

Federal Court



Cour fédérale

Date: 20191119

Docket: T-1626-18

Citation: 2019 FC 1450

Ottawa, Ontario, November 19, 2019

PRESENT: Mr. Justice James W. O'Reilly

BETWEEN:

PETLINE INSURANCE COMPANY

Applicant

and

**TRUPANION BROKERS ONTARIO, INC
AND TRUPANION, INC**

Respondents

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Petline Insurance Company, and the respondents, Trupanion Brokers Ontario, Inc and Trupanion Inc (Trupanion), are competitors in the pet health insurance market.

[2] Petline submits that Trupanion has infringed the *Trademarks Act*, RSC 1985, c T-13 and the *Competition Act*, RSC 1985, c C-34 by publishing false and misleading comments about

Petline for the purposes of promoting Trupanion's product. Petline seeks a declaration that Trupanion has acted contrary to those laws, an injunction preventing Trupanion from making further statements against Petline, and damages.

[3] In my view, Petline is not entitled to the relief it seeks.

[4] At issue is a publication by Trupanion containing a comparison between its insurance and that offered by Petline (under its registered trademark PETSECURE). The comparison appeared on Trupanion's website and in pamphlets. Petline submits that the statements contained in the comparison are false and misleading, and had a detrimental impact on the goodwill attached to its trademark.

[5] There are three separate legal grounds on which Petline relies. First, it contends that Trupanion's statements are contrary to s 7(a) of the *Trade-marks Act*, (all statutory provisions cited are set out in an Annex). To succeed on that ground, Petline has to establish that Trupanion made a false or misleading statement tending to discredit Petline that resulted in actual or potential damage.

[6] Second, Petline argues that Trupanion's statements included a false or misleading representation for the purpose of promoting Trupanion's insurance product, contrary to s 52 of the *Competition Act*.

[7] Third, Petline maintains that Trupanion's comparison made improper use of the PETSECURE trademark contrary to s 22 of the *Trade-marks Act*. To succeed on this ground, Petline must establish that Trupanion used the PETSECURE trademark in a manner that would likely have a negative effect on Petline's goodwill.

[8] In my view, Petline fails on the first two grounds because it has not shown that Trupanion's statements were false or misleading. It fails on the third ground because it has not shown harm to its goodwill. Therefore, I cannot grant the relief Petline seeks.

II. Issue One – Are the statements in the comparison false or misleading?

[9] Comparative advertising helps consumers make better choices (*Kirkbi AG and Lego Canada Inc v Ritvik Holdings Inc et al*, 2003 FCA 297 at para 71, *aff'd* 2005 SCC 65). Still, the statutes relied on by Petline in this case set parameters on the ways in which comparisons can be made. Most important in this case is the requirement that a competitor's comparison not be based on false or misleading statements.

[10] There are nine Trupanion statements in the comparison that are in dispute. As I explain below, two of them were removed from Trupanion's website after Petline clarified its policies. Still, I consider all nine, and find that none of them is false or misleading.

(1) "We can pay your veterinarian directly – usually within 5 minutes"

[11] Petline suggests that this statement is misleading because it implies that Trupanion usually pays veterinarians directly and that Petline cannot do so. In fact, says Petline, the evidence shows that Trupanion pays veterinarians directly only in 30% of cases, and that Petline also offers this service.

[12] I disagree with Petline. Petline concedes that it does not have an equivalent service. It uses a “standard reimbursement model” in which policy holders pay their veterinarian bills and are compensated for the insurable amount later by cheque. In some special circumstances, Petline will arrange to pay veterinarians directly, but policy holders would have to contact Petline to make those arrangements. The availability of this process is not mentioned in Petline’s policies or on its website. By contrast, Trupanion’s default payment service involves paying veterinarians directly. The statement is not misleading.

(2) “We process your co-insurance fairly”

[13] Petline says this statement is misleading because it implies that Petline is unfair to its policy holders, in particular, by paying out less to pet owners.

[14] I disagree. The evidence shows that the two companies process claims differently. Petline processes the co-insurance before the deductible which, all else being equal, results in pet owners receiving less reimbursement on claims than Trupanion’s policy holders. In addition, Trupanion’s website shows a simple calculation of the reimbursement on a \$1000.00 claim. The resulting payment to Petline customers is \$550.00 and the amount paid to Trupanion policy holders is \$675.00. There are other factors that can affect the reimbursable amount – the eligible

costs, the degree of coverage, etc. But there is a reasonable basis for the statement in the comparison; it is not misleading.

- (3) “We don’t change coverage or rates for submitting claims” whereas PETSECURE “punishes unlucky pets for filing claims”

[15] Petline maintains that this statement is misleading because Trupanion does, in fact, increase premiums in response to claims. In addition, Trupanion denies coverage to pets that had an illness or injury twice in the eighteen months prior to enrolment.

[16] I disagree. Again, the two companies have different approaches to managing risk. Petline increases individual premiums for policy holders who make claims. Trupanion increases premiums on the basis of the number of claims within a given class of pets, on a going-forward basis. In other words, if statistics show a rise in claims in respect of dachshunds, the premiums for new policies for dachshunds may increase. However, the premiums for existing policy holders will not change. Accordingly, Trupanion’s statement is not misleading.

- (4) PETSECURE can cancel a policy for “absolutely no reason at all” whereas “we don’t drop coverage”

[17] Petline states that this statement is false because it is contrary to insurance law. Insurance companies cannot cancel policies capriciously.

[18] This is perhaps somewhat of an overstatement, but it is not false. Trupanion was seeking to distinguish its policies, which define the situations where a policy can be cancelled, from

Petline's, which provide a non-exhaustive list of circumstances that could result in cancellation. According to Petline, its policies reflect the possibility that cancellations could result from unforeseen circumstances. In reality, however, Trupanion's policy holders know when their policies can be cancelled, but Petline's will not be entirely sure. Their policies could be cancelled for some unknown reason. On its website, Trupanion allows that Petline may choose not act on that authority.

[19] In my view, this statement is not false or misleading. There was a reasonable basis for it.

- (5) "We don't exclude conditions we've covered for your pet in the past just because you change your coverage"

[20] Petline claims that this statement is misleading because it does not reflect the fact that Petline does not withdraw coverage when a policy holder wants to increase coverage. However, coverage for a particular condition cannot be increased after diagnosis.

[21] I disagree. Petline, agreeing that the language in its policies was unclear, changed it after seeing Trupanion's characterization. Trupanion's original statement was not misleading. In any case, it has now been removed from Trupanion's website.

- (6) "We don't dictate how your veterinarian should treat your pet"

[22] Petline contends that this statement is misleading because Petline does not advise veterinarians on treatment. It does, however, put limits on the duration of medication covered.

[23] I disagree. Trupanion's statement was an accurate characterization of Petline's policy on medication. Petline has now clarified that its policies limit coverage for medications to six months at a time. Coverage can be renewed in six-month installments. Given the clarification, Trupanion has removed this statement from its website.

(7) "We don't cover wellness"

[24] Petline submits that this statement is misleading because it suggests that Petline covers things like toys and leashes.

[25] I disagree. Petline is taking the reference to toys and leashes on Trupanion's website out of context. Trupanion explains that its policies focus on providing the best value to pet owners by not covering expenses that they would expect to pay themselves. Trupanion states in the comparison that there are costs that pet owners know they will have to cover – checkups, vaccines, food, leashes, and toys. It goes on to say that insurance should be used for unexpected costs. I do not read the statement as suggesting that Petline pays for toys and leashes; I see nothing misleading about the statement.

(8) "We're here for you 24/7"

[26] Petline submits that this statement is misleading because its coverage is available outside of call-centre hours.

[27] I disagree. Trupanion has a call centre that is open 24/7. Petline does not. There is nothing misleading about the statement.

(9) “You pick your deductible no matter your pet’s age” Trupanion does not “penalize pets for aging”

[28] Petline maintains that this statement is misleading because both companies factor age into their premiums.

[29] I disagree. Again, the companies deal with age differently. Petline increases premiums and deductibles as pets age. Trupanion, however, takes account of a pet’s age only at the date of enrolment. Premiums and deductions do not rise as the pet ages. As such, the statement is not misleading.

[30] I have found no false or misleading statements in the comparison; there was a reasonable basis for each of them (*Purolator Courier Ltd v United Parcel Service Canada Ltd* [1995] OJ No 876 (OCJ Gen Div) at para 63).

[31] It follows that Petline cannot succeed on its claims that Trupanion’s statements are contrary to s 7(a) of the *Trademarks Act* and s 52 of the *Competition Act*.

III. Issue Two – Has Petline shown that its goodwill was harmed?

[32] Petline asserts that its goodwill was harmed by Trupanion’s use of the PETSECURE trademark in the comparison of the insurance policies offered by the two companies.

[33] I have insufficient evidence of harm. Petline must show that the likely effect of Trupanion's use of Petline's trademark was to depreciate Petline's goodwill (*Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23 at para 67).

[34] Petline has not filed any evidence from customers, employees or others about the impact of Trupanion's statements. Ms Carolyn Baker, from Petline, testified that she sometimes hears customers use language that echoes the statements in the comparison. She conceded, though, that it is difficult, if not impossible, to calculate the harm caused to Petline. Her own affidavit shows that both Petline and Trupanion grew in terms of the gross value of premiums over the years 2016 to 2018, although Petline's market share declined while Trupanion's rose.

[35] Ms Baker claims that 33 Petline customers switched to Trupanion in 2017, but did not provide any information about why they might have done so, or what the data shows for other years. Trupanion states that in 2017 at least 42 of its policy holders moved over to Petline, some of them citing lower costs, a desire for wellness coverage, a wish to consolidate all pets under the same insurer, or a move to obtain a policy with an annual deductible. The evidence shows, in essence, that policy holders may move from one insurer to another for any number of reasons, which is conceded by Ms Baker.

[36] The evidence does not persuade me that there has been any depreciation in Petline's goodwill owing to Trupanion's comparative statements.

IV. Conclusion and Disposition

[37] Trupanion's comparison of its insurance with Petline's did not include any false or misleading statements. Further, Petline has failed to show any depreciation of its goodwill. Therefore, I dismiss Petline's application, with costs.

JUDGMENT IN T-1626-18

THIS COURT'S JUDGMENT is that the application is dismissed, with costs.

"James W. O'Reilly"

Judge

<i>Trademark Act, RSC 1985, c T-13</i>	Annex <i>Loi sur les marques de commerce, LRC (1985), ch T-13</i>
Prohibitions	Interdictions
<p>7. No person shall</p> <p>(a) make a false or misleading statement tending to discredit the business, goods or services of a competitor;</p>	<p>7. Nul ne peut :</p> <p>a) faire une déclaration fausse ou trompeuse tendant à discréditer l'entreprise, les produits ou les services d'un concurrent;</p>
Depreciation of goodwill	Dépréciation de l'achalandage
<p>22(1) No person shall use a trademark registered by another person in a manner that is likely to have the effect of depreciating the value of the goodwill attaching thereto.</p>	<p>22 (1) Nul ne peut employer une marque de commerce déposée par une autre personne d'une manière susceptible d'entraîner la diminution de la valeur de l'achalandage attaché à cette marque de commerce.</p>
Action	Action à cet égard
<p>(2) In any action in respect of a use of a trademark contrary to subsection (1), the court may decline to order the recovery of damages or profits and may permit the defendant to continue to sell goods bearing the trademark that were in the defendant's possession or under their control at the time notice was given to them that the owner of the registered trademark complained of the use of the trademark.</p>	<p>(2) Dans toute action concernant un emploi contraire au paragraphe (1), le tribunal peut refuser d'ordonner le recouvrement de dommages-intérêts ou de profits, et permettre au défendeur de continuer à vendre tout produit portant cette marque de commerce qui était en sa possession ou sous son contrôle lorsque avis lui a été donné que le propriétaire de la marque de commerce déposée se plaignait de cet emploi.</p>
<i>Competition Act, RSC 1985, c C-34</i>	<i>Loi sur la concurrence, LRC (1985), ch C-34</i>
False or misleading representations	Indications fausses ou trompeuses
<p>52 (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the</p>	<p>52 (1) Nul ne peut, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'utilisation d'un produit, soit des intérêts commerciaux quelconques, donner au public, sciemment ou sans se soucier des conséquences, des</p>

public that is false or misleading in a material respect.

indications fausses ou trompeuses sur un point important.

Proof of certain matters not required

Preuve non nécessaire

(1.1) For greater certainty, in establishing that subsection (1) was contravened, it is not necessary to prove that

(1.1) Il est entendu qu'il n'est pas nécessaire, afin d'établir qu'il y a eu infraction au paragraphe (1), de prouver :

- (a) any person was deceived or misled;
- (b) any member of the public to whom the representation was made was within Canada; or
- (c) the representation was made in a place to which the public had access.

- a) qu'une personne a été trompée ou induite en erreur;
- b) qu'une personne faisant partie du public à qui les indications ont été données se trouvait au Canada;
- c) que les indications ont été données à un endroit auquel le public avait accès.

Permitted representations

Indications

(1.2) For greater certainty, in this section and in sections 52.01, 52.1, 74.01, 74.011 and 74.02, the making or sending of a representation includes permitting a representation to be made or sent.

(1.2) Il est entendu que, pour l'application du présent article et des articles 52.01, 52.1, 74.01, 74.011 et 74.02, le fait de permettre que des indications soient données ou envoyées est assimilé au fait de donner ou d'envoyer des indications

Representations accompanying products

Indications accompagnant un produit

(2) For the purposes of this section, a representation that is

(2) Pour l'application du présent article, sauf le paragraphe (2.1), sont réputées n'être données au public que par la personne de qui elles proviennent les indications qui, selon le cas :

- (a) expressed on an article offered or displayed for sale or its wrapper or container,
- (b) expressed on anything attached to, inserted in or accompanying an article offered or displayed for sale, its wrapper or container, or anything on which the article is mounted for

- a) apparaissent sur un article mis en vente ou exposé pour la vente, ou sur son emballage;
- b) apparaissent soit sur quelque chose qui est fixé à un article mis en vente ou exposé pour la vente ou à son emballage ou qui y est inséré ou joint, soit sur quelque chose qui sert de support à l'article pour l'étalage ou la

display or sale,

(c) expressed on an in-store or other point-of-purchase display,

(d) made in the course of in-store or door-to-door selling to a person as ultimate user, or by communicating orally by any means of telecommunication to a person as ultimate user, or

(e) contained in or on anything that is sold, sent, delivered, transmitted or made available in any other manner to a member of the public,

vente;

c) apparaissent à un étalage d'un magasin ou d'un autre point de vente;

d) sont données, au cours d'opérations de vente en magasin, par démarchage ou par communication orale faite par tout moyen de télécommunication, à un usager éventuel;

e) se trouvent dans ou sur quelque chose qui est vendu, envoyé, livré ou transmis au public ou mis à sa disposition de quelque manière que ce soit.

is deemed to be made to the public by and only by the person who causes the representation to be so expressed, made or contained, subject to subsection (2.1).

Representations from outside Canada

(2.1) Where a person referred to in subsection (2) is outside Canada, a representation described in paragraph (2)(a), (b), (c) or (e) is, for the purposes of subsection (1), deemed to be made to the public by the person who imports into Canada the article, thing or display referred to in that paragraph.

Deemed representation to public

(3) Subject to subsection (2), a person who, for the purpose of promoting, directly or indirectly, the supply or use of a product or any business interest, supplies to a wholesaler, retailer or other distributor of a product any material or thing that contains a representation of a nature referred to in subsection (1) is deemed to have made that representation to the public.

Indications provenant de l'étranger

(2.1) Dans le cas où la personne visée au paragraphe (2) est à l'étranger, les indications visées aux alinéas (2)a), b), c) ou e) sont réputées, pour l'application du paragraphe (1), être données au public par la personne qui importe au Canada l'article, la chose ou l'instrument d'étalage visé à l'alinéa correspondant.

Idem

(3) Sous réserve du paragraphe (2), quiconque, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'utilisation d'un produit, soit des intérêts commerciaux quelconques, fournit à un grossiste, détaillant ou autre distributeur d'un produit de la documentation ou autre chose contenant des indications du genre mentionné au paragraphe (1) est réputé avoir donné ces indications au public.

General impression to be considered

(4) In a prosecution for a contravention of this section, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect.

Offence and punishment

(5) Any person who contravenes subsection (1) is guilty of an offence and liable

(a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding 14 years, or to both; or

(b) on summary conviction, to a fine not exceeding \$200,000 or to imprisonment for a term not exceeding one year, or to both.

Reviewable conduct

(6) Nothing in Part VII.1 shall be read as excluding the application of this section to a representation that constitutes reviewable conduct within the meaning of that Part.

Duplication of proceedings

(7) No proceedings may be commenced under this section against a person against whom an order is sought under Part VII.1 on the basis of the same or substantially the same facts as would be alleged in proceedings under this section.

Il faut tenir compte de l'impression générale

(4) Dans toute poursuite intentée en vertu du présent article, pour déterminer si les indications sont fausses ou trompeuses sur un point important il faut tenir compte de l'impression générale qu'elles donnent ainsi que de leur sens littéral.

Infraction et peine

(5) Quiconque contrevient au paragraphe (1) commet une infraction et encourt, sur déclaration de culpabilité :

a) par mise en accusation, l'amende que le tribunal estime indiquée et un emprisonnement maximal de quatorze ans, ou l'une de ces peines;

b) par procédure sommaire, une amende maximale de 200 000 \$ et un emprisonnement maximal d'un an, ou l'une de ces peines.

Comportement susceptible d'examen

(6) Le présent article s'applique au fait de donner des indications constituant, au sens de la partie VII.1, un comportement susceptible d'examen.

Une seule poursuite

(7) Il ne peut être intenté de poursuite en vertu du présent article contre une personne contre laquelle une ordonnance est demandée aux termes de la partie VII.1, si les faits qui seraient allégués au soutien de la poursuite sont les mêmes ou essentiellement les mêmes que ceux qui l'ont été au soutien de la demande.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1626-18

STYLE OF CAUSE: PETLINE INSURANCE COMPANY v TRUPANION
BROKERS ONTARIO INC AND TRUPANION INC

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MAY 9, 2019

JUDGMENT AND REASONS: O'REILLY J.

DATED: NOVEMBER 19, 2019

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