

Federal Court of Appeal



Cour d'appel fédérale

Date: 20231122

Docket: A-202-22

Citation: 2023 FCA 228

**CORAM: STRATAS J.A.
WEBB J.A.
RENNIE J.A.**

BETWEEN:

**DRAGONA CARPET SUPPLIES
MISSISSAUGA INC.**

Appellant

and

**DRAGONA CARPET SUPPLIES LTD. and
FLOORENO BUILDING SUPPLIES INC.**

Respondents

Heard at Ottawa, Ontario, on October 25, 2023.

Judgment delivered at Ottawa, Ontario, on November 22, 2023.

REASONS FOR JUDGMENT BY:

RENNIE J.A.

CONCURRED IN BY:

**STRATAS J.A.
WEBB J.A.**

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REASONS FOR JUDGMENT

RENNIE J.A.

I. Overview

[1] Dragona Carpet Supplies Mississauga Inc. (Dragona Mississauga) commenced an action in the Federal Court seeking a declaration that the respondents had passed off its trademark, contrary to both the common law and subsection 7(b) of the *Trademarks Act*, R.S.C., 1985, c. T-

13 (Act), an injunction and damages. Dragona Carpet Supplies Ltd. (Dragona Scarborough) and FlooReno Building Supplies Inc. (FlooReno) counterclaimed, seeking damages and an expungement of the appellant's registered marks.

[2] The Federal Court (*Dragona Carpet Supplies Mississauga Inc. v. Dragona Carpet Supplies Ltd.*, 2022 FC 1042 *per* Zinn J.) dismissed the appellant's action. The court allowed the respondents' expungement claim, as the appellant's registered Dragona-related trademarks were confusing with the Dragona trade name and trademark as used by Dragona Scarborough. This expungement was on consent from the appellant, though without any admissions on the related allegations (Federal Court decision at paras. 80 and 83-84). This determination has not been appealed.

[3] The Federal Court concluded that Dragona Mississauga has significant goodwill in Mississauga, with some goodwill in Scarborough and that Dragona Scarborough has significant goodwill in Scarborough, with some goodwill in Mississauga and other areas within the Greater Toronto Area (GTA) where it made sales (Federal Court decision at paras. 115-117 and 126). The Federal Court also found that misrepresentation had not been made out, since both Dragona businesses had an established right to use the Dragona trade name and trademark in Mississauga.

[4] Dragona Mississauga now appeals to this Court.

[5] There are two prongs to the appellant's attack on the Federal Court decision; the first dealing with the Federal Court's findings with respect to goodwill and the second with respect to

misrepresentation. There are subsidiary arguments within each argument. To succeed on the appeal the appellant must prevail on both arguments.

[6] The appellant's argument is that the Federal Court failed to apply the correct legal test for the assessment of goodwill. It asserts that the Federal Court judge failed to identify the class or segment of the customer base in which the goodwill resides, whether contractors, retailers or the general public. The appellant argues that this error resulted in an additional error, namely that any confusion was not the result of a misrepresentation. The appellant further argues that even if the finding of goodwill is sustained, the judge erred in finding that the goodwill accrued to Dragona Scarborough on the basis that Dragona Mississauga used the mark under an oral licence from Dragona Scarborough. It asserts two errors in this regard: the judge erred in equating ownership of the mark as sufficient to establish control under subsection 50(1) of the Act, and, secondly, that the evidence did not evince control over the goods and services, as required by the Act and to the degree required by the jurisprudence.

[7] I would dismiss the appeal. The conclusions reached by the Federal Court were supported by the evidence and no legal error has been demonstrated in the application of the law to the facts. However, in order to better understand this disposition, and as the challenges to the findings of goodwill, the existence of an oral licence and control under subsection 50(1) of the Act raise questions of law and mixed fact and law, a somewhat more extensive review of the findings of the Federal Court is necessary to frame the legal issues.

II. The Background

[8] Dragona Scarborough and Dragona Mississauga are two separate businesses owned and operated by an extended family. Both use trademarks and trade names incorporating the word DRAGONA (the DRAGONA trademark). Both sell flooring-related products. Both primarily target contractors, but both also sell to retailers and the public. Dragona Mississauga has locations in Mississauga and North York. Dragona Scarborough has locations in Scarborough and Ottawa and in 2021 opened distribution centres in Mississauga and North York.

[9] The story begins in 1984 when Dragona Scarborough was founded by Nizar Hamam (Nizar). It was run by Nizar until his death in 2016 and is now managed by his sons, Abad Hamam (Abad) and Jamal Hamam (Jamal). Abad and Jamal also own FlooReno. Established in Mississauga in 2021, it carries on a similar business using the Dragona mark.

[10] Dragona Mississauga was founded in 1992 by Nizar and Talal Issawi (Talal). Talal is married to Nizar's sister.

[11] At the outset, Nizar and Talal each owned 50% of Dragona Mississauga's shares. The Federal Court judge found that Dragona Mississauga was opened to expand Dragona Scarborough's business in Mississauga (Federal Court decision at para. 131). The judge found that Dragona Scarborough and Dragona Mississauga operated together in many respects, including jointly sourcing the supplies, from the same suppliers, some of whom allowed for volume-based rebates based on joint sales. Dragona Scarborough ended these practices in 2021 with the commencement of the Federal Court action by Dragona Mississauga (Federal Court

decision at paras. 19 and 134). There was also some inventory sharing between Dragona Mississauga and Dragona Scarborough, which allowed certain customers of either business to use their account at one business to purchase products at the other, though this arrangement ended in 2012 (Federal Court decision at paras. 20 and 135).

[12] As a result of a falling out between Talal and Nizar, which the judge found was precipitated by Talal, it was agreed that Talal and Nizar would go their separate ways. This resulted in a share purchase agreement in 2012, whereby Talal purchased all of Nizar's shares in Dragona Mississauga (Federal Court decision at paras. 25 and 30-31). The share purchase agreement was mediated by a mutual friend, Mostapha Elmnini (Mostapha). It did not address the question of ownership nor use of the DRAGONA trademark.

[13] Mostapha testified that after the share purchase agreement Talal's son, in the presence of Talal, confirmed to Mostapha that Nizar through Dragona Scarborough continued to own the Dragona name, though it was understood that Dragona Mississauga could continue to use the Dragona name (Federal Court decision at paras. 32, 39 and 43); consequently, Dragona Mississauga continued to use the DRAGONA trademark. The court found Mostapha to be a credible witness and preferred his evidence to that of Talal.

[14] Immediately following the share purchase agreement, in March 2012, Talal applied to register two trademarks associated with the DRAGONA trademark: a wordmark and a design mark depicting the appellant's then-logo, with the words "Dragona Flooring". The trademarks were registered on August 13, 2014. On August 14, 2014, Talal applied for a design mark using

the words “Dragona Flooring Supplies”. The trademark was registered on May 20, 2016. All of the above trademarks were assigned to Dragona Mississauga.

[15] The judge accepted Mostapha’s testimony that shortly after filing the trademark applications, Talal called him and told him to tell Nizar not to oppose the trademark applications, as Talal was just securing his interest in the DRAGONA trademark “for a couple of years”. Talal further told Mostapha that he had no desire to use the mark after this period. I will return to this evidence in my consideration of the question of the degree of control required by subsection 50(1) of the Act.

[16] Mostapha testified that Nizar did not want to contest the trademark applications because everyone understood that Dragona Scarborough owned the DRAGONA trademark. Nizar also wished to avoid a family dispute since his sister—married to Talal—relied on Dragona Mississauga for income (Federal Court decision at paras. 41-43). This evidence also bears on the question of subsection 50(1) and assessment of what constitutes sufficient control.

[17] The judge found that “just prior to this litigation”, Mostapha met with Talal and Talal reiterated that the DRAGONA trademark belonged to Dragona Scarborough. The appellant rightly points out that the admission of ownership was made in 2012, not “just prior to this litigation” as found by the judge. It argues that a recent admission of ownership necessarily had a significant influence on the judge’s appreciation of the evidence and assessment of the issue of control.

[18] I do not agree. The judge was obviously incorrect as to when these conversations took place, but I do not think anything turns on this, as the judge's decision of the existence of an oral licence was based on his assessment of the entire history of business dealings between the parties. Additionally, the admission of Dragona Scarborough's ownership of the mark nevertheless has probative value, whether made at the time of the share purchase agreement in 2012 or on the eve of the litigation. In any event, the judge drew an adverse inference against the appellant for its failure to file an affidavit from Talal's son who was present at the meeting, countering Mostapha's evidence.

[19] In September 2020, Abad incorporated FlooReno. FlooReno opened locations in Mississauga and North York and displayed the DRAGONA trademark on its new stores, precipitating Dragona Mississauga's decision to launch the lawsuit and seek an injunction to restrain the use of the mark in Mississauga and the west of the GTA by the respondents.

III. Analysis

The goodwill analysis

[20] The appellant contends that Dragona Mississauga's post-2012 goodwill did not accrue to Dragona Scarborough. It argues that the judge erred in law in failing to identify the relevant market segment in which there was goodwill, as required by *Ciba-Geigy Canada Ltd. v. Apotex Inc.*, [1992] 3 S.C.R. 120, 95 D.L.R. (4th) 385 [*Ciba-Geigy*]. The failure to apply the correct test for goodwill is an error of law (*Sadhu Singh Hamdard Trust v. Navsun Holdings Ltd.*, 2016 FCA 69, 483 N.R. 33), but I do not believe that such an error was made.

[21] The judge was mindful of *Ciba-Geigy* and its requirement that passing off analyses must consider all persons affected by the product and their attitudes at the time of their connection with the product. This may result in a finding that one category of consumers is confused while another category is not (for example, doctors versus patients in the context of prescription drugs). However, the judge noted that in assessing goodwill, “one ought not to unduly restrict the customers to one group”, even if the business may have greater goodwill amongst one class of customers. Rather, the court must “determine whether the goodwill is among all customers or a subset of them” (Federal Court decision at para. 100). The court concluded that Dragona Scarborough and Dragona Mississauga both sell to contractors, retailers, and the public, with most sales made to contractors.

[22] I note that to the extent the Federal Court’s reasons can be read as holding that a goodwill analysis need *never* separate out categories of customers, I do not agree. Different classes of consumers can have very different perspectives on the same product or service (again, for example, doctors versus patients, as illustrated in *Ciba-Geigy*). A separate analysis for a certain type of consumer will be necessary where the evidence shows that one group may clearly be confused while another may not be. That, however, was not the case here.

[23] The court rejected the argument that there was an understanding that Dragona Mississauga and Dragona Scarborough would not compete in each other’s territories, with Yonge Street the border. The judge found that this was not supported by the evidence. He concluded that “contractors tend to buy from businesses close to their home location”, and therefore “generally, Dragona Scarborough would sell in the [east] of the GTA and Dragona

Mississauga would sell in the [west] of the GTA”. However, the court pointed to the evidence that “each sold in the area away from their physical location” (Federal Court decision at para. 111).

[24] These findings are substantiated by the evidence. The judge noted Talal’s admission that Dragona Scarborough was “doing well” throughout the GTA prior to Dragona Mississauga’s inception, and invoices said to be representative of sales by Dragona Scarborough west of Yonge Street between 2008-2019 (Federal Court decision at paras. 14, 105, 116 and 125-126).

[25] The judge ultimately concluded that Dragona Mississauga has significant goodwill in Mississauga, with some goodwill in Scarborough and that Dragona Scarborough has significant goodwill in Scarborough, with some goodwill in Mississauga and other areas within the GTA where it made sales (Federal Court decision at paras. 115-117 and 126).

[26] Consideration of the remaining arguments is framed by the fact that there was overlapping goodwill between Scarborough and Mississauga.

The finding of an oral licence

[27] The appellant argues that the Federal Court committed a palpable and overriding error in holding that Dragona Mississauga’s post-2012 goodwill accrued to Dragona Scarborough, since Dragona Scarborough did not exercise adequate control over the character or quality of the goods or services of Dragona Mississauga, as required under subsection 50(1) of the Act. More particularly, the appellant contends that the Federal Court erred in holding that an

acknowledgement of ownership must be seen as an acknowledgement of right to control the mark. The appellant argues that its acknowledgement of ownership is insufficient to show control, rather subsection 50(1) requires evidence of control of the goods and services associated with the mark.

[28] Having found that there was no agreed division of the market east and west of Yonge Street, and that Dragona Scarborough had goodwill throughout the GTA, the court concluded that any goodwill in the DRAGONA trademark accrued by the appellant belonged to Dragona Scarborough by virtue of subsection 50(1) of the Act. Consistent with the judge's prior findings of fact as to the understanding between Nizar and Talal, any use of the DRAGONA trademark by Dragona Mississauga, whether before or after the share purchase agreement in 2012, was based on an oral licence of use from Dragona Scarborough.

[29] The Federal Court judge did not err in his appreciation of the evidence nor in his understanding and application of the law.

[30] The judge conducted an extensive review of the business relationship between Dragona Scarborough and Dragona Mississauga from 1992 to 2021. He noted that Dragona Mississauga was opened to expand the business of the already well-established Dragona Scarborough. Nizar had "significant dealings" with Talal and both the Dragona businesses, and there was considerable cross-over between the businesses with respect to products, suppliers, rebates, and even inventory and customers (though the inventory sharing arrangement ended in 2012) (Federal Court decision at paras. 131-135). Specifically, the volume rebates allowed Dragona

Scarborough to influence the goods sold by Dragona Mississauga (Federal Court decision at para. 139).

[31] The judge found that this licence continued following the share purchase in 2012. He noted that the share purchase agreement related to the sale of shares only (not any licence agreement), and that the agreement was between Nizar and Talal as individuals, and therefore could not have addressed the use of the DRAGONA trademark, as this would have required Dragona Scarborough and Dragona Mississauga to be parties to the agreement (Federal Court decision at paras. 143-144). The judge also pointed out that even post-2012 the appellant continued to carry largely the same goods as Dragona Scarborough, likely due to the rebates (Federal Court decision at paras. 139-140).

Control under subsection 50(1)

[32] I turn to the question of the requisite degree of control required by subsection 50(1), which is set out in full in Annex A at the end of these reasons.

[33] Subsection 50(1) requires not only a licence to use a mark (which could more fairly be equated with an acknowledgement of ownership), but also a demonstration of direct or indirect control over the character of the quality of goods or services associated with the mark. An acknowledgement of ownership is highly relevant to the issue of control. An acknowledgement may constitute evidence of an intention to abide by established standards associated with a mark; indeed, subsection 50(2) of the Act creates a rebuttable presumption of control upon giving public notice of ownership of a mark. That said, ownership is not dispositive of control. An

acknowledgement of ownership is simply an acknowledgement of another's legal rights, *not* an acknowledgement that one will conform to those rights.

[34] The appellant argues that the Federal Court effectively conflated these two requirements of control and ownership. It says that the Federal Court's analysis focused on the fact of ownership as opposed to the facts relevant to control, and relies on *Milano Pizza Ltd. v. 6034799 Canada Inc.*, 2023 FCA 85, 2023 A.C.W.S. 1245, where this Court held that courts should not "take the trademark owner's word that they assert control over the final product or services" (at para. 4).

[35] The appellant is correct that the Federal Court reasons swim dangerously close to committing that error. I am not satisfied that any error was committed, however. The judge did not ignore the requirement that there be evidence of control; rather, the Federal Court acknowledged that "examples of actual control [over the mark] are few". This then raises the question of whether the evidence, such as it was, was sufficient to establish control. In my view, it was.

[36] The paucity of evidence is understandable. The judge found that between 2012 and 2021, there was no reason for Dragona Scarborough to intervene, challenge or take issue with Dragona Mississauga's use of the marks (at para. 147). Further, the close family relationship, the assurances from Talal that he was planning to phase out use of the mark, the evidence that Abad visited the Dragona Mississauga store and "kept an eye on [the] business", and the fact that the

vast majority of items in the two stores were identical give context to the degree of evidence of control to be expected in the circumstances.

[37] The judge also noted that from 1992-2012, Nizar was a 50% shareholder in Dragona Mississauga (Federal Court decision at para. 137). Even if Nizar had been a “hands-off owner” of Dragona Mississauga, the judge found it would be highly unlikely that a successful businessman like Nizar, with a strong interest in the reputation of the DRAGONA trademark, would have “remained on the sidelines” had Dragona Mississauga been unsuccessful (Federal Court decision at para. 138).

[38] The appellant points to an admission by Abad during cross-examination that Dragona Scarborough had stopped carrying a saw blade due to quality issues, but it did not step in to stop Dragona Mississauga from carrying that same product.

[39] Apart from this incident, it was open to the judge, on the basis of the evidence, to conclude that there was adequate control. Dragona Scarborough did not need to control every aspect of the appellant’s business operations in order to diligently monitor and control its use of the DRAGONA trademark, and it would have stepped in had it taken issue with how the appellant was using the mark (Respondents’ Memorandum of Fact and Law at paras. 75-76). In other circumstances lack of control in day-to-day business operations or lack of inspection rights are not fatal to a finding of control under subsection 50(1) (*Corey Bessner Consulting Inc. v. Core Consultants Realty Inc.*, 2020 FC 224, 171 C.P.R. (4th) 355). But here there was some

evidence, and importantly, a credible explanation as to why there was not more. Control is a heavily fact dependent determination and I see no reversible error in the trial judge's decision.

[40] Because there was a licence in place between 2012-2021, any goodwill earned by Dragona Mississauga during this period is deemed to have accrued to Dragona Scarborough. Without any independently owned goodwill, Dragona Mississauga cannot succeed in establishing passing off. This holding is therefore sufficient to dispose of the matter. However, as I detail below, the appellant's argument on misrepresentation fails regardless.

Misrepresentation

[41] There are three components that must be established to succeed in a passing off action under subsection 7(b) of the Act (set out in Annex A at the end of these reasons): the existence of goodwill, deception of the public due to a misrepresentation and actual or potential damage (*Ciba-Geigy* at para. 33). Again, in light of the finding that all goodwill resided with Dragona Scarborough under the licence, Dragona Mississauga cannot establish the existence of its own goodwill, and its claim fails at the outset. However, even if there were no licence in place and the appellant established its own goodwill, it is readily apparent that the misrepresentation argument cannot succeed, and the passing off claim still fails.

[42] Given Dragona Scarborough's goodwill in Mississauga, though, there can be no misrepresentation—even if there were no licence found. Dragona Scarborough had every right to use the mark west of the illusory Yonge Street boundary. Any resulting confusion from the use of the DRAGONA trademark in Mississauga is just the result of the respondents "making a

truthful statement of fact which [they] ha[ve] a legitimate interest in making” (*J.A. McMillan Ltd. v. McMillan Press Ltd.*, 1989 CanLII 7816 (N.B.C.A.), 27 C.P.R. (3d) 390 at 397 [*J.A. McMillan*] at para. 25, citing *Turton v. Turton* (1889), 42 Ch.D. 128, 38 W.R. 22 (C.A.) at para. 153).

[43] The conflict in this case arises from the use of overlapping marks and the legitimate use of the mark by its owner, Dragona Scarborough. The resulting conflict is not misrepresentation, but competition. Competition and passing off are two discrete concepts.

[44] Competition is two parties (lawfully) acting independently to secure the business of a third party and passing off is representing your goods as those of another (*J.A. McMillan* at paras. 16-17). Where as here, a party has a right to use a name it is not its responsibility if some misapprehend its legitimate use. By using the DRAGONA trademark in Mississauga, Dragona Scarborough was making a truthful statement of fact, arising from its ownership right and its right to use its goodwill associated with the DRAGONA trademark throughout the GTA.

[45] The appellant attempts to distinguish the misrepresentation cases cited by the Federal Court mainly on the ground that the respondents in this case have changed the nature of their use of the DRAGONA trademark by opening a physical location in Mississauga. However, the concurrent use of a mark, creating some confusion, is not sufficient to establish passing off. A misrepresentation does not arise in the absence of “improper filching” of another’s business (*J.A. McMillan* at paras. 22-23). That did not arise here—Dragona Scarborough was simply exercising its right to use the DRAGONA trademark in Mississauga, a location where it had existing

goodwill. Misrepresentation requires more than mere confusion; a party must misrepresent their goods to be that of another.

[46] The appellant contends that the judge erred in his understanding of the law governing concurrent, overlapping uses. I do not agree. Relying on *Edward Chapman Ladies' Shop Limited v. Edward Chapman Limited*, 2007 BCCA 370, 72 C.P.R. (4th) 45 at para. 50 (*Chapman*), the judge concluded that where the parties have jointly used and jointly benefited from the use of a mark, neither can exclude the other from using it in association with their respective business (Federal Court decision at para. 157).

[47] *Chapman* held that a joint owner of a name cannot take steps that increase the risk of confusion, which in *Chapman* arose when there were changes to the trade name that made it more similar to the other competing name (*Chapman* at para. 23). *Chapman* is distinguishable as there were no changes in trade name, the name was associated with the same services and critically, Dragona Scarborough had an existing right to use the DRAGONA trademark in Mississauga due to its standing goodwill in Mississauga.

[48] Given the Federal Court's finding that Dragona Scarborough was known throughout the GTA prior to 1992, and continued to sell throughout the GTA, it was entitled to the use of the DRAGONA trademark throughout the GTA. The Federal Court did not limit its findings of Dragona Scarborough's use of the DRAGONA trademark to some "distant point in the past", rather assessing its "longstanding and continuous use... throughout the GTA" (Respondents' Memorandum of Fact and Law at para. 56). Given this continuing ability to use the DRAGONA

trademark in Mississauga and beyond, there was, and could be, no misrepresentation by the respondents that their goods or services were those of the appellant.

[49] I would dismiss the appeal with costs.

“Donald J. Rennie”

J.A.

“I agree.
Stratas J.A.”

“I agree.
Webb J.A.”

ANNEX A

Unfair Competition and Prohibited Signs

Prohibitions

7 No person shall

...

(b) direct public attention to his goods, services or business in such a way as to cause or be likely to cause confusion in Canada, at the time he commenced so to direct attention to them, between his goods, services or business and the goods, services or business of another;

Licences

Licence to use trademark

50 (1) For the purposes of this Act, if an entity is licensed by or with the authority of the owner of a trademark to use the trademark in a country and the owner has, under the licence, direct or indirect control of the character or quality of the goods or services, then the use, advertisement or display of the trademark in that country as or in a trademark, trade name or otherwise by that entity has, and is deemed always to have had, the same effect as such a use, advertisement or display of the trademark in that country by the owner.

Concurrence déloyale et signes interdits

Interdictions

7 Nul ne peut :

[...]

b) appeler l'attention du public sur ses produits, ses services ou son entreprise de manière à causer ou à vraisemblablement causer de la confusion au Canada, lorsqu'il a commencé à y appeler ainsi l'attention, entre ses produits, ses services ou son entreprise et ceux d'un autre;

Licences

Licence d'emploi d'une marque de commerce

50 (1) Pour l'application de la présente loi, si une licence d'emploi d'une marque de commerce est octroyée, pour un pays, à une entité par le propriétaire de la marque, ou avec son autorisation, et que celui-ci, aux termes de la licence, contrôle, directement ou indirectement, les caractéristiques ou la qualité des produits et services, l'emploi, la publicité ou l'exposition de la marque, dans ce pays, par cette entité comme marque de commerce, nom commercial — ou partie de ceux-ci — ou autrement ont le même effet et sont réputés avoir toujours eu le même effet que s'il s'agissait de ceux du propriétaire.

Idem

(2) For the purposes of this Act, to the extent that public notice is given of the fact that the use of a trademark is a licensed use and of the identity of the owner, it shall be presumed, unless the contrary is proven, that the use is licensed by the owner of the trademark and the character or quality of the goods or services is under the control of the owner.

Licence d'emploi d'une marque de commerce

(2) Pour l'application de la présente loi, dans la mesure où un avis public a été donné quant à l'identité du propriétaire et au fait que l'emploi d'une marque de commerce fait l'objet d'une licence, cet emploi est réputé, sauf preuve contraire, avoir fait l'objet d'une licence du propriétaire, et le contrôle des caractéristiques ou de la qualité des produits et services est réputé, sauf preuve contraire, être celui du propriétaire.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-202-22

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WEBB J.A.

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