

Federal Court



Cour fédérale

Date: 20140327

Docket: T-1766-12

Citation: 2014 FC 295

Ottawa, Ontario, March 27, 2014

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

UNICAST SA

Applicant

and

**SOUTH ASIAN BROADCASTING
CORPORATION INC.**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application brought by Unicast SA [the “Applicant”] under section 57 of the *Trade-marks Act*, RSC, 1985, c T-13 [the “Act”] calling for the invalidation of Canadian Trade-Mark Registration No. TMA715146, held by South Asian Broadcasting Corporation Inc. [the “Respondent”] and the expungement of said trade-mark from the Canadian Trade-Mark Register.

[2] For the following reasons, this Court has decided to dismiss this application for expungement.

II. The registration at issue

[3] The particulars of the registered trade-mark at issue in the present matter are as follows:

Registration Number:	TMA715146
Date of advertisement:	September 9, 2007
Date of Registration:	May 26, 2008
Registered Owner:	South Asian Broadcasting Corporation Inc.
Trade-Mark:	RED FM
Services for which the mark is registered:	(1) Operation of a radio station, radio broadcasting, and radio broadcast programming reflecting ethnic diversity.

III. The parties

A. The Applicant

[4] The Applicant, Unicast SA, is a radio broadcaster based in Switzerland that operates an FM radio station in association with the trade-mark “ROUGE FM”. This radio station also broadcasts its programming to surrounding French-speaking countries via the FM radio band and across the world, including in Canada, through its website. The Applicant owns two radio stations (including the ROUGE FM station), a television station, an advertising agency, and several websites, mobile applications, webradios and webtv.

[5] The ROUGE FM radio station was previously known as Radio Framboise S.A. until a change in the ownership of the company resulted in the transition to ROUGE FM between March and June 2005. The newly-branded radio station was officially launched on July 1, 2005. As part of the transition from Radio Framboise S.A. to ROUGE FM, the Applicant wanted to make use of

more than simple FM broadcasting in order to reach French-speaking areas out of Switzerland, including Canada. As such, the ROUGE FM website was launched on the same day as the radio station. It is available throughout the world, and it offers a live streaming of the radio broadcast programming. The radio station's programming is also available through an application for smart phones launched in 2010.

[6] The rights in the ROUGE FM trade-mark in Switzerland were transferred to the Applicant on December 18, 2009, who has been a majority shareholder of ROUGE FM since August 2011.

[7] Ever since its launch, an increasing number of Canadians have visited the website – so much so that Canada has become ROUGE FM's third largest audience after Switzerland and France. The radio station has also been active on social media networks, interacting with listeners, including Canadians.

B. The Respondent

[8] The Respondent, South Asian Broadcasting Corporation Inc., a radio broadcaster based in Surrey, British-Columbia (Canada), was founded in September 2004 to offer radio programming aimed at the local South Asian audiences. On December 22, 2005, the Respondent filed a trade-mark application to register "RED FM" based on previous use.

[9] The trade-mark was duly registered on May 26, 2008. The Respondent is present in Canada and holds all the required licences from the Canadian Radio-Television and Telecommunications Commission [the "CRTC"] and from Industry Canada in order to operate its radio station.

IV. Factual background

[10] The Applicant filed a trade-mark application in Canada on September 8, 2011 in view of registering the ROUGE FM trade-mark in relation to services related to the following (the application was prepared in French):

<ul style="list-style-type: none"> • Communications radiophoniques; 	<ul style="list-style-type: none"> • [TRANSLATION] Radio communications;
<ul style="list-style-type: none"> • Diffusions d'émissions radiophoniques; 	<ul style="list-style-type: none"> • [TRANSLATION] Broadcasting of radio programming;
<ul style="list-style-type: none"> • Transmission de son, de messages par terminaux d'ordinateurs, nommément diffusion de programmes de musique, de radio par ordinateurs. 	<ul style="list-style-type: none"> • [TRANSLATION] Transmission of sound, information and messages by computer terminals, namely the broadcast of music and radio programming by computer.

In its application, the Applicant claimed to have used the ROUGE FM trade-mark beginning in July 2005.

[11] A Canadian Intellectual Property Office Examiner raised an objection with respect to the Applicant's application for registration on February 29, 2012 on the ground that the requested trade-mark registration, ROUGE FM, could be considered confusing with an existing registered trade-mark under paragraph 12(1)(d) of the Act, i.e. Canadian Trade-mark Registration No. TMA715146, RED FM, owned by the Respondent. As stated above, this trade-mark was registered on May 26, 2008 on the basis of previous use since December 21, 2005.

V. The alleged grounds for expungement

[12] The Applicant claims that the Canadian Trade-Mark Registration No. TMA715146, RED FM, should be held invalid and expunged by this Court:

1. because the Respondent made a fraudulent misrepresentation with respect to the date of first use in Canada [the “misrepresentation ground”], or
2. alternatively, because the Respondent was not the person entitled to secure a registration at the date of first use, pursuant to section 18 *in fine* of the Act, given that the Applicant was already using, at that time, its ROUGE FM trade-mark in Canada with respect to similar services [the “non-entitlement ground”].

VI. The Applicant’s evidence and submissions

A. The Applicant’s submissions

[13] As noted above, the Applicant claims that the Respondent’s RED FM trade-mark should be held invalid and expunged by this Court because the Respondent made a fraudulent misrepresentation and because the Respondent was not the person entitled to secure a registration at the date of first use, as the Applicant was already using ROUGE FM at that time with respect to similar services.

1. Misrepresentation ground

[14] The Applicant argues that the registration at issue was fraudulently obtained because, although the Respondent claimed in its trade-mark registration application to have already been using RED FM for the operation of a radio station and for radio broadcasting services, there is contradictory evidence as to whether the radio station started broadcasting on December 21, 2005, January 20, 2006 or January 23, 2006. In fact, the Respondent has been unable to provide tangible evidence – press release, news article, etc. – confirming that the trade-mark was effectively used on December 21, 2005. The Respondent even refused to produce the financial statements related to its

first two years of operation. What is more, a document submitted by the Respondent to the CRTC clearly shows that the Respondent started broadcasting on January 23, 2006. There are also inconsistencies regarding the hiring of radio hosts and the alleged date on which the radio went into operation.

[15] Consequently, as the Respondent was not able to prove it was actively broadcasting programming on December 21, 2005, it can be assumed that it knowingly made a fraudulent misrepresentation in applying for its trade-mark on December 22, 2005 based on previous use. This ground is of particular importance considering that if this Court assents the Respondent's trade-mark despite the fact that it is clearly based on a misrepresentation, this would preclude other rightful trade-mark owners, including the Applicant, from presenting their own application in order to have their trade-mark duly recognized and registered.

2. Non-entitlement ground

[16] Alternatively, the Applicant submits that the trade-mark registration for RED FM is invalid under section 18 *in fine* of the Act because the Respondent was not the entitled person to apply for the registration as contemplated by paragraph 16(1)(a) of the Act. For the following reasons, the Applicant is of the opinion that it, and not the Respondent, was the entitled person to do so.

[17] Confusion (subsection 17(1) of the Act) – The ROUGE FM and RED FM trade-marks are, for all intents and purposes, identical as they are the direct equivalents of one another in French and English. Further, the trade-marks must be considered from the point of view of the average Canadian consumer who, it can be assumed, is bilingual because ROUGE FM broadcasts its content across Canada, including in the French-speaking province of Quebec.

[18] *Previous* use (subsection 17(1) of the Act) – Regarding the previous use of the confusing trade-mark, the Applicant claims that it has used ROUGE FM in Canada with respect to similar services as the Respondent’s RED FM despite the fact that it offers its programming from outside Canada and via the Internet rather than on traditional airwaves and that it does not hold a licence from the CRTC.

[19] The Applicant submits that its radio station actually uses the ROUGE FM trade-mark with respect to “radio broadcasting” services because the CRTC has interpreted the notion of “broadcasting” as being technology neutral, meaning that broadcasting through the Internet nonetheless constitutes “broadcasting” for the purposes of Canadian legislation. A distinction between the two types of transmission would be inconsequential. This also explains why the Applicant is not required to hold a CRTC licence. In addition, the Applicant is of the view that the use of a trade-mark in Canada in association with a service originating from outside the country – e.g. Switzerland – and that is available in Canada still constitutes use of the trade-mark pursuant to paragraph 16(1)(a) of the Act. Indeed, subsection 4(2) of the Act states that “[a] trade-mark is deemed to be used in association with services if it is used or displayed in the performance or advertising of those services” and, in this regard, this Court has stated on a number of occasions that the location from where the information originates is of no importance, as long as the trade-mark appears on a Canadian computer screen. Thus the Applicant argues that the ROUGE FM trade-mark has been constantly used and displayed on its website since July 2005 with respect to “radio broadcasting services.”

[20] Also, building on the submissions related to the misrepresentation ground, above, considering that the Respondent failed to establish that its radio station was in operation as of December 21, 2005, it most certainly failed to establish its use of the RED FM trade-mark on that date, and much less that it had used the RED FM trade-mark before July 2005.

[21] Lastly, regarding the question of whether this *previous use* of the trade-mark is sufficient, the Applicant adds that although it was not required to do so, it nonetheless produced evidence of *hits* on its website originating from Canada for the period between July and December 2005. The Applicant reminds this Court that evidence required under paragraph 16(1)(a) of the Act is minimal and that it is not necessary to prove that a Canadian actually listened to the radio programming so long as the services were offered to Canada and could have been performed in Canada.

[22] *Non-abandonment* (subsection 17(1) of the Act) – The Applicant claims to have submitted evidence which establishes that the trade-mark ROUGE FM has been constantly used on its website since July 2005. Therefore, the Applicant had not abandoned the trade-mark at the date of the advertisement of the Respondent's trade-mark registration application.

[23] Consequently, the Applicant having proved its previous use and non-abandonment of the confusing ROUGE FM trade-mark for the purposes of subsection 17(1) and paragraph 16(1)(a) of the Act, the Respondent most certainly could not have been the person entitled to seek registration for the confusing Canada Trade-mark Registration No. TMA715146 and, as such, this trade-mark is to be held invalid and expunged pursuant to paragraph 18(1)(a) *in fine* of the Act.

B. The Applicant's evidence

[24] The Applicant submitted evidence in support of its claims. In addition to what has been mentioned in the Applicant's submissions above and to an affidavit produced by Frédéric Piancastelli, the Applicant's CEO, the Applicant provided this Court, amongst other evidence, with numerous screen captures. It is submitted that these screen captures establish the display of the ROUGE FM trade-mark on its website, starting July 1, 2005 and going through 2012. Statistical data is also submitted concerning the number of people around the world who have visited the Applicant's website starting in 2005 as well as actual listenership statistics starting in 2009. The Applicant has also submitted messages the radio station received via Facebook from Canadian listeners.

VII. The Respondent's submissions

[25] The Respondent argues that the Applicant, who bears the onus of proving its case, failed to establish, on a balance of probabilities, that the trade-mark registration of RED FM is invalid on any of alleged grounds. In support of its claim, the Respondent puts forward five main arguments, namely that the Applicant:

- (1) failed to prove that the Respondent obtained its registration for RED FM fraudulently and that this registration is void *ab initio*;
- (2) failed to prove that it used its trade-mark ROUGE FM in the period of July to December 2005, i.e. prior to the Respondent using RED FM in Canada;
- (3) failed to establish the likelihood of confusion between the two trade-marks;

- (4) would not be entitled to register its ROUGE FM trade-mark, as it would be misdescriptive because in Canada the Applicant uses the Internet and not actual FM airwaves; and
- (5) would not have been authorized to register its ROUGE FM trade-mark in 2005 because it did not obtain the statutory and regulatory authorizations required to perform services in Canada which are similar to those for which the Respondent is registered.

A. RED FM trade-mark not void ab initio

[26] The Applicant claims that the Respondent fraudulently obtained its RED FM trade-mark registration mainly based on a document produced by the Respondent itself to the CRTC and that indicates that broadcast began in January 2006. However, the Respondent submitted material to the effect that this document merely refers to the commencement of the broadcast of actual radio programming. Prior to this, there was a *test loop* from December 2005 to January 2006, and this test loop qualifies as broadcasting to the general public for the purposes of Canadian legislation. What is more, contrary to the Applicant's suggestion, the Respondent in fact provided a large number of documents, including financial documents, which relate to the commencement of broadcast operations in 2005.

B. No proof of the use of the ROUGE FM trade-mark in Canada

[27] The Applicant also failed to establish having used its trade-mark in Canada between July and December 2005. The jurisprudence on which the Applicant relies must be interpreted in context. More particularly, although it was determined that a trade-mark appearing on a computer

screen website in Canada constitutes use under subsection 4(2) of the Act independently of the origin of the information, this was not to be interpreted as a general statement. Indeed, the Courts have further specified that mere display of a trade-mark could only be considered “use” with respect to information services relating to and provided to Canada over the web. The distinction lies between services performed in Canada and services performed outside Canada; case law has interpreted that when advertising (display) is the only mode of use under subsection 4(2) of the Act, the services advertised must be available in Canada. In the present case, the Applicant does not offer services in Canada but in Switzerland.

[28] More importantly, the Applicant’s interpretation of the case law – that a mere display of a trade-mark constitutes an advertising of services under subsection 4(2) of the Act – would render useless the Act’s distinction between “use” (under section 4) and “making known” (under section 5) in Canada.

[29] In addition, the Respondent raises serious doubts with respect to the Applicant’s evidence concerning user statistics and alleged hits on the Applicant’s website, in particular the fact that the Applicant’s affiant acknowledged, during cross-examinations on affidavit, that there was no way of knowing how many hits for the month of July 2005 actually came from Canada, that there were no statistics on listenership activity prior to 2009 and that there was no way of knowing whether a user who hits on the Applicant’s website really listened to the audio stream. Therefore, there is no solid proof that live Canadians have accessed the Applicant’s website between July and December 2005.

[30] The Respondent claims to have commenced broadcasting of its radio station on December 21, 2005 and used the trade-mark RED FM as of that date. As noted above, the Respondent applied for the registration of the trade-mark the following day, and registration occurred on May 26, 2008. To the contrary of the Applicant, the Respondent is based in Canada. The trade-mark was used starting December 21, 2005 both on-air during programming as well as through the Radio Broadcast Data System [RBDS] signal, which sent out “RED FM” as a message to appear on the screen of so equipped radio receivers.

[31] Moreover, the Respondent’s trade-mark registration relates to the “Operation of a radio station, radio broadcasting, and radio broadcast programming reflecting ethnic diversity”, services which are not offered by the Applicant. In fact, the Applicant offers radio broadcasting services in Switzerland and only offers a link to the audio stream in Canada. As stated above, the Applicant’s 2011 trade-mark application was for “radio communications, the broadcasting of radio programming, the transmission of sound, information and messages by computer terminals, namely the broadcast of music and radio programming by computer. [My emphasis.]” As such, the Respondent submits that the Applicant could only argue that it has offered, in Canada, the second portion of the listed services (the underlined portion, above) [the “second set of services”]. However, the Applicant has failed to establish even that, given the unconvincing evidence submitted in this regard, especially the lack of statistics on listenership prior to 2009.

1. Lack of confusion

[32] The Applicant failed to establish that given the circumstances of the case at bar, the trade-marks ROUGE FM and RED FM are indeed confusing pursuant to the test prescribed by subsection

6(5) of the Act. The Respondent claims that the first four considerations of the test – paragraphs 6(5)(a) through (d) – actually favour its position and not the Applicant's.

2. Misdescriptiveness

[33] The Respondent reminds this Court that, pursuant to paragraph 12(1)(b) of the Act, a trade-mark cannot be registered if it is “[...] clearly descriptive or deceptively misdescriptive in the English or French language of the character or quality of the wares or services in association with which it is used or proposed to be used [...].” In the case at hand, the second component of the ROUGE FM trade-mark – FM – explicitly refers to services of radio transmission through the airwaves, and it would thus be misdescriptive for a corporation to register ROUGE FM in relation to services offered in Canada via the web only. Consequently, the Applicant could not even contemplate having this trade-mark registered.

3. Lack of statutory authorization

[34] As noted above, of all the services the Applicant alleges to have performed, the only ones that are comparable to those offered by the Respondent are the ones concerning “radio communications, the broadcasting of radio programming” services. Not only did the Applicant not perform these services, but it could not have done so as it did not hold the required CRTC and Industry Canada licences, pursuant to the terms of the *Broadcasting Act*, SC 1991, c 11 [the “Broadcasting Act”], and the *Radio Communication Act*, RSC, 1985, c R-2. Therefore, the Applicant would never have been successful had it tried to register its trade-mark in 2005.

VIII. The issues raised

[35] In order to determine whether Canadian Trade-mark Registration No. TMA715146 is to be held invalid and expunged, this Court must address the following questions:

1. Is Canadian Trade-mark Registration No. TMA715146, RED FM, void *ab initio* because the Respondent made a fraudulent misrepresentation with respect to the date of first use in Canada?

2. Alternatively, is Canadian Trade-mark Registration No. TMA715146, RED FM, invalid pursuant to subsection 18(1) *in fine* of the Act because the applicant for registration, the Respondent, was not the person entitled to secure registration considering that, at the date on which it first used it, it caused confusion with the ROUGE FM trade-mark used in Canada by the Applicant (under paragraph 16(1)(a) of the Act)?

This particular issue encompasses two sub-questions:

- 2.1 Did the Applicant establish having used its ROUGE FM trade-mark prior to December 2005, i.e. prior to the Respondent using RED FM, with respect to radio broadcast services and, if so, does this warrant the expungement of the Respondent's trade-mark under section 17 of the Act?

- 2.2 Did the Applicant establish having used its ROUGE FM trade-mark prior to December 2005, i.e. to the Respondent using RED FM, with respect to the second set of services of its trade-mark application and, if so, does this warrant the expungement of the Respondent's trade-mark under section 17 of the Act?

IX. Analysis

A. *Jurisdiction and Standing*

[36] It must first be determined whether this Court has jurisdiction to hear the present application and whether the Applicant has proper standing to bring this application forward. Under subsection 57(1) of the Act, this Court has exclusive jurisdiction to order the expungement of a registered trade-mark. Also, this disposition gives standing to the Applicant to submit its application as a “person interested” in the matter:

Trade-marks Act, RSC, 1985,
c T-13

Loi sur les marques de
commerce, LRC (1985),
ch T-13

LEGAL PROCEEDINGS

PROCÉDURES JUDICIAIRES

Exclusive jurisdiction of Federal Court

Jurisdiction exclusive de la Cour fédérale

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

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

[My emphasis.]

[Non souligné dans l’original.]

[37] In addition, section 17 of the Act provides as follows:

*Trade-marks Act, RSC, 1985,
c T-13*

*Loi sur les marques de
commerce, LRC (1985),
ch T-13*

VALIDITY AND EFFECT OF
REGISTRATION

VALIDITÉ ET EFFET DE
L'ENREGISTREMENT

Effect of registration in relation
to previous use, etc.

Effet de l'enregistrement
relativement à l'emploi
antérieur, etc.

17. (1) No application for registration of a trade-mark that has been advertised in accordance with section 37 shall be refused and no registration of a trade-mark shall be expunged or amended or held invalid on the ground of any previous use or making known of a confusing trade-mark or trade-name by a person other than the applicant for that registration or his predecessor in title, except at the instance of that other person or his successor in title, and the burden lies on that other person or his successor to establish that he had not abandoned the confusing trade-mark or trade-name at the date of advertisement of the applicant's application.

17. (1) Aucune demande d'enregistrement d'une marque de commerce qui a été annoncée selon l'article 37 ne peut être refusée, et aucun enregistrement d'une marque de commerce ne peut être radié, modifié ou tenu pour invalide, du fait qu'une personne autre que l'auteur de la demande d'enregistrement ou son prédécesseur en titre a antérieurement employé ou révélé une marque de commerce ou un nom commercial créant de la confusion, sauf à la demande de cette autre personne ou de son successeur en titre, et il incombe à cette autre personne ou à son successeur d'établir qu'il n'avait pas abandonné cette marque de commerce ou ce nom commercial créant de la confusion, à la date de l'annonce de la demande du requérant.

When registration incontestable

Quand l'enregistrement est
incontestable

(2) In proceedings commenced

(2) Dans des procédures

after the expiration of five years from the date of registration of a trade-mark or from July 1, 1954, whichever is the later, no registration shall be expunged or amended or held invalid on the ground of the previous use or making known referred to in subsection (1), unless it is established that the person who adopted the registered trade-mark in Canada did so with knowledge of that previous use or making known.

[My emphasis.]

ouvertes après l'expiration de cinq ans à compter de la date d'enregistrement d'une marque de commerce ou à compter du 1er juillet 1954, en prenant la date qui est postérieure à l'autre, aucun enregistrement ne peut être radié, modifié ou jugé invalide du fait de l'utilisation ou révélation antérieure mentionnée au paragraphe (1), à moins qu'il ne soit établi que la personne qui a adopté au Canada la marque de commerce déposée l'a fait alors qu'elle était au courant de cette utilisation ou révélation antérieure.

[Non souligné dans l'original.]

[38] Therefore, subsection 17(1) of the Act allows a person such as the Applicant to commence these proceedings. However, this subsection also places the burden on the Applicant to prove its claims. As for the issue of time limitation found in subsection 17(2) of the Act, given that the trade-mark RED FM was registered on May 26, 2008 and that the Notice of Application in the present proceedings was filed on October 4, 2012, the Applicant is well within the allotted time to proceed with action. Consequently, this Court finds that it has jurisdiction over the present matter and that the Applicant has standing to apply.

B. Legal scheme

[39] Section 17 of the Act, reproduced above, allows for the expungement of a trade-mark registration on the ground of previous use by a person other than the person who applied for the trade-mark registration in question. This is the provision relied upon by the Applicant. According to

subsection 17(1) of the Act, the Applicant must prove the following: (1) it has used its own trade-mark (ROUGE FM) in Canada prior to the Respondent using its trade-mark (RED FM), (2) the trade-marks caused confusion (within the meaning of subsection 6(2) of the Act), and (3) the Applicant has not abandoned its trade-mark at the date of the advertisement of the Respondent's trade-mark application. Only if these three criteria are met can the Respondent's trade-mark be held invalid and expunged by this Court.

[40] In addition, subsection 18(1) of the Act sets out specific situations where the registration of a trade-mark is to be held invalid under the Act. More specifically, as it concerns the case at bar, subsection 18(1) *in fine* of the Act states that in cases where the applicant is not the "person entitled to secure the registration" at the time of the application, said registration is invalid. To determine who exactly this entitled person is, one must turn its attention to section 16 of the Act, particularly, again for the purposes of the present matter, to paragraph 16(1)(a), which provides as follows:

Trade-marks Act, RSC, 1985,
c T-13

*Loi sur les marques de
commerce*, LRC (1985),
ch T-13

PERSONS ENTITLED TO
REGISTRATION OF TRADE-
MARKS

PERSONNES ADMISES À
L'ENREGISTREMENT DES
MARQUES DE COMMERCE

Registration of marks used or
made known in Canada

Enregistrement des marques
employées ou révélées au
Canada

16. (1) Any applicant who has filed an application in accordance with section 30 for registration of a trade-mark that is registrable and that he or his predecessor in title has used in Canada or made known in

16. (1) Tout requérant qui a produit une demande selon l'article 30 en vue de l'enregistrement d'une marque de commerce qui est enregistrable et que le requérant ou son prédécesseur en titre a

Canada in association with wares or services is entitled, subject to section 38, to secure its registration in respect of those wares or services, unless at the date on which he or his predecessor in title first so used it or made it known it was confusing with

employée ou fait connaître au Canada en liaison avec des marchandises ou services, a droit, sous réserve de l'article 38, d'en obtenir l'enregistrement à l'égard de ces marchandises ou services, à moins que, à la date où le requérant ou son prédécesseur en titre l'a en premier lieu ainsi employée ou révélée, elle n'ait créé de la confusion :

(a) a trade-mark that had been previously used in Canada or made known in Canada by any other person;

a) soit avec une marque de commerce antérieurement employée ou révélée au Canada par une autre personne;

[...]

[...]

[41] In light of this legislative framework, if the Applicant wishes to be successful in these proceedings, it must satisfy this Court that it had used its trade-mark before the Respondent, that it has not abandoned its trade-mark and that the two trade-marks were confusing. Then, this Court would have no choice but to conclude that the Respondent was not the person entitled to present the trade-mark application for RED FM and, consequently, to invalidate and expunge this trade-mark registration.

[42] It is well established in law that a registered trade-mark enjoys a presumption as to its validity and that the onus is on the party seeking the expungement, here the Applicant, to satisfy this Court of its invalidity (see for example *Andrés Wines Ltd v Vina Concha Y Toro SA*, 2001 FCT 575 at para 8, [2001] FCJ No 893).

[43] What follows is a more detailed explanation of the three-fold criteria the Applicant must satisfy in order for this Court to grant its application for expungement.

1. Previous use

[44] Courts have addressed through case law the issue of whether the use of a trade-mark on a website constitutes use in Canada for the purposes of the Act, specifically of subsection 4(2) of the Act. In its factum, the Applicant relies on jurisprudence from this Court which needs to be put back into context because, as noted by the Respondent, the Applicant seeks from this Court an interpretation that is way too broad.

[45] Indeed, with regard to concept of use, the Applicant mainly relies on *HomeAway.com, Inc. v Hrdlicka*, 2012 FC 1467, [2012] FCJ No 1665 [*HomeAway*] and the following passage at para 22:

[22] I find, therefore, that a trade-mark which appears on a computer screen website in Canada, regardless where the information may have originated from or be stored, constitutes for Trade-Marks Act purposes, use and advertising in Canada.

[46] Building on this decision, the Applicant claims that the simple fact for a trade-mark to appear on a computer screen through the Internet, notwithstanding the origin of the trade-mark, suffices to prove that it was “used” within the meaning of the Act. However, this Court must side with the Respondent’s interpretation of the decision and put this finding into context. In *HomeAway*, above, the trade-mark was used in association with services that were actually offered to Canadians over the web. As rightly put by the Respondent in its factum, there is “an important distinction between services performed in Canada and services performed outside Canada, perhaps for Canadians.” Although it is true that subsection 4(2) provides that a “trade-mark is deemed to be

used in association with services if it is used or displayed in the performance [...] of those services”, the Courts and tribunals, including the Trade-marks Opposition Board, have nonetheless added that such services must be effectively offered to Canadians or performed in Canada (see for example *Express File Inc. v HRB Royalty Inc.*, 2005 FC 542 at para 20, [2005] FCJ No 667).

[47] To go against this logical interpretation of the law would lead to some twisted and unfortunate consequences none of which could have been Parliament’s intent in drafting the Act. For example, should we follow the Applicant’s point of view, any foreign trade-mark holder could request and obtain the expungement of a *bona fide* Canadian trade-mark based on previous use through the Web even if this foreign trade-mark owner had basically nothing to do with Canada and no physical presence in the country. How could it be logical to interpret the applicable legal scheme as putting every single Canadian trade-mark owner at risk of having its trade-mark taken away by another trade-mark that has no nexus to Canada? Should Canadian companies be expected to protect themselves from every company around the world which has a website that is accessible in Canada? Could this even be possible to achieve? It would be illogical and impossible to take this approach.

[48] What is more, the Respondent quite rightly submits that this situation would be unthinkable should the roles in these proceedings be reversed. Would a Canadian trade-mark owner have the right to request from a foreign trade-mark owner that they stop using their trade-mark if this foreign owner’s presence in Canada is limited to the Internet? In particular, should this Court uphold the RED FM trade-mark as valid, could the Respondent then request from the Applicant that it stops

streaming its programming online because one of the listeners could potentially be Canadian?

Again, this suggestion is preposterous. The notion of performing the services is essential.

[49] Therefore, the Applicant shall have to prove having used its trade-mark with respect to services actually provided to Canadians or performed in Canada.

[50] As for the notion of *previous* use, it goes without saying that the Applicant must satisfy this Court that it used ROUGE FM according to applicable legislation and case law before the Respondent used RED FM.

2. Conclusion

[51] In order to determine whether a trade-mark causes confusion with respect to another trade-mark under subsection 6(2) of the Act – the applicable provision in the present matter –, this Court must consider all the “surrounding circumstances” including the factors listed in subsection 6(5) of the Act:

<i>Trade-marks Act</i> , RSC, 1985, c T-13	<i>Loi sur les marques de commerce</i> , LRC (1985), ch T-13
INTERPRETATION	DÉFINITIONS ET INTERPRÉTATION
<u>When mark or name confusing</u>	<u>Quand une marque ou un nom créé de la confusion</u>
6. (1) [...]	6. (1) [...]
<i>What to be considered</i>	<i>Éléments d'appréciation</i>
(5) In determining whether trade-marks or trade-names are	(5) En décidant si des marques de commerce ou des noms

confusing, the court or the Registrar, as the case may be, shall have regard to all the surrounding circumstances including	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) the inherent distinctiveness of the trade-marks or trade-names and the extent to which they have become known;	a) le caractère distinctif inhérent des marques de commerce ou noms commerciaux, et la mesure dans laquelle ils sont devenus connus;
(b) the length of time the trade-marks or trade-names have been in use;	b) la période pendant laquelle les marques de commerce ou noms commerciaux ont été en usage;
(c) the nature of the wares, services or business;	c) le genre de marchandises, services ou entreprises;
(d) the nature of the trade; and	d) la nature du commerce;
(e) the degree of resemblance between the trade-marks or trade-names in appearance or sound or in the ideas suggested by them.	e) le degré de ressemblance entre les marques de commerce ou les noms commerciaux dans la présentation ou le son, ou dans les idées qu'ils suggèrent.

3. Non-abandonment

[52] This element is pretty self-explanatory: the Applicant will have to prove that it has continuously used its ROUGE FM trade-mark from the date on which it claims to have started using this trade-mark up to the date of advertisement of the Respondent's trade-mark application for RED FM.

C. Analysis

1. Is Canada Trade-mark Registration No. TMA715146, RED FM, void *ab initio* because the Respondent made a fraudulent misrepresentation with respect to the date of first use in Canada?

[53] At the hearing, both parties downplayed the importance of this issue, placing more emphasis on the second one. These reasons were developed accordingly.

[54] As for the answer to this question, it is clearly no. This Court is satisfied that the Respondent indeed undertook a *test loop* period starting December 21, 2005 prior to the commencement of its regular broadcasting programming on January 23, 2006, and I find that there is no contradiction between the Respondent's trade-mark application for RED FM and the beginning of its radio station's activities. This conclusion is further supported by two affidavits. First, the affidavit of Mark Lewis, the Respondent's media-regulatory lawyer who is responsible for the disputed document and who claims to have arranged the technical examination which resulted in RED FM starting its test loop broadcasting on December 21, 2005 (see the Applicant's Motion Record [AMR], Volume 4, Tab 5, at para 29). Second, the affidavit of Dave Glasstetter who claims to have been present on December 21, 2005 for the initial broadcast and to have witnessed, on several occasions during the day, the "RED FM" trade-mark appearing on RBDS-enabled radio receivers (see the AMR, Volume 5, Tab E-1, at paras 2 and 3).

[55] Simply put, the Applicant, who relied on misrepresentation as a ground of invalidity, had the onus of proving its claims, and given that this Court is not satisfied by the Applicant's insufficient evidence, the presumption of validity must stand. There was evidently no fraudulent misrepresentation.

2. Alternatively, is Canada Trade-mark Registration No. TMA715146, RED FM, invalid pursuant to subsection 18(1) *in fine* of the Act because the applicant for registration, the Respondent, was not the person entitled to secure registration considering that, at the date on which it first used it, it caused confusion with the ROUGE FM trade-mark used in Canada by the Applicant (under paragraph 16(1)(a) of the Act)?

[56] As stated above, the Applicant must establish its previous use of the ROUGE FM trade-mark with respect to services provided to Canadians or performed in Canada, that it has not abandoned its ROUGE FM trade-mark since then, and that RED FM caused confusion with ROUGE FM. Prior to embarking in the analysis, it should be noted that the Applicant's application called for the registration of ROUGE FM as a trade-mark for services related with "[TRANSLATION] radio communication, the broadcasting of radio programming, the transmission of sound, information and messages by computer terminals, namely the broadcast of music and radio programming by computer [emphasis added]", whereas the Respondent registered its RED FM trade-mark with respect to services related to the "operation of a radio station, radio broadcasting, and radio broadcast programming reflecting ethnic diversity". It is this Court's belief that only the first portion of the Applicant's application, and which is emphasized above, is common to both parties, namely the services pertaining to "radio communication, the broadcasting of radio programming". This should be dealt with first, and the last set of services shall be addressed afterwards.

- 2.1 Did the Applicant establish having used its ROUGE FM trade-mark prior December 2005, i.e. prior to the Respondent using RED FM, with respect to radio broadcast services and, if so, does this warrant the expungement of the Respondent's trade-mark under section 17 of the Act?

[57] As adequately put by the Applicant, the Act and case-law indeed established a distinction between the use of a trade-mark in relation with wares or services, and as stated above, the Applicant claims to be offering services – broadcasting services, that is – to the Canadian population

through its website. Building on this assertion by the Applicant, this Court set out to determine whether this was the case or not.

[58] As a side note, this Court notes that it is public knowledge that radio broadcasting as we know it in Canada is more than simple transmission of sound. It calls for community relations, social content related to this community, identification with announcers (speakers), the attraction of certain services related to program advertising, social community messages, etc. With that background in mind, as it will be seen later, however, a review of the jurisprudence showed that certain factors are to be considered when discussing broadcasting undertakings for the purposes of our conclusions.

[59] Thus, this Court must first determine whether the Applicant's online activities constitute "broadcasting" for the purpose of Canadian legislation. In this regard, the Applicant claims that ROUGE FM is qualified as a "new media broadcasting undertaking" pursuant to CRTC Order 1999-197 [the "CRTC Order"], meaning that its activities constitute broadcasting that is unregulated in Canada but broadcasting in Canada nonetheless. Indeed, the CRTC Order was rendered necessary by the new media context and especially by the arrival of the Internet. The CRTC could not regulate all the broadcasting content aimed at Canadian listeners: this task would be simply insurmountable. As such, it deregulated certain services through an "exemption order", pursuant to which new media broadcasting undertakings did not have to obtain licences from the CRTC in order to provide broadcasting services. And so, the Applicant claims to be a new media broadcasting undertaking, but this Court comes to a different conclusion for the reasons set out below.

[60] It should be noted that the *CRTC Order* uses the term “broadcasting undertaking”, which refers directly to the Act. In fact, subsection 4(2) of the Broadcasting Act provides that this Act “[...] applies in respect of broadcasting undertakings carried on in whole or in part within Canada [...] [Emphasis added]”. As such, only those broadcasting undertakings which are carried on at least partly within Canada are subject to this act. In coming to this conclusion, this Court examined case-law and came to the realization that, in recent years, various courts around the country have shed some light, through their decisions, as to what could be the proper interpretation of “carried on in whole or in part within Canada”. It was quite right and important for the Courts to do so considering that this portion of the provision defines the notion of “broadcasting undertakings” as it relates to the application of the Broadcasting Act as well as, almost inevitably, of any regulation and legal instruments made there-under. After having reviewed relevant jurisprudence, it is possible to identify certain criteria for courts to determine whether an undertaking is carried on in whole or in part in Canada, i.e. whether there is a nexus between said undertaking and Canada, especially as it relates to the transmission of programming through the web. The existence of such a nexus would be necessary for any “broadcasting undertaking”, including the ROUGE FM station, to be considered as such under Canadian legislation. At hearing, the parties were presented with the relevant decisions identified by this Court through this exercise and were invited to produce further submissions on the issue. Keeping in mind these submissions, the relevant criteria are *inter alia* addressed in the following paragraphs.

[61] First, is the content offered by the website stored on servers located in Canada? See *Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers*, 2004 SCC 45 at para 61, [2004] 2 SCR 427 [*Society of Composers*], which relates to the

situs of a content provider. In the present matter, the Applicant testified that it does not in fact store its transmitted content on Canadian servers.

[62] Second, does the Applicant have a physical presence in Canada, e.g. an office? See for example *Pro-C Ltd. v Computer City Inc.*, [2000] OJ No 2823 at para 131, 7 CPR (4th) 193, overturned on another issue in *Pro-C Ltd. v Computer City, Inc.* (2001), 55 OR (3d) 577, [2001] OJ No 3600, where it was established that the presence of a store or an office in Canada is a relevant factor to be considered in determining whether using a name on an American website constituted use in Canada for the purposes of the Act. The Applicant is not physically present in Canada and practically never has been. Only once in its existence was it somewhat present in Canada, and that is in 2010 when it hired a former Canadian radio host to cover the Vancouver Olympics.

[63] Third, does the Applicant solicit or actually have advertisers in Canada with respect to the content it offers? See for example *Composers Authors and Publishers Association of Canada Ltd v Kvos Inc.*, [1963] SCR 136, where it was held that the fact for an American broadcasting company to present itself to advertisers as being able to communicate with an important number of Canadians through broadcasts could help settle the applicability of the *Copyright Act*, RSC, 1985, c C-42 [the “Copyright Act”] to the broadcasts in question. The Applicant testified that it does not seek nor have advertisers in Canada.

[64] Fourth, is there any indication that the Applicant is actively targeting Canadian audiences in its programming? See *Society of Composers*, above at paras 136-140, where it was also held that this could help to determine whether the *Copyright Act*, is applicable to certain communications.

The Applicant claims to be targeting French-speaking audiences outside Switzerland. However, nothing in what the Applicant presented satisfied this Court that it actually took steps towards gathering Canadian listeners other than offering live streaming of its programming online.

[65] I believe these criteria to be cumulative and none exhaustive – none of them could be determinative on its own and there could certainly be more. However, they do help appreciate the possible existence of a relation between ROUGE FM and Canada, and considering these criteria as a whole, it seems rather obvious that there is in fact no actual nexus between the Applicant and Canada in the present case. As such, this Court finds that the Applicant’s activities in relation with ROUGE FM do not constitute a “broadcasting undertaking” as they are not “carried in whole or in part in Canada” and therefore fall outside of the CRTC’s purview.

[66] The Applicant claims to be a “new media broadcasting undertaking” under the above-mentioned *CRTC Order*. However, such is not the case. This Order was issued pursuant to subsection 9(4) of the Broadcasting Act and must consequently be interpreted and applied in accordance with this act, including its definitions. As a matter of fact, it is trite law that unless otherwise specified, any delegate legislation (including the CRTC Order) is to be construed within the framework and scope of its enabling act. Accordingly, given that the Applicant is not a “broadcasting undertaking” within the scope of the Broadcasting Act, as it was just established by this Court, it most certainly cannot be considered as being a “new media broadcasting undertaking”.

[67] As such, if the Applicant falls outside the scope of the CRTC and is not an exempted new media broadcasting undertaking, it cannot claim to have used the ROUGE FM trade-mark while

providing broadcasting “services” to Canadians for the purpose of Canadian legislation – particularly under subsection 4(2) of the Act – and neither can it contemplate filing a trade-mark application on this ground.

[68] By way of consequence, the Applicant’s application for the expungement of the Respondent’s RED FM trade-mark must be dismissed as it concerns the strict issue of radio broadcasting.

3. What if the Applicant’s activities actually constituted “services” within the meaning of Canadian legislation?

[69] That being said, should this Court happen to be wrong in its interpretation of the CRTC Order and the services offered by the Applicant truly constitute “services” within the meaning of subsection 4(2) of the Act, the current application would nonetheless not warrant the expungement of the Respondent’s trade-mark because there is practically no evidence of these services actually being performed in Canada between July and December 2005, i.e. no proof of actual previous use. The Applicant was not in a position to provide data related to its online listenership prior to 2009, rendering this information useless for the purposes of determining whether the Applicant has used its ROUGE FM trade-mark with respect to services prior to the Respondent using RED FM.

[70] This Court must fall back on the evidence provided by the Applicant respecting the number of hits on its website emanating from Canada. For July 2005, the Applicant submitted that 7,375 hits on its website came from Canada. This accounted for 0.21% of the total of hits on the Applicant’s website coming from around the world. Other data submitted with regard to July 2005 indicate that a total of 24,645 different IP addresses (*Total des sites uniques*) visited the website. If one multiplies

this number of IP addresses by the percentage of hits coming from Canada, one would most likely end up with the number of hits on the Applicant's website coming from Canadian IP addresses in July 2005. This total would be 51.77 hits. Applying this same formula to the months of August to December, one gets the following number of Canadian IP addresses: 45.02 hits (August); 39.92 hits (September); 50.24 hits (October); 20.45 hits (November); 71.32 hits (December). It should also be noted that the number of hits is not the number of visits but the number of files downloaded from a server when accessing a page, e.g. each image, sound, text, etc. Accordingly, loading a single elaborate web page, such as that of the Applicant's radio station, will undoubtedly result in a high number hits. Once this is understood, it is clear that the Canadian traffic on the Applicant's website was nearly if not completely nil. What is more, the Applicant was not able to satisfy this Court that this incredibly low number of hits actually resulted from visits on the website by human beings and not by bots.

[71] Consequently, even if this Court had concluded that the Applicant's radio station live streaming in Canada should be considered services for the purpose of Canadian legislation, the Applicant still would not have produced satisfactory evidence proving that it has effectively used ROUGE FM in Canada in relation with these services, much less before the Respondent using RED FM. Therefore, this Court would nonetheless have found that the Applicant failed to prove its previous use of ROUGE FM and dismissed the application for expungement as it relates to the performance of radio broadcast services in Canada.

2.2 Did the Applicant establish having used its ROUGE FM trade-mark prior to December 2005, i.e. to the Respondent using RED FM, with respect to the second set of services of its trade-mark application and, if so, does this warrant the expungement of the Respondent's trade-mark under section 17 of the Act?

[72] This Court just found that the Applicant is not a “broadcasting undertaking” – and therefore that it cannot offer broadcasting services in Canada –, and considering the services referred to in the Applicant’s trade-mark application and the Respondent’s registered trade-mark, one must admit that the trade-mark application giving rise to these proceedings could reasonably only have been filed with respect to the last set of the services to which it refers, specifically “the transmission of sound, information and messages by computer terminals, namely the broadcast of music and radio programming by computer”.

[73] The question then becomes: hypothetically, if the Applicant had filed an application to register its ROUGE FM trade-mark with respect to this last set of services, could it reasonably contemplate being granted this request or would it also be denied? Moreover, would this possible trade-mark warrant this Court’s intervention in expunging the Respondent’s trade-mark?

[74] In order to answer this question, this Court must once again turn its mind to subsection 17(1) of the Act which provides the criteria for expungement: previous use of a confusing trade-mark and the non-abandonment of said trade-mark. The application of these criteria to the present case is as follows.

4. Previous use

[75] As previously stated, the issue of previous use relates to the services being performed in Canada. Following the hearing and after being presented with the evidence, this Court is satisfied

that the Applicant's radio station's services in Canada would indeed constitute transmission of sound, information and messages through computers to Canadians. In addition, as previously mentioned, merely displaying a trade-mark can suffice as a means of use of a trade-mark only in cases where services are actually offered to Canadians (*HomeAway*, above), and to the contrary of the issue of "broadcasting" services, I find that such would have been the case in the present matter: the Applicant could indeed have used its ROUGE FM trade-mark during the transmission of sound, information and messages through computers to Canadians. However, this Court has already found Canadian traffic on the Applicant's website to be more than negligible for the purposes of establishing use of trade-mark in relation to radio broadcast services. The same user data apply to the second set of services listed in the Applicant's trade-mark registration application, and accordingly, they are insufficient to satisfy this Court that the Applicant has in fact performed as of July 2005 these services to Canadians along with ROUGE FM prior to the Respondent using RED FM.

[76] The fact that the Applicant was not able to establish previous use is sufficient to dismiss its application, but I will nonetheless examine the two last criteria, i.e. confusion and non-abandonment.

5. Confusion

[77] To address this criterion, this Court must determine whether, in these particular circumstances, the ROUGE FM trade-mark would be considered as causing confusion with the RED FM trade-mark within the meaning of subsection 6(5) of the Trade-Marks Act mentioned

above. As submitted by the Respondent, this Court finds that, in all likelihood, it would not. The following is an application of the relevant criteria to the present matter.

[78] *Inherent distinctiveness* (para 6(5)(a) of the Act) – Both ROUGE and RED are quite common words and therefore none of them is inherently distinctive. In addition, the extent to which ROUGE FM has become known as a trade-mark in Canada between June and December 2005 is nil.

[79] *Length of time* (para 6(5)(b) of the Act) – Even if this Court were to accept (which it did not) that the Applicant had used ROUGE FM as a trade-mark in Canada between June and December 2005, this period is very short especially considering the extremely low number of Canadian hits on the Applicant's website for that period and the inherently imprecise nature of the evidence submitted to that effect.

[80] *Nature of the services* (para 6(5)(c) of the Act) – As stated above, the services that the Applicant would actually offer to Canadians along with using its trade-mark are quite different from those stated on the original trade-mark application, as in reality they do not include broadcasting services within the meaning of Canadian legislation. In addition, they would also be quite different from those services offered by the Respondent, who effectively offers radio broadcasting services.

[81] *Nature of the trade* (para 6(5)(d) of the Act) – As explained above, the Applicant has absolutely no trade in Canada – no tie whatsoever to Canada, for that matter – whereas the

Respondent has offices, employees and advertisers in Canada. The Applicant simply offers free audio streaming to any computer around the world.

[82] *Degree of resemblance* (para 6(5)(e) of the Act) – At the hearing, the Applicant relied on the Supreme Court of Canada’s decision in *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27, [2011] SCJ No 27 [*Masterpiece*]. This is the only factor that favours the Applicant’s submission to the effect that the trade-marks are confusing. As a matter of fact, they would, to some extent, share a high degree of resemblance. The Respondent argues that their main target audiences are not at all the same (the Applicant is targeting French-speaking Canadians and the Respondent’s programming is aimed at an audience that speaks English and a variety of languages other than French). However, this is not the approach to be adopted. The Supreme Court of Canada taught us in *Masterpiece*, above, at paras 28-33, that the Canadian trade-mark regime is of national scope, meaning that a trade-mark owner is entitled to the exclusive use of said trade-mark across the country. Therefore, it is not appropriate to “split” potential audiences on the basis of their geographical location. As such, ROUGE FM and RED FM could indeed be considered as sharing a high level of resemblance. Having said that, although the Applicant rightly submits that the degree of resemblance is likely to be the most important factor in the confusion analysis (see *Masterpiece*, above, at para 49), this Court adds that it is not the sole factor to be considered. In the present case, the other factors vastly outweigh that of the degree of resemblance, particularly the fact the parties do not offer the same type of services and that the Applicant has for all purposes no trade in Canada.

[83] *Conclusion on confusion* – This Court finds that, hypothetically, should the Applicant apply for another trade-mark registration with respect to the services it actually offers, this trade-mark

would in no way cause confusion with the Respondent's registered trade-mark RED FM independently of their degree of resemblance.

6. Non-abandonment

[84] Considering the previous finding to the effect that the two trade-marks would likely not be confusing, it is not necessary to assess this criterion. However, this issue is settled by the first criterion: one cannot abandon a trade-mark if it is found never to have effectively been used in Canada during the relevant period (from July to December 2005).

[85] In addition, it should be noted that, as submitted by the Respondent, granting a trade-mark to the Applicant with respect to the second set of services set out in its registration application would result in a deceptively misdescriptive trade-mark under paragraph 12(1)(b) of the Act. Particularly, FM is acronym which stands for "frequency modulations" and is associated with traditional broadcasting services, whereas the second set of services would only be provided over the web and not through over-the-air technology.

[86] Therefore, considering that the Applicant has failed to prove having used its trade-mark in Canada prior to the Respondent using its own trade-mark and further considering that the two trade-marks would likely not cause confusion, the Applicant's application for the expungement of the Respondent's trade-mark is also to be dismissed as it concerns the second set of services (the transmission of sound, information and messages by computer terminals, namely the broadcast of music and radio programming by computer).

[87] Given that this Court has dismissed the application with respect to all of the Applicant's services, both the alleged broadcasting services and the second set of services listed in the application, this Court has no choice but to dismiss the application for expungement as a whole.

[88] In the exercise of my discretion, pursuant to subsection 400(1) of the *Federal Courts Rules*, SOR/98-106, I award costs in the amount of \$6,000 against the Applicant in favour of the Respondent.

JUDGMENT

THIS COURT'S JUDGMENT IS THAT:

1. This application for the expungement of Canadian Trade-mark Registration No. TMA715146, RED FM, owned by the Respondent, is dismissed;
2. Costs in the amount of \$6,000 are awarded against the Applicant in favour of the Respondent.

“Simon Noël”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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