

Federal Court of Appeal



Cour d'appel fédérale

Date: 20130528

Docket: A-18-12

Citation: 2013 FCA 137

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

BETWEEN:

MONSTER CABLE PRODUCTS, INC.

Appellant

and

MONSTER DADDY, LLC

Respondent

Heard at Toronto, Ontario, on May 22, 2013.

Judgment delivered at Ottawa, Ontario, on May 28, 2013.

REASONS FOR JUDGMENT BY:

GAUTHIER J.A.

CONCURRED IN BY:

**PELLETIER J.A.
WEBB J.A.**

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] This is an appeal from the decision of Campbell J. of the Federal Court (the Judge) (2012 FC 1260) rejecting, in part, Monster Cable Products Inc.'s (Monster Cable) appeal from the decision of the Registrar of trade-marks (2010 TMOB 212), who rejected, in part, Monster Cable's Opposition to Monster Daddy LLC's (Monster Daddy) application for the trade-mark MONSTER based on the proposed use of various wares described at paragraph 1 of the Judge's reasons.

[2] Monster Cable filed as new evidence before the Judge a supplementary affidavit from Mr. Tognotti (Monster Cable's General Counsel and Vice-President) in support of its Opposition in respect of the wares described in Monster Daddy's application not already excluded by the Registrar. Its main position was that such evidence could have materially affected the Registrar's findings in respect of confusion and lack of distinctiveness. Thus, Monster Cable submits that the Judge should have decided these issues *de novo*.

[3] The Judge did not agree that such new evidence could have materially affected the Registrar's findings, except in relation to "all purpose disinfecting and sanitizing preparations", where he found that the new evidence did support a finding of likelihood of confusion with the common law use of Monster Cable's mark in association with cleaning products. Thus, he noted that in respect of the other proposed wares, he could only intervene if the Registrar's decision was unreasonable. He dismissed Monster Cable's appeal regarding the following wares: "adhesives for general industrial and commercial use; chemicals for use in the manufacture of cleaning solutions; vehicle waxes; automotive lubricants and oils".

[4] On appeals of decisions made pursuant to subsection 56(1) of the *Trade-marks Act*, R.S.C. 1985, c. T-13 (the *Act*), the role of this Court is to determine if the judge properly identified and applied the standard of review. There is no dispute that the Judge properly identified the standard as reasonableness. He also correctly stated that he could only review an issue *de novo* if the new evidence produced by Master Cable could have materially affected the Registrar's findings in that respect. This Court has already determined that the question of the materiality of new evidence is a question of mixed fact and law and that the Judge's findings will stand in the absence of a palpable

and overriding error or an extricable error of law (*Spirits International B.V. v. BCF S.E.N.C.R.L.*, 2012 FCA 131, at paragraph 12).

[5] Monster Cable also argues that the Registrar failed to properly consider that the burden remained on Monster Daddy at all times to establish that there was no likelihood of confusion and that the mark could be distinctive of its wares. In Monster Cable's view, the Judge should have recognized this and, in its view, he made the same mistake as the Registrar.

[6] However, Monster Cable acknowledged that the Registrar properly described where the burden of proof lay in the Opposition proceeding (see paragraphs 7, 36 and 41 of the decision). In my view, what Monster Cable is disputing is the weight given to its evidence. This is clear when one considers that Monster Cable also says that the Registrar and the Judge should have drawn a negative inference against Monster Daddy since Monster Daddy did not participate in the hearing before the Judge or before this Court and filed a brief affidavit and written submissions before the Registrar in answer to its Opposition. Monster Cable says that if such an inference had been drawn, the only conclusion that could be reached is that there is a lack of distinctiveness and a likelihood of confusion in respect of all the wares enumerated in the application.

[7] First, I note that this last point (negative inference) does not appear to have been raised before the Judge and that neither of the alleged errors referred to above are listed in the Notice of Appeal filed before this Court. In any event, the Judge could not simply substitute his own assessment of the evidence to that of the Registrar. His role in the applicable standard of reasonableness is limited to determining whether, on the basis of the evidentiary record before him,

the Registrar's decision falls within a "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9, at paragraph 47).

[8] Turning now to the new evidence and the arguments in respect of each of the remaining wares (see paragraph 3 above), I start with "vehicle waxes and automotive lubricants and oils". Having carefully examined the record, I cannot find any new evidence in relation to this. All the relevant registrations were before the Registrar. The only paragraph in the supplementary affidavit relevant to Monster Cable's argument which mentions the word "car" is paragraph 2. It is identical to the first sentence of paragraph 2 in the affidavit that was before the Registrar. Thus, the Judge did not err in finding that the standard applicable to findings in respect of those wares is reasonableness.

[9] Monster Cable submits that both the Registrar and the Judge ignored the fact that the wares in their two 2006 registrations included automotive and marine electrical power components, as well as automotive and marine mobile phone equipment. Decision makers are presumed to have considered all the evidence before them (*Housen v. Nikolaisen*, 2002 SCC 33, at paragraph 46). Moreover, in this case, it is clear that the Registrar carefully considered the 2006 registrations, given that he lists in his non exhaustive summary found at paragraph 38 of his reasons mobile phone equipment and electric power equipment such as "surge protectors", which wares are only mentioned in the 2006 registrations in reference to marine and automotive components. I have not been persuaded that any of the Registrar's findings in respect of those wares are unreasonable.

[10] In respect of "chemicals for use in the manufacture of cleaning solutions", the new evidence consists of a statement by Mr. Tognotti that Monster Cable manufactures the cleaning solutions it

sells, and that this, in and of itself, could have affected the Registrar's conclusion that there was no likelihood of confusion between the above-mentioned wares and Monster Cable's common law use of its marks in association with cleaning products for electronic devices. In Monster Cable's view, this new evidence would also have affected the distinctiveness of Monster Daddy's mark in association with those wares. I cannot agree.

[11] I note that Monster Cable confirmed at the hearing that its common law use does not extend to such chemicals. Moreover, it appears to me that the argument in this respect in fact highlights the point that consumers or buyers of such chemicals are not the consumers of electronic products to whom Monster Cable sells its own cleaning solutions. This would support, to some extent, the Registrar's findings in respect of confusion and distinctiveness in association with those wares.

[12] This brings me to the last wares: "adhesive for general, industrial and commercial use". The relevant new evidence is a statement by Mr. Tognotti that Monster Cable sells some kits which would include some adhesive components. To support this assertion, Mr. Tognotti included some extracts from the company's website. The first and only extract where reference to adhesives is made is the one relating to a wall cable management system kit. The features of the kit do not include a reference to adhesive components. However, in the upper right hand corner of the extract, one can read that the system is used to hide cables (already owned or bought separately) for an uncluttered look. It is noted that the system "attaches easily to walls with safe non-permanent adhesive or with standard screws".

[13] Monster Cable's trade-mark would appear on the packaging only. Monster Cable recognizes that such management system is not part of the enumerated wares in its registration, including the accessories described therein. It views such wares as natural extensions (complimentary wares) of the registered wares.

[14] The link to Monster Daddy's proposed "adhesives for general industrial and commercial use" is so tenuous that I cannot agree that this evidence could have materially affected any of the Registrar's findings in respect of such wares. I certainly cannot conclude that the Judge made a palpable and overriding error in his assessment of this evidence.

[15] Finally, I have also not been persuaded that any of the Registrar's findings regarding all those wares were not open to him, having regard to the record before him.

[16] Despite Monster Cable's counsel's able submissions, I have not been persuaded that this Court's intervention is warranted. I would dismiss the appeal.

"Johanne Gauthier"

J.A.

"I agree
J.D. Denis Pelletier"

"I agree
Wyman W. Webb"

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-18-12

**APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE DOUGLAS
CAMPBELL DATED OCTOBER 30, 2012, DOCKET NO. T-257-11**

STYLE OF CAUSE:

MONSTER CABLE PRODUCTS,
INC. v. MONSTER DADDY, LLC

PLACE OF HEARING:

Toronto, Ontario

DATE OF HEARING:

May 22, 2013

REASONS FOR JUDGMENT BY:

GAUTHIER J.A.

CONCURRED IN BY:

PELLETIER J.A.
WEBB J.A.

DATED:

May 28, 2013

APPEARANCES:

Kenneth D. McKay

FOR THE APPELLANT

No Appearance

FOR THE RESPONDENT

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FOR THE APPELLANT

N/A

FOR THE RESPONDENT