

Federal Court



Cour fédérale

Date: 20190503

Docket: T-321-19

Citation: 2019 FC 573

Ottawa, Ontario, May 3, 2019

PRESENT: Mr. Justice Lafrenière

BETWEEN:

**SATINDER PAUL SINGH DHILLON AND
EMMET TISDALE PIERCE IN HIS
CAPACITY AS CHIEF AGENT**

Plaintiffs

and

**MAXIME BERNIER, CHRISTIAN ROY IN
HIS CAPACITY AS CHIEF AGENT AND THE
PEOPLE'S PARTY OF CANADA**

Defendants

ORDER AND REASONS

[1] This is a motion for an interlocutory injunction pursuant to Rule 373 of the *Federal Courts Rules*, SOR/98-106 [the FCR] brought by the Plaintiffs, Satinder Paul Singh Dhillon and Emmet Tisdale Pierce, against the Defendants, Maxime Bernier, Christian Roy in his capacity as Chief Agent, and The People's Party of Canada. The Plaintiffs seek to stop the Defendants from using the words "People's Party of Canada" or "The People's Party of Canada" in the run-up to

the federal by-election in Nanaimo-Ladysmith to be held on May 6, 2019 and until a final determination of the action on its merits.

[2] The motion is dismissed as it suffers from serious threshold legal defects. The Plaintiffs fall well short of establishing a serious issue to be tried or that they will suffer irreparable harm if the injunctive relief requested is not granted. Further, the balance of convenience clearly favours maintaining the status quo in favour of the Defendants.

I. Overview

[3] The Plaintiffs commenced the underlying action on February 18, 2019 for trademark infringement pursuant to section 7 of the *Trade-marks Act*, RSC 1985, c T-13 [*Trade-marks Act*] and copyright infringement pursuant to subsections 27(1) and 27(2) of the *Copyright Act*, RSC 1985, c C-42 [*Copyright Act*] by way of Statement of Claim. The action concerns a dispute over competing intellectual property rights to name a federal political party the People's Party of Canada. The Plaintiffs assert statutory and common law copyright and trade-mark rights over the words “People’s Party of Canada” and “The People’s Party of Canada” and a communication signal for the same words. They claim that the Defendants have infringed on the exclusive and protected use of their intellectual property in Canada.

[4] On April 11, 2019, the Plaintiffs gave notice to the Court of their intention to bring the present motion for an interim and interlocutory injunction and requested that a hearing be scheduled on an urgent basis on April 24 and 25, 2019. The request was granted and a tight

timetable was fixed for service and filing of the parties' materials. The matter was ultimately heard in person in Montreal on April 25, 2019.

[5] At the hearing, counsel for the Plaintiffs clarified that their trade-mark claim is based on paragraph 7(b) and not paragraph 7(c) of the *Trade-marks Act*, as incorrectly pleaded in the Statement of Claim. Counsel also conceded that the Plaintiffs' claim for infringement pursuant to sections 19 and 20 of the *Trade-marks Act* was not available given that they do not have a registered trade-mark. Their trade-mark application is at an early stage and has only been formalized by the Canadian Intellectual Property Office.

II. The Facts

[6] Both Plaintiffs filed an affidavit in support of their motion. The Defendants filed the affidavit of Martin Masse, Policy Director of the People's Party of Canada, in response. There were no cross-examinations.

[7] The relevant facts are set out chronologically below.

[8] Mr. Dhillon states in his affidavit sworn February 18, 2019 that he founded the People's Party of Canada in May of 2015. He and his advisors had previously discussed several potential names for the party. They eventually settled on the name "The People's Party of Canada". The name had been suggested by Mr. Mo Dhaliwal, a close friend and business associate of Mr. Dhillon, who is said to have "granted explicit permission" to use the name.

[9] According to Mr. Dhillon, the public launch of the People's Party of Canada occurred on July 1, 2015 when the name The People's Party of Canada was "published on the cover story" of a magazine called The Times of Canada.

[10] Officers and supporters met frequently in 2015 to discuss the logistical and political plan for the party and how to launch it on a national and international stage. Mr. Dhillon indicates that there was "less activity in 2016 and 2017" due to the election of the Liberal government.

[11] Mr. Dhillon states that the new government failed to meet some of the expectations after taking office and that, beginning in 2017, members and supporters realized that "only pushing forward and getting involved politically at a federal level could [they] effect change in this country."

[12] Mr. Dhillon mentions that in 2017, he was featured in a publication about Punjabis around the world known as the Jewel of Punjab. The article refers to an anti-corruption movement started by Mr. Dhillon in Canada called the People's Party of Canada "which aims to inform the people of all the good and bad that goes on in his country."

[13] Mr. Bernier declared publicly on August 23, 2018 that he was launching his own political movement. Mr. Masse states that he, along with Mr. Bernier and Mr. Charles Laflamme, picked the name "Parti populaire du Canada" and "People's Party of Canada" for the new party on August 30, 2018.

[14] On September 4, 2018, the Defendants applied to register their non-profit organization with the proposed name with Innovation, Science and Economic Development Canada (formerly Industry Canada). The Defendants conducted a corporate name search to ascertain whether the chosen name was available in both official languages. The name of the Plaintiffs' party was not listed.

[15] On September 14, 2018, Mr. Bernier officially announced the launch of the new party during a press conference in Ottawa. The name of the party ("Parti populaire du Canada" and "People's Party of Canada") along with three stylized trade-marks were featured prominently. The same day, the Defendants created an official website for the party with the domain names of www.partipopulaireducanda.ca and www.peoplespartyofcanada.ca to promote the party and its program.

[16] Mr. Dhillon filed an application for a trade-mark over the word mark "People's Party of Canada" on September 14, 2018. Two days later, he registered a copyright over the communication signal "People's Party of Canada" and "The People's Party of Canada".

[17] On September 20, 2018, Mr. Dhillon submitted an application to register "The People's Party of Canada / Parti du Peuple Canadien" and its logo as a registered political party under the *Canada Elections Act*, SC 2000, c 9 [*Canada Elections Act*]. To apply for registration, a party has to fill out a form and send it to Elections Canada. The form explains what information and signatures must be included, such as the party's full name and, optionally, its logo and short-form name or abbreviation; the party leader's contact information and a copy of the party's

resolution to appoint the leader; contact information and signed consent of party officers and the chief agent; and, notably, names and addresses of at least 250 electors and their declarations in the prescribed form that they are members of the party and support the party's application for registration.

[18] Mr. Dhillon's application was supported by the signatures of 343 electors. The application was received by the Office of the Chief Electoral Officer on September 25, 2018.

[19] By letter dated October 4, 2018, Ms. Josée Villeneuve, Senior Director, Political Financing with Elections Canada advised Mr. Dhillon that the application would be examined to determine whether the party was eligible for registration under section 387 of the *Canada Elections Act*, including whether the party name or logo is confusing with that of a registered or eligible party.

[20] On October 10, 2018, the Defendants applied to Elections Canada to register their new party, accompanied by approximately 500 forms of electors in support. The Defendants called the signatories to ensure that each of them quickly confirmed their signature with Elections Canada.

[21] On October 18, 2018, Mr. Dhillon was informed that Elections Canada had received the Defendants' political party application with the name of "People's Party of Canada / Parti populaire du Canada."

[22] On November 14, 2018, Elections Canada declared the Defendants' Party to be eligible, having received more than 250 signatures of voters supporting the creation of the party.

[23] By letter dated November 15, 2018, the Chief Electoral Officer advised Mr. Dhillon that although he was not able to consider the matter at that time, the risk of confusion was evident, and offered Mr. Dhillon the opportunity to change the name of his political party.

[24] Mr. Dhillon was later informed that, as December 4, 2018, Elections Canada was only able to verify that 85 of the required 250 electors were in fact party members who supported the party's application for registration.

[25] On January 17, 2019, Elections Canada declared the Defendants' party as registered since the party had announced candidates for the by-elections being held on February 25, 2019.

[26] On February 20, 2019, the Chief Electoral Officer advised the Plaintiffs that their application for registration was refused for the following reasons:

I must base my decision on sections 385(2) and 387 of the *Canada Elections Act*. Although you may have registered a copyright and a trademark regarding the name of your party, this is not a relevant consideration under the *Canada Elections Act*. In my opinion, the name of your party would likely be confused with the name of a registered party. Therefore, your application, as submitted, cannot be accepted for registration. Pursuant to section 389 of the Act, I am therefore informing you that the party has not met the requirement to become eligible. Consequently, The People's Party of Canada's application for registration is refused.

[27] The Plaintiffs brought the present motion on April 16, 2019 seeking the following injunctive relief:

- (1) An order prohibiting and restraining the Defendants, its officers, directors, employees, agents, candidates, electoral district associations, members, related entities, and all those over whom it exercises control (the “Related Parties”), from any and all use of the words “People’s Party of Canada” and “The People’s Party of Canada”, as a trade name, trade-mark, or otherwise in association with its political party wares or products, until such time as this Court renders a final determination in the within Action;
- (2) An order prohibiting and restraining the Defendants and the Related Parties, from any and all broadcasting of the words “People’s Party of Canada” and “The People’s Party of Canada”, via any means, until such time as this Court renders a final determination in the within Action;
- (3) An order requiring the Defendants and the Related Parties to forthwith recall and destroy under oath all documents or records, products, packaging, displays, advertisements, signs, whether in electronic form or otherwise, the use of which would offend the terms of the Order sought herein at paragraphs 1 and 2.

III. Issue to be Determined

[28] At the hearing of the motion, the Plaintiffs abandoned their request for relief at paragraph 3 of the Notice of Motion. Accordingly, the issue to be determined is whether orders should be granted on the terms requested by the Plaintiffs at paragraphs 1 and 2.

IV. Analysis

A. *Test to be Applied*

[29] Generally speaking, a party seeking an interlocutory injunction must satisfy the well-known tri-partite test set out in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR

311 at 334 and 342, 111 DLR (4th) 385 [*RJR-MacDonald*]. The party must first establish that there is a serious issue to be tried. Second, the party is required to show that it is likely to suffer irreparable harm if the injunction is not granted. Third, the onus is on the moving party to establish that the balance of convenience favours the granting of the injunction.

[30] The Defendants submit that the relief requested by the Plaintiffs would effectively require them to remove election signs bearing the name People's Party of Canada, pull their advertisement, change their website and withdraw their registrations with Elections Canada and Innovation, Science and Economic Development Canada – in other words, to take positive action. As such, the Plaintiffs are seeking a mandatory rather than a prohibitive injunction.

[31] The Supreme Court of Canada has recently confirmed in *R v Canadian Broadcasting Corp*, 2018 SCC 5 [*CBC*], that where a mandatory injunction is requested, there is a heightened threshold at the first stage of the *RJR-MacDonald* test in that the moving party must establish a “strong *prima facie* case”. The Supreme Court defines the strong *prima facie* case as a “strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice.”

[32] Distinguishing a prohibitive from a mandatory injunction is difficult, given that even prohibitive language may require a party to take positive action. However, in the present case, I am satisfied that the Defendants would be required to take positive actions should the Plaintiffs succeed in their motion. The Defendants have adduced evidence showing that they have prepared promotional material, presented candidates at by-elections, promoted the use of the name

“People’s Party of Canada” in both English and French with its supporters, maintained a website and social media pages using this name and made extensive preparations for the upcoming federal election. Concrete positive steps would need to be taken by the Defendants in the event an injunction was granted on the broad terms requested by the Plaintiffs. This would include withdrawing their political party registration.

[33] In the circumstances, I conclude that the heightened test of establishing a “strong *prima facie* case” applies in this case. I should add that this is an academic debate given that the Plaintiffs have, in any event, failed to establish a serious issue to be tried.

B. *Whether the Plaintiffs have a strong prima facie case*

[34] The Plaintiffs claim that they have statutory and common law copyright and trade-mark rights that can be enforced by this Court. For the reasons that follow, I find that the Plaintiffs have failed to adduce sufficient evidence of ownership of any such rights.

(1) Pursuant to section 27 of the *Copyright Act*

[35] As evidenced by a Certificate of Registration of Copyright, Mr. Dhillon is the owner of copyright in a communication signal for “People’s Party of Canada” and “The People’s Party of Canada”. However, the fact that Mr. Dhillon is shown on the Canadian Copyright Register as owner of the communication signal merely creates a rebuttable presumption in his favour: *Jules Jordan Video Inc v Elmaleh*, 2009 FC 488 at paragraph 16.

[36] At paragraphs 22 and 23 of the Statement of Claim, the Plaintiffs claim that copyright subsists in a communication signal first broadcast on July 1, 2015 and that Mr. Dhillon has been using and broadcasting the communicating signal since that time. If I understand the claim correctly, Mr. Dhillon is asserting the exclusive right to produce or reproduce the words “People’s Party of Canada” in any material because the words appeared in an article about him and he has shared the article with others by e-mail or other electronic means.

[37] There are special rules for subject matter other than works as defined in the *Copyright Act*. With regard to communication signals, only a “broadcaster” may have a copyright in a communication signal. Section 21 gives a broadcaster copyright in its communication signals including the compilation of all the programs, advertisements and other content that make up the signal transmitted by the broadcaster: *Interbox Promotion Corp v 9012-4314 Québec Inc*, 2003 FC 1254 at paragraph 18. The term “broadcaster” is defined at section 2 as “a body that, in the course of operating a broadcasting undertaking, broadcasts a communication signal in accordance with the law of the country in which the broadcasting undertaking is carried on, but excludes a body whose primary activity in relation to communication signals is their retransmission.”

[38] The Plaintiffs submit that Mr. Dhillon, by electronically sharing the Times of Canada article which mentions the words “People’s Party of Canada”, acted as a broadcaster. On the basis of the record before me, I am not satisfied that Mr. Dhillon is a broadcaster within the meaning of section 2 of the *Copyright Act* or that the work claimed in the certificate of

registration is even a communication signal. The entire premise of the Plaintiffs' claim of copyright is nonsensical.

(2) Pursuant to the *Trade-Marks Act*

[39] The Plaintiffs claim to have first used the unregistered trade-mark "The People's Party of Canada" in relation to their political party in 2015, preceding the Defendants' use for the same purpose.

[40] It is trite law that in order to claim a common law trademark infringement, a party must first establish that it holds a trade-mark as defined by section 2 of the *Trade-marks Act*. Further, no rights can be asserted unless there is use as defined by section 4 of the Act:

4 (1) A trade-mark is deemed to be used in association with goods if, at the time of the transfer of the property in or possession of the goods, in the normal course of trade, it is marked on the goods themselves or on the packages in which they are distributed or it is in any other manner so associated with the goods that notice of the association is then given to the person to whom the property or possession is transferred.

(2) A trade-mark is deemed to be used in association with services if it is used or displayed in the performance or advertising of those

4 (1) Une marque de commerce est réputée employée en liaison avec des produits si, lors du transfert de la propriété ou de la possession de ces produits, dans la pratique normale du commerce, elle est apposée sur les produits mêmes ou sur les emballages dans lesquels ces produits sont distribués, ou si elle est, de toute autre manière, liée aux produits à tel point qu'avis de liaison est alors donné à la personne à qui la propriété ou possession est transférée.

(2) Une marque de commerce est réputée employée en liaison avec des services si elle est employée ou montrée dans l'exécution ou l'annonce de

services.

ces services.

[41] As stated by Mr. Justice Binnie in *Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22, at paragraph 5:

Unlike other forms of intellectual property, the gravaman of trade-mark entitlement is actual use. By contrast, a Canadian inventor is entitled to his or her patent even if no commercial use of it is made. A playwright retains copyright even if the play remains unperformed. But in trade-marks the watchword is “use it or lose it.

[42] The Plaintiffs have adduced no evidence that would suggest that they have used the word mark “People’s Party of Canada” in association with the promotion of their party before or even after the Defendants publicly launched their party on September 14, 2018.

[43] The mere fact that Mr. Dhillon declared to a reporter with *The Times of Canada* in 2015 that he intended to start a movement with a certain name does not constitute use. Contrary to what is asserted by Mr. Dhillon, the name “The People’s Party of Canada” was not published on the cover story. The only reference to the proposed movement is at the last page of a five page article entitled “Satinder Dhillon – Modern Day Revolutionary Fights Corruption” in which Mr. Dhillon is quoted as saying:

The PPC (People’s Party of Canada) is not about politics, it is much more than that. It is a movement to inform the citizens about what is really going on in this country. If they choose to vote for one of our anti-corruption candidates, then that is just a byproduct. This is bigger than politics.

[44] Although the words “PPC (People’s Party of Canada)” appear in the article, no mention is made of the trade-mark itself, nor is the alleged trade-mark distinguished from the surrounding

text. There was no real use of the name in association with the Plaintiffs' party's activities to properly distinguish and associate the party with the name.

[45] In the *Jewels of Punjab*, the article describes the Plaintiffs' party as "an anti-corruption movement in Canada, called the People's Party of Canada (PPC) which aims to inform the people of all the good and bad that goes on in his country". Once again, this does not establish the use of the name in association with a political party. At best, it establishes proposed use of the name.

[46] In *Medos Services Corporation v Ridout and Maybee LLP*, 2015 FCA 77, the Federal Court of Appeal held that the simple appearance of a mark in an email communication is insufficient to claim the use of the trademark where the mark is not distinguished from the surrounding text. Similar considerations apply to the case at hand.

[47] The Plaintiffs have not adduced any evidence that their movement was associated with the name "The People's Party of Canada" in the eyes of the public before the Defendants publicly launched their party. Other than general statements, there is a dearth of evidence as to any steps taken or activities organized by the Plaintiffs promoting their party by prominently displaying the words "People's Party of Canada". One would have expected the Plaintiffs to produce copies of pamphlets, photos, advertisement, screenshots of the party's website or other promotional material.

[48] Beyond failing to establish use, the Plaintiffs have adduced no evidence to satisfy the test of passing off of a common law trade-mark (*CW Parsons Ltd v Parsons Paving Ltd*, 2019 FC 458 at para 29; *Sadhu Singh Hamdard Trust v Navsun Holdings Ltd*, 2016 FCA 69 at para 20).

[49] The first ingredient to succeed in a passing off action requires the plaintiff to establish goodwill or reputation regarding their goods or services. However, the Plaintiffs have not adduced any evidence of goodwill or reputation of their party prior to the launch of the Defendants' party.

[50] Secondly, a plaintiff must establish a degree of misrepresentation or guile to be a material factor in the marketing activity of the Defendants and that such misrepresentation or guile caused confusion in the consumer's mind. On the basis of the uncontradicted evidence of Mr. Masse, I conclude that the Defendants were unaware of the existence of the Plaintiffs' party. In the circumstances, I am not satisfied that there was any misrepresentation on their part.

[51] In summary, the evidence tendered by the Plaintiffs does not show a strong *prima facie* case of the underlying action.

C. *Whether the Plaintiffs would suffer irreparable harm*

[52] Based on the record before me, the Plaintiffs' evidence is wholly insufficient for injunctive relief and there is no need to go to the next step in the *RJR-MacDonald* test. In any event, the Plaintiffs have failed to establish that they would suffer irreparable harm if an injunction is not granted.

[53] In his affidavit, Mr. Dhillon says that he has spent countless hours building rapport, support and political clout for the Plaintiffs' party which has members in many ridings across Canada. He claims that due to the Defendants' party, potential supporters and donors have expressed their concern over the confusion between the two parties. Further, he claims that many officers and supporters of the Plaintiffs' party have expressed difficulty recruiting new supporters because of the confusion between the two parties.

[54] While that may be the case, the evidence before me suggests that the Plaintiffs have taken no active steps to promote their party since 2015. After almost three years of apparent inactivity, the Plaintiffs rushed to protect their party's name on the same day that the Defendants began promoting theirs. More likely than not, this is not a coincidence. The Plaintiffs have not shown irreparable harm. It is not in the public interest for parties to sit on their rights, to the extent that they may have any, for long periods of time before pursuing them, without offering any excuse for having done so.

D. *Balance of convenience*

[55] According to Mr. Masse, as of February 21, 2019, the Defendants' party has 35 508 members and raised \$1,033,715 in donations. The Defendants are actively preparing for the upcoming federal elections in October 2019. They have hundreds of candidates who will be running for election and have prepared extensive promotional material. The Plaintiffs have adduced no such evidence of election preparation, recruitment and donations. In the circumstances, the balance of convenience clearly favours the Defendants.

V. Conclusion

[56] For the above reasons, I have not been persuaded that the injunctive relief sought by the Plaintiffs is warranted, as they have not satisfied the heightened tripartite test set forward in *CBC*.

[57] At the hearing, counsel for the Defendants requested that costs be fixed to the successful party on a solicitor and client basis in the fixed amount of \$40,000. Plaintiffs' counsel countered that costs should be in the range of \$5,000 to \$7,000, plus disbursements.

[58] The general rule is that costs should follow the event. The "event" in this case is the disposition of the motion. This is because the discrete issue to be determined is whether to grant an interlocutory injunction. This is not the issue at trial. The Court is concerned only to assess whether the Plaintiffs have a claim or a right that ought to be protected until trial.

[59] Given that the Defendants were entirely successful in resisting the confusing and essentially baseless motion, I conclude that costs should be awarded at an elevated scale. Further, the Plaintiffs' alleged urgency was unjustified. Costs are hereby fixed in the amount of \$20,000, inclusive of disbursements and taxes, payable by the Plaintiffs in any event of the cause, but not forthwith.

ORDER IN T-321-19

THIS COURT ORDERS that:

1. The Plaintiffs' motion for an interlocutory injunction is dismissed.
2. Costs of the motion, hereby fixed in the amount of \$20,000, inclusive of disbursements and taxes, shall be paid by the Plaintiffs to the Defendants in any event of the cause.

"Roger R. Lafrenière"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-321-19

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PLACE OF HEARING: MONTRÉAL, QUEBEC

DATE OF HEARING: APRIL 25, 2019

ORDER AND REASONS: LAFRENIÈRE J.

DATED: MAY 3, 2019

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