

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20130430**

**Docket: A-392-12**

**Citation: 2013 FCA 119**

**CORAM: SHARLOW J.A.  
DAWSON J.A.  
WEBB J.A.**

**BETWEEN:**

**REYNOLDS PRESTO PRODUCTS INC.**

**Appellant**

**and**

**P.R.S. MEDITERRANEAN LTD.**

**Respondent**

Heard at Toronto, Ontario, on April 8, 2013.

Judgment delivered at Ottawa, Ontario, on April 30, 2013.

**REASONS FOR JUDGMENT BY:**

**WEBB J.A.**

**CONCURRED IN BY:**

**SHARLOW J.A.  
DAWSON J.A.**

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REYNOLDS PRESTO PRODUCTS INC.

Appellant

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**REASONS FOR JUDGMENT**

**WEBB J.A.**

[1] This is an appeal from the decision of the Federal Court (2012 FC 824) rendered by Harrington J. (the Judge) dismissing the application by Reynolds Consumer Products, Inc. (now Reynolds Presto Products Inc.) (Presto) under section 57 of the *Trade-marks Act*, R.S.C. 1985, c. T-13 (the Act). The application by Presto was for an order to strike out the NEOWEB entry in the Trade-Marks Register. The registered owner of the NEOWEB mark is P.R.S. Mediterranean Ltd. (P.R.S.). Presto's application was based on the allegation that the NEOWEB mark used by P.R.S. in association with its cellular confinement systems is confusing with the GEOWEB mark of Presto

used by it in association with its cellular confinement systems. If this allegation is valid, then the trade-mark NEOWEB would not have been registrable by P.R.S. in association with cellular confinement systems.

*Facts*

[2] Presto registered the GEOWEB trade-mark in Canada in 2001 in association with its cellular confinement systems. These systems are arrays of pockets or cells created by welding together perforated strips of polyethylene (or some other material) in a honeycomb shape. The cells are then filled with sand, gravel, concrete, soil or some other material. The systems are used for erosion control or to stabilize the ground. Presto stated that it had been using the mark “GEOWEB” in Canada in association with these wares since at least August 1993.

[3] In 1996 (which was the same year that P.R.S. was incorporated), Presto granted P.R.S. a license to use the GEOWEB trade-mark in association with the manufacture and sale of cellular confinement systems. P.R.S. distributed these systems in approximately 20 countries (which were not identified). As stated by the Judge, it is not clear whether P.R.S. was licensed to sell GEOWEB products in Canada. Since the Chairman of P.R.S. stated during cross examination that P.R.S. had never sold GEOWEB products in Canada, this would mean that either P.R.S. was an unsuccessful distributor of such products in Canada or that Canada was not one of the unidentified countries in which P.R.S. was licensed to sell GEOWEB products.

[4] The licensing agreement (which was to have expired in 2001) was extended to 2006. The agreement was either terminated in 2006 or not renewed. P.R.S. then began to compete with Presto.

Initially there was no significant difference between the cellular confinement systems sold by P.R.S. using the trade-mark NEOWEB and the cellular confinement systems sold by Presto using the trade-mark GEOWEB. P.R.S. has claimed that it has since made some improvements to the systems that it is selling.

[5] In August 2007, P.R.S. applied to have the trade-mark NEOWEB registered for use in association with cellular confinement systems and this trade-mark was eventually registered in 2010. Although the description of the wares for the NEOWEB trade-mark is longer than the description of the wares for the GEOWEB trade-mark, the Judge found, in paragraph 6 of his reasons, that “it really comes to the same thing: three-dimensional polymeric webs for soil and earth stabilization and cellular confinement systems”. This finding has not been challenged.

### *Legislation*

[6] Presto had applied under section 57 of the Act for an order to strike out the registration of the NEOWEB trade-mark. Subsection 57(1) of the Act provides as follows:

57. (1) The Federal Court has exclusive original jurisdiction, on the application of the Registrar or of any person interested, to order that any entry in the register be struck out or amended on the ground that at the date of the application the entry as it appears on the register does not accurately express or define the existing rights of the person appearing to be the registered owner of the mark.

57. (1) La Cour fédérale a une compétence initiale exclusive, sur demande du registraire ou de toute personne intéressée, pour ordonner qu’une inscription dans le registre soit biffée ou modifiée, parce que, à la date de cette demande, l’inscription figurant au registre n’exprime ou ne définit pas exactement les droits existants de la personne paraissant être le propriétaire inscrit de la marque.

[7] As noted above, the basis for the application was the allegation that the use of the NEOWEB trade-mark in association with the wares identified by P.R.S. was confusing with the GEOWEB trade-mark in association with the wares identified by Presto.

[8] Section 6 of the Act provides, in part, that:

6. (1) For the purposes of this Act, a trade-mark or trade-name is confusing with another trade-mark or trade-name if the use of the first mentioned trade-mark or trade-name would cause confusion with the last mentioned trade-mark or trade-name in the manner and circumstances described in this section.

(2) The use of a trade-mark causes confusion with another trade-mark if the use of both trade-marks in the same area would be likely to lead to the inference that the wares or services associated with those trade-marks are manufactured, sold, leased, hired or performed by the same person, whether or not the wares or services are of the same general class.

...

(5) In determining whether trade-marks or trade-names are confusing, the court or the Registrar, as the case may be, shall have regard to all the surrounding circumstances including

6. (1) Pour l'application de la présente loi, une marque de commerce ou un nom commercial crée de la confusion avec une autre marque de commerce ou un autre nom commercial si l'emploi de la marque de commerce ou du nom commercial en premier lieu mentionnés cause de la confusion avec la marque de commerce ou le nom commercial en dernier lieu mentionnés, de la manière et dans les circonstances décrites au présent article.

(2) L'emploi d'une marque de commerce crée de la confusion avec une autre marque de commerce lorsque l'emploi des deux marques de commerce dans la même région serait susceptible de faire conclure que les marchandises liées à ces marques de commerce sont fabriquées, vendues, données à bail ou louées, ou que les services liés à ces marques sont loués ou exécutés, par la même personne, que ces marchandises ou ces services soient ou non de la même catégorie générale.

[...]

(5) En décidant si des marques de commerce ou des noms commerciaux créent de la confusion, le tribunal ou le registraire, selon le cas, tient compte de toutes les circonstances de l'espèce, y compris :

- |  |   |
|--|---|
| (a) the inherent distinctiveness of the trade-marks or trade-names and the extent to which they have become known;             | a) le caractère distinctif inhérent des marques de commerce ou noms commerciaux, et la mesure dans laquelle ils sont devenus connus;                  |
| (b) the length of time the trade-marks or trade-names have been in use;  | b) la période pendant laquelle les marques de commerce ou noms commerciaux ont été en usage;  |
| (c) the nature of the wares, services or business;   | c) le genre de marchandises, services ou entreprises;   |
| (d) the nature of the trade; and   | d) la nature du commerce;   |
| (e) the degree of resemblance between the trade-marks or trade-names in appearance or sound or in the ideas suggested by them. | e) le degré de ressemblance entre les marques de commerce ou les noms commerciaux dans la présentation ou le son, ou dans les idées qu'ils suggèrent. |

### *Judge's Decision*

[9] After quoting subsection 6(5) of the Act and referring to certain excerpts from the reasons of Rothstein J. in *Masterpiece Inc. v. Alavida Life-styles Inc.*, 2011 SCC 27, (*Masterpiece*), the Judge stated that:

21 Turning now to section 6(5) of the Act, I consider it safe to eliminate subsections (b), (c) and (d).

22 Apart from the claim in the GEOWEB application, taking that claim at its face value, there has been no evidence of further use in Canada. Mr. Erez, P.R.S.' Chairman, testified that his company had never sold a GEOWEB product here. However, as aforesaid, it is not clear that it was licensed to sell GEOWEB products in Canada, or, if it was, whether it was a sole distributor. There is some evidence of the use of the NEOWEB trade-mark. There was one shipment of NEOWEB product, attendances at trade shows and the like. At best, NEOWEB has a slight edge.

23 Both companies are engaged in the same wares, business and trade. P.R.S. claims the latest version of its product is better, but there is no evidence that it is appealing to a different, more sophisticated market or that its product is more expensive.

24 In my opinion, the test for confusion, in this case, is to be found in the surrounding circumstances, including subsections 5(a) and 5(e). In subsection 5(a), I limit myself to "the

inherent distinctiveness of the trade-marks..." as I am not satisfied that it has been established that either GEOWEB or NEOWEB is better known than the other.

[10] The Judge then reviewed the inherent distinctiveness of the two trade-marks, the resemblance of the two trade-marks and other surrounding circumstances as listed in paragraph 31 of his reasons, which were:

- a. misleading marketing practices on the part of P.R.S.;
- b. actual confusion;
- c. treatment of the trade-marks in other jurisdictions;
- d. family of marks; and
- e. the opinion of the trade-marks examiner.

[11] He then concluded in paragraph 46 that:

46 Having reviewed the evidence and the written and oral submissions of the parties, in my opinion the use of the GEOWEB and NEOWEB trade-marks in Canada would not likely lead to the inference that the wares associated with the marks were manufactured or sold by the same person.

#### *Standard of Review*

[12] In *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33, the Supreme Court of Canada confirmed that the standard of review for questions of law is correctness. Findings of fact (including inferences of fact) will stand unless it is established that the Judge made a palpable and overriding error. For questions of mixed fact and law, the standard of correctness will apply to any extricable question of law and otherwise the standard of palpable and overriding error will apply. An error is palpable if it is readily apparent and it is overriding if it changes the result.

#### *Analysis*

[13] As provided in subsection 6(5) of the Act, the question of whether NEOWEB is confusing with GEOWEB is to be determined by having regard to all of the surrounding circumstances,

including those listed in paragraphs 6(5)(a) to (e) – the inherent distinctiveness of the trade-marks and extent to which they are known, the length of time the trade-marks have been in use, the nature of the wares, the nature of the trade, and the resemblance in appearance, sound or ideas suggested by them.

[14] Presto argues that the Judge eliminated the three factors that are set out in paragraphs 6(5) (b), (c) and (d) of the Act in determining whether the two trade-marks are confusing. If the Judge did not consider any of these three factors that he was required to consider, then this would be an error of law (*Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.* [1997] 1 S.C.R. 748, paragraphs 39 and 41).

[15] P.R.S., on the other hand, argues that these factors were considered and the reference to “eliminating” the factors in paragraph 21 of his reasons, when read with his comments in paragraphs 22 to 24, simply means that he was not assigning any weight to these factors. This would mean that he had decided that these factors, in this case, were not important and did not assist him in determining whether the two trade-marks were confusing. If the Judge did make an error in determining whether these factors assisted him in deciding that the two trade-marks are not confusing, this error could only be addressed by this Court if it amounted to a palpable and overriding error and would have changed the outcome (*ITV Technologies, Inc. v. WIC Television Ltd.* 2005 FCA 96 (paragraph 36)). P.R.S. argues that no palpable and overriding error was made by the Judge.



[16] Although it is not entirely clear (since the Judge indicated in paragraph 21 of his reasons that he was eliminating “subsections (b), (c) and (d)”), it seems to me that the correct interpretation of his reasons is that the Judge had determined that these factors did not assist him in determining whether the two trade-marks are confusing, *i.e.*, he assigned no weight to these factors. Therefore, this finding can only be disturbed only if there was a palpable and overriding error.

[17] In my respectful view, the nature of the wares and the nature of the trade assist in determining whether these two trade-marks are confusing. Having found that “both companies are engaged in the same wares, business and trade” (paragraph 23 of his reasons), the Judge should have considered how this finding should have been assessed in determining whether the use of the NEOWEB trade-mark in association with cellular confinement systems would be confusing with the use of the GEOWEB trade-mark in association with cellular confinement systems. If this analysis had been conducted, it would have changed the result.

[18] Since the analysis of these two factors was not completed by the Judge, this Court could either send the matter back to the Federal Court to complete this analysis or conduct its own analysis. Since all of the testimony of the individuals was submitted by affidavits, in my opinion, it would seem appropriate in this case for this Court to conduct its own analysis, with deference to the findings of fact of the Judge where no any palpable and overriding error was made.

[19] In conducting the analysis required to determine whether the two trade-marks are confusing it is helpful to start with the general comments of Rothstein J. (who was writing for the entire Court) in *Masterpiece*:

40 At the outset of this confusion analysis, it is useful to bear in mind the test for confusion under the *Trade-marks Act*. In *Veuve Clicquot Ponsardin v. Boutiques Cliquot Ltée*, 2006 SCC 23, [2006] 1 S.C.R. 824, Binnie J. restated the traditional approach, at para. 20, in the following words:

The test to be applied is a matter of first impression in the mind of a casual consumer somewhat in a hurry who sees the [mark], at a time when he or she has no more than an imperfect recollection of the [prior] trade-marks, and does not pause to give the matter any detailed consideration or scrutiny, nor to examine closely the similarities and differences between the marks.

Binnie J. referred with approval to the words of Pigeon J. in *Benson & Hedges (Canada) Ltd. v. St. Regis Tobacco Corp.*, [1969] S.C.R. 192, at p. 202, to contrast with what is not to be done - a careful examination of competing marks or a side by side comparison.

...  
67 This Court has affirmed that consumers in the market for expensive goods may be less likely to be confused when they encounter a trade-mark, but the test is still one of "first impression". In his reasons, the trial judge used the importance and cost of expensive goods and services to change the likelihood of confusion test from one of first impression of a trade-mark to a test of consumers being "unlikely to make choices based on first impressions". This approach is not consistent with the test for confusion under s. 6(5) which has been consistently endorsed by this Court, most recently in *Veuve Clicquot*.

70 The focus of this question is the attitude of a consumer in the marketplace. Properly framed, consideration of the nature of the wares, services or business should take into account that there may be a lesser likelihood of trade-mark confusion where consumers are in the market for expensive or important wares or services. The reduced likelihood of confusion is still premised on the first impression of consumers *when they encounter* the marks in question. Where they are shopping for expensive wares or services, a consumer, while still having an imperfect recollection of a prior trade-mark, is likely to be somewhat more alert and aware of the trade-mark associated with the wares or services they are examining and its similarity or difference with that of the prior trade-mark. A trade-mark, as Binnie J. observed in *Mattel*, is a shortcut for consumers. That observation applies whether they are shopping for more or less expensive wares or services.

71 It is not relevant that, as the trial judge found, consumers are "unlikely to make choices based on first impressions" or that they "will generally take considerable time to inform themselves about the source of expensive goods and services" (para. 43). Both of these - subsequent research or consequent purchase - occur *after* the consumer encounters a mark in the marketplace.

72 This distinction is important because even with this increased attentiveness, it may still be likely that a consumer shopping for expensive goods and services will be confused by the trade-marks they encounter. Careful research and deliberation may dispel any trade-mark

confusion that may have arisen. However, that cannot mean that consumers of expensive goods, through their own caution and wariness, should lose the benefit of trade-mark protection. It is confusion when they encounter the trade-marks that is relevant. Careful research which may later remedy confusion does not mean that no confusion ever existed or that it will not continue to exist in the minds of consumers who did not carry out that research.

73 Indeed, *before* source confusion is remedied, it may lead a consumer to seek out, consider or purchase the wares or services from a source they previously had no awareness of or interest in. Such diversion diminishes the value of the goodwill associated with the trade-mark and business the consumer initially thought he or she was encountering in seeing the trade-mark. Leading consumers astray in this way is one of the evils that trade-mark law seeks to remedy. Consumers of expensive wares or services and owners of the associated trade-marks are entitled to trade-mark guidance and protection as much as those acquiring and selling inexpensive wares or services.

[20] The test for confusion is to be applied when a consumer encounters a trade-mark. The test is whether the consumer who sees a particular trade-mark and who has an imperfect recollection of another trade-mark will erroneously assume that the goods or services associated with the particular trade-mark are associated with the other trade-mark. Since this is a civil case, the burden on Presto is to establish that it is more likely than not that a consumer who encounters the NEOWEB trade-mark in association with cellular confinement systems (when that consumer has an imperfect recollection of the GEOWEB trade-mark in association with the same or substantially the same wares) would be confused and erroneously assume that the NEOWEB cellular confinement systems were being sold by Presto. Even though the cellular confinement systems would be considered to be expensive items with only a limited market, "the test is still one of 'first impression'".

[21] This determination of whether the two trade-marks are confusing is made based on all of the surrounding circumstances including those specifically enumerated in paragraphs 6(5)(a) to (e) of the Act. As noted by the Judge in paragraph 31 of his reasons, there are circumstances that were

alleged to be relevant, in addition to those specifically enumerated in paragraphs 6(5)(a) to (e) of the Act.

*Paragraph 6(5)(a) – Inherent Distinctiveness and the Extent to Which They are Known*

[22] Paragraph 6(5)(a) of the Act provides that the inherent distinctiveness of the trade-marks and the extent to which they have become known are to be considered. These factors will determine the strength of the particular trade-mark (*Pink Panther Beauty Corp. v. United Artists Corp.*, [1998] 3 F.C. 534, paragraph 23). If a trade-mark is not inherently distinctive (and has not acquired distinctiveness as a result of continual use in the marketplace), it will not be considered to be a strong trade-mark and it will be afforded less protection.

[23] The Judge found (in paragraph 24) that it had not been established that either trade-mark was better known than the other one and he therefore limited his analysis to the inherent distinctiveness of the trade-marks. In paragraph 28 of his reasons, the Judge found that neither trade-mark was inherently distinctive. As noted by the Judge, both trade-marks are comprised of a three letter Greek prefix (geo and neo) and a common suffix – web. In my opinion, there is no basis to interfere with these findings. Since the GEOWEB trade-mark is not inherently distinctive, it will be afforded less protection than if it were inherently distinctive. However, less protection does not mean it will not be afforded any protection.

[24] Although GEOWEB is not a strong trade-mark, the question is still whether a consumer, upon encountering the NEOWEB trade-mark in association with cellular confinement systems, would likely be confused about whether these were the GEOWEB wares of Presto.

*Paragraph (b) – The Length of Time That the Trade-marks Have Been in Use*

[25] In paragraphs 14 and 22, the Judge noted that there was little evidence of the use of either trade-mark in Canada and that “[a]t best, NEOWEB has a slight edge”. There is no basis to interfere with this finding.

*Paragraphs (c), (d), and (e) – The Nature of the Wares and Trade and the Resemblance of the Two Trade-marks*

[26] In this case, the wares were the same (or substantially the same) and the nature of the trade was the same, as noted by the Judge in paragraph 23 of his reasons.

[27] In *Pink Panther Beauty Corp.*, Linden J.A., writing on behalf of this Court, stated that:

26 Clearly, where trade-marks are similar, the degree to which the wares or services which bear those marks are similar will be a large factor in determining whether confusion is likely to result.

[28] In *Precision Door & Gate Service Ltd. v. Precision Holdings of Brevard, Inc.*, 2012 FC 496, O'Reilly J. stated that:

34 Both parties offer primarily garage door services. The nature of their wares and services is essentially identical. This suggests that the potential for confusion is high.

[29] In *Mattel, Inc. v. 3894207 Canada Inc.*, [2006] 1 S.C.R. 772, the Supreme Court of Canada commented on the decision of this Court in *Pink Panther* and noted in paragraph 71 that a difference in wares will not always be a dominant consideration and that any comments of Linden J.A. that could be interpreted as requiring a resemblance between wares before trade-marks could be found to be confusing, should not be followed. However, the Supreme Court also noted, in the same

paragraph, that the difference between wares will “generally be an important consideration”. There is no significant difference between the wares sold by P.R.S. using the trade-mark NEOWEB and the wares sold by Presto using the trade-mark GEOWEB and, in this case, this is an important consideration.

[30] There is a greater likelihood of confusion if two trade-marks that resemble each other are used in association with the same products (or substantially the same products) in the same markets. As a result, the resemblance of the two trade-marks should not be viewed in isolation but rather in conjunction with the nature of the wares and the nature of the trade.

[31] In analysing the resemblance of GEOWEB and NEOWEB, these two trade-marks should not be analysed syllable by syllable, but rather as a whole, in order to determine whether NEOWEB, in association with cellular confinement systems, so resembles GEOWEB, in association with cellular confinement systems, in the same market, that it would cause confusion for the consumer with the imperfect recollection of the GEOWEB trade-mark (*Park Avenue Furniture Corp. v. Wickes/Simmons Bedding Ltd*, [1991] F.C.J. No. 546).

[32] In comparing the entire trade-mark NEOWEB with GEOWEB it should be noted that only the first letter is different and, as a whole, each is comprised of a Greek prefix with the same suffix. The two sound similar (they rhyme) and the use of “neo” as a prefix could suggest that NEOWEB is simply a newer version of GEOWEB. It seems to me that, as a whole, NEOWEB would likely cause confusion with consumers with an imperfect recollection of the GEOWEB trade-mark. Since the wares associated with each trade-mark are the same wares (or substantially the same wares) and

since the markets for the wares are the same, the likelihood of confusion is even greater and, in my opinion, elevated to the point where it would be more likely than not that the consumer with the imperfect recollection of the GEOWEB trade-mark in association with cellular confinement systems would be confused about whether NEOWEB cellular confinement systems were made by Presto.

*Other Circumstances – Marketing by P.R.S.*

[33] As noted above, there were other circumstances that were alleged to be relevant in this matter. One such circumstance was the marketing by P.R.S. or its distributors which identified NEOWEB as formerly GEOWEB. The issue in this case is whether the first impression of the consumer in encountering the trade-mark NEOWEB (not the additional words in the promotional material) with an imperfect recollection of the trade-mark GEOWEB would be confused and erroneously assume that the NEOWEB systems were made by Presto. Confusion is determined based on the trade-mark, not on the additional words included in any advertising material. Therefore, the marketing practices of P.R.S. do not assist in determining whether the two trade-marks are confusing.

*Other Circumstances – Actual Confusion*

[34] Presto referred to an e-mail that it had received from an unidentified customer in an unidentified country which indicated that the author of the e-mail was confused. However, as noted by the Judge, since there was no indication that the person was in Canada, this is of no assistance in determining whether the two trade-marks are confusing for the purposes of the Act.

*Other Considerations – The treatment of the Trade-marks in Other Jurisdictions*

[35] P.R.S. introduced evidence showing that, of the 31 jurisdictions in which a trade-mark search was conducted, both trade-marks are registered in three countries – Australia, Japan and South Korea. However, no evidence was introduced in relation to the trade-mark law of these three countries. Presto introduced a decision of the *Office for Harmonization in the Internal Market (Trade Marks and Design) - Opposition Division*, Opposition No B 1 302 530, dated 27 February 2012. As noted by the Judge “[t]his was an opposition based on the registration of GEOWEB in the Benelux countries, Czech Republic, Greece, Hungary, Ireland, Italy, Poland, Slovakia, Denmark, France, Germany, Spain and the United Kingdom”. The Judge also stated that this “decision deals with language used in various jurisdictions and concluded that the opposition was partially well-founded on the basis of Presto's **GEOWEB**” (paragraph 38) and that “this decision is in appeal” (paragraph 40). Neither party provided any update on the status of this appeal.

[36] There are also a number of other jurisdictions in which a search was conducted for both registrations. However, there was no indication of whether P.R.S. had attempted to register NEOWEB in these other jurisdictions or whether the registration of the NEOWEB trade-mark had been rejected in these other jurisdictions.

[37] It seems to me that, although it should not be given a great deal of weight, that this would favour GEOWEB since of the 31 jurisdictions that were searched, the registration of the two trade-marks was allowed in three and successfully opposed in 13 jurisdictions with no explanation for what happened in the other 15 jurisdictions.



*Other Considerations – Family of Marks*

[38] The Judge noted that AGRIWEB is a registered trade-mark of Presto and NEOLOY is a registered trade-mark of P.R.S. Neither party has any claim that it has a family of trade-marks that would affect the confusion analysis.

*Other Considerations – Position of the Trade-marks Examiner*

[39] The only other circumstance that the Judge identified as favouring either party was the determination by the trade-mark examiner. On February 6, 2008, a Senior Trade-marks Examiner wrote to P.R.S. indicating that the NEOWEB trade-mark was confusing with the previously registered GEOWEB trade-mark. Following submissions made by P.R.S., the registration of the trade-mark NEOWEB was allowed. As noted by the Judge, this circumstance favours P.R.S. However, in my opinion, it does not so strongly favour P.R.S., that, when all of the surrounding circumstances are taken into account, the two trade-marks could not be found to be confusing.

*Conclusion*

[40] It seems to me that if all of the surrounding circumstances are taken into account (including those specifically enumerated in paragraphs 6(5)(a) to (e) and those identified by the Judge in paragraph 31 of his reasons) it is more likely than not that a consumer, with an imperfect recollection, who encounters NEOWEB used by P.R.S. in association with cellular confinement systems, would be confused with respect to whether the NEOWEB systems were made by Presto. The two trade-marks are obviously similar (with only one letter different and with the substitution of one Greek three letter prefix for another). The two also rhyme and the use of “neo” could suggest

that NEOWEB is a newer version of GEOWEB. The wares associated with each trade-mark are the same or substantially the same and the markets in which the wares are sold are also the same.

[41] As a result, I would allow the appeal, with costs in this Court and in the Federal Court, and set aside the judgment of the Federal Court. Making the judgment that should have been made, I would order that the Registration No. TMA 780,538 for the trade-mark NEOWEB be struck out.

"Wyman W. Webb"

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J.A.

"I agree.

K. Sharlow J.A."

"I agree.

Eleanor R. Dawson J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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**REASONS FOR JUDGMENT BY:** WEBB J.A.

**CONCURRED IN BY:** SHARLOW J.A.  
DAWSON J.A.

**DATED:** April 30, 2013

**APPEARANCES:**

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