

Federal Court



Cour fédérale

Date: 20150113

Docket: T-939-14

Citation: 2015 FC 42

Toronto, Ontario, January 13, 2015

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

**DECOMMODIFICATION LLC,
BURNING MAN PROJECT AND
BLACK ROCK CITY, LLC, DOING
BUSINESS AS BURNING MAN**

Plaintiffs

and

**BURN BC ARTS COOPERATIVE,
JACKSON SMITH,
BHAK JOLICOEUR AND BRIAN CORKUM,
SOMETIMES OPERATING INDIVIDUALLY
OR COLLECTIVELY AS BURN BC,
BURNBC.ORG AND/OR
BURN BC ARTS COOPERATIVE**

Defendants

ORDER AND REASONS

[1] The Plaintiffs have brought a motion *ex parte* for default judgment against one the Defendants, Burn BC Arts Cooperative. This action has been discontinued against one of the

originally named Defendants, Tanya Evans. An Order will go removing her name from the style of cause. Two of the other named Defendants, Brian Corkum and Jackson Smith, have filed lengthy, largely identical Defences acting on their own behalf. No relief is sought in the present motion against Bhak Jolicoeur who is also named as an individual Defendant, and has not yet filed a Defence although I am informed that he served a Defence, largely identical to that of Corkum and Smith, on the solicitors for the Plaintiffs, but out of time.

[2] Bhak Jolicoeur made an “informal” application to this Court for leave to represent the Defendant, Burn BC Arts Cooperative (referred to herein as Burn BC). Justice Heneghan, by an Order dated November 6, 2014, denied such leave. At page 5 of her Order, Justice Heneghan wrote:

In the result, Burn BC shall appoint a lawyer to act on its behalf within 30 days. That lawyer is to file a defence within that 30 day period, failing which the Plaintiffs can move on an ex parte basis, that is, without notice to Burn BC, for the entry of default judgment.

[3] Over two months have passed since Justice Heneghan issued her Order. No appeal was taken, no lawyer has been appointed to represent Burn BC and no defence has been filed on behalf of that Defendant. Accordingly, the Plaintiffs have moved on an *ex parte* basis, without notice to Burn BC, for the entry of default judgment in accordance with the procedure as set out in the above Order of Justice Heneghan.

[4] Rule 210 of the *Federal Courts Rules* provides that where a party has failed to file a timely Defence, a plaintiff may move for default judgment. Unlike provisions in the *Rules* of some other Courts, the allegations made in the Statement of Claim cannot be accepted as true

unless they are supported by affidavit evidence filed on the motion. Here, the Plaintiffs have filed affidavit evidence of Raymond Allen, General Counsel to the Plaintiffs. He has served in various capacities with the Plaintiffs since 2004. Also filed is an affidavit of Dayle Boutilier, a legal assistant in the law firm representing the Plaintiffs. By a supplemental motion record filed with leave of the Court, the Plaintiffs also filed the affidavit of Roxanna Monemdjou, an articling student with the law firm representing the Plaintiffs.

[5] The Plaintiffs' action is based on section 7(b) of the *Trade-marks Act*, R.S.C. 1985, c. T-13. It is alleged that the Defendants, by their use of the words Burning Man, Burn BC and Decompression in association with the promotion and holding of cultural and community events in Canada, have directed public attention to their wares, services and businesses in such a way as to cause or likely to cause confusion in Canada, at the time they commenced to do so, between their wares, services and businesses and those of the Plaintiffs.

[6] It is important to note that this is not an action for infringement of any registered trade-marks. The Plaintiffs have recently filed applications to register certain trade-marks but they have not yet been registered.

[7] It is further interesting to note that Burn BC filed applications to register Burning Man and BC Decompression as trade-marks in the Canadian Trade-marks office asserting that it wished to prevent "commercialization" of those marks by "others". Following correspondence with the Plaintiffs' lawyers, these applications were withdrawn.

[8] I have reviewed the affidavit evidence submitted by the Plaintiffs on this motion and I am satisfied that the evidence shows that:

- the Plaintiffs have, since as early as 1986 and certainly by the mid-1990's, organized and conducted an annual event, now located in Nevada, which has received broad notoriety not only in the United States but in Canada and probably elsewhere;
- that event is known as the Burning Man event and can be described as a combination art festival, social event and experiment in community living;
- the trade-marks Burning Man and Decompression have become well known as being associated with this annual event;
- the Plaintiffs have licensed others to conduct such events;
- since at least 1996, these events have become well known in Canada including with an association with the trade-marks Burning Man and Decompression. There has been significant effort to advertise and promote these events to Canada, thousands of tickets to these events have been sold each year to Canadians; these events have been well publicized in the Canadian media;
- since in or about 2009, the Defendant, Burn BC, has commenced to organize similar events in Canada. This Defendant has, by its website and otherwise given the impression that it is authorized by or associated with the Plaintiffs and their events. This Defendant has used the words Burning Man, Burn BC and Decompression in association with such activities;
- the Defendant, Burn BC, has no license or permission from the Plaintiffs to carry on such activities.

[9] I conclude that the Defendant Burn BC's activities are likely to cause confusion between its activities in organizing, promoting and holding events and those activities of the Plaintiffs in a manner contrary to the provisions of section 7(b) of the *Trade-marks Act*.

[10] Having so concluded, the issues become those of remedies. The Plaintiffs seek a declaration and injunction in very broad terms. They seek destruction of offensive materials. They seek transfer of certain domain names, damages and costs.

[11] The first issue is to decide how the Defendant, Burn BC, is to be described in the injunction. It is organized under the *Cooperative Association Act*, S.B.C. 1999, c 28. It thereby has members and investment shareholders; it has directors. The liability of members and investment shareholders in such a cooperative is limited to the amount, if any, unpaid on the shares of the member or investment shareholder (section 55 of the *Act*). It is a separate legal entity from its members (*McGauley v British Columbia*, [1989] B.C.J. No. 1699 (CA) at page 30). Therefore, the injunction should be directed as against the Defendant, Burn BC Arts Cooperative, its members, investment shareholders, directors, servants, agents and all those over whom it exercises control.

[12] The next issue is the scope of the injunction. It cannot be so broad as to enjoin simply any activity contrary to section 7(b) of the *Trade-marks Act* as that would invite further argument as to whether certain activity was or was not within that provision. The injunction will include a provision in addition to a general provision that the use of the specific trade-marks at issue with respect to the specific activities at issue, are enjoined.

[13] The third issue is whether this Court can order that the Defendant transfer certain domain names. This Court can enjoin the continued use of certain domain names and restrain their transfer to others but, in my view, has no jurisdiction to require their transfer to the Plaintiffs.

[14] The last issue is the ascertainment of the quantum of damages and profits to be awarded, if any. There is no evidence as to the profits made by Burn BC, if any. The Plaintiffs have not provided any evidence to support any particular quantum of losses suffered, if any, by reason of the activities of Burn BC. Nominal damages, not necessarily small, have been awarded by this and other Courts in such a situation. They are usually based on an estimate of losses including an amount sufficient to serve as a deterrent to others contemplating similar activities. The Plaintiffs have asked for \$25,000.00. Given that nothing to support that award is in their evidence but I agree that the Plaintiffs have suffered some damages and others should be deterred, I will allow \$10,000.00 in damages.

[15] The Plaintiffs have provided a draft Bill of Costs that I am satisfied will support an award of \$10,000.00 in costs for this motion which is to include the costs of Judgment against Burn BC.

ORDER

THIS COURT ORDERS that

1. The name Tanya Evans is removed from the Style of Cause herein;
2. Judgment against the Defendant, Burn BC, shall be given as issued separately
herein;
3. Costs of this motion are included in the cost disposition of the Judgment.

“Roger T. Hughes”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-939-14

STYLE OF CAUSE: DECOMMODIFICATION LLC,, BURNING MAN PROJECT AND, BLACK ROCK CITY, LLC, DOING, BUSINESS AS BURNING MAN v BURN BC ARTS COOPERATIVE, JACKSON SMITH, BHAK JOLICOEUR AND BRIAN CORKUM, SOMETIMES OPERATING INDIVIDUALLY OR COLLECTIVELY AS BURN BC, BURNBC.ORG AND/OR BURN BC ARTS COOPERATIVE

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JANUARY 13, 2015

ORDER AND REASONS: HUGHES J.

DATED: JANUARY 13, 2015

APPEARANCES:

Kevin Sartori and James Green FOR THE APPLICANTS

No One FOR THE RESPONDENT
BURN BC

SOLICITORS OF RECORD:

Gowling LaFleur Henderson LLP FOR THE APPLICANTS
Barristers & Solicitors
Toronto ON

No One FOR THE RESPONDENT
BURN BC