

Federal Court



Cour fédérale

Date: 20160818

Docket: T-1343-15

Citation: 2016 FC 949

Ottawa, Ontario, August 18, 2016

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

TRANS-HIGH CORPORATION

Applicant

and

**CONSCIOUS CONSUMPTION INC.,
LUCELENE PANCINI AND DIMITRIOS
HATZOGLIDIS A.K.A. JIMMY
HATZOGLIDIS, SOMETIMES OPERATING
INDIVIDUALLY OR COLLECTIVELY AS
HIGH TIMES**

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] This is an application relating to alleged contravention of subsections 7(b) and 22(1), and sections 19 and 20 of the *Trade-marks Act*, RSC, 1985, c T-13 [the Act], by the Respondents.

II. Issues

[2] The issues raised in the present application are as follows:

- i. Are the individual Respondents, Lucelene Pancini and Dimitrios Hatzoglidis a.k.a. Jimmy Hatzoglidis, personally liable for the alleged infringements of the Applicant's trademark rights?
- ii. Did the Respondents infringe the Applicant's registered trademarks HIGH TIMES and HIGHTIMES, and trademark registrations TMA 243,863 and TMA 896,788 in respect thereof, contrary to sections 19 and 20 of the Act?
- iii. Did the Respondents direct public attention to their wares, services or business in such a way as to cause or be likely to cause confusion in Canada, between their wares, services or business and the Applicant's wares, services or business, contrary to subsection 7(b) of the Act?
- iv. Did the Respondents use the Applicant's registered trademarks HIGH TIMES and HIGHTIMES in a manner that is likely to have the effect of depreciating the value of the goodwill attaching thereto, contrary to subsection 22(1) of the Act?
- v. Are the Respondents liable to the Applicant for damages and costs and, if so, in what amount?

III. Background

[3] The Applicant Trans-High Corporation [Trans-High] is a corporation with a principle business located at 250 West 57th Street, Suite 920, New York, NY 10107, USA.

[4] The Applicant owns Canadian trademark Reg. No. TMA 243,868 for the trademark HIGH TIMES (registered since 1980 for use with magazines), Reg. No. TMA 896,788 for the trademark HIGHTIMES (registered for use in association with various retail store services, and whole and retail distribution relating to smoking accessories and other goods, since 1986 and 1990, respectively). The Applicant also has a pending Canadian trademark application, App. No. 1,679,221, for the trademark HIGH TIMES, applied for in association with a variety of other goods and services. Particulars of the Applicant's registered HIGH TIMES and HIGHTIMES trademarks, and the HIGH TIMES trademark application are attached as Schedule A.

[5] Since its launch over 40 years ago, the Applicant's HIGH TIMES magazine [the Publication] has become known for high quality photography and cutting-edge journalism covering a wide range of topics, such as politics; music; film; and activism for counterculture interests, including but not limited to decriminalization/legalization of marijuana.

[6] The HIGH TIMES trademark is well known in the counterculture community in Canada, and the Applicant has used the HIGH TIMES trademark expansively in relation to the sale of a diverse range of products bearing or featuring the HIGH TIMES trademark. Merchandise featuring the HIGH TIMES mark [High Times Goods] was first offered for sale through the Publication, via mail orders, but was eventually also offered for sale in retail stores, at festivals, as well as online at the official HIGH TIMES head shop (www.headshop.hightimes.com).

[7] Among the High Times Goods that have been available for mail-order sale through the Publication, which was and is distributed in Canada, are smoking articles and accessories such as

cigarette papers (offered since the June 1983 issue), lighters (offered since the November 1984 issue) and ashtrays (offered since the November 1998 issue).

[8] Consumers in Canada have also been exposed to a wide range of goods and services designated by the HIGH TIMES trademark through the official HIGH TIMES website (www.headshop.hightimes.com).

[9] The affidavit of Mary McEvoy, Publisher and Chief Events Officer of Trans-High, shows that the Publication has been sold in Canada since 1982 through news-stands, retailers and wholesalers, including retailers who service the counterculture market. This market includes, but is not limited to, the medical and recreational use of marijuana. A review of the Applicant's application record also shows that the use of marijuana is a strong focus of the Publication, and that the Publication has been featured or referenced in news articles relating to marijuana in Canada since as early as 1993.

[10] According to Ms. McEvoy's affidavit, through decades of continuous use and promotion of the trademark HIGH TIMES in Canada, the Applicant has developed significant goodwill throughout Canada for its HIGH TIMES trademark—i.e., as used in association with the Publication, a variety of goods (including smoking accessories, such as ashtrays, lighters, DVD's, tee-shirts and caps), and the retail and wholesale sale and distribution of such articles. The Applicant has signed a number of agreements for the distribution of the Publication and various High Times Goods, as shown in the various exhibits to Ms. McEvoy's affidavit.

[11] The HIGH TIMES trademark is distinctive of the Applicant in Canada (including in the area of Toronto, Ontario) in relation to all such goods and services as described in Ms. McEvoy's affidavit.

[12] The corporate Respondent, Conscious Consumptions Inc., is a corporation incorporated under the laws of the Province of Ontario with Ontario Corp. No. 1867928, and with a registered head office address at 714 Bloor Street West, Toronto, Ontario.

[13] The individual Respondent, Lucelene Pancini, is a registered director, and is believed to be an owner and directing mind of the corporate Respondent. Ms. Pancini's address is recorded, in records maintained by the Ontario Ministry of Government Services, as 8185 Laidlaw Ave., Washago, Ontario.

[14] The individual Respondent, Dimitrios Hatzoglidis a.k.a. Jimmy Hatzoglidis, is described in the Respondents' advertising materials and in publications concerning the Head Shop as an owner of the corporate Respondent. His current address is unknown.

[15] The Respondents operate a retail store [the Head Shop] located at 714 Bloor St. W., Toronto, Ontario, which sells smoking articles and related merchandise, and targets the counterculture market. The corporate Respondent was incorporated in February 2012, and it appears that the Respondents have continuously operated the Head Shop from that location in association with the trade name HIGH TIMES since at least 2012.

[16] The “HIGH TIMES” mark and name has appeared prominently on exterior store signage for the Head Shop since as early as late 2012, and the Respondents have widely used the “HIGH TIMES” mark and name on online advertising materials in connection with their business.

[17] The Head Shop sells an assortment of smoking and counterculture goods and paraphernalia, such as glass smoking pipes, bongs, and other accessories; and other merchandise, such as jewelry, clothing, and decorative items.

[18] The Applicant has never authorized any of the Respondents to adopt or use any mark of name that includes “HIGH TIMES” in connection with their business.

[19] Despite the Applicant’s repeated attempts to resolve this dispute since September 2015, the Respondents have failed to comply with the Applicant’s demands to cease all use of HIGH TIMES, to provide a written undertaking to do so, and to provide compensation for past alleged infringing activities and legal costs.

IV. Analysis

A. *Are either or both of the individual Respondents, Lucelene Pancini and Dimitrios Hatzoglidis, liable for the alleged infringements of the Applicant’s trademark rights?*

[20] In *Mentmore Manufacturing Co v National Merchandise Manufacturing Co*, [1978] FCJ No 521 at paragraph 28, the Federal Court of Appeal explained the circumstances in which

defendants are personally liable for infringement by a company:

...there must be circumstances from which it is reasonable to conclude that the purpose of the director or officer was not the direction of the manufacturing and selling activity of the company in the ordinary course of his relationship to it but the deliberate, wilful and knowing pursuit of a course of conduct that was likely to constitute infringement or reflected an indifference to the risk of it.

[21] According to the documents before the Court, the individual Respondent Lecelene Pancini is listed as the registered director and appears to be an owner of the corporate Respondent Conscious Consumption Inc. She has been served with notice of this proceeding.

[22] According to the documents before the Court, the individual Respondent Dimitrios Hatzoglidis is described as an owner of the corporate Respondent. He has been served with notice of this proceeding.

[23] I understand the Applicant's frustration at the Respondents' infringement; their failure to acknowledge the Applicant's trademark rights, or to negotiate any form of settlement; and their failure to participate in the Court's process.

[24] Nevertheless, by deciding to proceed by way of application, the Applicant chose to forego any opportunity for discovery, and thereby compel further and better information to establish personal liability of the individual Respondents. The Applicant needs to establish that either or both individual Respondents have acted outside their normal duties in the direction of the corporate Respondent, such that there is clear evidence of a deliberate, willful and knowing

pursuit of a course of conduct that is likely to constitute an infringement or that reflects an indifference to the risk of it.

[25] Having reviewed the evidence of the corporate Respondent's corporate documents and social media postings, which clearly indicate that the two individual Respondents are the owners and directing minds of the corporate Respondent, and having found that their willful infringement of the Applicant's trademarks rights cannot be a legitimate exercise of their corporate duties as officers, directors or the controlling minds of the corporate Respondent, I find each individual Respondent personally liable for the infringing activities described below.

B. *Have the Respondents infringed the Applicant's registered trademarks HIGHTIMES and HIGH TIMES contrary to sections 19 and 20 of the Trademark Act?*

[26] The test to determine if the Respondents' use of the name HIGH TIMES is confusing with the Applicant's registered mark HIGH TIMES is to consider whether, as a matter of first impression, "a casual consumer somewhat in a hurry" who sees the Respondents' trade name or trademark, having no more than an imperfect recollection of the Applicant's trade name or trademark, would be likely to think that the Respondents' wares or services would be from the same source as the Applicant's, regardless of whether the parties' wares or services are of the same general class (*Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27 at paras 39-45; *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 25 at paras 18-21 [*Veuve Clicquot*]).

[27] In analysing trademark confusion, the Court must have regard to all relevant surrounding circumstances, as set out in subsection 6(5) of the Act:

- A. the inherent distinctiveness of the trademarks or trade names and the extent to which they have become known;
- B. the length of time the trademarks or trade names have been in use;
- C. the nature of the goods, services or business;
- D. the nature of the trade; and
- E. the degree of resemblance between the trademarks or trade names in appearance or sound or in the ideas suggested by them.

[28] The length of time in use and extent to which the parties' trademarks have become known both weigh in favour of the Applicant. The Applicant's trademark HIGH TIMES has been registered and in use in Canada for decades in association with the Publication and the High Times Goods, as described in paragraph 4 above. The Applicant's HIGHTIMES trademark has been used in Canada since 1986 for certain services and since 1990 for other, related services, again as described in paragraph 4 above. The trademarks are well-known in Canada to relevant consumers in the counterculture community, both as a magazine and as a source of related wares and services, including smoking accessories. The Respondents' Head Shop has only been confirmed to have operated since 2012 or 2013. Further, there is little evidence of the extent to which the Head Shop has become known, other than for associated yoga classes under the Conscious Consumption trade name and its use of HIGH TIMES through social media postings, as shown in the evidence.

[29] There is also a clear overlap between the Applicant's magazine business; related wares sold by the Applicant through the Publication, wholesalers and retail outlets; the Applicant's website; and the wares sold in the Head Shop and offered through the Respondents' social media postings. The customers and communities targeted by both parties are the same or very similar. Both parties also sell their wares through traditional retail and online channels.

[30] The Applicant's use of HIGH TIMES as a trade name and trademark is the same as the Respondents' use of HIGH TIMES.

[31] I find that there is sufficient evidence to show that there is a likelihood of confusion between the Applicant's use of its trademark HIGH TIMES for the Publication and related wares—which are sold through the Publication, the website www.headshop.hightimes.com, as well as retail outlets—and the Respondents' previous prominent use of HIGH TIMES on the Head Shop storefront, their continued use of the cannabis motif and HIGH TIMES mark in association with the sale of counterculture wares in the Head Shop, and their continued use of HIGH TIMES on their website and online advertising.

[32] The Respondents have infringed the Applicant's HIGH TIMES and HIGHTIMES trademarks, contrary to sections 19 and 20 of the Act.

C. *Have the Respondents directed public attention to their wares, services or business in such a way as to cause or be likely to cause confusion in Canada, at the time they commenced so to direct public attention to them, between its wares, services or business and the wares, services or business of the Applicant, contrary to subsection 7(b) of the Act?*

[33] The Applicant's evidence has established that they have a sufficient reputation in Canada, such that the Respondents' unauthorized previous use of HIGH TIMES on their storefront, which only ended recently, their continued online advertising in association with the HIGH TIMES trade name and trademark, and their continued use of HIGH TIMES on the retail goods in the Head Shop could create a likelihood of deception and could cause damage to the Applicant's reputation.

[34] The Respondents have therefore passed off their business and wares as being associated or connected with the Applicant's business and wares, contrary to subsection 7(b) of the Act.

D. *Have the Respondents used the Applicant's registered trademarks HIGH TIMES and HIGHTIMES in a manner that is likely to have the effect of depreciating the value of the goodwill attaching thereto, contrary to subsection 22(1) of the Act?*

[35] The Supreme Court of Canada considered section 22 of the Act and held that goodwill attaching to a trademark may be depreciated by a non-confusing use, where the fame and goodwill of the trademark transcends the wares or services with which the mark is usually associated or used. When assessing depreciation, the Court will look at the degree of recognition of the mark within the relevant universe of consumers and ask the question "Is depreciation likely to occur?" (*Veuve Clicquot*, above).

[36] I am satisfied that given:

- i. the Respondents' use of the Applicant's registered HIGH TIMES trademark and effective use of the HIGHTIMES trademark as well;
- ii. the loss of quality control over the Applicant's registered trademarks as a result of the Respondents' unauthorized use of HIGH TIMES;
- iii. the not only potential, but actual, loss of distinctiveness of the Applicant's HIGH TIMES and HIGHTIMES trademarks, if the Respondents are allowed to continue their unauthorized use of HIGH TIMES;
- iv. the low-end character and quality of the wares associated with the Applicant's HIGH TIMES trademark offered by the Respondents; and
- v. the fact that there is no reason for the Respondents to adopt and use the Applicant's HIGH TIMES trademark other than to trade off the goodwill and reputation established by the Applicant in its registered HIGH TIMES and HIGHTIMES trademark

the resulting depreciation of the goodwill in the Applicant's HIGH TIMES and HIGHTIMES registered trademarks is likely to occur because of the Respondents' unauthorized use of the HIGH TIMES mark and trade name.

E. *What is the Respondents' liability for damages and costs?*

[37] The Applicant claims declaratory and injunctive relief and damages for potential lost licence fees in the range of \$150,000 to \$200,000, for the three to four years the Respondents have been infringing the Applicant's trademark rights. In the alternative, the Applicant claims at least \$25,000 as being appropriate damages.

[38] The Applicant also claims that legal fees and disbursements incurred by the time of the hearing are in excess of \$10,000.

[39] There is no evidence to support the quantum of possible licence fees and damages other than a bald assertion by the Applicant's affiant Ms. McEvoy. There are no voluntary licences granted by the Applicant to other parties to provide any frame of reference other than mere speculation.

[40] However, given the factors I have referred to in paragraph 24 above, I find that damages in the amount of \$25,000 is reasonable.

[41] I also accept the Applicant's submissions as to costs, which are to be fixed in the amount of \$10,000.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Respondents:
 - a. have infringed and are deemed to have infringed the Applicant's trademarks HIGH TIMES (Reg. No. TMA243,868) and HIGHTIMES (Reg. No. TMA896,788) contrary to sections 19 and 20 of the *Trade-marks Act*, RSC, 1985, c T-13 [the Act];
 - b. have, directed public attention to their goods, services or business in such a way as to cause or be likely to cause confusion in Canada, between their goods, services or business and the Applicant's goods, services or business, contrary to subsection 7(b) of the Act; and
 - c. have used the Applicant's registered HIGH TIMES and HIGHTIMES trademarks in a manner that is likely to have the effect of depreciating the value of the goodwill attaching thereto, contrary to subsection 22(1) of the Act

as a result of their use of the confusingly similar trademark and trade name HIGH TIMES in association with the operation of a marijuana-themed retail store located in Toronto, Ontario, without the consent, license, or permission of the Applicant;
2. Each of the Respondents and any of the corporate Respondent's affiliates, subsidiaries and all other related companies and businesses, and any officers, directors, employees, successors and assigns of the corporate Respondent, as well as all others over whom any of the Respondents by themselves or through any companies or other businesses directly or indirectly control or operate, are hereby enjoined from:
 - a. selling, distributing, advertising or otherwise dealing in goods or services in association with a trademark or trade name that is confusing with the Applicant's

- registered trademarks HIGH TIMES and HIGHTIMES, including without limitation the marks or names HIGH TIMES and HIGHTIMES, contrary to sections 19 and 20 of the Act;
- b. directing public attention to their goods, services or business in such a way as to cause or be likely to cause confusion in Canada, between their goods, services or business and the Applicant's goods, services or business, contrary to subsection 7(b) of the Act—including without limitation by adopting, using or promoting HIGH TIMES or HIGHTIMES as or as part of any trademark, trade name, trading style, corporate name, business name, domain name (including any active or merely re-directing domain name) or social media account name; and
 - c. using the Applicant's registered trademarks HIGH TIMES and HIGHTIMES in a manner that is likely to have the effect of depreciating the value of the goodwill attaching thereto, contrary to subsection 22(1) of the Act.
3. The Respondents shall deliver-up or destroy under oath any goods, packages, labels and advertising material in their possession, power or control, as well as any equipment used to produce the goods, packaging, labels or advertising material, that bear the Applicant's HIGH TIMES and HIGHTIMES trademarks or any other trademark or trade name confusingly similar thereto, or that are or would be contrary to this Judgment, in accordance with section 53.2 of the Act.
 4. The Respondents shall jointly and severally pay to the Applicant forthwith damages in the amount of \$25,000 arising from their violations of the Act, and such amount shall bear post-judgment interest at the rate of 5% per year from the date of this judgment.

5. The Applicant is awarded costs of the Application, which costs are fixed in the lump sum amount of \$10,000 and are payable forthwith by the Respondents, jointly and severally.

"Michael D. Manson"

Judge

SCHEDULE "A"

Canadian trade-mark data: 1679221 - Canadian trade-marks database - Intellectual proper... Page 1 of 2



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Un organisme
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Canadian Intellectual Property Office

Canadian trade-mark data**Third-Party Information Liability Disclaimer**[Back to search](#)

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APPLICATION NUMBER:

1679221

REGISTRATION NUMBER:

not registered

STATUS:

ALLOWED

FILED:

2014-05-30

FORMALIZED:

2014-06-03

ADVERTISED:

2015-04-29

APPLICANT:

Trans-High Corporation
250 West 57th Street
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UNITED STATES OF AMERICA

AGENT:

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REPRESENTATIVE FOR SERVICE:

SHAPIRO COHEN LLP
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OTTAWA
ONTARIO K2K 2X3

TRADE-MARK (Word):**HIGH TIMES****INDEX HEADINGS:**

HIGH TIMES

GOODS:

- (1) Electrical apparatus, namely, pre-recorded CDs featuring music; pre-recorded DVDs featuring videos about cannabis.
- (2) Magazines.

0021



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Marques de commerce
Certificat d'authenticité

Le(la) soussigné(e) certifie par la présente que le document ci-joint est une copie authentique de l'enregistrement officiel de la marque de commerce effectué sous le numéro TMA 243,868 conformément à la Loi sur les marques de commerce.

Conformément aux dispositions de la *Loi sur les marques de commerce*, la présente marque de commerce est enregistrée pour 15 années à compter de la date d'enregistrement ou de la dernière date de renouvellement indiquée dans le document ci-joint, qui contient tous les renseignements sur l'enregistrement.

Trade-marks
Certificate of Authenticity

The undersigned hereby certifies that the attached document is a true copy of the record of the registration of the trade-mark registered under No. TMA 243,868 in accordance with the Trade-marks Act.

In accordance with the provisions of the *Trade-marks Act*, this trade-mark is registered for 15 years from the registration date or the latest renewal date shown on the attached particulars of registration.

HIGH TIMES

Soumenal Singh
Agent certificateur / Certifying Officer

8 janv/Jan 2016

Date

Canada

(CIPO 00200)
09-15



0022

APPL'N/DEM. NO 431 250 REGISTRATION/ENREGISTREMENT NO TMA243,868

FILING DATE/DATE DE PRODUCTION: 23 oct/Oct 1978
REGISTRATION DATE/DATE D'ENREGISTREMENT: 25 avr/Apr 1980
RENEWAL DATE/DATE DE RENOUELEMENT: 25 avr/Apr 2010

REGISTRANT/PROPRIÉTAIRE ORIGINAL:

TRANS-HIGH CORPORATION
250 West 57th Street
Suite 920
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UNITED STATES OF AMERICA

REP FOR SERVICE/REP POUR SIGNIFICATION:

SHAPIRO COHEN LLP
SUITE 200
411 LEGGET DRIVE
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ONTARIO K2K 3C9

TRADE-MARK/MARQUE DE COMMERCE:

HIGH TIMES

GOODS/PRODUITS:

Magazine.

CLAIMS/REVENDEICATIONS:

Used in CANADA since at least as early as September 23, 1974 on goods.

Used in UNITED STATES OF AMERICA on goods.

Registered in or for UNITED STATES OF AMERICA on September 07, 1976 under No. 1047654 on goods.

FOOTNOTES/NOTES:

OWNER ADDRESS CHANGE/CHANGEMENT D'ADRESSE DU PROPRIÉTAIRE:
DATE REGISTERED/DATE DE L'ENREGISTREMENT: 19 mai/May 1995

OWNER ADDRESS CHANGE/CHANGEMENT D'ADRESSE DU PROPRIÉTAIRE:
DATE REGISTERED/DATE DE L'ENREGISTREMENT: 17 sept/Sep 2009
COMMENTS/COMMENTAIRES: Voir Preuve au dossier/See evidence on File No. 431250

0023

APPL'N/DEM. NO 431 250 REGISTRATION/ENREGISTREMENT NO TMA243,868

OWNER ADDRESS CHANGE/CHANGEMENT D'ADRESSE DU PROPRIÉTAIRE:
DATE REGISTERED/DATE DE L'ENREGISTREMENT: 17 sept/Sep 2009
COMMENTS/COMMENTAIRES: Voir Preuve au dossier/See evidence on File No. 431250

OWNER ADDRESS CHANGE/CHANGEMENT D'ADRESSE DU PROPRIÉTAIRE:
DATE REGISTERED/DATE DE L'ENREGISTREMENT: 15 fév/Feb 2013
COMMENTS/COMMENTAIRES: Voir Preuve au dossier/See evidence on File No. 431250



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0024

Marques de commerce
Certificat d'authenticité

Le(la) soussigné(e) certifie par la présente que le document ci-joint est une copie authentique de l'enregistrement officiel de la marque de commerce effectué sous le numéro TMA 896,788 conformément à la Loi sur les marques de commerce.

Conformément aux dispositions de la *Loi sur les marques de commerce*, la présente marque de commerce est enregistrée pour 15 années à compter de la date d'enregistrement ou de la dernière date de renouvellement indiquée dans le document ci-joint, qui contient tous les renseignements sur l'enregistrement.

Trade-marks
Certificate of Authenticity

The undersigned hereby certifies that the attached document is a true copy of the record of the registration of the trade-mark registered under No. TMA 896,788 in accordance with the Trade-marks Act.

In accordance with the provisions of the *Trade-marks Act*, this trade-mark is registered for 15 years from the registration date or the latest renewal date shown on the attached particulars of registration.

HIGHTIMES

Saumier/Landis
Agent certificateur / Certifying Officer

8 janv/Jan 2016

Date

(CIPO 00200)
09-15

Canada

OPIC  CIPO

FEDERAL COURT

SOLICITORS OF RECORD

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CONSUMPTION INC ET AL

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: AUGUST 10, 2016

JUDGMENT AND REASONS: MANSON J.

DATED: AUGUST 18, 2016

APPEARANCES:

James Green

FOR THE APPLICANT

SOLICITORS OF RECORD:

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Toronto, Ontario

FOR THE APPLICANT