

Federal Court of Appeal



Cour d'appel fédérale

Date: 20151028

Docket: A-436-14

Citation: 2015 FCA 233

**CORAM: GAUTHIER J.A.
WEBB J.A.
GLEASON J.A.**

BETWEEN:

KITASOO BAND COUNCIL

Appellant

and

URBAN DISTILLERS INC.

Respondent

Heard at Vancouver, British Columbia, on October 28, 2015.
Judgment delivered from the Bench at Vancouver, British Columbia, on October 28, 2015.

REASONS FOR JUDGMENT OF THE COURT BY:

GAUTHIER J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Vancouver, British Columbia, on October 28, 2015).

GAUTHIER J.A.

[1] This is an appeal by the Kitasoo Band Council from a decision of the Federal Court on a summary judgment motion brought by the appellant and by the City of Terrace in the context of their action for infringement of their official marks.

[2] We have not been persuaded that the judge made a palpable and overriding error in finding that the applicants had failed to establish that either of them had used the official marks as of the relevant dates. (sub-paragraph 9(1)(n)(i) of the *Trade-marks Act*, R.S.C. 1985, c.T-13). Thus, their marks could not be enforced against the respondent.

[3] In light of the way in which the applicants cast their motion for summary judgment seeking a declaration of enforceability of their marks and a declaration of infringement against the respondent, we do not accept the appellant's argument that the judge had no jurisdiction to grant judgment, effectively dismissing their action.

[4] However, in the absence of a summary judgment motion in respect of the Counterclaim of the respondent, the judge erred in granting the Counterclaim.

[5] Thus, the appeal will be granted in part without costs. The judgment of the Federal Court will be amended to read as follows:

The action is dismissed with costs.

"Johanne Gauthier"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-436-14

**(APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE
MARTINEAU OF THE FEDERAL COURT, DATED SEPTEMBER 2, 2014, DOCKET
NO. T-700-13.)**

STYLE OF CAUSE:

KITASOO BAND COUNCIL v.
URBAN DISTILLERS INC.

PLACE OF HEARING:

Vancouver, British Columbia

DATE OF HEARING:

OCTOBER 28, 2015

REASONS FOR JUDGMENT OF THE COURT BY:

GAUTHIER J.A.
WEBB J.A.
GLEASON J.A.

DELIVERED FROM THE BENCH BY:

GAUTHIER J.A.

APPEARANCES:

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