

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20111208

Docket: A-464-10

Citation: 2011 FCA 342

**CORAM: NOËL J.A.
PELLETIER J.A.
TRUDEL J.A.**

BETWEEN:

NAUTILUS PLUS INC.

Appellant

and

CENTRES STOP INC.

Respondent

Heard at Montréal, Quebec, on December 1, 2011.

Judgment delivered at Ottawa, Ontario, on December 8, 2011.

REASONS FOR JUDGMENT BY:

NOËL J.A.

CONCURRED IN BY:

PELLETIER J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal from a decision rendered by Justice Harrington of the Federal Court (the Federal Court judge), dismissing the appeal of Nautilus Plus Inc. (the appellant) on the basis that the delegate of the Registrar of Trade-marks (the Registrar) had been correct in refusing the application for registration of the trade-mark STOP DIETE filed by the appellant under the *Trade-marks Act*, R.S.C., 1985, c. T-13 (the Act).

BACKGROUND

[2] The appellant filed its application for registration in July 2005. The application was based on proposed use in association with nutrition programs, “namely nutritional recommendations for active people” (Registrar’s decision, at paragraph 1).

[3] Centres Stop Inc. (the respondent) opposed the application, filing six grounds of opposition. The Registrar allowed two of these grounds. He concluded that STOP DIETE was confusing with the respondent’s trade-marks, namely STOP POIDS and STOP WEIGHT, and that, moreover, the proposed mark was not distinctive.

[4] The matter was appealed before the Federal Court, and both parties exercised their right to file additional evidence. The Federal Court judge examined the new evidence and concluded that it did not have the effect of undermining the factual basis of the Registrar’s decision, which was otherwise reasonable.

[5] The present appeal ensued.

[6] In support of its appeal, the appellant argues that the new evidence filed before the Federal Court judge was capable of altering the conclusion reached by the Registrar and that, consequently, the standard of correctness applied (*Mattel, Inc. v. 3894207 Canada Inc.*, 2006 SCC 22, [2006] 1 S.C.R. 772, at paragraphs 36 and 37 [*Mattel*]; *Shell Canada Limited and P.T. Sari Incofood Corporation*, 2008 FCA 279, 380 N.R. 317, at paragraph 27). Alternatively, it

submits that the Registrar's decision was unreasonable and that the Federal Court judge erred in concluding the contrary.

ANALYSIS AND DECISION

[7] The Registrar first found that the businesses operated by the parties and the services offered in association with the trade-marks in question were of the same nature (Registrar's reasons, at paragraphs 35 and 45), findings that are not challenged in the present appeal. He then examined whether there was a likelihood of confusion between the marks in question. In the course of his analysis, the Registrar rejected the appellant's argument that the meanings of the marks at issue were different (Registrar's reasons, at paragraph 37) :

I cannot agree with the [appellant]. The word "STOP" means to cause something to cease. When juxtaposed with the word "WEIGHT" or the French equivalent "POIDS", the idea suggested is that of ceasing to gain weight. I concede that the combination of the words "STOP" and "DIETE" may seem strange at face value, but the idea of a diet is to lose or maintain weight. I conclude that, overall, the marks suggest a similar idea and that they also resemble each other visually and phonetically because of the word "STOP".

[Emphasis added.]

[8] Before the Federal Court judge, the appellant introduced into evidence several definitions of the word "diète", including that found in the *Multidictionnaire de la langue française* (the *Multidictionnaire*), published in Montréal in 2005. According to that definition, the word "diète" means:

[TRANSLATION] A dietary regimen prescribed by a physician. A liquid diet. A low-salt, iron-rich diet. Not to be confused with a weight-loss program.

[9] According to the appellant, the definition found in this work, published in the same year as the application for registration was filed, provides the exact meaning of the word “diète”. It demonstrates that the mark STOP DIETE suggests avoiding dietary regimens prescribed by a physician and is not to be associated with a weight-loss diet. According to the appellant’s submission, the Registrar would not have concluded that there was a likelihood of confusion if this definition had been brought to his attention.

[10] With respect, the Federal Court judge correctly rejected this argument. The *Multidictionnaire* definition must be considered in light of the other definitions of the word “diète” and in consideration of spoken language (reasons, at paragraphs 31 and 32). In that respect, the appellant’s definition, which associates the word “diète” with a dietary regimen prescribed by a physician, undoubtedly reflects proper usage in the French language. However, the aside following this definition, [TRANSLATION] “Not to be confused with a weight-loss program”, indicates another use that does associate the word “diète” with a weight-loss program. This meaning is consistent with the English word “diet”, which can be associated with weight control (*Concise Canadian Oxford Dictionary*, Oxford University Press Canada, 2005). It is useful to note in this regard that the word DIETE, as it appears on the proposed mark, is found in neither English nor French, since it is spelled differently from “diet” in English and does not have a grave accent as it would in French, and is preceded by the word STOP, a word used in both French and English. I would add here that consideration must be given to the fact that the

target audience, given the geographic area where the marks are likely to be used, presumably has functional knowledge of both English and French (*Mattel*, at paragraph 58).

[11] In that context, it was entirely open to the Federal Court judge, after careful consideration of the new evidence, to find that the word DIETE, as it appears on the mark, evokes a weight-loss program (reasons, at paragraph 33). It follows that the new evidence was of no consequence.

[12] Having correctly assessed the impact of the new evidence introduced before him, the Federal Court judge concluded that the Registrar's decision was otherwise reasonable. The appellant, in challenging this conclusion, relies on the fact that the marks at issue have very little inherent distinctiveness. In such circumstances, it points out correctly that small differences can be sufficient to distinguish them (*Kellogg Salada Canada Inc. v. Canada (Registrar of Trade Marks)*, [1992] 3 F.C. 442, at page 436).

[13] According to the appellant, the Federal Court judge's finding on the meaning of the appellant's mark, when juxtaposed with the Registrar's finding, demonstrates that such a difference exists. It places particular emphasis on the Registrar's view that the idea suggested is that of "ceasing to gain weight" and the Federal Court judge's statement that the underlying concept is to "stop going on diets; it doesn't work" (reasons, at paragraph 33).

[14] With respect, this is only a superficial difference. While I acknowledge that the Federal Court judge could have expressed himself differently, the idea he is attempting to convey is

obviously that it is not necessary to follow a weight-loss program to lose weight. His agreement, in the previous sentence, with the meaning accepted by the Registrar cannot be explained otherwise. In my opinion, both the Registrar's and the Federal Court judge's findings on the idea suggested by the mark STOP DIETE are the same, namely the idea that is expressed literally by the STOP POIDS and STOP WEIGHT marks.

[15] Lastly, the appellant contends that the Federal Court judge applied the wrong legal test in holding that there was a "possibility" of confusion rather than a "likelihood". The appellant is relying on the fact that the Federal Court judge, in the course of the French version of his reasons, on two occasions referred to a "possibilité" of confusion rather than a "probabilité" (reasons, at paragraphs 28 and 38). In my opinion, this is an accident, since the Federal Court judge referred to the correct test elsewhere in his reasons (see paragraphs 2, 13, 17, 18, 29, 34 and 37). I would add that, in any event, the evidence allowed the Registrar to conclude that there was a likelihood of confusion between the appellant's mark and those of the respondent.

[16] The respondent asked that it be awarded costs on a solicitor-client basis. There is no reason to grant this request.

[17] I would dismiss the appeal with costs.

“Marc Noël”

J.A.

“I agree.

J.D. Denis Pelletier J.A.”

“I agree.

Johanne Trudel J.A.”

Certified true translation
Johanna Kratz

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET: A-464-10

**APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE HARRINGTON
OF THE FEDERAL COURT DATED NOVEMBER 5, 2010, DOCKET T-229-10.**

STYLE OF CAUSE: NAUTILUS PLUS INC. v.
CENTRES STOP INC.

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: December 1, 2011

REASONS FOR JUDGMENT BY: Noël J.A.

CONCURRED IN BY: Pelletier J.A.
Trudel J.A.

DATED: December 8, 2011

APPEARANCES:

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