underling added)

**40** In *Shafron, supra,* Rothstein J. reiterated a point made in *Nordenfelt* that with respect to restrictive covenants, there is greater freedom to contract between a buyer and seller than between an employer and employee.

**41** The terms of the covenants are for five years followed by a further five years. This split into two five year periods was obviously to protect against the risk that a court might think that ten years was too long but five not. Shaw contends that ten years was not reasonable because of the rapid evolution in broadcasting technology. I am not sure why that would make a ten year period unreasonable as between Rogers and Shaw. No one understood better than they the fact of an evolving broadcasting technology, which was the rational provided by them to the CRTC and the Competition Bureau to support the swap of assets. I think Rogers has a good case on this aspect.

**42** The same I think can be said of the geographic coverage of the covenants. There is some

evidence, which is contested, that what the parties were trying to do related to only two cable businesses, to prevent Rogers from acquiring Moffat in the West and to prevent Shaw from acquiring Cogeco in the east. Be that as it may, the parties clearly had the ability to compete against one another in the acquisition of other cable businesses throughout Canada, as they had done long before the Swap Agreement, and knowingly agreed to the restrictive covenants covering all of western Canada for Shaw and all of eastern Canada for Rogers.

**43** Shaw relies upon the principle that there should be a proprietary or legitimate interest that is entitled to be protected in order for a restrictive covenant to be enforceable. See *Tank Lining Corp. v. Dunlop Industries Ltd., supra,* at p. 224; *Elsley, supra,* at p. 925 and *Winnipeg Livestock Sales Ltd. v. Plewman* (2000), 192 D.L.R. (4th) 525 at para. 25. The evidence is quite clear, and confirmed by Mr. O'Carroll of Rogers on cross-examination, that the non-competition covenants were not necessary to protect the cable operations that were swapped because it is highly unlikely that a cable operator would face competition for subscribers from another cable company in any licensed area. The competition comes from other service providers such as satellite operators. Thus, says Shaw, the cable television assets acquired by Rogers provide no legitimate or proprietary interest to justify the covenant. Shaw says that the situation is the same as in *Vancouver Malt and Sake Brewing Co. v. Vancouver Breweries,* [1934] A.C. 181, which held that a bare covenant not to compete was unenforceable. In that case, Lord Macmillan stated:

> The covenants restrictive of competition which have been sustained have all been ancillary to some main transaction, contract or arrangement, and have been found justified because they were reasonably necessary to render the transaction, contract or arrangement effective.

**44** Rogers relies on the following statement of Lord Macmillan in *Vancouver Malt* to distinguish that case from the situation here:

> Nor is it a case of an arrangement among traders to submit themselves to mutual restrictions on their activities in the common interest of all the parties.

**45** Rogers contends that the mutual restrictive covenants are such an arrangement and that while cases have upheld such covenants when they were reasonably necessary to protect the sale of a business, such as in *Elsley,* the cases have not said that it is only in such circumstances that the covenants will be enforced as reasonable between the parties. Rogers says that the legitimate business interest being protected is a geographical concentration of cable operations for ten years and the opportunity to acquire cable operations without competition from Shaw in Eastern Canada, and vice versa for Shaw in western Canada. Mr. O'Donnell, a senior vice-president of Rogers, confirmed that was the goal of the non-competition covenants. Rogers says this is a legitimate interest to protect.

**46** The parties here were knowledgeable businessmen of equal bargaining strength, and thus taken to know what was reasonable in their own interests. They made mutual restrictions on their

ability to compete for new cable businesses that came on the market. To say these restrictions were reasonable as between Rogers and Shaw is not a stretch. That does not necessarily mean, however, that the restrictions are reasonable with respect to the public interest.

**47** So far as whether the restrictive covenants would be held to be reasonable as between the parties, I think it can be said at this stage that Rogers has a good case.

**(iv) Reasonableness in the public interest**

**48** This is not a case in which cable television subscribers will be directly affected by the non-competition covenants of Rogers and Shaw. The structure of the industry is such that subscribers to cable television do not enjoy competition from two cable television service providers in any area. The non-competition covenants of Rogers and Shaw will thus not prevent competition between cable service providers for subscribers, as they do not enjoy it anyway. Competition is provided by other service providers such as satellite operators. To the extent that the covenants would mean further clustering of cable television operations by either Roger or Shaw, the CRTC has approved such clustering as being beneficial to subscribers and thus in that sense in the public interest.

**49** As stated by Lord Macnaghten in *Nordenfelt* and quoted by Rothstein J. in *Shafron*, the public have an interest in every person's carrying on his trade freely and so has the individual. Rothstein J. also quoted in *Shafron* a statement of James V-C in *Leather Cloth Co. v. Lorsont*, L.R. 9 Eq. 345, that "pubic policy requires that when a man has by skill or by any means obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market ...".

**50** In this case, the person Shaw says is the person whom public policy should protect is the owner of Mountain or some other cable television operator who wants to sell his or her business. Shaw contends that the non-competition covenants constitute an agreement by the two largest buyers in the market to divide the country into eastern and western halves, by agreeing not to buy assets from third parties and as such, their effect will be to deprive vendors of independent cable companies of the full value of their businesses.

**51** Shaw also contends that unlike *Elsley* and other cases involving the sale of a business, the non-competition covenants do not protect the assets that were swapped under the Swap Agreement and thus there is not a valid justification on that basis to support the covenants.

**52** Rogers contends that the restrictive covenants are in fact consistent with public policy and that while it may be true that the reduction of competition between Rogers and Shaw for the purchase of certain cable systems could reduce the price ultimately paid for those businesses, both Rogers and Shaw represented to the CRTC that the asset exchange transaction was ultimately in the public interest and that it would promote efficient delivery of service to customers, allow continued innovation and investment, speed deployment of new digital facilities and expansion of channel capacity, and permit more effective advertising.

**53** Rogers points to the approval of the CRTC to the exchange of cable systems and that in so doing the CRTC found that the asset exchange would result in greater efficiencies, cost savings and service improvements and would allow the two companies to rationalize their cable holdings in Canada which would strengthen the systems being exchanged and benefit subscribers who would enjoy enhanced services at a lower price as a result of the operational and marketing efficiencies created by clustering.

**54** The difficulty with this argument of Rogers is that the CRTC did not expressly deal with the non-competition covenants. The CRTC was exercising its jurisdiction under its Broadcasting Distribution Regulations that required its approval to the change of control of the specific cable operations being swapped. The non-competition covenants did not involve a change in control of any cable operations and no request was made by Rogers or Shaw to bless those covenants. As agreed by the parties, the purpose of the covenants was to allow each of Rogers and Shaw to bid on a cable operation in their area if one were put on the market without the competition of the other and to try for a lower price to be paid to the seller of the business. The CRTC gave no consideration to those issues.

**55** Shaw relies on the principle enunciated in *Tank Lining Corp. v. Dunlop Industries Ltd, supra,* at p. 231-2 that an agreement that clearly contravenes the *Competition Act* will automatically be struck down, and refers to recent amendments to the *Competition Act* which provide that it is a criminal conspiracy for parties who compete with respect to a product "to allocate sales, territories, customers or markets for the production or supply of the product". Product is defined to include a service. These amendments will come into force in March 2010. The legislation contains a transitional provision that provides that persons may apply to the Commissioner for a written opinion on the applicability of these new provisions to an existing agreement, with a view to allowing persons time to reform their business arrangements so as not to be contrary to the new provisions. This transitional provision is perhaps one indication that the legislation is intended to affect agreements made before the amendments to the legislation. The new legislation also contains a civil review provision in section 90.1 that will also come into effect in 2010 that Shaw says would lead to the non-competition covenants being prohibited.

**56** There is law that suggests that a 2000 agreement cannot be judged by new standards to come into force in 2010. In *Doerner v. Bliss & Laughlin Industries Inc*., [1980] 2 S.C.R. 865, a case involving a non-competition covenant given at the time of a sale of a business, McIntyre J. for the Court stated that the relevant time to consider reasonableness was the time the covenant was made. He stated:

> ... the question of reasonableness of a covenant of this nature must be considered with reference to the time the covenant was given. ... Canadian authority appears in *H.F. Clarke Ltd. v. Thermidaire Corp. Ltd*., [1978] 2 O.R. 57, in the Ontario Court of Appeal where Brooke J.A., speaking for the Court, said at p. 66:

> This covenant is a covenant in restraint of trade and, when considering whether or nor it meets the test of reasonableness, regard must be had to the time when the covenant was made.

This principle was reasserted in the Ontario Court of Appeal in *Stephens v. Gulf Oil Canada Ltd. et al*.

**57** Shaw asserts that it would be unthinkable for a court to enforce an agreement that at the time the order was made was illegal under the criminal provisions of the *Competition Act*. It says that even though the new legislation is not yet in effect, it is a reflection of what Parliament considers to be not in the public interest.

**58** Rogers asserts that the non-competition covenants will not be contrary to the new legislation. It refers to an "ancillary agreement" defence to section 45 that states that it is not an offence if the agreement under attack is ancillary to a separate agreement and reasonably necessary for giving effect to the objective of that separate agreement. Shaw says that defence is not available because the non-competition covenants were not necessary to give effect to the objectives of the agreement to swap cable assets. Rogers also contends that it is much more likely that the non-competition covenants would be considered by the Bureau under the civil review provisions of section 90.1 and that the covenants would not contravene those provisions because of an "efficiency defence" when it is found that the gains in efficiency will be greater than, and will offset, the effects of any prevention of lessening of competition. Shaw says that the provisions of section 90.1 would be breached.

**59** While these assertions regarding the new legislation that is to come into effect in March 2010 are interesting, it is very difficult to consider them without a full evidentiary record. While there was no argument on the point, it may be that the new legislation does not affect the validity of agreements that were made before the legislation came into effect. Arguments as to the retroactive or retrospective application of new statutes are usually not very straightforward or easy. At this stage, I cannot say that the results of the application of the new legislation are so clear as to make it frivolous or vexatious for either side to advance at a trial the arguments that they have made. On this point, there is a "serious issue to be tried".

**60** Shaw contends that the non-competition covenants also contravene the *Competition Act* in force in 2000 and today. Section 45 (1) provides, in part,

> 45.(1) Every one who conspires, combines, agrees or arranges with another person
>
> (a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,

...

(d) to otherwise restrain or injure competition unduly,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.

**61** S. 45(1)(a) or (d) would appear to be the section to be most likely considered in relation to the non-competition covenants. Regarding (a), what would be an undue limitation of supplying cable television services would require economic evidence of who the relevant suppliers were to the relevant market. If the market consisted of all suppliers of television signals, including satellite operators, that would affect whether keeping Rogers out of the west and Shaw out of the east could be considered to be an undue limitation in the supply of television signals to consumers. At this stage, I am in no position without a proper factual record to be making any judgment on this issue.

**62** Regarding (d), whether the non-competition covenants could be said to restrain or injure competition unduly is a somewhat different matter. Competition between Rogers and Shaw, Canada's two largest cable operators, for the purchase of a cable television business, is more than restrained under the covenants. It is eliminated. Mr. O'Carroll acknowledged in cross-examination that the purpose of the covenants was to enable each of Rogers and Shaw to expand their cable television businesses in their territory without competition for the purchase of new cable systems from the other, and to try to get them more cheaply.

**63** Rogers contends that even if the non-competition covenants otherwise contravened the *Competition Act*, the covenants would be immunized from scrutiny by virtue of the regulated conduct defence. This defence applies if the conduct is regulated by valid legislation and directed or authorized by that legislation. *See A.G. of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307. Rogers says that the Swap Agreement was authorized by the CRTC and thus the non-competition covenants are immunized from attack under the *Competition Act*. In my view, this defence is weak. The CRTC did not authorize the non-competition covenants. It approved the swap of specific cable television operations between Rogers and Shaw.

**64** In my view, looking at the matter from the point of view of the record before me, Shaw has a good case that the non-competition covenants are contrary to the public interest in relation to their effect on an owner of a cable television business who wants to sell his or her business in a competitive marketplace and a good case that these covenants are contrary to section 45(1)(d) of the *Competition Act* as it existed in 2000 and exists today. Because of this, it cannot be said that overall Rogers has a strong *prima facie* case, and I am doubtful that it has a *prima facie* case.[1] It can be said, however, that Rogers has met the low threshold of a serious issue to be tried.

**65** In the circumstances, it is necessary to consider the second and third issues of irreparable harm and balance of convenience set out in *RJR-Macdonald*. In the language of Sharpe, *Injunctions and*

*Specific Performance, supra*, it cannot be said that Rogers' case is so strong that there is little doubt on the merits.

**Irreparable harm**

**66** Irreparable harm refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. See *RJR-Macdonald* at para. 59. In Sharpe, *Injunctions and Specific Performance*, it is stated at p. 2-29 that irreparable harm in the context of preliminary injunctive relief means that the plaintiff, before the trial, must risk some injury which cannot be compensated or remedied other than through the granting of an interlocutory injunction. It is further stated, however, at p. 2-39 that the term irreparable harm has not been given a definition of universal application and that its meaning takes shape in he context of each particular case.

**67** Evidence of irreparable harm must be clear and not speculative. In *Kanda Tsushin Kogyo v. Coveley*, [1997] O.J. No. 56, 1997 CarswellOnt 80 (Div. Ct.), the Court stated:

> As to the question of irreparable harm, we are in concurrence with the Federal Court of Appeal's view that evidence of irreparable harm must be clear and not speculative: see *Syntex Inc. v. Novapharm Ltd.* (1991), 36 C.P.R. (3d) 129 (F.C.A.) at p. 135, leave to appeal to S.C.C. refused [1991] S.C.C.A. No. 309, 39 C.P.R. (3d) v, 137 N.R. 391n; see also *Centre Ice Ltd. v. National Hockey League* (1994), 53 C.P.R. (3d) 34 (F.C.A.) at page 54; *Willow Corp. v. McDonald's Restaurants of Canada Ltd*., [1994] O.J. No. 1169 at para 7; *Risi Stone Ltd. v. Omni Stone Corp.,* [1989] O.J. No. 103

**68** On the other hand, it has been said that a moving party need not demonstrate irreparable harm beyond a reasonable doubt or even on a balance of probabilities. It is enough to show a real risk of consequences for which damages would be of little or no comfort. See *Matrix Photocatalytic Inc. v. Purifics Environmental Technologies Inc.* (1994) 58 C.P.R. (3d) 289 at 129.

**69** The irreparable harm advanced in oral argument by Rogers relates to the loss of the future opportunity to acquire cable operations that might come on the market and the harm to Rogers in facing competition from Shaw in the acquisition of such an operation. It is contended that it is not possible to put a value on the increased likelihood of Rogers winning a bid if Shaw is not a competitive bidder. In its factum, Rogers asserts that the loss of market share and profits it could derive from the Mountain cable business is a loss not compensable in damages and thus irreparable.

**70** I do not accept that Rogers will suffer irreparable harm if an injunction is not granted. Rogers has no proprietary right to acquire the shares of Mountain and it failed to come to terms with the shareholders of Mountain while it had an exclusive period to negotiate with them. There is little evidentiary basis to say that Rogers would have acquired Mountain but for the participation of Shaw. It is also a matter of speculation that if an injunction were now granted, Rogers would

succeed in acquiring Mountain. There were other bidders and it could not be said that the owners of Mountain would necessarily, or likely, sell to Rogers. There is evidence that the owners of Mountain have concerns regarding their employees' long-term prospects if employed by Rogers, and want to protect their employment, although whether this would be a deal breaker if a price and all other terms were agreed is a matter of speculation.

**71** Even if it could be said that Rogers would likely acquire Mountain if Shaw were enjoined from doing so, putting a value on the damages that would be suffered would not seem insurmountable. The cable assets swapped between Rogers and Shaw involving a number of cable operations in different parts of the country were valued at $3,300 per cable customer. Because Shaw's cable operations transferred to Rogers served fewer cable customers than the Rogers' cable operations transferred to Shaw, Shaw paid Rogers approximately $85 million, or $3,300 per subscriber, to equalize the value of the assets swapped. If a value could be put on the worth of a cable subscriber in 2000, presumably it could be done in 2009 to estimate the damages suffered by Rodgers in not being able to acquire Mountain's approximately 41,000 cable subscribers.

**72** I have some difficulty with Rogers' argument of irreparable harm in not being able to bid for future cable operations that may be put up for sale without Shaw being able to make a competing bid before the expiration of the non-competition covenants. This harm is speculative in the extreme. There is no evidence that any cable operations will come on the market before the non-competition covenants expire. Rogers acknowledges in its factum that most independent Canadian cable companies are family-controlled and rarely come up for sale.

**73** Moreover, in the event that a cable business came up for sale in eastern Canada, it is speculative that Rogers would or would not be able to succeed in acquiring it, regardless of whether Shaw was a competing bidder. This is not a matter of an inability to quantify damages in monetary terms. It is a matter of being unable to prove damage caused by Shaw being able to be a competing bidder. Rogers has no proprietary interest in some future cable operation that may come on the market.

**74** On the record before me, I am unable to conclude that Rogers has established that it will suffer irreparable harm if the requested injunction is not granted.

**Balance of Convenience**

**75** This third test 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 which can be taken into account are numerous and the weight to be attached to them will vary from case to case. See *RJR-Macdonald* at paras. 67 and 68. In considering the balance of convenience, it is appropriate to consider the comparative strength of the parties' cases. See *Quizno's Canada Restaurant Corp. v. 1450987 Ontario Corp.*, *supra*, at para. 46.

**76** The questions of irreparable harm and balance of convenience are closely linked, but balance

of convenience also relates to matters difficult to quantify in monetary terms. See Sharpe, *supra*, at p. 2-47. It is also stated in Sharpe at p. 2-48 that a question that may be asked is whether the injunction would prejudice the public interest or the rights of parties not before the court.

**77** Rogers asserts that it will irretrievably lose its opportunity to acquire Mountain if an injunction is not granted. It is the case that if an injunction is not granted, Mountain will be sold to Shaw, assuming the CRTC approves the change in control of Mountain. However, as stated, Rogers has no proprietary right to acquire Mountain and it is quite speculative that Rogers would acquire Mountain if it were again able to bid on it. Further, the harm that Rogers may suffer is not irreparable.

**78** If an injunction is granted, there is some cogent evidence that the business of Mountain might well be harmed, which would harm Shaw's interest in Mountain in the event that Shaw ultimately succeeds in this action and acquires Mountain.[2]

**79** The evidence of Mr. Piercy, the president of Mountain until June 30, 2009, is that because Roger's carries on its business nearby Mountain's operations, it is inevitable that if Rogers acquires Mountain, it will integrate Mountain's operations with Roger's operations over time leading to probable loss of jobs for Mountain employees. Because of an absence of Shaw operations in southwestern Ontario, the shareholders of Mountain do not see the same threat to Mountain's employees if Shaw acquires the business. Since the announcement of the sale to Shaw, the employees have become aware of the position of Rogers and they have expressed nervousness as to the future. Mountain faces the risk of loss of key employees during a period of uncertainty that an injunction would bring, which would be detrimental to its business, and apparently a number of key employees have received enquiries from other organizations about employing them. This evidence is not surprising and the concerns of the employees are understandable. Uncertainty caused by an injunction and trial, let alone a potential appeal, could only exacerbate the situation.

**80** Mr. Bissonette's evidence is to the same effect, and he states that Shaw will maintain the employment of the current Mountain employees. He is concerned that an injunction will have a negative effect on Mountain employees.

**81** Mr. Piercy's further evidence is that during the period prior to closing of the sale to Shaw, the Mountain business must operate in a status quo mode, and he states that no business can stay still for an extended period of time without damaging its competitive position and future potential.

**82** On the record before me, I conclude that the balance of convenience favours Shaw.

**Conclusion and order**

**83** It follows from the foregoing that the motion by Rogers for an interlocutory injunction is dismissed. In light of the fact that the ultimate issue is whether the non-competition provisions are valid, costs of the motion are in the cause.

F.J.C. NEWBOULD J.

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1 For the meaning of a strong *prima facie* case and a *prima facie* case, see Perell J. in Quizno's Canada Restaurant Corp. v. 1450987 Ontario Corp., [2009] O.J. No. 1743, 2009 CarswellOnt 2280 at paras. 39 and 40.

2 The sale agreement between Shaw and the Mountain shareholders is not in the record and it is not known therefore whether the shareholders of Mountain could walk from the deal if an injunction were granted.