

Federal Court of Appeal



Cour d'appel fédérale

Date: 20131204

Docket: A-132-13

Citation: 2013 FCA 279

**CORAM: EVANS J.A.
STRATAS J.A.
WEBB J.A.**

BETWEEN:

**ONTARIO DENTAL ASSISTANTS
ASSOCIATION**

Appellant

and

**CANADIAN DENTAL
ASSOCIATION/L'ASSOCIATION DENTAIRE
CANADIENNE**

Respondent

Heard at Toronto, Ontario, on December 3, 2013.

Judgment delivered from the Bench at Toronto, Ontario, on December 3, 2013.

REASONS FOR JUDGMENT OF THE COURT BY:

WEBB J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Toronto, Ontario, on December 3, 2013).

WEBB J.A.

[1] The Ontario Dental Assistants Association filed an application to register the certification mark “CDA” (Mark) under the *Trade-Marks Act*, RSC 1985, c. T-13 (*Act*). The Canadian Dental Association filed a Statement of Opposition opposing this application. The Trade-Marks Opposition Board (Board) allowed the Canadian Dental Association’s opposition to

the registration of the certification mark by the Ontario Dental Assistants Association (2011 TMOB 125). Justice Manson dismissed the appeal of the Ontario Dental Assistants Association from the decision of the Board (2013 FC 266). The Ontario Dental Assistants Association has appealed this decision.

[2] The parties submit that the standard of review in this appeal is correctness for any questions of law, including any questions of law that can be separated from any questions of mixed fact and law. For any questions of fact or mixed fact and law where there is no extricable question of law, the parties submit that the standard of review is palpable and overriding error. However, since this is an appeal from the Federal Court from a decision of the Board under section 56 of the *Act* (and not an appeal from a decision of the Federal Court rendered in relation to an application made to that Court under section 57 of the *Act*), the role of this Court in this Appeal is to determine whether the Federal Court Judge identified the applicable standard of review and whether he applied it correctly (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paragraphs 45-46; *Monster Cable Products, Inc. v. Monster Daddy, LLC*, 2013 FCA 137). The Federal Court Judge identified the standard of review as reasonableness and the parties do not contest this. We agree that this was the appropriate standard.

[3] The Board made three findings:

- (a) “professional designations cannot function as certification marks” (paragraph 57 of the decision of the Board);

(b) even if the Mark could function as a certification mark, the Ontario Dental Assistants Association did not establish use of this Mark as provided in subsection 4(2) of the *Act* (paragraphs 59 to 65 of the decision of the Board); and

(c) the Mark was not distinctive because the acronym “CDA” was sufficiently recognized as referring the Canadian Dental Association to negate the distinctiveness of the Mark (paragraphs 69 to 83 of the decision of the Board).

[4] In order to be successful either in the appeal to the Federal Court or in this Appeal, the Ontario Dental Assistants Association would have to be successful in overturning all three findings by the Board.

[5] The Federal Court Judge did not agree with the finding that a professional designation can never qualify as a certification mark. This finding by the Federal Court Judge has not been appealed.

[6] The Federal Court Judge found that the Mark could not be registered under the *Act* because of the findings of the Board that:

(a) the Ontario Dental Assistants Association had not used the Mark as provided in subsection 4(2) of the *Act* as claimed in its application for registration since 1965; and

(b) the Mark was not distinctive because “CDA” had become sufficiently known as a reference to the Canadian Dental Association to negate the distinctiveness of the Mark

were reasonable. We have not been persuaded that he committed any error in so finding. As the Federal Court Judge found, both of these findings could reasonably be made by the Board on the evidence before it.

[7] As a result the Appeal will be dismissed, with costs.

“Wyman W. Webb”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-132-13

APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE MANSON OF THE FEDERAL COURT OF CANADA DATED MARCH 12, 2013, DOCKET NO. T-1600-11

STYLE OF CAUSE: ONTARIO DENTAL ASSISTANTS
ASSOCIATION v. CANADIAN
DENTAL
ASSOCIATION/L'ASSOCIATION
DENTAIRE CANADIENNE

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: DECEMBER 3, 2013

REASONS FOR JUDGMENT OF THE COURT BY: EVANS J.A.
STRATAS J.A.
WEBB J.A.

DELIVERED FROM THE BENCH BY:
WEBB J.A.

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