

Federal Court



Cour fédérale

Date: 20210611

Docket: T-1127-10

Citation: 2021 FC 602

Ottawa, Ontario, June 11, 2021

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

SADHU SINGH HAMDARD TRUST

Plaintiff

and

**NAVSUN HOLDINGS LTD. AND 6178235
CANADA INC.**

Defendants

AMENDED JUDGMENT AND REASONS

I. Overview

[1] This matter revolves around the Punjabi term AJIT, meaning “unconquerable” or “invincible,” and the rights to it in Canada in association with newspapers. The dispute between the parties is lengthy and the procedural history leading to this second redetermination of the summary trial is complex. The issues to be redetermined are the Plaintiff’s claims of passing off,

infringement and depreciation of goodwill, including all factual and legal issues related to liability.

[2] To address the issues to be redetermined, I first summarize the factual background, followed by the nature of the proceedings and procedural history, including the findings that stand. I then summarize the parties' evidence and particularize the issues to be redetermined. Finally, I base my analysis on this foundation, including careful consideration of the parties' records and submissions for this second redetermination, and applicable legal principles.

[3] For the reasons that follow, I find Hamdard Trust succeeds in its claim for passing off, but only in respect of Navsun's Original Logo (described below). The Defendants are liable to Hamdard Trust for compensatory damages in the amount of \$10,000, but only for the period July 2004 to September 2009, having regard to the applicable limitation and defence. Otherwise, Hamdard Trust's claims for infringement under Sections 19 and 20, and depreciation of goodwill under Section 22, in respect of Navsun's Modified Logo (described below) are dismissed.

II. Factual Background

(a) *Daily Ajit*

[4] The Plaintiff, Sadhu Singh Hamdard Trust [Hamdard Trust] publishes a Punjabi-language newspaper known as AJIT, widely-read and well-known among the Punjabi population in India. Since at least as early as 1968, the words THE DAILY AJIT JULLUNDUR (with AJIT shown in larger, bold text), and later *Daily Ajit, Jalandhar*, were displayed in Latin characters on the

newspaper's masthead, in addition to a stylized version of the Punjabi name AJIT. The word "Daily" appears to have been dropped altogether by 2016, leaving the words *Ajit*, *Jalandhar*. To differentiate between the Plaintiff's and Defendants' newspapers, I refer to the Plaintiff's newspaper as *Daily Ajit*.

[5] In 1955, Dr. Sadhu Singh Hamdard founded *Daily Ajit*, originally under the name *Ajit Patrika*, in Jalandhar, Punjab state, India. The name changed in 1959 to simply AJIT and has been used continuously since then. Dr. Hamdard was the Chief Editor from 1955 until his death in 1984. A sample masthead from 1968 is reproduced immediately below:



[6] Dr. Hamdard created Hamdard Trust in 1977, a public charitable trust, and donated all assets of the *Daily Ajit* newspaper to it, including machinery, presses and buildings. Dr. Hamdard was the Chair of Hamdard Trust until his death in 1984. As the English name *Daily Ajit* implies, it is a daily newspaper with typical content, including local, national and international news, weather forecasts, sports, television listings, features, editorials and advertisements. Hamdard Trust launched the website with the domain name www.ajitjalandhar.com in 2002. The *Daily Ajit* content is available to read on the Hamdard Trust's website and also on mobile apps.

[7] The *Daily Ajit* newspaper's average daily circulation has grown from 23,467 copies in 1975 to 400,126 copies in 2016, with 414,590 copies on weekends. There have been subscribers in Canada and other countries since at least 1968. Circulation of the *Daily Ajit* newspaper beyond India is thin, however, because of late delivery resulting from large geographical distances. This is borne out, for example, by the circulation figures for Canada. During the twenty-year period spanning from 1990 to 2010, circulation of *Daily Ajit* reached a high of 43 subscribers in 1991, with a low of 4 in 2003, 2004, 2006 and 2008, and only 7 in 2010. In each of the years 2002 until and including 2010, the number of Canadian subscribers was under 10. Not many daily subscriptions to the newspaper, therefore, are sold overseas. There have been, however, letters to the editor and advertising from Canada over the years. Further, since the launch of Hamdard Trust's mobile apps in about December 2012, which permit users to access *Daily Ajit* content online free of charge, the number of user downloads of the apps for Android and IOS operating systems in Canada has grown to exceed 71,000 as of August 17, 2017.

[8] Since 1984, the *Daily Ajit* masthead features a logo comprised of the Punjabi name AJIT in a unique stylized form [Hamdard Trust's Logo] and in the colour red. The most unusual part of Hamdard Trust's Logo is the "hook" above the stylized Punjabi word AJIT, which is flattened on top and extends to the left across adjacent characters. The flattened bottom of the final letter also is unique. These design features comprise an original design created by an employee of Hamdard Trust in 1984 and are not found in any Punjabi font. That said, the balance of the lettering resembles a font known as "Nanak heavy font" first published in 1995. A sample masthead from 2004 is reproduced immediately below:



[9] Hamdard Trust's Logo is registered in Canada under trademark registration No. TMA914925 dated September 23, 2015 essentially for printed and electronic newspapers and magazines and related services. The registration is based on use of the trademark in Canada since at least as early as August 22, 1984 for such goods and claims other dates of use for the remaining goods and services. Colour is not claimed as a feature of the trademark. Hamdard Trust's Logo as registered is reproduced immediately below:

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[10] Hamdard Trust became aware of *Ajit Weekly* (described below) when its then Editor-in-Chief, Dr. Barjinder Singh Hamdard, visited Canada in 1995.

(b) *Ajit Weekly*

[11] Since 1993, the Defendant, Navsun Holdings Ltd. [Navsun] and its predecessors, the Bains family, have published a free weekly newspaper in Canada targeted to the Punjabi community in Canada and subsequently, in the United States of America. To differentiate between the Defendants' and Plaintiff's newspapers, I refer to the Defendants' newspaper as *Ajit*

Weekly. The *Ajit Weekly*, also a Punjabi-language newspaper, had some English language content.

[12] The family-run business first operated under the name *The Ajit* or *Weekly Ajit*. Navsun was incorporated in 1997, originally under the name Ajit Newspaper Advertising, Marketing and Communications Inc. which was changed to Navsun Holdings Ltd. in 2005. Since 1998, Navsun has operated a website with the domain name www.ajitweekly.com where electronic versions of the *Ajit Weekly* newspaper are published. The Defendant, 6178235 Canada Inc. [617Canada] is the current publisher of the *Ajit Weekly* newspaper, under licence from Navsun since January 2004. The Bains family remains involved with the business and the companies. Unless implied from the context or stated otherwise, references to Navsun include 617Canada.

[13] The *Ajit Weekly* newspaper is distributed every week in bundles to grocery stores, supermarkets, restaurants, temples and newspaper stands around the Greater Toronto and Vancouver areas. Copies are placed in newspaper boxes bearing Navsun's AJIT Design Mark (described in greater detail below) at specific locations in British Columbia and Toronto. As of 2014, Navsun was printing 11,000 newspapers per week from its Vancouver-based printer and 13,000 newspapers per week from its Toronto-based printer. The website at www.ajitweekly.com, where the electronic version of *Ajit Weekly* newspaper is published, receives a wide ranging number of visits each month (from about as low as 5,500 to as high as 30,000 and sometimes beyond).

[14] For many years Navsun's masthead incorporated the Punjabi word AJIT (essentially in the form of Hamdard Trust's Logo depicted in paragraph 8 above), with the words "The Ajit (Weekly Newspaper)" underneath, and with a design featuring two Canadian flags flanking the Sikh Khanda symbol under those words, as shown immediately below:



[15] Each week a different colour was chosen to use on the front of the newspaper and in the Punjabi word AJIT. In 2000, Navsun decided to use the colour magenta for such word and replaced the words "The Ajit (Weekly Newspaper)" with "www.ajitweekly.com." A sample masthead from the *Ajit Weekly* newspaper as it appeared in January 2000 is shown immediately below:



[16] On March 3, 2005, Navsun registered the design mark shown below [Navsun's Original Logo] in Canada under registration No. TMA634203 essentially for printed and electronic newspapers and magazines, and related online services, based on use of the mark in Canada since at least as early as October 15, 1993. Navsun's Original Logo was comprised of Hamdard

Trust's Logo with the words AJIT WEEKLY underneath. Because earlier iterations of Navsun's Original Logo depicted above contained the same design element and some form of the words AJIT WEEKLY underneath, I include those earlier iterations in the term Navsun's Original Logo. Navsun cancelled the registration in 2010, after Hamdard Trust commenced expungement proceedings that were rendered moot by reason of the cancellation.



[17] Since September 2009, Navsun has used the following design mark instead [Navsun's Modified Logo], normally with the stylized Punjabi word AJIT in the colour green:



[18] Navsun adopted the above mark further to a Partial Settlement Agreement signed by the parties on September 15, 2009 discussed in greater detail below.

III. Nature of the Proceedings and Procedural History

[19] There have been numerous proceedings involving these parties in Canada, the United States of America and elsewhere. The relevant USA and Canadian proceedings are summarized below.

- (1) United States of America

[20] On August 12, 2004, the Hamdard Trust commenced an action in the United States District Court for the Eastern District of New York [District Court] against Navsun and Darshan Singh, also known as Dr. Darshan Singh Bains (Director of Navsun and Editor-in-Chief of the *Ajit Weekly* newspaper), now deceased. Hamdard Trust alleged trademark and copyright infringement by the Defendants. The District Court granted, and the United States Court of Appeals for the Second Circuit confirmed on appeal, summary judgment in favour of the Defendants, except with respect to the copyright claim.

[21] In settlement of the copyright claim, the parties signed a Partial Settlement Agreement [PSA] on September 15, 2009 in which the Defendants agreed not to dispute, in any jurisdiction, that Hamdard Trust owns valid copyright in Hamdard Trust's Logo (identified as the "Daily Ajit Logo" in the PSA) and that Hamdard Trust's Logo, but not the word AJIT, meets the requirements to merit copyright protection.

[22] The PSA terms also included a limited licence to the Defendants to use Hamdard Trust's Logo and Navsun's then essentially identical logo, until December 31, 2009. Navsun agreed to use, as of January 1, 2010, a "clearly distinguishable" logo. The parties stipulated that the different stylized form of the word AJIT, as shown in green above in Navsun's Modified Logo, is "clearly distinguishable." The parties also agreed that: (i) the limited licence would not affect their respectively asserted trademark and other rights in any jurisdiction; and (ii) the PSA could be pleaded as a full and complete defence in other proceedings. The District Court made the PSA part of an Order on October 1, 2009, by consent of all parties.

(2) Canada

[23] Hamdard Trust commenced the present action on July 15, 2010 against Navsun, 617Canada and Master Web Inc., a printer and distributor of the *Ajit Weekly* newspaper in Canada. Proceedings against Master Web were discontinued in 2015.

[24] In its Thrice Amended Statement of Claim, Hamdard Trust alleges, briefly, that the Defendants:

- by their use of Navsun’s Original and Modified Logos, have directed and continue to direct attention to their wares, services or business in such a way as to cause or be likely to cause confusion in Canada between the Defendants’ wares, services or business and those of Hamdard Trust, contrary to paragraph 7(b) of the *Trademarks Act*, RSC 1985, c T-13;
- have infringed Hamdard Trust’s Logo and AJIT trademark within the meaning of section 20 of the *Trademarks Act*;
- by their use of AJIT and Navsun’s Original Logo, have infringed Hamdard Trust’s Logo and AJIT trademark within the meaning of section 19 of the *Trademarks Act*;
- by their use of Navsun’s Modified Logo, have depreciated the value of the goodwill in Hamdard Trust’s Logo and AJIT trademark; and
- have infringed copyright in Hamdard Trust’s Logo.

[25] In their Second Amended Statement of Defence and Counterclaim, the Defendants dispute Hamdard Trust’s claims. The Defendants allege that a number of the claims in registration No. TMA914925 for Hamdard Trust’s Logo are false, including the claimed date of use in Canada (since at least as early as August 22, 1984), in so far as electronic publications and internet related services are concerned. The Defendants thus counterclaim for a declaration that

registration No. TMA914925 is void *ab initio* and should be struck from the register of trademarks. (The Defendants' counterclaim previously alleged false and misleading statements by Hamdard Trust tending to discredit the business, wares or services of a competitor, contrary to paragraph 7(a) of the *Trademarks Act*. The Counterclaim was dismissed by the Federal Court in 2014, confirmed on appeal, as mentioned below, and hence, no longer forms, altogether, part of the proceedings.) The Defendants also point out that Hamdard Trust's claims of infringement and depreciation of goodwill, which they denied, cannot be advanced before the date of registration of Hamdard Trust's Logo (September 23, 2015). Further, the Defendants plead delay, laches and acquiescence.

[26] In its Amended Reply to the Second Amended Statement of Defence and Counterclaim, Hamdard Trust claims that registration No. TMA914925 covers both Hamdard Trust's AJIT Logo and AJIT trademark. In addition, registration No. TMA914925 contains no misrepresentations and conforms to the requirements of the *Trademarks Act*. Further, the Defendants were aware of the underlying application and did not oppose it.

[27] The Plaintiff brought a motion for summary judgment, summary trial, or for an order that the Statement of Claim be treated as a Notice of Application pursuant to Rule 300 of the *Federal Court Rules* and that the Application be heard and decided on the basis of the filed evidence. The Defendants brought a cross-motion for summary judgment or summary trial to be heard the same date as the Plaintiff's motion. These motions resulted in the first of several Federal Courts' determinations of this matter.

(a) 2014 FC 1139 [*Hamdard FC 2014*]

[28] Noting the complexity of the matter, Justice McVeigh found that it could be determined as a summary trial on affidavit evidence filed and cross-examined by both parties. This finding has not been displaced in successive determinations; hence, the matter has come before me as a second redetermination of the parties' summary trial motions. Justice McVeigh dismissed Hamdard Trust's claim and the Defendants' counterclaim, with no costs to either party.

(b) 2016 FCA 69 [*Hamdard FCA 2016*]

[29] On appeal from *Hamdard FC 2014*, the Federal Court of Appeal allowed Hamdard Trust's request that the matter be remitted to the Federal Court for redetermination of its claim but maintained the judgment regarding the dismissal of Hamdard Trust's claim against Master Web and the dismissal of the Defendants' counterclaim regarding violation of paragraph 7(a) of the *Trademarks Act*. In arriving at this determination, Justice Gleason made a number of noteworthy findings.

[30] First, because the *Copyright Act*, RSC 1985, c C-42, prescribes a three-year limitation period, Hamdard Trust can claim copyright infringement only for acts going back as far as July 15, 2007 (three years prior to the issuance of the Statement of Claim on July 15, 2010): *Hamdard FCA 2014*, at para 10. Second, both parties' marks are comprised of a stylized version of the word AJIT which is a commonly-used name among Punjabis. The trademarks in issue thus are not just the word AJIT "but, rather, the word and the stylized way in which it is written, that both papers use as their logos": *Hamdard FCA 2016*, at para 28. Third, "the presence of the requisite

damages to found a claim in passing off can be established through proof of a loss of control over reputation, image or goodwill”: *Hamdard FCA 2016*, at para 31 (citing *Cheung v Target Event Production Ltd*, 2010 FCA 255 at paras 24, 27-28; *Orkin Exterminating Co Inc v Pestco Co. of Canada Ltd et al*, 1985 CanLII 157 (ON CA) [*Orkin*], [1985] O.J. No. 2536, 1985 CarswellOnt 144 at paras 48-49, 75).

(c) 2018 FC 1039 [*Hamdard FC 2018*]

[31] On the first redetermination of this matter, Justice Fothergill incorporated Justice McVeigh’s summary of the evidence to that point, and then summarized additional evidence subsequently filed by the parties: *Hamdard FC 2018*, at paras 25-27. On the merits, Justice Fothergill found that Hamdard Trust established its claims of passing off, but only with respect to Navsun’s Original Logo (and not with respect to Navsun’s Modified Logo nor the domain name www.ajitweekly.com), and awarded only nominal damages of \$5,000 (because of no proven impact on Hamdard Trust’s business).

[32] Justice Fothergill also found Navsun’s Original Logo infringed Hamdard Trust’s copyright. Hamdard Trust thus could recover damages, but only from July 2007 (three years prior to the time when the action was commenced in July 2010, having regard to the three-year limitation period noted by Justice Gleason in *Hamdard FCA 2014*) to September 2009 (when the PSA was executed). A nominal amount of \$5,000 in damages for copyright infringement was awarded. Otherwise, Justice Fothergill found that Hamdard Trust had not met its burden of establishing passing off, trademark infringement, depreciation of goodwill or copyright infringement in respect of Navsun’s Modified Logo.

[33] Regarding the Defendants' Second Amended Statement of Defence and Counterclaim, which was filed in advance of the first redetermination, Justice Fothergill found that while the Defendants were granted leave to file an amended statement of defence, this could not have the effect of reviving the counterclaim given its prior dismissal.

(d) 2019 FCA 295 [*Hamdard FCA 2019*]

[34] On appeal from *Hamdard FC 2018*, the Federal Court of Appeal granted the following (in summary):

1. the cross-appeal by Navsun and 617Canada, in part regarding the (re)determination of liability for passing off from July 2007 to September 2009 in respect of Hamdard Trust's Logo;
2. variation of the damages award so that Navsun is liable to Hamdard Trust for \$5,000 for copyright infringement from July 2007 to September 2009 (regarding Navsun's Original Logo);
3. Hamdard Trust's appeal regarding the dismissal of its claims under paragraph 7(b) and sections 19, 20 and 22 of the *Trademarks Act*, with the matter remitted to the Federal Court for redetermination of all factual and legal issues related to liability under these provisions.

[35] In the course of arriving at this disposition, Justice Laskin made several noteworthy findings that have a bearing on the outstanding issues, as well as on my analysis. First, so long as the summary trial judge undertakes their own analysis, nothing precludes the judge from adopting the evidential summaries or portions of the reasons from the previous summary trials: *Hamdard FCA 2019*, at para 16. Second, an infringement claim under section 19 of the *Trademarks Act* involves the question of whether the trademarks in issue are identical which means the same, not merely similar: *Hamdard FCA 2019*, at paras 20, 22.

[36] Third, an infringement claim under section 20 of the *Trademarks Act* involves a consideration of all subsection 6(5) factors, even where there is a significant degree of resemblance between the trademarks in issue: *Hamdard FCA 2019*, at paras 25, 28. Fourth, the test for assessing depreciation of goodwill under section 22 of the *Trademarks Act* is the four-part test set out in paragraph 46 of *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23 [*Veuve Clicquot*]: *Hamdard FCA 2019*, at para 34.

[37] Fifth, to have recourse to a passing off claim under paragraph 7(b) of the *Trademarks Act*, a plaintiff must meet the threshold requirement of having “a valid and enforceable trademark, whether registered or unregistered, at the time the defendant first began directing public attention to its own goods and services.” This in turn requires consideration of whether the plaintiff has demonstrated use of its trademark to distinguish its wares and services from those of others: *Hamdard FCA 2019*, at para 39.

[38] Sixth, it was open to the Federal Court to consider the factors described at para 54 of *Veuve Clicquot* (for assessing goodwill in the context of section 22) in connection with the Federal Court’s conclusion of the existence of the goodwill required to support a claim under paragraph 7(b): *Hamdard FCA 2019*, at paras 47-50. Seventh, the Federal Court made no palpable and overriding error in concluding that “Navsun has offered no credible explanation for its decision to use the ‘Ajit’ name in Canada when it launched the Ajit Weekly in 1993”: *Hamdard FCA 2019*, at para 52. Eighth, the Federal Court was correct in finding the Defendants’ counterclaim no longer was before it, and in declining to consider it: *Hamdard FCA 2019*, at paras 55-56.

(e) The Word Mark AJIT

[39] In addition to the above legal proceedings, the parties have engaged in proceedings before the Trademarks Opposition Board. One such proceeding is noteworthy, in part because the parties referred to it in their pleadings and submissions in the case before me. Further, I consider that it has a bearing on Justice Gleason's finding in *Hamdard FCA 2014*, at para 28, to the effect that the trademarks in issue are not just the word AJIT but rather the word and its stylization that both papers use as their logos. I find what is at issue in this second redetermination, at least as of December 28, 2012, is the stylized version of the word AJIT used by the parties.

[40] Hamdard Trust applied in 2010 to register the word mark AJIT under application No. 1487122 for printed publications and newspapers (as amended). Further to Navsun's opposition, the Registrar of Trademarks refused the application on the basis of non-distinctiveness. The material date as of which the Registrar assessed the distinctiveness of Hamdard Trust's applied for trademark AJIT was the date of filing of the opposition, December 28, 2012. The Registrar found that Navsun's mark AJIT was known sufficiently by such date to negate the distinctiveness of the word mark AJIT in the hands of Hamdard Trust, citing *Bojangles International LLC v Bojangles Café Ltd*, (2006) 48 CPR (4th) 427 (2006 FC 657 [*Bojangles*] at para 34). Thus, the Registrar refused the application: *Navsun Holdings Ltd v Sadhu Singh Hamdard Trust*, 2015 TMOB 214 [*Navsun TMOB 2015*] at para 41. Hamdard Trust's appeals to the Federal Court (2018 FC 42) and Federal Court of Appeal (2019 FCA 10) were dismissed, as was its application for leave to appeal to the Supreme Court of Canada.

IV. Issues to be Redetermined

[41] Before framing the issues to be redetermined, I note the following points no longer are in dispute based on the above procedural history:

- the determination of this matter as a summary trial on affidavit evidence filed and cross-examined by both parties;
- adoption of summaries of affidavit and cross-examination evidence, as well as portions of the reasons, from *Hamdard FC 2014* and *Hamdard FC 2018: Hamdard FCA 2019*, at para 16;
- copyright infringement with respect to Navsun’s Original Logo: *Hamdard FC 2018*, at para 79; and nominal damages of \$5,000 for such infringement; *Hamdard FCA 2019*, at para 63;
- copyright infringement with respect to Navsun’s Modified Logo (Hamdard Trust did not pursue such claim before the Federal Court on the first redetermination because of the PSA): *Hamdard FCA 2019*, at para 11, and *Hamdard FC 2018* at para 76;
- that Navsun’s internet domain name *www.ajitweekly.com* is not confusingly similar to Hamdard Trust’s Logo: *Hamdard FCA 2019*, at para 32;
- the existence of goodwill in connection with Hamdard Trust’s paragraph 7(b) claim: *Hamdard FCA 2019*, at paras 47-50;
- that Navsun offered no credible explanation for its decision to use AJIT in Canada when it launched *Ajit Weekly* in 1993: *Hamdard FCA 2019*, at para 52; and
- the Defendants’ counterclaim: *Hamdard FCA 2019*, at paras 55-56.

[42] In addition to the above points, the Plaintiff agreed at the rehearing of the matter before me that paragraph 7(c) of the *Trademarks Act* also no longer is left for redetermination. I note, in any event, that the thrice Amended Statement of Claim does not contain any claim based on such provision.

[43] The following overarching issues thus remain for the second redetermination of this matter:

- A. *Have the Defendants engaged in passing off within the meaning of paragraph 7(b) of the Trademarks Act?*
- B. *Have the Defendants infringed Hamdard Trust's Logo within the meaning of Section 19 of the Trademarks Act?*
- C. *Have the Defendants infringed Hamdard Trust's Logo within the meaning of Section 20 of the Trademarks Act?*
- D. *Have the Defendants depreciated whatever goodwill attaches Hamdard Trust's Logo within the meaning of Section 22 of the Trademarks Act?*
- E. *What remedies, if any, are appropriate in the circumstances?*

[44] The first question must be determined with regard to Navsun's Original Logo and Navsun's Modified Logo, while second, third and fourth questions are to be determined with reference to Hamdard Trust's Logo as registered under registration No. TMA914925 dated September 23, 2015 and Navsun's Modified Logo which Navsun has used in Canada since September 2009.

V. Relevant Provisions

[45] See Annex "A" below.

VI. Parties' Evidence

[46] Because nothing precludes me from adopting the evidentiary summaries of the prior proceedings (*Hamdard FCA 2019*, at para 16), I do so. See Annex "B" for a list of the affidavits

the parties rely on; see Annex “C” for the summaries of the affidavits and cross-examinations, including relevant portions of additional affidavits not previously summarized.

VII. Analysis

A. *Passing Off – Paragraph 7(b)*

(1) General Principles

[47] The *Trademarks Act* regulates both registered and unregistered trademarks. More specifically, paragraph 7(b) is directed to the enforcement of trademarks and trade names in Canada. “[T]he civil remedy in s. 7(b) protects the goodwill associated with trade-marks and is directed to avoiding consumer confusion through use of trade-marks”: *Kirkbi AG v Ritvik Holdings Inc*, 2005 SCC 65 [*Kirkbi*] at para 35. As noted by Justice Laskin, it is a requirement that the Plaintiff prove “possession of a valid and enforceable trademark, whether registered or unregistered, at the time the defendant first began directing public attention to its own goods and services”: *Hamdard FCA 2019*, above at para 39. Apart from the amendment of the word “wares” to “goods” and the formal repeal of paragraph 7(e), section 7 has remained substantially the same from the time when the Plaintiff commenced this lawsuit in 2010 to the present, including the recent amendments to the *Trademarks Act* that came into force in June 2019.

[48] In order to succeed in an action for passing off, a plaintiff must establish three elements: the existence of goodwill; deception to the public because of a misrepresentation; and actual or potential damage to the plaintiff. Greater detail about these prerequisites can be found in *Ciba-Geigy Canada Ltd v Apotex Inc*, 1992 CanLII 33 (SCC), [1992] 3 SCR 120 [*Ciba-Geigy*] at 132,

citing *Reckitt & Colman Products Ltd v Borden Inc*, [1990] 1 All ER 873 at 880. Paraphrasing, a plaintiff must establish, more specifically, that:

- (1) there exists goodwill or reputation attached to the goods or services supplied by the plaintiff, in the mind of the purchasing public, by reason of association with the identifying get up, such as a brand, recognized by the public as distinctive of the plaintiff's goods or services;
- (2) the defendant has made a misrepresentation to the public (whether intentional or not) resulting in or likely to result in the public concluding the defendant's goods or services are those of the plaintiff; and
- (3) the plaintiff has suffered or likely will suffer damage as a result of the erroneous belief caused by the defendant's misrepresentation regarding the source of the goods or services.

[49] In my view, inherent in (1) above is the threshold requirement for a plaintiff to establish that it has used its trademark to distinguish its goods and services from those of others, thus resulting in a valid and enforceable trademark, whether registered or unregistered, at the time the defendant started to direct public attention to its own goods and services: *Hamdard FCA 2019*, at para 39, citing *Nissan Canada Inc v BMW Canada Inc.*, 2007 FCA 255 at paras 15-18. A plaintiff who does not meet this minimum threshold cannot succeed in preventing others from using that mark or name: *Brewster Transport Co v Rocky Mountain Tours & Transport Co*, 1930 CanLII 36 (SCC), [1931] SCR 336 at pages 339-340.

[50] A trademark's distinctiveness resides in its ability "to indicate the source of a particular product, process or service in a distinctive manner, so that, ideally, consumers know what they are buying and from whom": *Kirkbi AG v Ritvik Holdings Inc*, 2005 SCC 65 [*Kirkbi*] at para 39, [2005] 3 SCR 302. While a trademark's traditional role was to create a link in the prospective buyer's mind between the product and the producer, it has come to represent not only a guarantee of origin but also an assurance to the consumer that the quality will be what they have

come to associate with the mark (paraphrasing *Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22 [*Mattel*] at para 2, [2006] 1 SCR 772).

[51] An assessment of the issue of deception to the public because of a defendant's alleged misrepresentation necessitates consideration of the likelihood of confusion under section 6 of the *Trademarks Act: Hamdard FCA 2019*, at para 53. As noted more recently by the Federal Court of Appeal, "[t]he Supreme Court made it clear in *Masterpiece* that all factors set out in subsection 6(5) and surrounding circumstances must be assessed and balanced unless the marks do not resemble one another": *Loblaws Inc v Columbia Insurance Company*, 2021 FCA 29 at para 11, citing *Masterpiece Inc v Alavida Lifestyles Inc.*, 2011 SCC 27 [*Masterpiece*] at para 49. The confusion test to be applied can be summed up generally as follows: "[it] is a matter of first impression in the mind of a casual consumer somewhat in a hurry who sees the [mark] at a time when he or she has no more than an imperfect recollection of the [prior] trade-marks and does not pause to give the matter any detailed consideration or scrutiny, nor to examine closely the similarities and differences between the marks" *Veuve Clicquot*, at para 20.

[52] With these principles in mind, I find Hamdard Trust has established the Defendants engaged in passing off with respect to Navsun's Original Logo but not with respect to Navsun's Modified Logo, for the reasons below.

(2) Navsun's Original Logo

(a) *Threshold – Distinctiveness*

[53] The passing off enquiry begins with a consideration of whether Hamdard Trust had a protectable right in Canada in 1993 when Navsun's predecessors launched *Ajit Weekly* and, thus, began to direct public attention to their newspaper as contemplated by paragraph 7(b) of the *Trademarks Act*. I find that it did, having regard to the three criteria for establishing the distinctiveness described by Justice Noël, that: a mark and product are associated; the trademark owner uses the association between the mark and the product; and the association enables the owner to distinguish their product from those of others: *Bojangles*, at para 70 citing *Havana House Cigar and Tobacco Merchants Ltd v Skyway Cigar Store* (1998), 1998 CanLII 7773 (FC), 147 FTR 54, [1998] FCJ No 678 (FC), rev'd on other grounds by (1999), 251 NR 215, [1999] FCJ No 1749 (FCA). In 1993, Hamdard Trust's Logo was associated with Punjabi-language newspapers; Hamdard Trust used that association to sell its *Daily Ajit* newspapers, and the association enabled Hamdard Trust to distinguish its *Daily Ajit* newspapers from those of others.

[54] Contrary to Navsun's argument, in my view the word AJIT, whether in Punjabi or Latin characters, is inherently distinctive in connection with newspapers and related goods and services. It has no meaning in and of itself in relation to such goods and services and, thus, it is capable of serving as a source indicator, notwithstanding how common AJIT may be as a first or given name of individuals or as the name of other businesses in other fields or industries. That said, the proliferation of AJIT as a name of individuals and businesses can have an impact on its strength as a trademark.

[55] Navsun succeeded, however, in its opposition to Hamdard Trust's application to register the word mark AJIT, not because AJIT lacks inherent distinctiveness. Rather, as of the date

Navsun opposed the application on December 28, 2012, Navsun had acquired a significant, or at least sufficient, reputation in Canada in Navsun's Original Logo to displace any earlier reputation Hamdard Trust may have had in the word AJIT in connection with its *Daily Ajit* newspaper: *Navsun TMOB 2015*, at paras 37-42. In addition, the Registrar noted, "it appears that the parties are on common ground in accepting that each party uses the English term AJIT as a trade-mark and also uses the Punjabi script form of the word 'ajit' as a trade-mark": *Navsun TMOB 2015*, at para 25.

[56] I find based on the evidence in the case before me, the parties have used the word AJIT both in Punjabi and Latin characters, to varying degrees but as part of, or in connection with, their respective logos. As Justice Gleason concluded, the marks at issue in the case are not simply the word AJIT but, rather, the word and the stylized way in which it is written and used as logos by both parties: *Hamdard FCA 2016*, at para 28.

[57] Turning to the situation in 1993, I agree that Hamdard Trust had very few subscribers for its *Daily Ajit* newspaper in Canada. This is not, however, the sole measure of the distinctiveness of Hamdard Trust's Logo nor of *Daily Ajit's* reputation (as opposed to "acquired distinctiveness") in Canada. Further, I disagree with Navsun that such reputation is limited by or dependent on whatever "acquired distinctiveness" arose through the use of Hamdard Trust's Logo in Canada (because of the small number of *Daily Ajit* subscribers).

[58] As noted by Justice Southcott in Hamdard Trust's appeal to the Federal Court of the Registrar's decision in *Navsun TMOB 2015*, conclusions about *Daily Ajit's* possible reputation

and resulting goodwill, in the context of passing off, among a wider group in Canada than the few subscribers who bought the print version of the paper, “need not arise from the plaintiff’s use of the relevant trade-mark in the defendant’s market[; ...] in assessing a passing off claim, the distinctiveness of the mark relevant to the confusion assessment can also be acquired through use of the plaintiff’s mark outside Canada”: *Trust v Navsun Holdings Ltd*, 2018 FC 42 [*Trust FC 2018*] at para 39. Justice Southcott’s view in this regard was formulated with reference to Justice Gleason’s decision in *Hamdard FCA 2016* (at paras 25-27 of the latter decision).

[59] Navsun also points to a lack of evidence of any advertising of *Daily Ajit* newspaper in Canada prior to 1993. As noted by Justice Noël, however, “[t]he reputation of the mark can be proven by any means, and is not restricted to the specific means listed in section 5 of the Act, and it is for the decision-maker to weigh the evidence on a case-by-case basis”: *Bojangles*, at para 33. Although Justice Noël made this observation in the context of trademark opposition proceedings, I find nonetheless that, in the context of passing off proceedings, it was open to Hamdard Trust to establish the reputation of Hamdard Trust’s Logo in Canada in 1993, at the time when Navsun started to direct attention to its newly launched *Ajit Weekly* newspaper, by means other than (or in addition to) those listed in Section 5 of the *Trademarks Act*.

[60] Both parties’ affiants, including those residing in Canada, attested to the reputation of Hamdard Trust’s *Daily Ajit* Punjabi-language newspaper. It was the largest Punjabi-language newspaper in the world. It was well-known, if not famous, in India where it had been published for almost 40 years by 1993 under the name AJIT or a name containing AJIT (i.e. the initial name *Ajit Patrika*), and where Hamdard Trust’s Logo had been used for about 9 years by then. In

the circumstances, I find it reasonable to infer that *Daily Ajit*, at the relevant time, thus was known or had a wider reputation among the sizable Punjabi diaspora in Canada, and in particular among the relevant universe of consumers being readers of Punjabi-language newspapers, than just those subscribers to the physical or hard copy newspaper. Satpaul Singh Johal's affidavit of February 21, 2014 attests that, according to Canadian census data he reviewed, the people who gave Punjabi as their mother tongue numbered: 136,460 in 1991; 201,780 in 1996; 271,220 in 2001; 382,585 in 2006; and more than 450,000 in 2011. Punjabi speakers are mostly immigrants from the Punjab state in India or their descendants. The parties' evidence does not address, however, the familiarity of such descendants in Canada with *Daily Ajit*.

[61] The possible contemporaneous or overlapping existence of a Hindi-language publication with the name *Ajeet Patrika* does not detract, in my view, from *Daily Ajit*'s reputation, or negate the distinctiveness of Hamdard Trust's Logo, particularly in the absence of any details concerning *Ajeet Patrika*'s circulation, readership and reputation including whether the latter has any reputation in Canada. Nor does the existence of other people and businesses in India bearing the name "Ajit," especially absent evidence that they occupy the newspaper, magazine or similar media publishing sphere, the extent to which they may do so, and whether their reach includes Canada.

[62] Further, as mentioned above, the Federal Court of Appeal found no palpable and overriding error in the determination that Navsun provided no credible explanation for its decision to use "Ajit" in Canada when it launched *Ajit Weekly*: *Hamdard FCA 2019*, at para 52, referring to *Hamdard FC 2018*, at para 36. Having considered the totality of the evidence,

including the transcript of Kanwar (Sunny) Bains' cross-examination on January 29, 2018, I agree with Justice Fothergill's determination in this regard. Mr. Bains admitted to reading *Daily Ajit* newspaper "off and on" when growing up in the Punjab; in addition, he agreed that readers of *Ajit Weekly* newspaper "are entirely immigrants from the Punjab," who "have been arriving in Canada continuously since [he] began to publish [his] newspaper." Further, the Defendants did not allege independent creation or derivation of the stylized Punjabi word AJIT in Navsun's Original Logo.

[63] As held by the Registrar of Trademarks, "... it is likely that the opponent [Navsun] had knowledge of it [*Daily Ajit*] when the opponent adopted the mark AJIT in Canada[; i]t also is likely that the opponent's readers in Canada were, and continue to be, aware that a newspaper of the same name was being published in India": *Navsun TMOB 2015*, at para 22. While this was not fatal to Navsun's success, on the basis of non-distinctiveness, in its opposition to Hamdard Trust's application for the word mark AJIT, this does not equate, in my view, to a finding that the word AJIT is not inherently distinctive. For all these reasons, I conclude Hamdard Trust had a protectable right in Canada in 1993 in that Hamdard Trust's Logo, comprised of the word AJIT in stylized form, was distinctive of Hamdard Trust as the source of the *Daily Ajit* newspaper.

Whether that right was sustainable in Canada in the long term, is a different issue.

(b) *Goodwill*

[64] Turning to the three elements that a plaintiff must establish in order to succeed in an action for passing off, in my view not much more needs to be said about the existence of reputation, and hence, goodwill in support of this claim in this case. As noted by Daniel R

Bereskin, QC in *The Canadian Law of Unfair Competition* (Toronto: Thomson Reuters Canada Limited, 2020) at §5.8, page 68: “Reputation [from which goodwill derives] refers to the notoriety of a trademark, indicating a connection in the mind of the public between the business of the trademark owner and the associated goods or services.” I agree with Justice Fothergill that Hamdard Trust’s Logo enjoyed a high degree of recognition (or, a significant reputation) among the relevant universe of consumers and, together with its distinctiveness, sufficient goodwill in Canada in 1993 to support a passing off claim: Hamdard FC 2018, at para 36.

(c) *Misrepresentation – Likelihood of Confusion*

[65] The second element of the passing off test, deception to the public because of a misrepresentation, involves a consideration of whether the Defendants’ use of Navsun’s Original Logo likely was confusing with Hamdard Trust’s Logo within the meaning of Subsection 6(2) of the *Trademarks Act*. Examining the non-exhaustive factors described in Subsection 6(5), I find that it was. In addition to all the surrounding circumstances, these factors include:

- the inherent distinctiveness of the trademarks and the extent to which they have become known;
- the length of time the trademarks have been in use;
- the nature of the goods, services or business;
- the nature of the trade; and
- the degree of resemblance between the trademarks, including in appearance or sound or in the ideas suggested by them.

[66] The Supreme Court of Canada has stated that the resemblance factor often has the greatest effect on the confusion analysis: *Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22 [*Mattel*] at para 54; *Masterpiece*, at para 49. The term “degree of resemblance,” however, implies that a likelihood of confusion does not arise solely from identical trademarks; marks with

some differences nonetheless may result in likely confusion, thus necessitating a consideration of all the Subsection 6(5) factors including all the surrounding circumstances: *Masterpiece*, at para 62. The likelihood of confusion is to be determined on a balance of probabilities. Each situation is fact and context specific: *Veuve Clicquot*, at para 21. As noted above, the test to be applied is one of first impression in the mind of a casual consumer somewhat in a hurry who has no more than an imperfect recollection of the prior trademark and who does not stop to consider the differences and similarities between the marks in issue: *Veuve Clicquot*, at para 20.

[67] I find that the design element of Navsun's Original Logo, being the Punjabi word AJIT in stylized form, was identical to Hamdard Trust's Logo. In other words, there was a strong degree of resemblance favouring Hamdard Trust. In addition, I am not persuaded that the presence of the word WEEKLY, signifying the frequency of publication of *Ajit Weekly*, detracts from the similarity of the ideas suggested by the parties' respective trademarks. As a surrounding circumstance, Hamdard Trust's *Daily Ajit* newspaper also was associated with a term signifying frequency of publication, namely, "Daily." Although the word "Daily" appears to have been dropped from the *Daily Ajit* masthead by 2016, this is not a relevant consideration regarding the passing off assessment in so far as Navsun's Original Logo is concerned. In any event, as Kanwar (Sunny) Bains agreed during his cross-examination on January 29, 2018, there is nothing preventing a daily newspaper from publishing a weekly newspaper or weekly edition of their daily newspaper.

[68] As discussed above, I find the word AJIT is inherently distinctive. In my view, the extent to which the parties' respective trademarks would have become known in Canada as of 1993,

and the length of time the trademarks had been in use then, are factors that favour Hamdard Trust. As for the nature of the goods, services or business, I find they are essentially identical and thus, this factor also favours Hamdard Trust.

[69] Regarding the nature of the trade, on cross-examination in 2014, Dr. Barjinder Singh Hamdard testified that the *Daily Ajit* newspaper is a “professional paper” and not a free “grocery-shop paper.” It is sent by post to subscribers outside India, in addition to being available online. Otherwise, I find Dr. Hamdard’s answers were vague about plans to come to Canada, to print or publish the newspaper here, and to distribute the paper “as per the system, the distribution system of that country.” There would have been no availability, however, of either newspaper online in 1993 when Navsun’s predecessors launched *Ajit Weekly* in Canada. I thus find this factor neutral or somewhat favours the Defendants, when considered in the context of the reputation of *Daily Ajit* in Canada at that time.

[70] As a surrounding circumstance, Hamdard Trust adduced several affidavits attesting to actual confusion among readers of *Ajit Weekly* who, familiar with *Daily Ajit*, initially thought the latter newspaper was associated with *Daily Ajit* or published by the same publisher. Additionally, some of Hamdard Trust’s affiants were offended by ads for mystical services or sorcery that appeared in *Ajit Weekly*, as contrasted with *Daily Ajit*.

[71] Navsun argues that the relevance of such evidence is diminished because it is anecdotal and that there are significant credibility issues because some of the affiants were friends or acquaintances of Hamdard Trust’s correspondents in Canada. I note, however, the Defendants

also seek to rely on the anecdotal evidence of several affiants (albeit fewer than the number of Hamdard Trust's affiants) who, familiar with *Daily Ajit*, were not confused when confronted with *Ajit Weekly* in the Canadian marketplace.

[72] I find that the affiants of both parties, for the most part, attested to their familiarity with, and the reputation of, *Daily Ajit* based on years, if not decades, of readership in India, before they came to Canada and discovered *Ajit Weekly*. In addition, I note that no evidence was adduced of any confusion or lack of confusion among readers of the online content of either newspaper. I am not persuaded in the circumstances that either party's selected affiants are reflective of what the relevant universe of consumers thinks (i.e. the first impression of casual consumers somewhat in a hurry who see Navsun's Original Logo at a time when they have no more than an imperfect recollection of Hamdard Trust's Logo and do not pause to give the matter any detailed consideration or scrutiny, nor to examine closely the similarities and differences between the marks). Accordingly, in my view, this factor weighs in neither party's favour.

(d) *Actual or Likely Damage*

[73] I note it is not necessary that Hamdard Trust and Navsun to have been or be in direct competition for Hamdard Trust to suffer injury: *Orkin*. Further, I find Navsun's decision to use the name "Ajit" when it launched *Ajit Weekly* in Canada, without any credible basis and in light of *Daily Ajit*'s reputation in Canada which preceded it, "supports the inference that the name had commercial value in Canada at that time...": *Hamdard FC 2018*, at para 36, citing *Orkin*. It also meant that Hamdard Trust effectively "lost control over the impact of its trade name in the

defendant's jurisdiction": *Orkin; Cheung v Target Event Production Ltd*, 2010 FCA 255

[*Cheung*] at paras 26-28. As held in *Cheung* at para 28, "[s]uch loss is sufficient to ground the third component of the tripartite test" for passing off.

[74] I find, however, Hamdard Trust has failed to establish that it suffered any significant damage by such loss of control in Canada. Although the parties have engaged in related litigation in other jurisdictions, including the US and the UK, and Hamdard Trust made some efforts to complain about Navsun's activities involving AJIT in Canada, nonetheless Hamdard Trust did not pursue its claims against the Defendants in Canadian courts until 2010, about 17 years after *Ajit Weekly* was launched in Canada (and 15 years after *Ajit Weekly* came to the attention of *Daily Ajit's* then Editor-in-Chief). Further, as of 2014, Hamdard Trust still had no concrete plans to pursue printing or publishing and distribution of *Daily Ajit* within Canada. In addition, the PSA granted Navsun a short licence between September 15, 2009 until December 31, 2009 to use Hamdard Trust's Logo, thus providing Navsun with at least a partial defence against Hamdard Trust's passing off claim for that limited period of time.

[75] On the other hand, Navsun also did not take any steps to prevent Hamdard Trust from sending *Daily Ajit* by post to Canadian subscribers or making *Daily Ajit* content available to Canadians through its mobile apps, even though Kanwar (Sunny) Bains testified, in cross-examination on January 29, 2018, that AJIT distinguishes *Ajit Weekly* from other Punjabi-language newspapers and that Navsun believes it can stop other newspapers from using AJIT in their name because it has a well-established business for over 20-plus years.

(3) Navsun's Modified Logo

[76] I find that whatever distinctiveness Hamdard Trust's Logo enjoyed in Canada in 1993 and in subsequent years was displaced by late 2009, some 16 years later, when Navsun adopted Navsun's Modified Logo pursuant to the PSA. The parties stipulated in the PSA that Navsun's Modified Logo is "clearly distinguishable to the average person" in form, letter thickness, and general appearance, as well as colour, from Hamdard Trust's Logo.

[77] The parties also agreed, however, that such stipulation "shall [not] have a preclusive effect or be granted any weight whatsoever with respect to the issue of 'likelihood of confusion' as applied to [Hamdard] Trust's non-copyright claims in this Action or in other contexts." With this in mind, I turn to the situation in September 2009 when Navsun started to direct public attention to *Ajit Weekly* with Navsun's Modified Logo. In my view, Hamdard Trust has failed to establish that as of 2009, a **substantial segment** of the Canadian market, or more specifically Punjabi-language readers in Canada, associated Navsun's Modified Logo or AJIT with Hamdard Trust, rather than with Navsun, notwithstanding evidence of some confusion among the relevant target market: *Bojangles*, at para 27, citing *Bousquet v Barmish Inc*, [1991] FCJ No 813 (F.C.), aff'd [1993] FCJ No. 34 (FCA). To paraphrase Justice Noël, although I do not doubt the importance of Hamdard Trust's business – with daily circulation of *Daily Ajit* exceeding 400,000 by 2016 and some international distribution and online readership, including Canada – this does not necessarily translate into a "substantial, sufficient or significant reputation in Canada" relative to Navsun's Modified Logo by this point in time: *Bojangles*, at para 52.

[78] Based on the totality of the evidence, I am not persuaded that Hamdard Trust's Logo was known sufficiently in Canada in 2009 relative to Navsun's Modified Logo to negate its

distinctiveness. I find in particular that the evidence does not meet the third of three criteria for establishing the distinctiveness of Hamdard Trust's Logo described by Justice Noël, namely, that the association between the mark and the product enables the owner to distinguish their product from those of others: *Bojangles*, at para 70. Rather, the evidence favours the distinctiveness of Navsun's Modified Logo as signifying, to the target Canadian market, a publisher in Canada as the source of the *Ajit Weekly* newspaper.

[79] I thus conclude that Hamdard Trust has not met the threshold distinctiveness required to succeed in its claim for passing off in respect of Navsun's Modified Logo.

B. *Infringement – Section 19*

[80] As noted by the Federal Court of Appeal, “[t]he relevant question in assessing the section 19 claim, ... was not whether Navsun's mark was confusingly similar to Hamdard Trust's registered mark, but whether the two marks were identical; ...[i]n the section 19 context, identical simply means the same, not merely similar”: *Hamdard FCA 2019*, at paras 20 and 22. In assessing whether the trademarks here are identical, it is necessary to take into account that, as this Court stated in the first appeal (at para. 28), “[t]he trade-marks in this case are [...] not simply the word ‘Ajit’ but, rather, the word and the stylized way in which it is written, that both papers use as their logos.”: *Hamdard FCA 2019*, at para 22

[81] Because Navsun's Modified Logo had been used for about six years in Canada when Hamdard Trust's Logo was registered in 2015, and because these logos are not identical, I find Hamdard Trust cannot succeed in its claim for infringement under Section 19.

C. *Infringement – Section 20*

[82] The relevant question in assessing the Section 20 claim is whether Navsun's Modified Logo is confusingly similar, and hence likely to be confused, with Hamdard Trust's Logo. I find that it is not likely to be so confused. Actual confusion is not a prerequisite for success in respect of such claim. As with the misrepresentation element of the passing off claim, the likelihood of confusion is to be assessed with reference to Subsections 6(2) and 6(5) of the *Trademarks Act*. The relevant date, however, is the date of the hearing before this Court on September 10, 2020: *Altacor Inc v Nutravite Pharmaceuticals Inc*, 2005 FCA 269 at paras 12, 14-15.

[83] Regarding Paragraph 6(5)(a), inherent distinctiveness has been canvassed already and is applicable to the assessment in respect of the Section 20 claim. Regarding the extent to which the parties' respective trademarks have become known in Canada, I find, based on the totality of the evidence, that *Ajit Weekly* and Navsun's Modified Logo had become distinctive and fairly well known in Canada among the target market of Punjabi-language readers, having regard to the volume of hard copy and online readership of *Ajit Weekly* newspaper reached by 2014. I thus find this factor tipped in favour of Navsun.

[84] Regarding Paragraph 6(5)(b), the length of time the trademarks have been in use still favours Hamdard Trust but less so, in my view, because of the length of time Navsun's Modified Logo has been in use in Canada at this point, namely, more than ten years.

[85] Regarding Paragraphs 6(5)(c) and (d), I find my analyses above, regarding these factors in the passing off context, are applicable in the infringement context. One change that potentially impacts the consideration of Paragraph 6(5)(d) is the advent of online accessibility or availability for both newspapers. In my view, this could diminish somewhat the differences in the channels of trade. That said, neither party adduced evidence regarding readers who read only the online version or content of their newspaper and have no familiarity with the hard copy version. Accordingly, I find it has not been demonstrated that this change affects overall the nature of the trade analysis.

[86] Regarding Paragraph 6(5)(e), arguably the more important factor in assessing infringement in this case, I find that on balance that the degree of resemblance factor does not favour Hamdard Trust. As of 2015 when Hamdard Trust's Logo was registered, and as of the date of the hearing of this matter before me, its distinguishing features were, and hence its strength resided largely in, the hook extending to the left above the Punjabi word AJIT and the flattened bottom of the last letter. These features are absent from Navsun's Modified Logo which no longer has a solid bar across the top of several characters (as contrasted with Hamdard Trust's Logo). Further Navsun's Modified Logo involves a different stylization overall of the individual characters (Nanak heavy font) and is coupled with the words AJIT WEEKLY in Latin characters.

[87] While I am mindful that the test for confusion is one of imperfect recollection, rather than a side-by-side comparison of the parties' logos, I find that several surrounding circumstances mitigate any likelihood of confusion resulting from some resemblance of the parties' logos

owing to the influence of the common name AJIT on their respective design elements. First among these is the Registrar's and Federal Courts' rulings concerning the non-distinctiveness of AJIT *per se* in the hands of Hamdard Trust.

[88] Further, although the PSA is not to have a preclusive effect in terms of, or granted any weight with respect to, Hamdard Trust's Section 20 claim (i.e. its "non-copyright claims... in other contexts"), the negotiation of the PSA had a direct effect on Navsun's adoption of Navsun's Modified Logo, particularly with respect to the colour green which Navsun adopted, instead of purple, with Hamdard Trust's knowledge and approval.

[89] In addition, the parties agreed that as of January 1, 2010, after the expiry of the limited licence granted to Navsun regarding Hamdard Trust's Logo, all logos used by Navsun must be different and clearly distinguishable (to the average person) in form, letter thickness, and general appearance, as well as colour (in particular, red and variations) from Hamdard Trust's Logo (which has been displayed in the colour red for more than 30 years when it was adopted in 1984). The parties stipulated that Navsun's Modified Logo is clearly distinguishable, "notwithstanding [Hamdard] Trust's other intellectual property and common law claims in this action." Such contractual term cannot displace, however, the Court's ability to consider whether Navsun's Modified Logo in fact is distinguishable or not. The concept of "distinguishability" or the ability of a logo to "distinguish" is a trademark one, rather than a copyright concept such as independent creation, authorship or originality.

[90] Despite references to “in this action” in the PSA, the parties appear to treat the agreement as having application in Canada. For example, the PSA contains a mechanism for Navsun to change its logo, subject to Hamdard Trust’s approval, and the parties agreed to work together in good faith to ensure any new logos are compliant with the PSA. The parties also agreed that any proposed changes would not involve the colours red, orange, pink, yellow, white, or variations of these colours. The change from the colour purple to green, including with respect to Navsun’s Modified Logo as used in Canada, occurred essentially pursuant to the terms of the PSA but before it was executed. Further, Hamdard relied on the PSA after it had been executed to complain about the manner in which Navsun’s Original Logo continued to be displayed on some newspaper distribution boxes in the greater Toronto area in contravention of the PSA.

[91] Thus, notwithstanding the PSA’s settlement of Hamdard Trust’s copyright claim in respect of Hamdard Trust’s Logo, the PSA also seems to have been resorted to by the parties to govern the appearance of Navsun’s Modified Logo, whether from a copyright or trademark perspective. Further, although the trademark registration of Hamdard Trust’s Logo is not limited by a colour claim, nonetheless the PSA specifically addresses the colours Navsun is permitted to use (green) and those which it is not permitted to use (red, orange, pink, yellow, white, or variations).

[92] As a final surrounding circumstance, my analysis above of the parties’ affidavit (and cross-examination) evidence of confusion and no confusion respectively, in the passing off context, is equally applicable in the context of the infringement assessment. In my view, neither party’s selected affiants are reflective of what the relevant universe of consumers thinks.

[93] Having regard to all the above Section 20 considerations, I conclude that there is no likelihood of confusion between Hamdard Trust's Logo and Navsun's Modified Logo and, hence, no infringement of Hamdard Trust's registered trademark by the Defendants.

D. *Depreciation of Goodwill – Section 22*

[94] In my view, Hamdard Trust's Logo was not sufficiently well known in Canada at the material time to have significant goodwill to support a claim of depreciation of that goodwill. Thus, the test for depreciation of goodwill described below has not been met in this case.

[95] As noted by the Federal Court of Appeal, my conclusion regarding the lack of infringement under Section 20 is not an answer to the question of whether Navsun has depreciated the goodwill attached to Hamdard Trust's Logo: *Hamdard FCA 2019*, at para 34. A finding of confusion under Subsection 6(2) is not a prerequisite to finding depreciation of goodwill under Section 22, although having a registered trademark is.

[96] The four-part, conjunctive test for depreciation of goodwill is described by Justice Binnie as follows: (i) a defendant's use of the claimant's registered trademark with goods or services, regardless whether they are competitive with those of the claimant; (ii) the claimant's registered trademark is sufficiently well known to have a significant degree of goodwill attached to it, although there is no requirement that the trademark be well known or famous; (iii) the defendant's use of the trademark was likely to have an effect on that goodwill (in other words, there was a linkage); and (iv) the likely effect is to depreciate or cause damage to the value of the goodwill: *Veuve Clicquot*, at para 46. Put another way, Hamdard Trust need only demonstrate

that the Defendants have used a mark sufficiently similar to Hamdard Trust's Logo to evoke in the relevant universe of consumers a mental association (or linkage) of the two marks that is likely to depreciate the value of the (established, significant) goodwill attaching to Hamdard Trust's Logo: *Veuve Clicquot*, at para 38.

[97] Relevant factors to consider in determining the existence of "significant goodwill" include the degree of recognition of the mark within the relevant universe of consumers, the volume of sales and the depth of market penetration of products associated with the claimant's mark, the extent and duration of advertising and publicity accorded the claimant's mark, the geographic reach of the claimant's mark, its degree of inherent or acquired distinctiveness, whether products associated with the claimant's mark are confined to a narrow or specialized channel of trade, or move in multiple channels, and the extent to which the mark is identified with a particular quality: *Veuve Clicquot*, at para 54.

[98] Justice Fothergill considered these factors in concluding that Hamdard Trust's Logo enjoyed a high degree of recognition among the relevant universe of consumers and, together with its distinctiveness, sufficient goodwill in Canada in 1993 to support a passing off claim in respect of Navsun's Original Logo. Based on the evidence before me, I do not disagree with his assessments: *Hamdard FC 2018*, at para 35. The question, however, is whether Hamdard Trust's Logo continued to enjoy sufficient goodwill in 2015 and beyond to support a current claim of depreciation of goodwill in Canada. I conclude that it did not. As I found regarding Hamdard Trust's passing off claim against Navsun's Modified Logo, the evidence favours (and is reinforced with the passage of time from 2009 to 2015 and, further, to the date of the hearing) the

distinctiveness of Navsun's Modified Logo as signifying, to the target Canadian market, a publisher in Canada as the source of the *Ajit Weekly* newspaper.

E. *Remedies*

(1) Injunctive Relief

[99] In this second redetermination, Hamdard Trust is successful in its claim for passing off, but only in respect of Navsun's Original Logo. Both Navsun's Modified Logo and any proposed changes to such logo are subject to the requirements agreed upon by the parties under the PSA. Further, there is no evidence that Navsun intends to revert to Navsun's Original Logo. I therefore find that the injunctive relief Hamdard Trust seeks is not warranted in the circumstances. In my view, this finding obviates the need to consider delay, laches and acquiescence pleaded by the Defendants in their Second Amended Statement of Defence and Counterclaim.

(2) Quantum of Damages

[100] The remaining issue is the appropriate quantum of damages in the circumstances, further to Hamdard Trust's successful claim of passing off in respect of Navsun's Original Logo. As I found above, Hamdard Trust has failed to establish that it suffered any significant damage to its business by the loss of control in Canada over the name AJIT and Hamdard Trust's Logo, thus warranting only a modest award of compensatory damages.

[101] As noted in *Orkin*, "the practical consequence of this [loss of control] is that the plaintiff is then vulnerable to losing the Ontario customers it now has as well as prospective Ontario

customers, with respect to the services provided in the United States[; a]lso it can result in Orkin being prevented from using its trade name in Ontario when it expands its business into Ontario”: *Orkin*.

[102] In the case before me, I find that Canadian circulation of *Daily Ajit* was low from the outset. There is no direct evidence that the decline from the high of 43 subscribers in 1991 to below 10 in more recent years was directly attributable to the Defendants and *Ajit Weekly*. Instead, Hamdard Trust’s evidence pointed to weak or “thin” circulation of the *Daily Ajit* newspaper beyond India because of late delivery resulting from large geographical distances, as well as the launch of its website in 2002 with the domain name www.ajitjalandhar.com. Further, online access to *Daily Ajit* commenced and grew in Canada from 2002 onward, notwithstanding the establishment of *Ajit Weekly* by that point in time.

[103] In addition, unlike the situation in *Orkin* where the plaintiff was engaged, at the time of trial, in discussions with another company for the purpose of establishing an operation in Canada, I found Hamdard Trust’s evidence about plans to come to Canada, to print or publish, and distribute, the *Daily Ajit* newspaper here were vague. Based on the evidence before me, nothing materialized in that respect in Canada in the 25 years from 1968, when there first were Canadian subscribers, until 1993 when *Ajit Weekly* launched in Canada, nor in the subsequent 17 years until the instant proceedings were commenced in 2010.

[104] As noted by Justice Pelletier (as he then was), “speculative and unproven damages must be deleted from the calculation”: *Ragdoll Productions (UK) Ltd v Jane Doe*, 2002 FCT 918

(CanLII) at para 40 [*Ragdoll*], [2003] 2 FC 120, citing Fox's *Canadian Law of Trade Marks and Unfair Competition*, at pp 648-9. The Court may take into account, however, "that there cannot be deceptive trading without inflicting some measure of damage on the goodwill; [d]ifficulty in assessing damages does not relieve the court from the duty of assessing them and doing the best it can": *Ragdoll*, at pp 648-9.

[105] Both Justices Pelletier and Fothergill canvassed cases where either modest compensatory or nominal damages were awarded in the absence of concrete evidence of actual losses sustained by the successful party: *Ragdoll*, at paras 42-45; *Hamdard FC 2018*, at paras 59-60.

[106] In light of the lack of evidence of any significant damage to Hamdard Trust's business, I find a modest compensatory award of \$10,000 for Hamdard Trust's loss of control in Canada over the name AJIT and Hamdard Trust's Logo is warranted in the circumstances. This award takes into account the period of July 2004, six years before Hamdard Trust commenced its action (in July 2010), to January 2010, as of when Navsun agreed to adopt Navsun's Modified Logo (although it in fact adopted Navsun's Modified Logo earlier in September 2009), but then subject to Navsun's defence relying on the limited licence regarding Hamdard Trust's Logo granted in the PSA from September to December 2009. Unlike the *Copyright Act*, the *Trademarks Act* does not contain a limitation period. I find, however, the six-year limitation period prescribed in Subsection 39(2) of the *Federal Courts Act*, RSC 1985, c F-7, is applicable.

[107] Hamdard Trust also seeks punitive damages in the amount of approximately \$1.45 million representing about two years' of the Defendants' revenues. In my view, a punitive damages award is not warranted in the circumstances.

[108] The applicable principle regarding punitive damages is that they "should only be awarded where the evidence shows that there has been high-handed, malicious, arbitrary or highly reprehensible conduct that departs to a marked degree from the ordinary standards of decent behaviour[;] [t]his is a high threshold": *Bauer Hockey Corp v Sport Masko Inc (Reebok-CCM Hockey)*, 2014 FCA 158 [*Bauer Hockey*] at para 26. Further, punitive damages are an exceptional remedy warranted only "where a party's conduct has been malicious, oppressive and highhanded and offends the court's sense of decency and where other remedies are not sufficient to accomplish the objectives of retribution, deterrence, and denunciation": *Young v Thakur*, 2019 FC 835, at para 52, citing *Whiten v Pilot Insurance Co*, 2002 SCC 18 at paras 36, 123.

[109] I am not satisfied that the Defendants' conduct in this case meets this high threshold. Further, Navsun cooperated with Hamdard Trust in changing Navsun's Original Logo to Navsun's Modified Logo and agreed to a mechanism for future, proposed changes.

VIII. Conclusion

[110] For the reasons above, I conclude that Hamdard Trust succeeds in its claim for passing off, but only in respect of Navsun's Original Logo, warranting compensatory damages in the amount of \$10,000, but only for the period July 2004 to September 2009, having regard to the applicable limitation and defence. I am not satisfied, however, that the Defendants' behaviour in

this case meets the high threshold for punitive damages. Nor am I satisfied that injunctive relief is warranted, given the discontinued use of Navsun's Original Logo and the adoption of Navsun's Modified Logo instead.

[111] Otherwise, Hamdard Trust's claims for infringement under Sections 19 and 20, and depreciation of goodwill under Section 22, in respect of Navsun's Modified Logo are dismissed.

[112] In light of the divided success in the second redetermination of this matter, no costs are awarded to any party.

JUDGMENT in T-1127-10

THIS COURT'S JUDGMENT is that:

1. The Defendants, Navsun Holdings Ltd and 6178235 Canada Inc [collectively, Navsun], are liable to the Plaintiff, Sadhu Singh Hamdard Trust [Hamdard Trust], for passing off for the period July 2004 to September 2009 regarding Hamdard Trust's Logo depicted on the masthead of Hamdard Trust's *Daily Ajit* newspaper since 1984, but only with respect to Navsun's Original Logo which was comprised of Hamdard Trust's Logo with the words AJIT WEEKLY underneath.
2. Navsun will pay Hamdard Trust the amount of \$10,000 as compensatory damages for such passing off.
3. Hamdard Trusts claims for passing off, trademark infringement and depreciation of goodwill in respect of Navsun's Modified Logo, with the stylized Punjabi word AJIT in the colour green above the words AJIT WEEKLY, which Navsun adopted in September 2009.
4. No costs are awarded to any party.

"Janet M. Fuhrer"

Judge

Annex “A”: Relevant Provisions

Trademarks Act, R.S.C., 1985 c. T-13
Loi sur les marques de commerce L.R.C. (1985), ch. T-13

<p>Interpretation</p> <p>Definitions</p> <p><i>distinctive</i>, in relation to a trademark, describes a trademark 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 that is adapted so to distinguish them; (<i>distinctive</i>)</p> <p><i>trademark</i> means</p> <p style="padding-left: 40px;">(a) a sign or combination of signs that is used or proposed to be used by a person for the purpose of distinguishing or so as to distinguish their goods or services from those of others, or</p> <p style="padding-left: 40px;">(b) a certification mark; (<i>marque de commerce</i>)</p> <p><i>trade name</i> means the name under which any business is carried on, whether or not it is the name of a corporation, a partnership or an individual; (<i>nom commercial</i>)</p>	<p>Définitions et interprétation</p> <p>Définitions</p> <p><i>distinctive</i> Se dit de la marque de commerce qui distingue véritablement les produits ou services en liaison avec lesquels elle est employée par son propriétaire de ceux d'autres personnes, ou qui est adaptée à les distinguer ainsi. (<i>distinctive</i>)</p> <p><i>marque de commerce</i> Selon le cas :</p> <p style="padding-left: 40px;">a) signe ou combinaison de signes qui est employé par une personne ou que celle-ci projette d'employer pour distinguer, ou de façon à distinguer, ses produits ou services de ceux d'autres personnes;</p> <p style="padding-left: 40px;">b) marque de certification. (<i>trademark</i>)</p> <p><i>nom commercial</i> Nom sous lequel une entreprise est exercée, qu'il s'agisse ou non d'une personne morale, d'une société de personnes ou d'un particulier. (<i>trade name</i>)</p>
<p>When mark or name confusing</p> <p>6 (1) For the purposes of this Act, a trademark or trade name is confusing with another trademark or trade name if the use of the first mentioned trademark or trade name would cause confusion with the last mentioned trademark or trade name in the manner and circumstances described in this section.</p> <p>Confusion — trademark with other trademark</p>	<p>Quand une marque ou un nom crée de la confusion</p> <p>6 (1) Pour l'application de la présente loi, une marque de commerce ou un nom commercial crée de la confusion avec une autre marque de commerce ou un autre nom commercial si l'emploi de la marque de commerce ou du nom commercial en premier lieu mentionnés cause de la confusion avec la marque de commerce ou le nom commercial en dernier lieu mentionnés, de la manière et dans les circonstances décrites au présent article.</p> <p>Marque de commerce créant de la confusion avec une autre</p>

(2) The use of a trademark causes confusion with another trademark if the use of both trademarks in the same area would be likely to lead to the inference that the goods or services associated with those trademarks are manufactured, sold, leased, hired or performed by the same person, whether or not the goods or services are of the same general class or appear in the same class of the Nice Classification.

What to be considered

(5) In determining whether trademarks or trade names are confusing, the court or the Registrar, as the case may be, shall have regard to all the surrounding circumstances including

- (a) the inherent distinctiveness of the trademarks or trade names and the extent to which they have become known;
- (b) the length of time the trademarks or trade names have been in use;
- (c) the nature of the goods, services or business;
- (d) the nature of the trade; and
- (e) the degree of resemblance between the trademarks or trade names, including in appearance or sound or in the ideas suggested by them.

Unfair Competition and Prohibited Signs

Prohibitions

7 No person shall

- (b) direct public attention to his goods, services or business in such a way as to cause or be likely to cause confusion in

(2) L'emploi d'une marque de commerce crée de la confusion avec une autre marque de commerce lorsque l'emploi des deux marques de commerce dans la même région serait susceptible de faire conclure que les produits liés à ces marques de commerce sont fabriqués, vendus, donnés à bail ou loués, ou que les services liés à ces marques sont loués ou exécutés, par la même personne, que ces produits ou services soient ou non de la même catégorie générale ou figurent ou non dans la même classe de la classification de Nice.

Éléments d'appréciation

(5) En décidant si des marques de commerce ou des noms commerciaux créent de la confusion, le tribunal ou le registraire, selon le cas, tient compte de toutes les circonstances de l'espèce, y compris :

- a) le caractère distinctif inhérent des marques de commerce ou noms commerciaux, et la mesure dans laquelle ils sont devenus connus;
- b) la période pendant laquelle les marques de commerce ou noms commerciaux ont été en usage;
- c) le genre de produits, services ou entreprises;
- d) la nature du commerce;
- e) le degré de ressemblance entre les marques de commerce ou les noms commerciaux, notamment dans la présentation ou le son, ou dans les idées qu'ils suggèrent.

Concurrence déloyale et signes interdits

Interdictions

7 Nul ne peut :

- b) appeler l'attention du public sur ses produits, ses services ou son entreprise de manière à causer ou à

<p>Canada, at the time he commenced so to direct attention to them, between his goods, services or business and the goods, services or business of another;</p>	<p>vraisemblablement causer de la confusion au Canada, lorsqu'il a commencé à y appeler ainsi l'attention, entre ses produits, ses services ou son entreprise et ceux d'un autre;</p>
<p>Rights conferred by registration</p> <p>19 Subject to sections 21, 32 and 67, the registration of a trademark in respect of any goods or services, unless shown to be invalid, gives to the owner of the trademark the exclusive right to the use throughout Canada of the trademark in respect of those goods or services.</p>	<p>Droits conférés par l'enregistrement</p> <p>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 ces produits ou services.</p>
<p>Infringement</p> <p>20 (1) The right of the owner of a registered trademark to its exclusive use is deemed to be infringed by any person who is not entitled to its use under this Act and who</p> <p>(a) sells, distributes or advertises any goods or services in association with a confusing trademark or trade name;</p>	<p>Violation</p> <p>20 (1) Le droit du propriétaire d'une marque de commerce déposée à l'emploi exclusif de cette dernière est réputé être violé par une personne qui est non admise à l'employer selon la présente loi et qui :</p> <p>a) soit vend, distribue ou annonce des produits ou services en liaison avec une marque de commerce ou un nom commercial créant de la confusion;</p>
<p>Depreciation of goodwill</p> <p>22 (1) No person shall use a trademark registered by another person in a manner that is likely to have the effect of depreciating the value of the goodwill attaching thereto.</p>	<p>Dépréciation de l'achalandage</p> <p>22 (1) Nul ne peut employer une marque de commerce déposée par une autre personne d'une manière susceptible d'entraîner la diminution de la valeur de l'achalandage attaché à cette marque de commerce.</p>

Annex “B”: List of Parties’ Affidavits As Summarized in 2014 FC 1139, 2018 FC 1039, and Annex “C” (iii) Below

Plaintiff’s Affidavits

- Affidavits of Dr. Barjinder Singh Hamdard dated:
 - March 23, 2010 (T-273-10); and
 - October 17, 2016 (Supplemental)
- Affidavits of Satpaul Singh Johal dated:
 - March 19, 2010 (T-273-10);
 - March 25, 2010 (T-273-10);
 - February 21, 2014;
 - April 2, 2014;
 - January 28, 2017 (Supplemental); and
 - September 21, 2017 (Supplemental)
- Affidavit of Amritpal Singh Saini dated October 15, 2016 (Supplemental)
- Affidavit of Baldev Singh dated October 15, 2016 (Supplemental)
- Affidavits of Gurdial Singh Kanwal dated:
 - March 16, 2010 (T-273-10); and
 - October 15, 2016 (Supplemental)
- Affidavit of Gurmanpreet Singh dated September 22, 2012
- Affidavit of Gurvinder Singh Sandal dated March 20, 2010 (T-273-10)
- Affidavit of Jasjit Singh Dhami dated October 14, 2016 (Supplemental)
- Affidavit of Karmjeet Kaur Chahal dated October 15, 2016 (Supplemental)
- Affidavit of Karnail Singh dated October 15, 2016 (Supplemental)
- Affidavit of Narinder Pal Singh dated February 20, 2014
- Affidavits of Narinderjit Kaur Kanwal dated:
 - March 18, 2010 (T-273-10); and
 - October 18, 2016 (Supplemental)
- Affidavit of Rajinder Kaur dated October 15, 2016 (Supplemental)
- Affidavits of Satinderpal Singh Chahal dated:
 - March 18, 2010 (T-273-10); and
 - October 15, 2016 (Supplemental)
- Affidavit of Sukhjinder Singj Dhaariwal dated October 15, 2016 (Supplemental)
- Affidavit of Sukhvinder Singh dated October 17, 2016 (Supplemental)
- Affidavits of Sukhwant Singh dated:
 - January 10, 1985;
 - July 6, 2009; and
 - July 6, 2009
- Affidavit of Surjit Kaur Saini dated October 15, 2016 (Supplemental)

Defendants' Affidavits

- Affidavit of Amrajit Singh Rai dated March 24, 2014
- Affidavit of Gurbachan Singh Bhullar dated March 22, 2014
- Affidavit of Harjeet Singh dated March 24, 2014
- Affidavit of Harjinder Pal Singh Walia dated March 24, 2014
- Affidavits of Kanwar (Sunny) Bains dated:
 - March 20, 2014;
 - April 12, 2014; and
 - December 13, 2017 (Supplemental)
- Affidavit of Ninder Ghugianvi dated March 21, 2014
- Affidavit of Sukhmander Singh Brar dated March 23, 2014

Annex “C”: Summary of Affidavit and Cross-examination Evidence (including square-bracketed, italicized annotations to excerpts from 2014 FC 1139 and 2018 FC 1039)

(i) 2014 FC 1139, paras 32-57

[32] Below is a summary of evidence from the Plaintiff’s affidavits:

(1) Dr. Barjinder Singh Hamdard - sworn March 23, 2010

[33] Dr. Barjinder Singh Hamdard is the Editor-in-Chief of Ajit Publications and managing editor since 1984. Dr. Hamdard was previously elected a Member of Parliament in 1998. Dr. Hamdard is also an author of several books, editor of magazines and recipient of awards and honours for his work.

[34] Dr. Hamdard goes over the history of the Ajit Daily, the creation of the Hamdard Trust as well as outlines the many accomplishments and honours of the founder, Dr. Sadhu Singh Hamdard. Dr. Hamdard describes the contents of the Ajit Daily newspaper, the circulation numbers and the circulation worldwide. He stated that the newspaper and the Sunday newsmagazine have few foreign subscribers but still there have been some subscribers in Canada since at least 1968 and that Canadians contribute letters to the editor. Dr. Hamdard also describes the physical appearance of the masthead. Dr. Hamdard explains his view of how the Defendants came to use the word “Ajit” for the Canadian newspaper and that it was for the purpose of benefiting from the popularity of the Ajit.

(2) Satpaul Singh Johal three affidavits - sworn March 19 and 25, 2010, and February 21, 2014

[35] Mr. Satpaul Singh Johal is a Canadian correspondent for the Ajit Daily published by the Sadhu Singh Hamdard Trust. Mr. Johal describes the respected reputation of the Ajit Daily and the authorship of the Ajit logo. Mr. Johal writes that the Ajit logo is an original design and not a printing font and then describes the unique features of the logo. The subscription price is listed in Indian rupees and Canadian dollars as is the price of Canadian advertising sales. The affidavit describes the number of internet readers and some of the foetal gender selection advertising that has appeared in the Ajit Weekly newspaper. Mr. Johal writes that even after the change in the lettering of the Ajit Weekly logo in 2010, confused readers still contact him to confirm that there are no ties between the two newspapers.

[36] Mr. Johal writes that the Ajit Weekly publishes advertising for sorcery and wizardry, which offends Sikh practitioners. Further, that the Ajit Weekly printed his articles without permission which he wrote for the Ajit Daily.

[37] The March 25, 2014 affidavit describes the different website traffic for each of the Ajit Daily and the Ajit Weekly.

(3) Gurdial Singh Kanwal - sworn March 16, 2010

[38] Mr. Gurdial Singh Kanwal is an author of Punjabi books and publisher of his own Punjabi language newspaper in Toronto. He says that he always knew of the Ajit Daily and assumed that the Ajit Weekly was a product of the other. He says that when he introduced a mutual friend to Darshan Singh Bains, Dr. Bains said he was a friend of Dr. Hamdard. Later, Mr. Kanwal said that he learned the newspapers were not affiliated.

(4) Narinderjit Kaur Kanwal - sworn March 18, 2010

[39] Mrs. Narinderjit Kaur Kanwal, wife of Mr. Kanwal says that she used to read the Ajit Daily in India. When she saw the Ajit Weekly in Mississauga and Brampton, she thought it was published by the Ajit Daily and found it confusing that the contents of each newspaper were different.

(5) Satinderpal Singh Chahal - sworn March 18, 2010

[40] Mr. Satinderpal Singh Chahal is the owner/operator of a courier company in Ontario. He states that he knew of the Ajit Daily and its reputation while he was growing up in India and when he came to Canada in 2002 he thought the Ajit Weekly was associated with the Ajit Daily. As a Sikh, he says he is offended by the advertisements for mystical practises in the Ajit Weekly.

(6) Gurvinder Singh Sandal - sworn March 20, 2010

[41] Mr. Gurvinder Singh Sandal is a Punjabi folk singer and writes in his affidavit that prior to his immigration to Canada, he knew of the Ajit Daily and when he investigated, found out that it was not affiliated with the Ajit Weekly. Mr. Sandal writes that the advertising in the Ajit Weekly is offensive to him.

(7) Narinder Pal Singh - sworn February 20, 2014

[42] Mr. Narinder Pal Singh is the circulation manager of the Ajit Daily in Jalandhar, India. He transcribed the names and addresses of the Ajit Daily's Canadian subscribers and provided a spreadsheet of the information.

(8) Defendants' evidence was an affidavit of Kanwar (Sunny) Bains. That evidence is summarized below:

[43] Kanwar (Sunny) Bains is a shareholder and director of Navsun Holdings. Mr. Sunny Bains is the son of the founder of the Ajit Weekly. Mr. Bains describes the background of the Ajit Weekly starting with how the word was chosen, its meaning and the look of the masthead as it evolved. Mr. Bains describes the meaning and selection of the word Ajit, its history and other uses of the word of which he knows. Mr. Bains describes the evolution of the design marks of the Ajit Weekly and provides pictures of the different marks that the Ajit Weekly used over the years. Mr. Bains also provides pictures of the current variation of the Ajit Weekly design mark following the copyright partial settlement agreement in the United States action.

[44] Mr. Bains describes the distribution and circulation of the Ajit Weekly in Toronto and Vancouver and the Canadian companies that advertise in the newspaper.

[45] Mr. Bains also describes at length the Ajit Weekly website, the Ajit Broadcasting Corporation and the display of the marks online. Finally, Mr. Bains writes of the United States Litigation and the copyright settlement.

[46] Mr. Bains also defends running the advertisements of mystics and gurus as freedom of expression and tolerance of different beliefs. The gender-selection services are also ones that are in demand among the Punjabi population in Canada however Mr. Bains writes that the Ajit Weekly decided to stop advertising gender-selection herbal products.

(9) Cross Examination of Kanwar (Sunny) Bains - January 29, 2014

[47] Mr. Bains confirmed that the words "Ajit Weekly" only appear in English on the masthead and the word "Ajit" alone is written in Punjabi. Mr. Bains says that use of the name "Ajit" was jointly decided among his family and he cannot recall if one person specifically suggested it. Mr. Bains said that he checked to see if the mark was being used in Canada at the time he started the newspaper. Mr. Bains also says that his company cancelled the trade mark registration for the word "Ajit" and subsequently stopped using it after 2009. Mr. Bains said the logo on the Ajit Weekly had different colours every week including red.

[48] Mr. Bains describes the printing of the word "Ajit" on the masthead of the Ajit Weekly as a font that is simply typed out in Punjabi characters and that the two newspapers use different font for the masthead. He likens the use of the typed font "Ajit" as if an English word was typed in Arial or Times Roman. Mr. Bains said that he has never been contacted by any of his readers to see if there was a connection between the two newspapers.

(10) Cross Examination of Dr. Barjinder Singh Hamdard

[49] Dr. Hamdard first listed multiple Punjabi language newspapers in Jalandhar, Punjab, India and listed the Punjabi Tribune, Jagbani, Punjabi Jagran, the Mawan, the Akali Patrika, and Desh Sewak. He also stated that there are many other Punjabi and Hindi newspapers in Punjab and listed four Hindi newspapers. Dr. Hamdard listed the qualities of what makes a significant newspaper and then listed the contents of the Ajit Daily newspaper in Jalandhar. Dr. Hamdard said that there are different editions of the newspaper for other areas in India and within each newspaper there is an international section that is the same in all regions covering international news but that there is no specific edition published only for international distribution.

[50] Dr. Hamdard describes the process for distribution of the Ajit Daily with some being sent by post outside of the Punjab but within Punjab the newspaper is distributed by agents to bookshops, and delivered to homes. Dr. Hamdard said that the Ajit Daily is mailed to Canada via subscription and that he has plans to expand to Canada. He said that the Ajit Daily is not a grocery shop paper and is not available for free, unlike the Punjabi language newspapers that are available in Canada. Dr. Hamdard denied that there was any other Punjabi language newspaper in India called the Ajeet Patrika.

[51] Dr. Hamdard said that he knew Dr. Darshan Singh Bains when they were both in Jalandhar however they were not friends. Dr. Hamdard confirmed that he first learned of the Ajit Weekly in 1995 during a visit to Canada and that the first time the Trust challenged the use of "Ajit" by the Ajit Weekly was when it opposed a trademark application in Canada in 2005. Dr. Hamdard explained that he took many steps to complain about the Ajit Weekly in Canada including issuing statements and personally persuading them to stop using the name.

(11) Cross Examination of Satpal Singh Johal

[52] Mr. Johal confirmed that he was a correspondent for the Ajit Daily before and after he moved to Canada in 2009 and is now also a correspondent for other Canadian Punjabi language newspapers. However, Mr. Johal said that some other newspapers took his articles that he wrote for the Ajit Daily and printed them without paying him. He said that he really had to complain loudly to have the re-printing stop.

[53] Mr. Johal explains that the Trust has eight correspondents in Canada and that when he first began reporting in Canada, confused Punjabis had to confirm with him which Ajit newspaper he was working for. Mr. Johal also confirmed that he commissioned the affidavits of Gurdial Singh Kanwal, Narinderjit Kaur Kanwal, and Satinderpal Singh Chahal and that he knew them personally. Mr. Johal said that when Punjabi people are looking for a spouse, that they may place an advertisement in the Ajit Daily and may also place an advertisement in a local paper. Mr. Johal confirmed that the Ajit Daily is only available by subscription and online in Canada.

(12) Cross Examination of Gurvinder Singh Sandal

[54] Mr. Sandal said that he was confused about whether the Ajit Weekly was related to the Ajit Daily however admitted that there was nothing within the Ajit Weekly that would suggest it was published in Jalandhar. Mr. Sandal said he confirmed with an Ajit Daily correspondent that the two papers were not related and he was asked to swear his affidavit by the Ajit Daily correspondent.

(13) Cross Examination of Satinderpal Singh Chahal

[55] Mr. Chahal said that when he moved to Canada he found the Ajit Weekly was free and was surprised because he assumed that the Ajit Daily in India was for a charge and that with everything being more expensive in Canada, that the same newspaper would be free. Mr. Chahal said that he contacted the Ajit Daily in India and confirmed that the two newspapers were not affiliated. He said that he still picked up the Ajit Weekly from time to time to see whether advertising he found offensive was still there. Mr. Chahal confirmed that "Ajit" is also a popular name for people in India. Mr. Chahal said that he was surprised that two newspapers with the same name have different approaches toward society in relation to the advertisements for mystics and gurus and that the Ajit Daily would never have such advertisements.

(14) Cross Examination of Gurdial Singh Kanwal

[56] Mr. Kanwal is a reporter for the Ajit Daily and had a subscription for the newspaper to be sent by mail to Canada in the early 1970s. Mr. Kanwal started his own newspaper in Vancouver and published articles from the Ajit Daily. He said that because he was friends with the Plaintiff there was no need for an agreement to publish. Mr. Kanwal moved to Toronto and then restarted his newspaper there. He said that he often used the material from the Ajit Daily to re-print in his paper particularly the editorial section. Mr. Kanwal says he learned of the litigation between the parties when he visited India and from Satpal Johal.

(15) Cross Examination of Narinderjit Kaur Kanwal

[57] Mrs. Kanwal says that she saw copies of the Ajit Weekly in Punjabi stores in Canada and it also surprised her that it was a free newspaper because in India there is a cost. She said that the appearance of the newspaper was the same as the one in India and the contents were the same however the advertisements were different. Mrs. Kanwal said she has never seen a copy of the Ajit Daily in Canada.

(ii) 2018 FC 1039, paras 26-27

[26] The following is a summary of the supplementary affidavits provided by Hamdard.

(a) Affidavit of Dr. Barjinder Singh Hamdard dated October 17, 2016: Dr. Hamdard is a citizen of India, and Editor-in-Chief of the Daily Ajit. Dr. Hamdard describes the history and expansion of the Daily Ajit. He also provides a list of the number of Canadian subscribers to the Daily Ajit from 1990 to 2010, and a list of approximately 160 letters to the editor from Punjabi readers in Canada. He discusses the logo of the Daily Ajit, and states that the “hook” above the word is the most unusual part. Dr. Hamdard explains how he first became aware of the Ajit Weekly when he visited Canada in April 1995. He issued a statement that Hamdard had no connection with the Ajit Weekly. He says that Mr. Bains knew of the Daily Ajit and its style and content. He also says that the misuse of the name “Ajit” by the Ajit Weekly has handicapped Hamdard’s ability to expand its publishing in Canada. He says that Hamdard could not oppose Navsun’s trade-mark application in 2004 because the Registrar overlooked its request for an extension of time. Hamdard applied to expunge Navsun’s registered trade-mark in 2010, causing Navsun to cancel it.

(b) Affidavit of Jasjit Singh Dhama dated October 14, 2016: Mr. Dhama has been a correspondent for the Daily Ajit since 1995. He came to Canada in 2005. He says that the Daily Ajit is well known among Canadian Punjabis. When told he worked for the Daily Ajit, Canadian Punjabis would automatically think he was working for the Ajit Weekly. Canadian Punjabis assume that the Daily Ajit and Ajit Weekly are connected, and have asked him why the Daily Ajit publishes offensive advertisements.

(c) Affidavit of Narinderjit Kaur Kanwal dated October 18, 2016: Ms. Kanwal is a restaurant worker who migrated to Canada in 1988. She read the Daily Ajit in India, and thought the Ajit Weekly was connected with the Daily Ajit when she saw the publication in stores. She found the content differences between the two confusing.

(d) Affidavit of Baldev Singh dated October 15, 2016: Mr. Singh is a religious preacher and truck driver. He read the Daily Ajit in India. After coming to Canada in 2002, he first thought the Ajit Weekly was a product of the Daily Ajit.

(e) Affidavit of Gurdial Singh Kanwal dated October 15, 2016: Mr. Kanwal is a retired publisher, author and journalist, and the current president of the Canadian International Punjab Sahit Academy. He has known of the Daily Ajit since 1964, and after immigrating to Canada, he used the Daily Ajit to inform his own newspaper. He assumed the Ajit Weekly was a product of the Daily

Ajit, and only realized they were distinct when he heard about the litigation between the two. Mr. Bains told him that Dr. Hamdard was his friend.

(f) Affidavit of Amritpal Singh Saini dated October 15, 2016: Mr. Saini has been a correspondent for the Daily Ajit since 2009. He immigrated to Canada in 2000, and thought the Ajit Weekly was the Daily Ajit. He says the Canadian Punjabi community knows and respects the Daily Ajit newspaper and website. Since he began working for the Daily Ajit, people ask if he also works for Ajit Weekly, wrongly assuming the two are connected.

(g) Affidavit of Surjit Kaur Saini dated October 15, 2016: Ms. Saini is a heavy equipment operator who immigrated to Canada in 2004. She read the Daily Ajit in India, and when she first saw Ajit Weekly in Canada, she thought it was the Daily Ajit. She has been reading the Daily Ajit online for many years.

(h) Affidavit of Karnail Singh dated October 15, 2016: Mr. Singh is a truck driver and volunteer preacher of the Sikh religion. He has lived in Canada since 2005. He became familiar with the Daily Ajit while living in India. When he first arrived in Canada, he thought the Ajit Weekly was published by the Daily Ajit or Hamdard. He was shocked by the offensive advertisements in the Ajit Weekly. He called a Canadian correspondent of the Daily Ajit, and only then did he learn of the distinction between the two.

(i) Affidavit of Rajinder Kaur dated October 15, 2016: Ms. Kaur is a factory worker who has lived in Canada since 2009. She was an avid reader of the Daily Ajit while living in India, and was confused about whether the Ajit Weekly and the Daily Ajit were related.

(j) Affidavit of Sukhjinder Singh Dhariwal dated October 15, 2016: Mr. Dhariwal is a truck driver who immigrated to Canada in 2005. He has read the Daily Ajit since the fifth grade. He learned that the Daily Ajit and the Ajit Weekly had different owners after two or three years, once he heard about the litigation. He and his friends read the Daily Ajit online.

(k) Affidavit of Karmjeet Kaur Chahal dated October 15, 2016: Ms. Chahal immigrated to Canada in 2003. Her family in India subscribed to the Daily Ajit. She found the similarity between the name and logo of the Daily Ajit and the Ajit Weekly to be confusing.

(l) Affidavit of Satinderpal Singh Chahal dated October 15, 2016: Mr. Chahal is an owner and operator of a courier company who immigrated to Canada in 2000. He knows the Daily Ajit from India, and says the newspaper is well-known. He thought the Ajit Weekly was published by the Daily Ajit when he first saw it. He was offended by the advertisements in the Ajit Weekly. He found out there was no connection between the two when he called a correspondent of the Daily Ajit.

(m) Affidavit of Satpaul Singh Johal dated January 28, 2017: Mr. Johal is a journalist and correspondent of the Daily Ajit. He attaches what purport to be portions of a 2010 Hindi language newspaper called Ajeet Patrika, and states that Hindi is a different language from Punjabi with a different alphabet. A Punjabi person would not be able to read a Hindi language newspaper unless he or she was also familiar with written Hindi. Hamdard was unaware of Ajeet Patrika until it was raised in litigation by Mr. Bains. Hamdard was unable to locate the newspaper in its own investigation. It appears that Ajeet Patrika was registered in another state and has not submitted the required annual filings in a long time.

(n) Affidavit of Sukhvinder Singh dated October 17, 2016: Mr. Singh has been the marketing manager of the Daily Ajit for two years. He operates the website www.ajitjalandhar.com. The Daily Ajit has published the full daily newspaper on the website since 2002. He monitors website traffic using Google Analytics, and attaches records that demonstrate 909,405 visits to the website from Canada between May 11, 2008 and August 31, 2008. He also attaches reports from 2013 to 2015.

(o) Affidavit of Satpaul Singh Johal dated September 21, 2017: Mr. Johal is a journalist and has been a correspondent for the Daily Ajit since 2001. He says that the Daily Ajit publishes stories of interest to Punjabis in Canada. In December 2012, Hamdard released apps for mobile digital devices. Mr. Johal produces a table showing the download history. He says that the Daily Ajit logo is not produced by a font, and the letters overlap.

[27] Navsun has provided the affidavit of Kanwar (Sunny) Bains dated December 13, 2017. Mr. Bains deposes as follows:

(a) Mr. Bains is a shareholder and director of Navsun. He states that in June 2010, Hamdard applied to register the trade-mark AJIT. In 2015, Navsun successfully opposed the application before the Trade-mark Opposition Board for lack of distinctiveness.

(b) Hamdard applied to register its design mark, and Navsun did not oppose. However, Hamdard applied a second time to register its word mark, which Navsun is opposing. Mr. Bains states that Navsun is seeking to expunge Hamdard's mark only because Hamdard alleges infringement and makes false claims about first use. Mr. Bains maintains that Hamdard could not have used its mark in association with electronic goods and services since 1984 because it did not launch its website until 2002; Hamdard does not publish magazines; and the word "Ajit" is very common in Punjabi, and is used for many businesses.

(c) Ajit Weekly's website has approximately 12,500 to 30,000 visits per month. It prints around 12,000 newspapers per week in Vancouver and Toronto.

[*On cross-examination, it was noted that the lower end of the range dipped as low as about 5,498. Mr. Bains indicated that the range was based on an "unintelligent guess" and that he has "zero knowledge about this."*]

(d) Mr. Bains is not aware of any actual confusion between the two websites or newspapers. He believes immigrants can read the English word "Weekly" in Navsun's mark, and are therefore able to distinguish the two publications.

(iii) Summary of Additional Affidavits (Relevant Portions) Not Summarized in Earlier Proceedings

Plaintiff's Additional Affidavits

1. Affidavits of Satpaul Singh Johal dated April 2, 2014: Mr. Johal is employed by Hamdard Trust to write for *Daily Ajit*. Contrary to Mr. Bains evidence (in his March 20, 2014 affidavit), Mr. Johal asserts that Hamdard Trust did object to Navsun's trademark and Navsun was aware of the objection because of an editorial that appeared in the July 2, 2003 edition of the *Ajit Weekly*. Mr. Johal asserts that Nanak Heavy font first was published in 1995 and asserts that Hamdard Trust's Logo cannot be duplicated using Nanak Heavy font.
2. Affidavit of Gurmanpreet Singh dated September 22, 2012: Mr. Gurmanpreet Singh came to Canada as a student in 2011. Mr. Singh read *Daily Ajit* newspaper when he was in Punjab. Upon picking up *Ajit Weekly* newspaper in a box outside a grocery store in Toronto, he was confused by the name. He learned from colleagues there was no connection between the newspapers.
3. Affidavits of Sukhwant Singh dated January 10, 1985 and July 6, 2009 (attached as an Exhibit to Satpaul Singh Johal's affidavit dated February 21, 2014): Mr. Sukhwant Singh created Hamdard Trust's Logo in 1984, under the guidance of the *Daily Ajit*'s then Agency Manager; Mr. Singh was an employee of Hamdard Trust at that time.

Defendants' Additional Affidavits

4. Affidavit of Kanwar (Sunny) Bains dated April 12, 2014: This affidavit responds to Mr. Johal's April 2, 2014 affidavit regarding criminal proceedings in India which, in my view, are irrelevant to the instant proceedings. I therefore did not summarize that portion of Mr. Johal's affidavit and this is as much as I will say about Mr. Bains' April 12, 2014 affidavit.
5. Affidavit of Amrajit Singh Rai dated March 24, 2014: The affiant is the producer and host of Radio Punjab and Aikam TV (program on Vision TV Canada), having no relation

with *Ajit Weekly*. Amrajit Singh Rai is familiar with *Daily Ajit*, which is well-known in India, and became familiar with *Ajit Weekly* upon immigrating to Canada in about 1993. Upon learning of the latter publication, Amrajit Singh Rai understood the newspapers had no connection largely because of different publication cycles (daily versus weekly). The affiant also is aware of other newspapers using “Ajit” as part of their name and points to an example in Rajasthan, India.

6. Affidavit of Gurbachan Singh Bhullar dated March 22, 2014: The affiant resides in New Delhi, India and is a full-time writer and journalist in who regularly writes for *Ajit Weekly*. Gurbachan Singh Bhullar asserts that Ajit is used regularly in India in the names of Punjabi businesses and as a common (first) name for women and men of Punjabi descent. The affiant is aware of *Daily Ajit*, because it is one of the well-known Punjabi daily newspapers, and has known about *Ajit Weekly* since it began publication; Gurbachan Singh Bhullar has never been confused by the two newspapers. The affiant also is aware of other newspapers using “Ajit” as part of their name and points to the example of “Ajeet Patrika” in Rajasthan, India. Gurbachan Singh Bhullar further asserts that Sikh traditions are not offended by advertisements for sorcery services.
7. Affidavit of Harjeet Singh dated March 24, 2014: The affiant is a director and producer of radio programming for the Punjabi media. *Daily Ajit* has a good reputation in India. Harjeet Singh discovered *Ajit Weekly* upon immigrating to Canada in about 1996 but never believed that these two newspapers were related because of different publication cycles (daily versus weekly). The affiant is aware of a newspaper in Southern India that uses the word “Ajit.” Harjeet Singh further asserts that advertisements for sorcery do not offend Sikh traditions.
8. Affidavit of Harjinder Pal Singh Walia dated March 24, 2014: The affiant is a professor and head of the Department of Journalism and Mass Communication of Punjabi University in India. He regularly writes for *Ajit Weekly*. He has been aware of *Daily Ajit* since 1977 which has a good reputation among rural arrears [*sic*] of Punjab. The affiant learned of *Ajit Weekly* in 2006 conducting internet research. He never has been confused by the two newspapers nor believed they were related because one is a daily publication and the other is a weekly publication. Their front pages have a different look and feel and colour scheme. Further, the newspapers have different literary styles. The name Ajit often is used in other newspapers in India and abroad. He also asserts that Sikh traditions are not offended by advertisements for sorcery services.
9. Affidavit of Ninder Ghugianvi dated March 21, 2014: The affiant resides in New Delhi, India and is a freelance journalist and author who has been writing a weekly column for *Ajit Weekly* newspaper for over 15 years. Ninder Ghugianvi asserts that Ajit is a common name in the Punjabi language and is regularly used in India in the names of Punjabi businesses. The affiant is aware of *Daily Ajit* since their youth – it is one of the popular newspapers in Punjab. The affiant became aware of *Ajit Weekly* on a trip to Canada when they were introduced to Dr. Darshan Singh Bains who offered them a paid weekly column in the publication. Ninder Ghugianvi never has been confused by the two newspapers because one is a daily publication and the other is weekly. Ajit is used in

other newspapers in India and abroad. Ninder Ghugianvi further asserts that Sikh traditions are not offended by advertisements for sorcery services.

10. Affidavit of Sukhmander Singh Brar dated March 23, 2014: The affiant is a freelance writer, one of whose jobs is as a press reporter for the publisher of the *Ajit Weekly* newspaper. According to the affiant, *Ajit* is a common name in the Punjabi language and commonly used in the names of Punjabi-language businesses. The affiant often read *Daily Ajit*, one of several large newspapers published in Punjab, while living in India. Sukhmander Singh Brar became familiar with *Ajit Weekly* when they immigrated to Canada from India in 2007. The affiant did not believe there was any connection between the two publications, largely because one is published weekly and the other daily. Sukhmander Singh Brar believes that Sikh traditions are not offended by ads for sorcery services.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1127-10

STYLE OF CAUSE: SADHU SINGH HAMDARD TRUST v NAVSUN HOLDINGS LTD. AND 6178235 CANADA INC

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: SEPTEMBER 10, 2020

JUDGMENT AND REASONS: FUHRER J.

DATED: JUNE 11, 2021

APPEARANCES:

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