

Federal Court



Cour fédérale

Date: 20200120

Docket: T-438-19

Citation: 2020 FC 82

Ottawa, Ontario, January 20, 2020

PRESENT: Mr. Justice Norris

BETWEEN:

DOUBLE DIAMOND DISTRIBUTION, LTD.

Plaintiff

and

**CROCS CANADA, INC., CROCS, INC.,
CROCS RETAIL, LLC, WESTERN BRANDS
HOLDING COMPANY, LLC**

Defendants

ORDER AND REASONS

[1] The plaintiff and the defendants are competitors in the manufacture and sale of molded footwear made of ethylene vinyl acetate, particularly sandals and clogs.

[2] In a Statement of Claim issued in this Court on March 8, 2019, the plaintiff alleges that the defendants made or permitted to be made representations, statements and descriptions that misrepresented the nature of the Croslite™ material used in the defendants' footwear products.

In particular, the plaintiff alleges that the defendants have represented Croslite™ as being patented when in fact this is not the case. The plaintiff further alleges that these acts harmed it economically. The plaintiff seeks a declaration that the defendants acted contrary to section 52 of the *Competition Act*, RSC, 1985, c C-34 and subsections 7(a) and 7(d) of the *Trademarks Act*, RSC, 1985, c T-13. The plaintiff also seeks damages or disgorgement of the defendants' revenues or profits as well as punitive damages.

[3] The defendants have not filed a Statement of Defence yet.

[4] The Court has disposed of several motions brought by the parties: see the Order and Reasons dated June 27, 2019 (2019 FC 868) and the Order and Reasons dated October 31, 2019 (2019 FC 1373). In the latter Order and Reasons (which allowed the defendants' motion for security for costs), I also concluded that the defendants were entitled to their costs on that motion as well as on the motions disposed of earlier. I asked the parties to try to come to an agreement on those costs, failing which they would be permitted to file brief written submissions.

[5] On December 5, 2019, counsel for the defendants wrote to the Court to advise that they had been unable to come to an agreement with the plaintiff concerning costs on the motions. They had contacted counsel for the plaintiff to discuss this issue but had received no response. Accordingly, counsel for the defendants proposed that they file their costs submissions and supporting evidence no later than December 12, 2019, and that the plaintiff file its costs submissions and supporting evidence no later than one week after service and filing of the defendants' submissions. Counsel for the plaintiff did not respond to this proposal.

[6] On December 9, 2019, I issued an Oral Direction approving of the timeline for the service and filing of costs submissions proposed by the counsel for the defendants.

[7] The defendants served and filed their written submissions and supporting evidence on December 12, 2019.

[8] In accordance with my Direction, the plaintiff's responding submissions and evidence were due no later than December 19, 2019. However, the plaintiff did not serve and file any responding submissions or evidence, nor was an extension of time to do so requested.

[9] I have been advised by the Registry that messages were left with counsel for the plaintiff but were not returned.

[10] On January 10, 2020, counsel for the defendants wrote to the Court to request, given the failure of the plaintiff to respond to their costs submissions, that costs be awarded to the defendants in accordance with their written submissions and supporting evidence and that such costs be made payable to the defendants within fourteen (14) days of the Court's order.

[11] The same date, counsel for the plaintiff wrote to the Court stating that a response to this letter from counsel for the defendants would be provided on January 13, 2020.

[12] No such response from counsel for the plaintiff was received by the Court on January 13, 2020, or to date. Nor has counsel for the plaintiff addressed his failure to file submissions and evidence in accordance with my Direction dated December 9, 2019.

[13] The defendants seek their costs in accordance with the midpoint of Column III of the table to Tariff B in the *Federal Courts Rules*, SOR/98-106. I agree that this is both fair and reasonable in all the circumstances. This results in recoverable fees of \$5025.00 plus disbursements of \$2496.60, for a total amount of \$7521.60 (exclusive of any applicable taxes).

[14] I also agree with the defendants that a deadline should be imposed for the payment of these costs. In the absence of any response from the plaintiff, and being concerned that this is part of a pattern of conduct by the plaintiff, I see no reason not to make the order requested by the defendants.

ORDER IN T-438-19

THE COURT ORDERS that

1. The plaintiff shall pay costs to the defendants in the amount of \$7521.60 (exclusive of any applicable taxes).
2. These costs shall be paid no later than fourteen (14) days from the date of this Order.

"John Norris"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-438-19

STYLE OF CAUSE: DOUBLE DIAMOND DISTRIBUTION, LTD v CROCS CANADA, INC ET AL

PLACE OF HEARING: MATTER HEARD BY VIDEOCONFERENCE BETWEEN OTTAWA, ONTARIO AND CALGARY, ALBERTA

DATE OF HEARING: JUNE 20, 2019

JUDGMENT AND REASONS: NORRIS J.

DATED: JANUARY 20, 2020

APPEARANCES:

Tom C. Stepper FOR THE PLAINTIFF

Alexander Gloor FOR THE DEFENDANTS

SOLICITORS OF RECORD:

Tom C. Stepper Professional CORPORATION FOR THE PLAINTIFF

Calgary, Alberta

Gowling (WLG) Canada LLP FOR THE DEFENDANTS

Ottawa, Ontario