

**Date: 20071126**

**Docket: A-514-06**

**Citation: 2007 FCA 376**

**CORAM: LINDEN J.A.  
SHARLOW J.A.  
RYER J.A.**

**BETWEEN:**

**BERESKIN & PARR**

**Appellant**

**and**

**FAIRWEATHER LTD.**

**Respondent**

Heard at Toronto, Ontario, on November 26, 2007.

Judgment delivered at Toronto, Ontario, on November 26, 2007.

**REASONS FOR JUDGMENT BY:**

**RYER J.A.**

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**BETWEEN:**

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**REASONS FOR JUDGMENT OF THE COURT**

(Delivered from the Bench at Toronto, Ontario, on November 26, 2007)

**RYER J.A.**

[1] This is an appeal from the decision of Mactavish J. of the Federal Court (2006 FC 1248) allowing the respondent's appeal from a decision of the Registrar of Trade-marks, dated February 24, 2005. In that decision, the Registrar expunged the registration of the respondent's "TARGET APPAREL" trade-mark for non-use, pursuant to section 45 of the *Trade Marks Act*, R.S.C. 1985, c. T-13 (the "Act"), the so-called "use it or lose it" provision for removing "deadwood" from the Register.

[2] The trade-mark was registered under Registration No. TMA 261,305 on July 31, 1981 by Dylex Ltd. for use in association with “men’s clothing, namely suits, pants, jackets and coats”.

[3] In October of 2001, the respondent acquired the trade-mark, along with certain other property, from Dylex Ltd., which was then in receivership. Approximately six months later, the Registrar, at the request of the appellant, issued a notice pursuant to subsection 45(1) of the Act (the “Notice”), requiring the respondent to provide evidence showing whether the trade-mark had been used in Canada at any time within the preceding three years and if not, the date when it was last used and the reason for the absence of use since that date.

[4] The Registrar held that the evidence that was presented by the respondent failed to establish that the respondent had taken any steps during the period from the date of the acquisition of the trade-mark from Dylex Ltd. to the date of the Notice that demonstrated a serious intention to begin using the trade-mark in the near future, in accordance with the criteria for special circumstances that excuse the absence of use, as set out in the jurisprudence (see *Registrar of Trade Marks v. Harris Knitting Mills Ltd.* (1985), 4 C.P.R. (3d) 488; *Ridout & Maybee v. Sealy Canada Ltd.*, (1999) 87 C.P.R. (3d) 307; *NTD Apparel Inc. v. Ravinsky Ryan*, (2003) 27 C.P.R. (4<sup>th</sup>) 73 and *Lander Co. Canada Ltd. v. Alex E. Macrae & Co.* (1993) 46 C.P.R. (3d) 417). Accordingly, the Registrar expunged the registration of the trade-mark.

[5] The respondent appealed to the Federal Court pursuant to section 56 of the Act and, as permitted by that provision, adduced new evidence to support its appeal. The Judge held that the new evidence had probative significance and would have affected the Registrar's decision.

[6] The Judge found that the preliminary design and artwork that was undertaken in the period after the date of the assignment by Dylex Ltd. and before the date of the Notice established that, during that period, the respondent had the requisite ongoing intention to use the trade-mark. The Judge also held that the evidence of further design work and of actual sales of garments bearing the trade-mark, in the period after the date of the Notice, confirmed the ongoing intention of the respondent to use the trade-mark and grounded her decision to over-turn the expungement of the trade-mark for non-use.

[7] In this appeal, the appellant raised no issue with the Judge's expression of legal principles. Nor did the appellant question her findings of fact. Instead, the appellant challenged the application of the law to the facts.

[8] To succeed, the appellant must establish that the Judge's application of the law to the undisputed facts discloses either a palpable and overriding error on a question of mixed fact and law or a readily extricable error on a question of legal principle. In our view, no such error on the part of the Judge has been demonstrated. Accordingly, the appeal will be dismissed, with costs.

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"C. Michael Ryer"

J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-514-06

An appeal from the judgment of Mactavish J. dated October 19, 2006, in Federal Court File T-713-05.

**STYLE OF CAUSE:**

BERESKIN & PARR  
Appellant  
and

FAIRWEATHER LTD.  
Respondent

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** NOVEMBER 26, 2007

**REASONS FOR JUDGMENT  
OF THE COURT BY:** (LINDEN, SHARLOW, RYER J.J.A.)

**DELIVERED FROM THE  
BENCH BY:** RYER J.A.

**APPEARANCES:**

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APPLICANT

Mark K. Evans FOR THE RESPONDENT  
Geneviève M. Prévost

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