

Federal Court of Appeal File No.:  
Federal Court File No: T-1397-16

FEDERAL COURT OF APPEAL

BETWEEN:

2474234 ONTARIO INC.

and

THE ESTATE OF THE LATE MOISHE SMITH

Appellants

and

DUNN'S FAMOUS INTERNATIONAL HOLDINGS INC.

Respondent

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**Notice of Appeal**

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TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellants. The relief claimed by the appellants appears below.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellants. The appellants request that this appeal be heard at Ottawa, Ontario.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the [Federal Courts Rules](#) and serve it on the appellants' solicitors or, if the appellants are self-represented, on the appellants, WITHIN 10 DAYS after being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the [Federal Courts Rules](#) instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

September 27, 2023

Issued by: \_\_\_\_\_

*(Registry Officer)*

Thomas D'Arcy McGee Building  
90 Sparks Street, Main Floor  
Ottawa, Ontario  
K1A 0H9

**TO:**

Dunn's Famous International Holdings Inc.  
as represented by Pinto Legal

Michael Chevalier

99 Prince Street, suite 601  
Montreal, QC, Canada, H3C 2M7  
Tel.: (514) 905-5389  
[mchevalier@pintolegal.com](mailto:mchevalier@pintolegal.com)

Solicitors for the Respondent

## APPEAL

THE APPELLANTS APPEAL to the Federal Court of Appeal from the order of Mr. Justice Southcott dated June 28, 2023 (the “Order”), by which the Appellants’ motion requesting that the default judgment of the Court dated January 19, 2021 (the “Default Judgment”) be set aside pursuant to Rule 399(1) of the *Federal Courts Rules*, SOR/98-106, the timeline for service and filing of the Statement of Defence or any motion respecting the Statement of Claim be extended, and the writ of seizure and sale dated April 20, 2021 be struck, was dismissed.

### THE APPELLANTS ASK:

1. That the Order be set aside;
2. That the Federal Court of Appeal issue an order:
  - A. pursuant to Rule 399(1) of the *Federal Courts Rules*, setting aside, as against the Appellants, the Default Judgment dated January 19, 2021;
  - B. extending the timeline for service and filing of the Appellants’ Statement of Defence or any motion by the Appellants respecting the Statement of Claim to thirty (30) days from the date on which the Court issues an order setting aside the Default Judgment;
  - C. striking the writ of seizure and sale against the Moving Defendants dated April 20, 2021; and
  - D. awarding the Appellants their costs of this appeal;
3. In the alternative to the order requested in paragraph 2, that the Federal Court of Appeal issue an order:
  - A. declaring that the Appellants have a reasonable explanation for failure to file Statements of Defence, pursuant to Rule 399(1); and
  - B. referring the matter back to the Federal Court for a continuance of the motion on the issues that remain to be determined in the Rule 399(1) motion and ancillary relief requested in light of that declaration;
4. Such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS OF APPEAL are as follows:

5. This dispute relates to a restaurant business and its trademarks involving three generations of family, and the use (or non-use) of such trademarks under licenses granted by members of that family to third parties.
6. Dunn's Famous International Holdings Inc., the Respondent, commenced the Federal Court action under Court File No. T-1397-16 pleading, *inter alia*, ownership of various DUNN's trademarks, trademark infringement, passing off, depreciation of goodwill, and false and misleading advertising as against the Appellants and other defendants. The Respondent settled the matter with the defendant Ina Devine from whom the Appellants had a license to use the DUNN's trademarks.
7. During the COVID-19 pandemic, the Respondent moved on an *ex parte* basis for default judgement against the Appellants.
8. The Court granted the default judgment *ex parte* against the Appellants during the COVID-19 pandemic, on January 21, 2021. A writ of seizure and sale writ of seizure and sale was issued against the Appellants on April 20, 2021.
9. This appeal arises out of the Appellants' motion for an order, *inter alia*, setting aside the Default Judgment which granted the Respondent's *ex parte* motion for default judgment against the Appellants under Rule 399(1) of the *Federal Courts Rules*. Justice Southcott heard the motion and ordered that the Applicants' motion be dismissed.
10. In making the Order, the Honourable Judge made the following errors of law, and palpable and overriding errors of fact and of mixed fact and law:
  - (a) Finding that the Appellants do not have a reasonable explanation for the failure to file a Statement of Defence, including that:
    - (i) the Appellants have identified no basis for a conclusion that the Respondents' claim against them was resolved by the settlement with the defendant Ina Devine; and
    - (ii) despite finding that settlement communications took place between the parties until April 2020, finding that in the absence of evidence that the Appellants followed up with the Respondent during the height of the COVID-19 pandemic until after the date of the Default Judgment on January 19, 2021, there was no reasonable explanation for the failure to file a Statement of Defence;

- (b) Failing to find that the Respondent relied on financial statement documents that were subject to settlement privilege and upon which the award of damages in the Default Judgment was exclusively based;
- (c) Failing to give the evidence filed in the appealed-from motion, namely, the Affidavit of Renee Claudine Bates, Moishe Smith's widow and the Executrix and Trustee of his Estate, sufficient weight in view of the evidence being the best evidence available to the Appellants following the death of Moishe Smith;
- (d) Failing to consider and find that the Appellant, the Estate of the Late Moishe Smith, has a *prima facie* defence on the merits of the claim, as required under Rule 399(1) of the *Federal Courts Rules*, and in particular, failing to consider and find that Moishe Smith cannot be personally liable for trademark violations as there are insufficient facts pleaded and evidence put forth for a finding of personal liability against him, and that any relevant trademark use was by 2474234 Ontario Inc.;
- (e) Failing to consider and find that the Appellant, 2474234 Ontario Inc. has a *prima facie* defence on the merits of the claim, as required under Rule 399(1) of the *Federal Courts Rules*, and in particular, failing to consider and find that 2474234 Ontario Inc. has the *prima facie* defences that:
  - (i) The trademarks asserted are invalid and non-enforceable as a result of defects in the chain of title and ownership and on the basis of non-distinctiveness; and
  - (ii) If the trademarks are valid and enforceable, 2474234 Ontario Inc. had a license at all material times to use the trademarks; and
  - (iii) If the licensor of the trademarks to 2474234 Ontario Inc. did not have the authority to license the marks, 2474234 Ontario Inc. in good faith reasonably believed that they were a *bona fide* purchaser for value of the licenses.
- (f) Failing to consider and find that the Appellants moved promptly or within a reasonable time to set aside the Default Judgment, as required under Rule 399(1) of the *Federal Courts Rules*;
- (g) Failing to consider and treat the Appellants, 2474234 Ontario Inc. and the Estate of the Late Moishe Smith, as separate legal entities; and
- (h) As a result of the errors leading to the dismissal of the motion, failing to grant the ancillary relief sought in that motion by the Appellants.

THE COURT'S JURISDICTION IS:

11. *Federal Courts Act*, R.S.C. 1985, c F-7, ss. 27 and 52.

12. *Federal Courts Rules*, Part 6.

13. Such further and other grounds as the Appellants advise and this Honourable Court may permit.

THE APPELLANTS REQUEST that this appeal be heard at Ottawa, Ontario.

September 27, 2023



for

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Ashley Burk  
Burk Law PC

834 Colonel By Drive  
Ottawa, Ontario K1S 5C4  
Tel: (613) 218-6313  
[ashley@burk.law](mailto:ashley@burk.law)

Co-Solicitors for the Appellants

Victor Vallance Blais LLP

Stephen Victor, K.C.

112 Lisgar Street  
Ottawa, Ontario K2P 0C2  
Tel: (613) 238-1333  
[svictor@vvblawyers.com](mailto:svictor@vvblawyers.com)

Co-Solicitors for the Appellants