

Federal Court



Cour fédérale

Date: 20190528

Docket: T-33-18

Citation: 2019 FC 743

Ottawa, Ontario, May 28, 2019

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

**8073902 CANADA INC.
ICE COLD DISTRIBUTIONS INC.**

Applicants

and

GLEN E. VARDY

Respondent

JUDGMENT AND REASONS

[1] 8073902 Canada Inc. and Ice Cold Distributions Inc. [the Applicants] seek to expunge the trade-mark DIAL-A-BOTTLE [the Mark], owned by the Respondent, Glen Vardy, pursuant to section 57 of the *Trade-marks Act*, RSC 1985, c T-13 [the Act]. The Applicants submit that the Registration of the Mark [the Registration] is invalid for two reasons: the Mark lacked distinctiveness at the time of the commencement of this Application in 2018; and, the Mark was

not registrable at the time of its registration in 2009 because it had become generic or synonymous with alcohol delivery services.

[2] For the reasons that follow, the Application is allowed. Although the Respondent as owner of the Mark benefits from the presumption of the Registration's validity, the Applicants have met their burden to establish that the Registration was not valid pursuant to section 18 of the Act because the Mark was not distinctive at the time of the commencement of this Application.

[3] In summary, the Applicants and Mr. Vardy portray their relationships and their use of the DIAL-A-BOTTLE Mark differently. However, the evidence establishes on a balance of probabilities that by the date of the commencement of this application the Mark had lost its distinctiveness due to the use of the DIAL-A-BOTTLE name and variations of it by many businesses and persons for many years. Mr. Vardy and his predecessor had not done anything to enforce their right to the exclusive use of the Mark before 2015. Mr. Vardy's efforts to assert his rights only began after he purchased the Registration in 2015 and his efforts were selective and ineffective to distinguish his services from those of others.

[4] The evidence does not support Mr. Vardy's characterization of the majority of users of the Mark as his licensees or franchisees. He had licence agreements with some users and verbal agreements with some others. However, the evidence demonstrates that others simply used the Mark. Moreover, Mr. Vardy did not control the quality and character of the services provided by users of the DIAL-A-BOTTLE name, whether or not they were licensed.

I. Preliminary Issues

[5] The Respondent's supplementary Memorandum of Fact and Law, which included the legal submissions relied on, was accepted by the Court for filing at the hearing of this Application on the consent of the Applicants.

[6] The second affidavit of Mr. Vardy, dated June 11, 2018, was accepted by the Court for filing on the consent of the Applicants.

[7] As a general comment, the Mark is registered as DIAL-A-BOTTLE. The evidence on the record and in the submissions of the parties includes the use of the name with variations, including various combinations of upper and lower case letters. Although there may appear to be inconsistency in the manner that the Court refers to use of the DIAL-A-BOTTLE name, this simply reflects how the name was used in the evidence, exhibits and submissions.

II. Background

[8] To provide context for the submissions of the parties and the analysis of the issues, some background is essential. The record before the Court is approximately 2000 pages, including 11 affidavits of nine people tendered by the Applicants and two affidavits tendered by the Respondent, both of which are from Mr. Vardy. The background set out below is a summary derived from the record. The relevant evidence is described in further detail in ANNEX I.

[9] In 1971, Dial-a-Bottle Services Ltd, a corporation owned by Larry Lambert, registered DIAL-A-BOTTLE as a trade-mark. This registration was expunged on January 18, 2008 for non-use by the owner.

[10] Dial-a-Bottle Services Ltd again registered the DIAL-A-BOTTLE Mark on July 17, 2009 as TMA743727, the current Registration, in association with beverage, ice, flower, and prescription drug delivery services.

[11] The Respondent, Mr. Vardy, purchased the Registration from Dial-a-Bottle Services Ltd (Mr. Lambert) on January 15, 2015.

[12] The chronology of the use of DIAL-A-BOTTLE and variations of the name by various businesses over the years is somewhat confusing. The Applicants and other users of the name had casual business relationships with Mr. Vardy at some points in time. Other users had no relationship with Mr. Vardy. The Applicants' relationship with Mr. Vardy soured following some discussions regarding a potential licence agreement.

A. *The Applicants*

[13] The Applicants, 8073902 Canada Inc. and Ice Cold Distributions Inc., are liquor delivery service companies owned jointly by Jatinder Bajaj and Francis Butler. 8073902 Canada Inc. operates as "DIAL-A-BOTTLE" in Ottawa. Ice Cold Distributions Inc. operates as "DIAL-A-BOTTLE" in Toronto. The Applicants deliver convenience store items as well as alcohol.

[14] Mr. Bajaj originally operated a liquor delivery service in Ottawa called “BOOZE4U”, dating back to 2006. In 2008, he purchased a liquor delivery company doing business as DIAL-A-BOTTLE from Richard Major, who had used the name since 1979.

[15] Mr. Bajaj merged DIAL-A-BOTTLE into BOOZE4U. He registered the business name, DIAL-A-BOTTLE, in 2008 and operated under this name from that time.

[16] In 2011, BOOZE4U amalgamated with Last Call and City Booze, a delivery business owned by Mr. Butler, to form 8073902 Canada Inc. Mr. Bajaj and Mr. Butler became business partners. This business provides delivery services using the name DIAL-A-BOTTLE and variations, such as “The Original DIAL A BOTTLE” and “DIAL A BOTTLE OTTAWA”.

[17] Mr. Bajaj became an owner and director of Ice Cold Distributions Inc. in July 2012. The business has used the DIAL-A-BOTTLE name at least since 2012 and registered that business name in 2013.

[18] 8073902 Canada Inc. registered the business name, DIAL-A-BOTTLE, on November 23, 2016.

B. *The Respondent*

[19] Mr. Vardy is currently a sole proprietorship doing business as “DIAL-A-BOTTLE” (or as “Dial a Bottle” and variations). DIAL-A-BOTTLE operates a call centre which receives orders and distributes them to drivers and businesses, primarily in Ontario. Mr. Vardy refers to these

drivers and business as licensees. There are some examples on the record, which are not in dispute, demonstrating that some drivers and businesses have purchased and signed “licence agreements”. Pursuant to the agreements, Mr. Vardy agrees to provide support services and grants the right to use the Mark to the licensee to provide delivery services in exchange for fees. Mr. Vardy also attests that he has verbal agreements with other businesses that occasionally complete deliveries for him.

[20] Rodolfo Sanchez, an occasional business partner of Mr. Vardy, explained that in 2001 he and Mr. Vardy worked for Steve Smith, who operated a liquor delivery business that used the name, “Dial a Bottle”, to advertise its services. In 2003, Mr. Vardy took over Mr. Smith’s Mississauga territory and applied for a liquor delivery licence from the Alcohol and Gaming Commission of Ontario under the name, “At Home Delivery Service”. Mr. Sanchez stated that he operated under Mr. Smith with the name “Dial a Bottle Toronto”. In 2007, he and Mr. Vardy formed a partnership. Mr. Sanchez attests that they continued to use their own licences and respective business names until 2009, when Mr. Vardy began using the Dial a Bottle Toronto name. Shortly thereafter, the partnership dissolved, and Mr. Vardy began operating as DIAL-A-BOTTLE.

[21] Mr. Vardy stated in cross-examination that through a licence from Mr. Lambert, he had the rights to use and sublicense the Mark and the responsibility for monitoring its infringement since 2001. However, the current Registration of the Mark dates only from 2009. Mr. Vardy’s assertion of rights and responsibilities associated with the Mark since 2001 is also not entirely consistent with Mr. Sanchez’s description of their history. However, the evidence clearly

establishes that Mr. Vardy purchased the Registration from Mr. Lambert in 2015. The evidence also establishes that before that point in time, neither Mr. Lambert, nor Mr. Vardy through a licence, took action to protect the Mark or enforce any rights in it.

III. The Issues

[22] The Applicants submit that the Registration is invalid pursuant to section 18 for two reasons: the Mark was not distinctive at the time this Application was commenced and the Mark was not registrable at the date of registration. The Applicants submit that the Mark should be expunged. The Applicants' arguments raise two issues:

1. Was the Mark distinctive at the time the proceedings were commenced?
2. Was the Mark a generic name for beverage delivery services and, therefore, not registrable at the date of registration?

IV. Was the Mark distinctive at the time the proceedings were commenced?

A. *The Applicant's Submissions*

[23] The Applicants submit that the Registration is invalid because the Mark lacked distinctiveness at the date of the commencement of this Application, January 11, 2018. The Applicants argue that the name, DIAL-A-BOTTLE, does not distinguish the Respondent's delivery services from the services of others, based on its common use by many others, the Respondent's improper licensing, the Respondent's lack of enforcement, and the widespread customer confusion.

[24] The Applicants suggest that the Respondent seeks to take advantage of the presumption of the validity of the Mark. The Applicants also suggest that the Respondent ought to have known that the Mark was invalid at the time he purchased it from Mr. Lambert given that he was aware of its use by many others.

[25] The Applicants submit that the Respondent and his predecessor allowed the use of the Mark by others to such an extent that by January 11, 2018, it was not distinctive of the Respondent's services. The Applicants assert that they and their predecessors used the Mark since at least 1979. The Applicants assert that they and their predecessors have had five times the level of services and sales of the Respondent for the same period of time.

[26] The Applicants note that many businesses that were not licensed by the Mark's owner used the DIAL-A-BOTTLE name for many years and in various parts of Canada. The Applicants claim that the Respondent was well aware of the use by others. The Applicants note that neither the Respondent nor the previous owner of the Registration took action to protect the Mark until after 2015.

[27] The Applicants point to the evidence of the extensive use of the Mark by many businesses since 1979. In brief, the Applicants note that Mr. Major used the DIAL-A-BOTTLE name from 1979 to 2008. In 2008, Mr. Bajaj purchased Mr. Major's business and merged DIAL-A-BOTTLE into his business, BOOZE4U. Mr. Bajaj used the names, DIAL-A-BOTTLE, DIAL A BOTTLE OTTAWA and The Original DIAL A BOTTLE. Five other affiants describe

having used variations of the DIAL-A-BOTTLE name in Ontario for years before the Application was brought.

[28] The Applicants acknowledge that the Respondent made some attempts after 2015 to enforce the Mark, but submit that this was simply too late. By that time, the industry was established and the Mark did not distinguish the Respondent's services from the rest of the industry.

[29] The Applicants note that the Respondent sent cease and desist letters to some users beginning in 2016 and commenced some enforcement actions in 2017, but discontinued them. The Applicants add that there is no evidence that others stopped using the Mark even upon receipt of cease and desist letters and that the Respondent has no ongoing litigation to enforce his alleged trade-mark rights.

[30] The Applicants rely on *Auld Phillips Ltd v Suzanne's Inc*, 2005 FC 48, 268 FTR 53, aff'd 2005 FCA 429 [*Auld Phillips*], where the Court found that if an owner permits widespread use of their mark by others, the mark will lose its distinctiveness.

[31] The Applicants acknowledge that an owner may allow another person to use their trade-mark and its distinctiveness will not be diminished, provided that the owner licences such use and has control over the character and quality of the licensee's services. The Applicants do not dispute that the Respondent had licence agreements with some users. However, the Applicants submit that he had no formal or informal licence agreement with them or several

other users, notwithstanding that some of them performed deliveries for the Respondent. They add that the Respondent acknowledged that he did not exercise any control over their business, services, or advertising. Widespread unlicensed use contributed to the loss of distinctiveness of the Mark.

[32] The Applicants further submit that although some users were licensed, Mr. Vardy did not control the character or quality of the services these users offered. The Applicants submit that this improper licensing also contributed to the loss of distinctiveness of the Mark.

[33] The Applicants explain that all competitors had distinct businesses and logos and branded their businesses as they saw fit. The Applicants note that the Respondent permitted some of his competitors, who also delivered products for him, to use the Mark. The Applicants submit that you cannot compete with those you license.

[34] The Applicants further submit that there is widespread confusion among customers and advertisers regarding DIAL-A-BOTTLE services. They submit that evidence of actual confusion in the marketplace demonstrates that a mark no longer distinguishes the services of the owner. The Applicants note that the Respondent acknowledged in his affidavit and cross-examination that there was longstanding and frequent customer confusion. The Applicants allege that the Respondent has contributed to this confusion by using inconsistent branding for his own services (for example, by using different logos in advertising, one with a race car and one with the letters “db”) and redirecting traffic from websites with his competitor’s tradenames to his business.

[35] The Applicants dispute the Respondent's argument that the use of a prefix or suffix with the DIAL-A-BOTTLE name (e.g. *The Original Dial a Bottle* or *Dial a Bottle Toronto*) by other users distinguishes these services from the Respondent's and maintains the Mark's distinctiveness. First, the Applicants note that the Respondent took legal action against businesses that used the DIAL-A-BOTTLE name with a prefix or suffix, which demonstrates that he agreed that the prefix or suffix did not protect the distinctiveness of his services. Second, the Respondent also used other words or letters for his own businesses, including "A Dial A Bottle" and "db".

[36] The Applicants also note that they used the DIAL-A-BOTTLE name both with and without additional words or letters, as did other users

[37] The Applicants note that the Respondent only began to use the registered trade-mark symbol ® after 2015 and not consistently. The Applicants argue that the recent and inconsistent use of ® does nothing to make the Mark distinctive because the public did not recognize the Respondent as a single source of the services.

B. *The Respondent's Submissions*

[38] Mr. Vardy submits that the Mark is valid as it meets the three conditions for distinctiveness: the Mark is clearly associated with his services, he uses the association to sell his services, and he has distinguished his services from those of others.

[39] Mr. Vardy argues that it would be highly prejudicial to him if his Registration were expunged. He claims that he operates in 55 cities in three provinces and that his business is expanding through licence and franchise agreements.

[40] He describes the history of the DIAL-A-BOTTLE name in a manner similar to the Applicants, dating back to Mr. Lambert's first use in 1971 and Mr. Major's business in Ontario beginning in 1979.

[41] Mr. Vardy states that he has licensed several businesses which fill orders received by his call centre to use his advertising and marketing materials. He further argues that these licensees are franchisees. Mr. Vardy relies on the decision in *Fyfe v Vardy*, 2018 ONSC 5066, [2018] OJ No 4404 (QL) [*Fyfe*]), , where the Ontario Superior Court of Justice found that his arrangement with Ms. Fyfe and another person was a franchise agreement. He argues that since one licence agreement was found to be a franchise agreement, then all the licensees are franchisees.

[42] Mr. Vardy disputes the Applicants' assertion that many businesses use the Mark without a licence. He submits that the majority of businesses using the Mark are his licensees and franchisees. He suggests that there are only a few people who are not licensed by him and that these few have obtained multiple business licences with DIAL-A-BOTTLE as part of their name. He submits that this does not constitute widespread use.

[43] Mr. Vardy argues that a few infringements by a few unlicensed businesses are not sufficient to impact the distinctiveness of his Mark. He points to *Auld Phillips* at para 37, where the Court noted:

In his text, *The Canadian Law of Trade Marks and Unfair Competition*, 3rd ed. (Toronto: Carswell, 1972) at page 287, Harold G. Fox stated, with regard to loss of distinctiveness, that:

The amount of piracy necessary to cause loss of distinctiveness is a difficult question. A few scattered and unprosecuted infringements by several traders are not sufficient to cause a mark to become public juris, nor will extensive infringement by a single trader be sufficient.

[44] Mr. Vardy further submits that he enforced his rights in the Mark since the time of his purchase of the Registration in 2015. He notes that he sent cease and desist letters to the infringers in 2016 and asserts that several complied. He also commenced actions against the infringers in the Ontario Superior Court of Justice, which he later discontinued. In addition, he complained to Google, Google AdWords, Yellow Pages, and 411.ca to have ads using the Mark removed.

[45] Mr. Vardy also argues that there was no need for him to protect the Mark against the Applicants and other users who, at various points in time, delivered for him. He explains that he did not enforce his rights in the Mark vigorously against parties with whom he was negotiating business relationships.

[46] Mr. Vardy submits that most users have added other words or letters as suffixes or prefixes to the Mark, such as Always Dial A Bottle. These additions make their businesses distinguishable from his own and guard the distinctiveness of the Mark.

[47] Mr. Vardy disputes that he has caused or allowed widespread confusion regarding the Mark, including by his own use of additional words or prefixes and suffixes and different branding and logos for his own Dial a Bottle businesses. He also disputes that he admitted that there was confusion in the market. Mr. Vardy argues that the Applicants are responsible for any confusion that might exist among customers and advertisers because they have edited his contact information in online advertisements. He submits that the Applicants are destabilizing the market by seeking the expungement of his Registration. He argues that the Applicants should not be able to rely on the confusion that they have caused in order to challenge the Registration's validity.

C. *The Mark was not distinctive at the relevant time*

[48] The Court has considered the submissions of the parties, which rely on largely the same evidence but portray different accounts of their business relationships, the use of the Mark and variations thereof, and Mr. Vardy's efforts to enforce his rights as licensee and subsequently as owner of the Registration. The Court has examined the approximately 2000-page record. The evidence on the record establishes on a balance of probabilities that the Mark was not distinctive of Mr. Vardy's services at the time the Applicants commenced this Application, January 11, 2018. The Mark is, therefore, invalid and the Registration should be expunged.

[49] The purpose of trade-marks is to allow an owner to distinguish their products and services from those of others (*Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22 at para 2, [2006] 1 SCR 772 [*Mattel*]). In *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23 at para 18, [2006] 1 SCR 824, the Court explained that “the purpose of trade-marks is to function as a symbol of the source and quality of wares and services, to distinguish those of the merchant from those of another, and thereby to prevent “confusion” in the marketplace.”

[50] Section 19 of the Act provides that the owner of the trade-mark has the exclusive right to its use throughout Canada in respect of the goods and services in the registration, unless the registration is shown to be invalid. In other words, there is a presumption of validity for the registration. A party seeking to expunge a trade-mark has the onus of demonstrating that the registration is invalid and the Court must examine all the evidence to make the determination (*Emall.ca Inc v Cheaptickets and travel Inc*, 2008 FCA 50 at paras 11-12, [2009] 2 FCR 43).

[51] In *Kamsut Inc v Jaymei Enterprises Inc*, 2009 FC 627, [2009] FCJ No 803 (QL) [*Kamsut*] the Court set out the relevant principles for an application to expunge a registered trade-mark.

With respect to the onus on an applicant, the Court noted at para 27:

[27] It is settled law an Applicant, who seeks to expunge a trade-mark registration, has the onus of proof (i.e. must establish by evidence) on a balance of probabilities the grounds of invalidity he asserts in respect of a trade-mark registration and that registration, by virtue of section 19 of the *Act*, is presumed to be valid at law. As Justice Binnie put it at paragraph 5 of his reasons in *Veuve Clicquot Ponsardin v. Boutiques Cliquot Ltée*, [2006] 1 S.C.R. 824 (*Veuve Clicquot*): “Under s. 19 of the *Act*, the respondents' marks are presumptively valid, and entitles them to use the marks ...”

[Emphasis in original]

[52] Paragraph 18(1)(b) of the Act provides that the registration of a trade-mark is invalid if “the trade-mark is not distinctive at the time proceedings bringing the validity of the registration into question are commenced”.

[53] The definition in section 2 of the Act provides that a “distinctive” trade-mark actually distinguishes the goods or services in association with which it is used by its owner from the goods or services of others.

[54] The relevant provisions of the Act are set out in Annex II.

[55] The parties agree that a trade-mark must meet three conditions to be distinctive: (1) the mark and the goods or services must be associated; (2) the mark’s owner must use this association in manufacturing and selling its goods or services; and (3) this association must enable the mark’s owner to distinguish its goods or services from those of others (*Roots Corporation v YM Inc (Sales)*, 2019 FC 16 at para 56, [2019] FCJ No 12 (QL); *Nature’s Path Foods Inc v Quaker Oats Co of Canada Ltd*, 2001 FCT 366 at para 40, [2001] FCJ No 646 (QL) [*Nature’s Path*]).

[56] The first two conditions are established. The Mark is associated with Mr. Vardy’s services and Mr. Vardy has demonstrated that he uses the association with the Mark to advertise his delivery services and to sell support services to businesses that deliver for him. However, the evidence demonstrates that this association does not enable Mr. Vardy to distinguish his services

from those of others in the industry that have used the DIAL-A-BOTTLE name and variations of the name for many years.

[57] The evidence demonstrates wide use of the Mark by many businesses, including by those that were not licensed either formally or informally by Mr. Vardy. The wide use of the Mark and variations resulted in a loss of distinctiveness and defeated the notion of a single source of the services. The evidence also demonstrates that where Mr. Vardy alleges that he permitted or licensed use, he did not exert any control over the quality and character of the services provided by these businesses. There is no evidence that Mr. Vardy or the previous owner, Mr. Lambert, did anything to enforce their rights in the Mark before 2016. Mr. Vardy's efforts to protect the Mark after he purchased the Registration in 2015 were inconsistent and ineffective to create or restore any distinctiveness of Mr. Vardy's services. In addition, the wide use of the DIAL-A-BOTTLE name caused confusion in the market, by Mr. Vardy's own admission.

[58] The evidence shows that there was widespread use of the Mark as the predominant name of many businesses in various parts of Canada, particularly in Ontario, dating back to at least 1979. The Applicants trace their own use of the name to 1979 through Mr. Major.

[59] The evidence also shows that Mr. Vardy and the Applicants have been aware of each other since the early 2000s. More recently, the Applicants delivered on Mr. Vardy's behalf in the Ottawa and Toronto areas at least between 2012 and 2016. The Applicants explain that the calls from Mr. Vardy's business represented only a small portion of their business.

[60] At the relevant time, the Applicants were using the name, DIAL-A-BOTTLE, to sell their services in Ottawa and Toronto both in relation to deliveries for Mr. Vardy and their independent services. 8073902 Canada Inc. also used the variations, The Original DIAL A BOTTLE and DIAL A BOTTLE OTTAWA.

[61] The evidence also demonstrates that several others in the liquor delivery service industry used similar names in the promotion of their services. Mr. Tafader has operated in Toronto since 2006 using the names, “AAAA Dial A Bottle”, “4A Dial A Bottle”, “A Dial A Bottle Downtown”, and “Dial A Bottle Downtown”. Mr. Marinov owns “Always Dial A Bottle Ltd”, which has also operated in Toronto since 2010. Mr. Cassell has operated in Kingston as “Dial-A-Bottle” since 2000. Mr. Sanchez operated as “Dial a Bottle Toronto” in the Greater Toronto Area since 2003 (and since 2017 under a verbal agreement with Mr. Vardy). Mr. Chambers has operated in Oshawa under the name, “PETE’S DIAL A BOTTLE” since 2010. He also operated under this name in Peterborough from 2010-2017, but then sold that part of his business to Mr. Vardy.

[62] The evidence of Ms. Girard-Witts, who conducted a name search and examined online and print sources, demonstrates that well before January 2018, Yellow Pages ads and websites showed several other Dial a Bottle businesses operating in Canada.

[63] Some businesses used the DIAL-A-BOTTLE name with add-ons—for example, “Dial a Bottle” followed by the name of the city. Mr. Vardy also modified the DIAL-A-BOTTLE name in his own use. Contrary to Mr. Vardy’s submissions, the addition of other words or letters

(suffixes or prefixes) did not prevent confusion between Mr. Vardy's DIAL-A-BOTTLE and others. The Mark did nothing to distinguish the many businesses using it from each other or from Mr. Vardy's services.

[64] Although Mr. Vardy relies on *Auld Phillips* to support his argument that a few unprosecuted infringements will not cause a loss of distinctiveness, he failed to cite the subsequent passages in the Federal Court's judgment. In *Auld Phillips*, the Court added at para 39:

[39] In my view, the basic question must be the one stated by the Supreme Court of Canada in *Breck's v. Magder* (1975) 17 C.P.R. (2d) 201 at 205 (S.C.C.) in which it said that, for a trade mark to be distinctive of a respondent - the message to the public must be that the respondent is the source of services.

[Emphasis added]

[65] In *Auld Phillips*, the Court found that although there was only one infringing party, the infringement was widespread and of significant duration. In that case, the applicant had operated a clothing store as "Suzanne's" in British Columbia since 1972 and opened five other stores in Alberta in the early 2000s. The respondent had operated one store called "Suzanne's" since 1984 and registered the trade-mark "Suzanne's" in 2003. The Court concluded, at paras 40-41, that at the time of the commencement of the application in 2004, the trade-mark did not distinguish the respondent's services from those of the applicant due to the wide use of the name by the applicant in several locations since 1972.

[66] In the present case, the evidence demonstrates far more than a few "unprosecuted infringements"; there was widespread use of the Mark over a long period of time.

[67] A failure to protect a trade-mark from unauthorized use creates a risk that a mark may lose distinctiveness and its legal protection (*Mattel* at para 26). Mr. Vardy's efforts to protect his Mark by selectively sending out cease and desist letters, demanding that internet advertisements be removed, and commencing and discontinuing actions at the Ontario Superior Court of Justice, were not sufficient or timely. The Mark had lost its distinctiveness before he stepped up his efforts to protect his rights.

[68] As noted, the Mark was registered in 2009 and Mr. Vardy purchased the Registration in 2015. There is no evidence that from 2009 to 2015, either Mr. Vardy or the previous owner of the Registration, Mr. Lambert, took any action to discourage the Applicants, their predecessors, or others from using the Mark.

[69] Beginning in 2016, Mr. Vardy sent cease and desist letters to Mr. Tafader, Mr. Marinov and Mr. Chambers alleging trade-mark infringement and threatening legal action. Mr. Vardy also sent the Applicants a letter on February 5, 2017 requesting that they stop using DIAL-A-BOTTLE or similar terms. In January and February 2017, Mr. Vardy filed Statements of Claim against the Applicants, Mr. Marinov, Mr. Tafader, Mr. Chambers, and Mr. Sanchez in the Ontario Superior Court of Justice claiming infringement of the Mark. Mr. Vardy discontinued these actions on October 25, 2017, with prejudice. Mr. Vardy confirmed that he has no ongoing litigation related to the enforcement of his rights in the Mark.

[70] Cease and desist letters alone may not demonstrate sufficient protection of a trade-mark (see for example, *Auld Phillips* at para 40). In the present case, Mr. Vardy only sent cease and

desist letters to some users of the Mark. He did not send such letters to Mr. Cassell, Mr. Sanchez or Dial a Bottle Windsor. Mr. Vardy acknowledged that he does not protect his Mark from use by parties with whom he has or seeks a business relationship.

[71] Although Mr. Vardy attests that some users complied with the cease and desist letters, the evidence does not demonstrate who complied. Some users stated that they continued to use the Mark.

[72] The licence agreements that Mr. Vardy had with some users of the Mark do not protect the distinctiveness of the Mark. The Act provides in subsection 50(1) that the use, advertisement, or display of a trade-mark by an entity licensed by the owner to use the trade-mark has the same effect as that by the owner, if the owner has control of the character or quality of the services. Therefore, if the use of the Mark was pursuant to licences given by Mr. Vardy to the users in accordance with section 50, their use would not impair the distinctiveness of the Mark.

[73] As noted, Mr. Vardy's view is that that the majority of users of the Mark were his licensees. There is no dispute that he had licence agreements with some users—but not a majority as claimed. Mr. Vardy characterizes other users of the Mark as his licensees based on alleged verbal agreements or apparently based simply on his permission or acquiescence. Although Mr. Vardy may have regarded these users as his licensees, others, including the Applicants and several affiants, did not share this view.

[74] Mr. Vardy did not license the Applicants, either formally or informally, to use the Mark. There is evidence of Mr. Vardy's more recent attempt to negotiate with the Applicants in furtherance of a licence agreement, but the negotiations broke down.

[75] Despite Mr. Vardy's characterization of verbal agreements with other users as licences, the evidence only supports that these other users agreed to complete deliveries for him, in addition to their own business, for a fee. The evidence also shows that there were some users of the DIAL-A-BOTTLE name and variations of the name that had no dealings with Mr. Vardy and never delivered for him.

[76] Mr. Vardy cannot rely on subsection 50(1) of the Act. The evidence does not demonstrate that Mr. Vardy had any control over the quality and the character of the services provided by other users. Mr. Vardy acknowledged that he did not control the majority of the Applicants' business and services. Mr. Vardy also stated in cross-examination that he does not have control over his licensees' businesses, as they can market their own services, although he contradicted himself on this point a number of times. Moreover, Mr. Vardy never explained how he exercises control over the character and quality of services offered by any businesses using the DIAL-A-BOTTLE name. The widespread use of the Mark cannot be attributed to Mr. Vardy through licensing and control.

[77] Mr. Vardy's argument that *Fyfe* establishes that all of the affiants who completed deliveries for him at some point were his franchisees is without any merit. The decision in *Fyfe*

arose in a different context and it applies only to the agreement at issue between Mr. Vardy and the plaintiffs in that case.

[78] Mr. Vardy's suggestion that the Applicants should not benefit from their infringement and their failure to check whether the name was a registered trade-mark is not a response to this Application. Neither Mr. Vardy nor his predecessor did anything to enforce their rights in the Mark before 2016.

[79] The use of the Mark and variations thereof by many businesses caused confusion in the market. As noted in *Nature's Path* at para 44, where there is a likelihood of confusion between parties' trade-marks, the third condition of the test for distinctiveness cannot be met. The association between a trade-mark and the goods or services will not enable the owner to distinguish his services from others.

[80] In the present case, there is more than a likelihood of confusion. Mr. Vardy's own evidence is that there is actual confusion between businesses using the Mark and variations of it in the liquor delivery service industry. His evidence demonstrates that customers and advertisers have trouble distinguishing his services from those of others. He also stated that he launched legal proceedings against businesses with names that were "confusingly similar".

[81] Mr. Vardy's submission that any confusion that has resulted has been caused by the Applicants' infringing conduct and by this Application is also without merit. First, there is evidence of confusion unrelated to the Applicants' use of the Mark and well before the

commencement of this Application. Mr. Vardy stated that confusion existed from “the beginning”, which may mean before 2001 or since the date of the current Registration in 2009. Second, even if the Applicants’ use of the Mark constituted an infringement, the Federal Court of Appeal recently stated in *Sadhu Singh Hamdard Trust v Navsun Holdings Ltd*, 2019 FCA 10 at para 15, 301 ACWS (3d) 7, that “infringing prior use may cause a mark to lose its distinctiveness, although the extent or degree to which distinctiveness is eroded by infringing use remains a question of fact to be considered in each case.” The Federal Court of Appeal continued to explain at para 16 that it is incumbent upon the owner to protect the distinctiveness of its mark, even in the face of infringing use.

[82] The evidence establishes on a balance of probabilities that the Mark had lost its distinctiveness prior to Mr. Vardy’s efforts to enforce his rights after his purchase of the Registration in 2015 and that his subsequent efforts did not restore the distinctiveness of the Mark. At the time of the commencement of the Application, the Mark was not distinctive of Mr. Vardy’s services. Therefore, the Registration is invalid.

V. Was the Mark registrable at the date of registration?

A. *The Applicants’ Submissions*

[83] The Applicants submit that the Registration is invalid for a second reason: the Mark was not registrable on July 17, 2009, the date of its registration. The Applicants rely on paragraph 12(1)(c) of the Act. They submit that the DIAL-A-BOTTLE name had been commonly used in the alcohol delivery trade for 20 years prior to its Registration and was synonymous with alcohol

delivery services. The Applicants point to the 2009 Toronto Yellow Pages listings for “liquor & food delivery services” which has 19 listings of DIAL-A-BOTTLE and variations by different businesses. The Applicants note that eight of the listings were for Mr. Vardy’s business and 11 were for other businesses.

[84] The Applicants also point to a 2009 email from Mr. Vardy to his lawyer in which he suggested that DIAL-A-BOTTLE had become generic, like “Kleenex”. Mr. Vardy noted that over 30 businesses with the name Dial a Bottle operated in Ontario alone.

B. *The Respondent’s Submissions*

[85] Mr. Vardy submits that the Mark was registrable at the time of its registration in 2009 because it was not generic at that time. Mr. Vardy points to *Tommy Hilfiger Licensing Inc v Produits de Qualité IMD Inc*, 2005 FC 10 at paras 42-44, [2005] FCJ No 17 (QL) and submits that a Mark must fall within one of five categories in order to not be registrable. Mr. Vardy submits that his Mark does not fall within any of these categories. He emphasizes that the Mark is not anyone’s name, the name of the wares or services, descriptive or misdescriptive, confusing with another trade-mark or prohibited.

C. *The Mark was not synonymous with the services at the relevant time*

[86] As noted above, paragraph 18(1)(a) of the Act provides that the registration of a trade-mark is invalid if the trade-mark was not registrable at the date of registration—in this case, July 17, 2009. Section 12 of the Act governs when a trade-mark is and is not registrable.

Paragraph 12(1)(c), relied on by the Applicants, provides that a trade-mark is not registrable if it is “the name in any language of any of the goods or services in connection with which it is used or proposed to be used”.

[87] In *ITV Technologies Inc v WIC Television Ltd*, 2003 FC 1056 at para 81, [2003] FCJ No 1335 (QL), aff'd 2005 FCA 96 [*ITV Technologies*] the Court noted that the test under paragraph 12(1)(c) is narrower than that for the use of descriptive terms, such as in paragraph 12(1)(b). The Court found that to fall within paragraph 12(1)(c), “[t]he mark as a whole must clearly be the name of the wares or services based on the immediate and first impression of the everyday user of the registrant’s wares or services” (*ITV Technologies* at para 81). The Court explained at para 84:

In determining whether a mark is the name of the wares or services in connection with which it is used, the Court may have reference to dictionaries or other reference works to determine possible meanings for a mark. Nadon J. relied on French language dictionaries to conclude that the term “brûlerie” was a generic expression known to Canadians as being used in the coffee roasting business (*Brûlerie Des Monts Inc. v. 3002462 Canada Inc.* (1997), 132 F.T.R. 150). However, the Federal Court of Appeal has confirmed that dictionaries are sometimes inaccurate and should only be used as a guide (*Bagagerie S.A. v. Bagagerie Willy Ltée* (1992), 97 D.L.R. (4th) 684).

[88] Mr. Vardy’s statement in his 2009 email suggesting that the Mark was generically used and comparing it to the everyday use of the term “Kleenex” is simply an exaggeration of the popularity of his business. The statement does not establish that the Mark is the name of the service or is synonymous with alcohol delivery services.

[89] The Applicants have not provided any reference works to demonstrate the possible meanings of the Mark and appear to rely on the Court to draw inferences. Although prospective customers of DIAL-A-BOTTLE may glean some of the services provided from the name, the term DIAL-A-BOTTLE is not clearly the name of the services. A “bottle” suggests alcohol or beer, but not exclusively. “Dial” describes how the service provider may be contacted, but is not the name of the service. Moreover, DIAL-A-BOTTLE cannot be found to be the name of the other services the Mark is registered in association with, namely, ice, flower, and prescription drug delivery.

[90] The Applicants have not established that the Mark was not registrable at the date of registration.

VI. Conclusion

[91] The Application is granted and the Registration (TMA743727) is expunged. The Registration is invalid because the Mark was not distinctive at the time this Application was commenced.

[92] The Applicants are entitled to the costs of the Application. If the parties are not able to agree on costs, they may make written submissions to the Court in writing not exceeding five pages within 15 days of the issuance of this Judgment and Reasons.

Annex I

The Evidence

A. *The Applicants' Evidence*

[93] The affidavits and exhibits, which include copies of advertisements, demonstrate that the Applicants and several other persons and businesses have used terms similar or identical to the Mark to promote alcohol delivery service business in Canada, particularly in Ontario.

[94] Istiaq Mujib Tafader attests that he has been a sole proprietor of alcohol delivery services in Toronto since 2006. He used a number of business names continuously throughout this time, including “AAAA Dial A Bottle”, “4A Dial A Bottle”, “A Dial A Bottle Downtown”, and “Dial A Bottle Downtown”. He also delivers convenience store items under these names. He has advertised his business through his website, the Yellow Pages, Google AdWords, and flyers. Mr. Tafader attests that he also completed deliveries for Mr. Vardy between 2009 and 2011.

[95] Miroslav Marinov attests that he has operated an alcohol delivery service continuously since 2010. His business also delivers convenience store items. He began as a sole proprietorship doing business as “Always Dial A Bottle Toronto” and currently operates as “Always Dial A Bottle Ltd”, which he incorporated on November 4, 2015. Mr. Marinov has advertised his business using a website, Facebook, Twitter, YouTube, the Yellow Pages, Google AdWords, online business directories, flyers, and business cards.

[96] Peter Chambers attests that he operates a sole proprietorship alcohol delivery service doing business as “PETE’S DIAL A BOTTLE”. Mr. Chambers registered this business on

July 7, 2010. Mr. Chambers has delivered in Oshawa since 2010. Mr. Chambers also previously delivered in Peterborough. On March 12, 2017, Mr. Vardy purchased the domain name and phone number related to Mr. Chamber's Peterborough business. Mr. Chambers has advertised PETE'S DIAL A BOTTLE using a website, Google AdWords, and other promotional means.

[97] Ron Cassell attests that has provided alcohol and convenience store item delivery services in Kingston under the name, "Dial-A-Bottle" since 2000. He advertises using a website, the Yellow Pages, hotel advertisements, and other promotional means. Mr. Cassell states that for a short period of time in 2014, he filled orders from Mr. Vardy. He reports ending this business relationship with Mr. Vardy because the orders were received without the customers' full name, as required by law. Mr. Cassell attests that he also rejected Mr. Vardy's offer to license his use of the DIAL-A-BOTTLE name.

[98] Rodolfo Sanchez attests that he has provided liquor delivery services as "Dial a Bottle Toronto" since 2003. He was Mr. Vardy's business partner for a period of time between 2007 and approximately 2009. Mr. Sanchez states that he began to cover orders for Mr. Vardy in 2017 in the Greater Toronto Area. [Mr. Vardy states that Mr. Sanchez is licensed through a verbal agreement.]

[99] In addition to the use of the Mark by the affiants, there is evidence of the use of the Mark by others. The affidavit of Dominique Girard-Witts (a para legal in the office of Counsel for the Applicants) states the results of a search she conducted for webpages and Yellow Pages listings advertising delivery services using the term, DIAL-A-BOTTLE, in Canada. Ms. Girard-Witts

attests to finding “Dial A Bottle Oshawa”, “DIAL-A-BOTTLE WINDSOR”, “Dial A Bottle Victoria BC”, “Calgary Dial a Bottle”, and “Calgary DialaBottle.com”. Mr. Vardy confirmed that he was aware of these businesses and does not claim to have licence agreements with them.

[100] Mr. Butler attests that in 2015, Mr. Vardy told him that he had purchased the Registration and that he planned to control all DIAL-A-BOTTLE delivery services for North America.

Mr. Butler attests that Mr. Vardy stated that acquiring the Mark would allow him to force other businesses using the Mark or similar terms to stop. The Applicants refused Mr. Vardy’s offer to license them and continued to use the term DIAL-A-BOTTLE.

[101] On November 24, 2016, the Applicants brought an application (T-2032-16) to expunge the Registration. The application was discontinued on October 13, 2017, with consent and without prejudice.

B. *The Respondent’s Evidence*

[102] Mr. Vardy’s evidence is provided in two affidavits. This first affidavit, dated February 8, 2017, was filed in the Applicants’ 2016 application to expunge the Mark and again in the current Application. Mr. Vardy’s second affidavit, now filed for this Application, dated June 11, 2018, explains that Mr. Vardy also relies on his previous affidavit and the exhibits attached thereto.

[103] Mr. Vardy attests that he is the holder of the Mark which was validly transferred to him by assignment from Mr. Larry Lambert in 2015. Mr. Vardy attests that Mr. Lambert invented the name in 1969 and later registered it. Mr. Vardy attests that he also had permission from

Mr. Lambert to use the DIAL-A-BOTTLE name since 2001. Mr. Vardy previously operated as “At Home Delivery Service”.

[104] Mr. Vardy attests that he uses the registered trade-mark symbol ® in his advertising and branding “as much as possible” to show that DIAL-A-BOTTLE is a registered trade-mark owned by him.

[105] Mr. Vardy states that several users of the DIAL-A-BOTTLE name had verbal agreements with him and that since 2015 he has been negotiating to license these users or to purchase their businesses. He attests that the Applicants were negotiating with him to obtain a licence to use the Mark but does not provide a time frame.

[106] Mr. Vardy attests that after the discontinuance of T-2032-16, he met with Mr. Chambers and ultimately purchased Mr. Chambers’ business in Peterborough.

[107] Mr. Vardy attests that he also met with Mr. Cassell and reminded him that he had to be licensed to use the Mark. Mr. Cassel declined his offer.

[108] Mr. Vardy states that Mr. Sanchez is “now” licensed to use the Mark through a verbal licence agreement.

[109] Mr. Vardy attests that he has enforced his rights to his Mark since purchasing the Registration from Mr. Lambert.

[110] Mr. Vardy states that he sent cease and desist letters to businesses using names that he found to be identical or confusingly similar to his own, including the Applicants. The exhibits confirm that he sent such letters to Mr. Chambers, Mr. Tafader and Mr. Marinov, in 2016. He also sent a letter dated February 5, 2017 to Mr. Butler and Mr. Bajaj. Mr. Vardy adds that he commenced legal proceedings against those who did not comply. His exhibits include Statements of Claim he issued against the Applicants, Mr. Butler and Mr. Bajaj; Mr. Chambers; Mr. Tafader; Mr. Marinov; and Mr. Sanchez in early 2017. The Statements of Claim allege infringement and seek, among other remedies, damages. The Action was discontinued.

[111] Mr. Vardy's affidavit includes speculation and statements that border on argument. For example, he accuses the Applicants of confusing customers and advertisers by fraudulently editing his ads in the Yellow Pages and listings websites to redirect customers to the Applicants. He states that he has attempted to correct the information but he cannot police edits to his advertisements on a daily basis. He also claims that Mr. Butler and Mr. Bajaj own other businesses which infringe different trade-marks of his.

[112] In the context of Mr. Vardy's statement that he was negotiating with the Applicants for a licence agreement where they would use DIAL-A-BOTTLE under his "umbrella" of licensed delivery services across Canada, he notes that the negotiations ceased and he is no longer willing to grant a licence to the Applicants. He characterizes the Applicants as greedy because they seek the rights for free by "going after" his registered trade-mark. [The proposed agreement included as an exhibit would have granted an exclusive licence to use the Mark in the stated territory and, included conditions and obligations of each party. The exhibits show that several track changes

were made to the proposed agreement over many months and several issues remained to be resolved.]

[113] With respect to his efforts to promote and protect his Mark, Mr. Vardy attests to his revenue and his expenses for advertising and payroll at his call centre. He notes that he advertises on radio, social media and 411.ca, and sponsors a drag racing team which advertises DIAL-A-BOTTLE on cars and team jackets, among other promotional initiatives. He adds that he has incurred expenses to send cease and desist letters and launch legal action against infringers.

[114] Mr. Vardy states that advertisers and customers are frequently and significantly confused by the different entities using the Mark. He notes that customers have called his business looking for their orders, which he had not received because the customers placed them with a different DIAL-A-BOTTLE listing. In addition, he notes that customers sometimes accidentally order from multiple DIAL-A-BOTTLE listings, thinking they are the same, and confuse the business hours of different operations. He adds that he has received complaints that arose from other businesses' conduct.

Annex II

The Relevant Provisions of the *Trade-marks Act*, RSC 1985, c T-13

2 In this Act,	2 Les définitions qui suivent s'appliquent à la présente loi.
[...]	[...]
<i>distinctive</i> , in relation to a trade-mark, means a trade-mark that actually distinguishes the goods or services in association with which it is used by its owner from the goods or services of others or is adapted so to distinguish them; (<i>distinctive</i>)	<i>distinctive</i> Relativement à une marque de commerce, celle qui distingue véritablement les produits ou services en liaison avec lesquels elle est employée par son propriétaire, des produits ou services d'autres propriétaires, ou qui est adaptée à les distinguer ainsi. (<i>distinctive</i>)
[...]	[...]
12 (1) Subject to section 13, a trade-mark is registrable if it is not	12 (1) Sous réserve de l'article 13, une marque de commerce est enregistrable sauf dans l'un ou l'autre des cas suivants :
[...]	[...]
(b) whether depicted, written or sounded, either clearly descriptive or deceptively misdescriptive in the English or French language of the character or quality of the goods or services in association with which it is used or proposed to be used or of the conditions of or the persons employed in their production or of their place of origin;	b) qu'elle soit sous forme graphique, écrite ou sonore, elle donne une description claire ou donne une description fautive et trompeuse, en langue française ou anglaise, de la nature ou de la qualité des produits ou services en liaison avec lesquels elle est employée, ou en liaison avec lesquels on projette de l'employer, ou des conditions de leur production, ou des personnes qui les produisent, ou de leur lieu d'origine;

(c) the name in any language of any of the goods or services in connection with which it is used or proposed to be used;

c) elle est constituée du nom, dans une langue, de l'un des produits ou de l'un des services à l'égard desquels elle est employée, ou à l'égard desquels on projette de l'employer;

[...]

[...]

18 (1) The registration of a trade-mark is invalid if

18 (1) L'enregistrement d'une marque de commerce est invalide dans les cas suivants :

(a) the trade-mark was not registrable at the date of registration;

a) la marque de commerce n'était pas enregistrable à la date de l'enregistrement;

(b) the trade-mark is not distinctive at the time proceedings bringing the validity of the registration into question are commenced;

b) la marque de commerce n'est pas distinctive à l'époque où sont entamées les procédures contestant la validité de l'enregistrement;

(c) the trade-mark has been abandoned;

c) la marque de commerce a été abandonnée;

(d) subject to section 17, the applicant for registration was not the person entitled to secure the registration; or

d) sous réserve de l'article 17, l'auteur de la demande n'était pas la personne ayant droit d'obtenir l'enregistrement;

(e) the application for registration was filed in bad faith.

e) la demande d'enregistrement a été produite de mauvaise foi.

[...]

[...]

19 Subject to sections 21, 32 and 67, the registration of a trade-mark in respect of any goods or services, unless shown to be invalid, gives to the owner of the trade-mark the exclusive right to the use throughout Canada of the trade-mark in respect of those

19 Sous réserve des articles 21, 32 et 67, l'enregistrement d'une marque de commerce à l'égard de produits ou services, sauf si son invalidité est démontrée, donne au propriétaire le droit exclusif à l'emploi de celle-ci, dans tout le Canada, en ce qui concerne

goods or services.

ces produits ou services.

[...]

[...]

50 (1) For the purposes of this Act, if an entity is licensed by or with the authority of the owner of a trade-mark to use the trade-mark 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 trade-mark in that country as or in a trade-mark, 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 trade-mark in that country by the owner.

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.

(2) For the purposes of this Act, to the extent that public notice is given of the fact that the use of a trade-mark 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 trade-mark and the character or quality of the goods or services is under the control of the owner.

(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.

[...]

57 (1) The Federal Court has

57 (1) La Cour fédérale a une

exclusive original jurisdiction, on the application of the Registrar or of any person interested, to order that any entry in the register be struck out or amended on the ground that at the date of the application the entry as it appears on the register does not accurately express or define the existing rights of the person appearing to be the registered owner of the mark.

compétence initiale exclusive, sur demande du registraire ou de toute personne intéressée, pour ordonner qu'une inscription dans le registre soit biffée ou modifiée, parce que, à la date de cette demande, l'inscription figurant au registre n'exprime ou ne définit pas exactement les droits existants de la personne paraissant être le propriétaire inscrit de la marque.

JUDGMENT in T-33-18

THIS COURT'S JUDGMENT is that

1. The Application is allowed.
2. The Registration TMA743727 is expunged.
3. The Respondent shall pay the Applicants their costs.

"Catherine M. Kane"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-33-18

STYLE OF CAUSE: 8073902 CANADA INC., ICE COLD DISTRIBUTIONS
INC. v GLEN E. VARDY

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: APRIL 16, 2019

**REASONS FOR JUDGMENT
AND JUDGMENT:** KANE J.

DATED: MAY 28, 2019

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